Bench:

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

Death Reference No. 113 of 2019

The State ...petitioner
-Versus-
Md. Babul Hossain alias Kala Babul and another
...condemned-prisoners
with
Criminal Appeal No. 10484 of 2019

Md. Babul Hossain alias Kala Babul
...convict-appellant
-Versus-
The State ...respondent
with
Jail Appeal No. 259 of 2019
Amdad Hossain ...convict-appellant
-Versus-
The State ...respondent
and
Jail Appeal No. 260 of 2019

Md. Babul Hossain alias Kala Babul
...convict-appellant
-Versus-
The State ...respondent

Mr. Syed Ejaz Kabir and Ms. Nahid Hossain (Liza), Deputy Attorney Generals with Ms. Mahbuba Tasnim Akhi, Mr. Ashraful Alam and Md. Abdul Motaleb, Assistant Attorney Generals

...for the State
(Petitioner in reference and respondents in the appeals)

Mr. Md. Iqbal Hossain with
Mst. Rebecca Singha and
Mr. Siddique Azad, Advocates
...for the convict-appellant
(in Criminal Appeal No. 10484 of 2019)

Mr. S.M. Shafiqul Islam, Advocate
...appointed as a State Defence Lawyer
for condemned-prisoner Amdad Hossain

Judgment on: 01.11.2026

Bhishmadev Chakrabortty, J:

Learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal 3, Khulna (the Tribunal) on trial in Nari-o-Shishu Case 211 of 2010 found the condemned-prisoners Md. Babul Hossain alias Kala Babul and Amdad Hossain guilty of offence under section 9(3) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (the Ain, 2000) and sentenced them thereunder to death with fine and sent the proceedings to this Division for its confirmation. Against the said judgment and order of conviction and sentence, the condemned-prisoner Md. Babul Hossain alias Kala Babul preferred Criminal Appeal 10484 of 2019 and Jail Appeal 260 of 2019 while condemned-prisoner Amdad Hossain filed Jail Appeal 259 of 2019. Since the reference and appeals have arisen out of the same judgment and order of conviction and sentence, these have been heard together and are being disposed of by this judgment.

The prosecution case, in brief, is that PW1 Md. Imam Hossain, father of deceased Afsana Mimi (the victim), lodged a

first information report (FIR) with Khalishpur police station at about 21.15 hours on 16.11.2009 alleging, *inter alia*, that he returned home at about 07.00 pm on 15.11.2009 after doing work. His elder daughter, the victim then wanted Taka 2 for purchasing spicy puffed rice. He gave her the amount and the daughter went out to bring the food item. But unfortunately the victim did not return home. They searched for the victim but failed to find her out and consequently they lodged a GDE 596 on 15.11.2009 with Khalishpur police station. On the next morning, he searched for the victim to the houses of his relatives but did not find her out. After taking bath he went to the house of the mother of Hossain, a neighbour at about 15.00 hours to take mid day meal and at that time his younger daughter Afroza aged about 5 years informed him that the victim was found floating in a pond. He rushed there and found the victim's deadbody on the stair covered with cloths. He found there PW3 Abdul Quddus, a *Khadem* of madrasha and others while PW3 told that he brought out the deadbody from water and kept it on the stair. He uncovered the cloths and found an *urna* twisted and tied on victim's neck. He further

found black mark on her throat and injury below the left eye. He informed the fact to police. Police came and held inquest in presence of the witnesses. He further found marks of bite on the breast of the victim. He suspected that some unknown accused persons took away the victim in the evening on 15.11.2009 and killed her committing rape upon her. Accused Kala Babul son of late Abdul Kader and Amdad Hossain son of Abdus Sadeque (the condemned-prisoners) both are of Bastuhara colony used to tease her daughter. He could not do anything because he was a poor man. He told the above fact of teasing his daughter to the guardians of the accused but they did not make any response. Accused Amdad was in front of his house at about 07.00 pm on 15.11.2009 and at the time of his daughter's going to purchase spicy puffed rice he waved/winked the victim and called away her which his (informant's) wife saw. He went to the house of accused Amdad and Kala Babul for several times but did not find them in their houses. The aforesaid FIR was registered as Khalishpur police station Case No. 17 dated 16.11.2009 corresponding to GR 296 of 2009 under section 9(3) of the Ain against some unknown accused.

PW13 Md. Abu Mokaddem, Officer-in-Charge (OC) of Khalishpur police station at the material time, investigated the case. He arrested condemned-prisoner Babul Hossain alias Kala Babul and subsequently condemned-prisoner Amdad Hossain. He collected prosecution materials including the inquest report and the autopsy report, recorded the statements of witnesses under section 161 of the Code, arranged to record the confession of condemned-prisoner Kala Babul under section 164 of the Code of Criminal Procedure (The Code) and submitted a charge sheet against 6 accused including the condemned-prisoners under section 9(3) of the Ain.

The record of the case was then transmitted to the Tribunal for holding trial. The Tribunal took cognizance of offence against all the accused under the selfsame section of the Ain. Subsequently, the learned Judge of the Tribunal on 27.02.2013 framed charge against all the accused under section 9(3) of the Ain. The charge so framed was read over to accused Babul and Amdad Hossain then present in the dock, to which they pleaded not guilty and claimed to be tried. The charge in

respect of other accused could not be read over to them owing to their absconsion.

During trial, the prosecution in all examined 13 witnesses; of them PW1 Md. Imam Hossain, father of the victim stated supporting the statements made in the FIR. He further stated that the occurrence took place at about 07.00 pm on 15.11.2009. He was a day labour and had no house of his own. He had two daughters Afsana Mimi (14), the victim and Afroza (5). The victim was a student of class III. The accused persons used to disturb her elder daughter and threw bad proposals to her. He told it to the parents and relatives of the accused but did not get any justice from them. They used to threat him. On the day of occurrence he returned home at about 07.00 pm and found the accused persons in front of his house. They usually used to meet in front of his house. His victim daughter wanted Taka 2 from him to purchase spicy puffed rice. He gave her the amount and she went out from the house to purchase the food item. At that time accused Amdad winked her daughter which his wife had seen. At that time rainy storm started and the electricity was out. They became anxious and

went out in search of her daughter with his wife but they did not find her out. Consequently, he made a GDE with Khalishpur police station. On the next day on search they also did not find her out. At the event of taking mid day meal on the next day in a neighbour's house, his younger daughter Afroza informed him that the deadbody of the victim was found in the pond situated near the mosque. He rushed there and found the deadbody on the stair of the pond. He found bruise under the left eye of the victim and mud on her full body. Police came, enquired about the occurrence and he told to police that accused Amdad, Kala Babul and his accomplices strangulated her daughter to death after committing rape upon her. He found the left breast of the victim injured. The accused persons abused her daughter badly. He then lodged the FIR exhibit-1. He proved the FIR and identified his signature thereon. In cross-examination particularly by condemned-prisoners Kala Babul and Amdad he stated that he used to reside in the Bastuhara colony from before. Accused Kala Babul and Amdad used to reside in the same colony. He did not know that there were two groups in the colony. In the event of death of Hakim a

man of a group, Anamul came to the leadership and there were cases and counter cases regarding holding of arms and theft between the groups. Accused Amdad never told him to leave the place before the occurrence. He denied the defence suggestion that he was a member of a group. Accused Kala Babul and Amdad did not firming cattle but they used to dominate men of the locality. He did not lodge any GDE about disturbing his daughter. He filed a case under section 107 of the Penal Code but he did not know whether it was rejected. It was filed for making threat upon him. They wanted to abduct his younger daughter forcefully and for that reason he filed the case. Police arrested accused Babul from Boalmari, Faridpur. He denied the suggestion of the defence that Babul used to work in a brick filed there. After one day of Babul's arrest he was brought to the police station. He heard that Babul was assaulted in the police station. He lodged a GDE about missing of his daughter. He could not say what he stated there. He did not hear from anyone specifically where his victim daughter was taken. But he heard that she was taken near the school and

was raped. His wife told to police that Amdad called away his victim daughter.

PW2 Mst. Rozina Begum, mother of the victim in evidence stated that the accused were Amdad, Kala Babul, Asha, Jahid and Jahangir. The occurrence took place 6-7 years ago but she could not remember the date. In the evening while PW1 returned home, victim Afsana wanted money to him to purchase spicy puffed rice. The father gave her the amount and she went out to purchase the expected food. At the event of going outside of the house accused Amdad and Kala Babul beaconed at her and she saw it. She then called the father of victim. He came and at that time the electricity was out and the rainy storm started. They searched for the victim and being failed made a GD Entry with the police station. They went to the houses of Jahangir, Amdad and Kala Babul but did not find her daughter. On the next day, the mother of Hossain offered them to take mid day meal in their house. They went there and that time their younger daughter Afroza came and told that the victim was found in the pond and was covered with cloths. She went there. Police came, enquired about the matter, held

inquest and prepared a report and she put her signature therein. She proved the inquest exhibit-2 and identified her signature thereon. Accused Kala Babul and Amdad left the area and IO subsequently arrested them. In cross-examination by the defence she stated that she could not say the position of the school and pond where the deadbody was found. There was a wall beside the school but it was broken. She did not know whether the headmaster of the school resided inside the school premises. She could not say whether there was any night guard in the school. She told the IO that accused Amdad waved/winked the victim. Accused Kala Babul and Amdad beaconed at the victim. She then called PW1. She used to sell cakes and vegetables beside the road. She denied the defence suggestion that accused Amdad and Kala Babul did not wink her daughter or that she did not call her husband. She further denied that she had a quarrel with Amdad for keeping cattle in front of her house. She denied of deposing falsely.

PW3 Abdul Quddus, a service man of a madrasa stated that the occurrence took place few years ago in the pond of the colony. He was lying at home and at that time the people

informed him that a deadbody was found in the pond beside the school. He went there and found the deadbody floating. He got down into the pond and brought out the deadbody with the help of others. Police made a seizure and prepared a list. He did not know whether police held inquest on the deadbody. He did not put his signature to anywhere. He was not cross-examined by the defence.

PW4 Monwar Hossain, uncle of the deceased stated that the house of PW2 was situated 20 feet away from his shop. He used to sell glasses in his shop. At one occasion there was an altercation between the mother of victim and Amdad which was subsequently stopped. At this stage he was declared hostile and cross-examined by the prosecution, to which he stated that he had been residing in the said colony since 1973. The victim was his niece. The victim was found missing after 8-10 days of the quarrel between PW2 and accused Amdad. The victim was found missing from 7-8 pm. There was rainy storm at that time and the electricity was out. He did not know whether the informant made a GDE. On the next day the cook of the madrasa told that a deadbody was found floating in the pond.

Police came and took away the deadbody. He denied the suggestion of the prosecution that he did not tell all the truth. In cross-examination by accused Amdad he stated that 8-10 days before the occurrence there was an altercation of PW2 with Amdad about selling of cakes.

PW5 Lal Mia, a resident of the colony stated that he could not say the date and time of the occurrence. He could not say anything else. At this stage he was declared hostile and cross-examined by the prosecution, to which he stated that he had been residing in the colony for last 40 years. The house of the informant was 600-700 yards away from his house. He knew informant Imam Hossain and his family, because they used to go to purchase goods from his shop. Imam Hossain had a daughter. He did not know what happened to her. A deadbody was found into the water of the pond and he heard that it was the deadbody of the daughter of Imam Hossain. The defence did not cross-examine him.

PW6 Baby Begum, a resident of the colony stated that after the death of the girl, police came and held inquest of the deadbody. She proved the inquest report exhibit- 3. She went to

see the deadbody and then police took her signature. At this stage she was declared hostile by the prosecution and cross-examined, to which she stated that she knew the father of the victim. On the next day the deadbody was found floating into the pond. She saw the deadbody. Police came after the deadbody was brought out from water. Police took her signature. She identified the accused in the dock. The defence did not cross-examine her.

PW7 Md. Dulal Hossain in evidence stated that he could not remember the date of occurrence but it happened 8-10 years ago. The deadbody was found into the pond. The pond was situated at the back of the school and in front of the madrasa. Police came and found out that the occurrence took place near the stair of primary school. The accused were the men of the locality. In cross-examination by accused Babul he stated that after arresting accused Babul police assaulted him and he heard about it because the mother of the accused and relatives were crying for it.

PW8 Md. Manik Shikder, a man who resided in the said colony stated that he knew the informant and the accused. The

occurrence took place 6-7 years ago. He heard that the daughter of Imam Hossain died but he was not present at that time. In cross-examination by the defence he stated that he heard from others that the victim was killed.

PW9 Manas Ranjan Das, an Inspector of police who was posted to Khalishpur police station at the material time stated that they received information that a deadbody was found floating in the pond of school and madrasa. They rushed there and found the deadbody floating. The men appeared there told him that the victim was Afsana, a daughter of Imam Hossain aged about 13 years. He held inquest of the deadbody and prepared a report and sent the deadbody to the morgue through PW10 for holding autopsy. He proved the inquest exhibit-3 and identified his signature thereon. On recall he stated that he made a seizure of *payzama, kamiz* and *urna* of the victim and prepared a list. He proved the seizure exhibit- 10 and identified his signature therein. He also proved the *urna, payzama* and *kamiz* as material exhibit-I (series). In cross-examination by the defence, he stated that after holding inquest and seizing the wearing apparel of the victim, he sent the deadbody to the

morgue for holding autopsy. In his seizure list he did not mention who produced the alamots to him. He did not write the colour of *urna* and *kamiz* in the list. He denied all other material suggestions put to him by the defence.

PW10 Sheikh Hafizul Islam, a constable of police who was in duty with PW9 at the material time, took the deadbody to the morgue for holding autopsy. He stated that after holding inquest he took the deadbody to the morgue with necessary papers for holding autopsy.

PW11 S Mohammad Ali, a Judicial Magistrate who was posted to the metropolitan magistracy of Khulna at the material time recorded the confession of accused Babul under section 164 of the Code. In evidence he stated that accused Babul alias Kala Babul was produced before him at about 12 noon. He kept him in his personal chamber and giving him sufficient time for reflection and asking the question of column 6 recorded his confession. He allowed him 3 hours' time for reflection and at that time he was under the custody of his Peon Bishwajit Chakraborty. After expiry of 3 hours time he again asked him about his wish of making confession and then at 03.30 pm he

started recording the confession. He recorded the confession in total 5 pages. On query the accused disclosed that he confessed at his pang of conscience. After recording his confession it was read over to the accused and thereafter he put his signatures in the prescribed places of the form. PW11 also put signature in 7 difference place of the form. After recording the confession he made a certificate at the bottom as to its truth and voluntariness. He proved the confession exhibit-5 and identified his signature and that of the accused put therein. In cross-examination by accused Babul he stated that he did not ask the accused whether he was taken on remand. The accused told that police arrested him on 15.01.2010 from the house of his maternal father-in-law Abdul Latif situated at Boalmari. He wrote it in the form. He was produced before him on 17.01.2010. In column 1 of the form it has been written that OC Mokaddem through Court GRO produced the accused before him. The accused told that he was not assaulted by police. He denied the defence suggestion that although there was mark of injury below the knee of the accused but he did not write it in the form. He did not know whether the accused was produced before him during

remand period. He denied the defence suggestion that the accused did not know anything. He further denied that he called the IO and OC in his personal chamber and that they threatened the accused of torture. He further denied that as police officer was sitting in front of the accused so the accused failed to put his signature properly. He did not ask the accused where he was kept during 15-17 of January, 2010. He had no knowledge about retraction of confession made by the accused on 30.01.2010. He further stated that he told the accused about the questions of column 5 to make him understand the result of making confession. He wrote the certificate himself as to the truth and voluntariness of the confession.

PW12 Doctor Haridas Biswas, an Assistant Professor of Forensic Medicine of Khulna Medical College Hospital at the material time held autopsy on the deadbody. He stated that he held necropsy of Afsana Khatun on 17.11.2009 and found the following injuries:

(1) One circular ligature mark was found at the level of thiroid cartilage of neck, measuring 14"x1.5"

(2) One circular bite mark was found on the upper part of left breast, measuring 1.5" in diameter.

On dissection: They found antemortem extra vessation clotted blood on the subcutaneous tissues of neck. There was fracture of thiroid cartilage. Hymen was reptured and antemortem clotted blood was found on the vaginal cannel. Lungs, liver, spleen, kidneys and brain were congested. High vaginal swab was taken and sent for spermatozoa, report is not found.

He finally opined that the death was due to asphyxia as a result of strangulation which was antemortem and homicidal in nature, following forceful sexual intercourse.

He proved the autopsy report exhibit-6 and identified his signature thereon. In cross-examination by the defence, he stated that he did not mention the age of injuries found on the person of the victim. If a man fall into water and dies, it may be due to asphyxia. He did not find any spermatozoa in the report. He himself did the autopsy of the deadbody. He denied of conducting the autopsy very casually. In cross-examination by accused Babul and others he stated that in the inquest cause of

death was written as strangulation. He did not write the whether ligature mark was caused by soft or hard substance. The ligature mark was circular but he could not say whether it was done by hand or rope. The ligature mark was $1\frac{1}{2}$" depth. He denied the defence suggestion that if a man is strangulated by rope, the injury would be found in 2 places. In case of strangulation it requires twisting. Spermatozoa may be alive up to 48 hours. Postmortem examination was held within 48 hours of the death. There was mark of bite on victim's left breast and there was mark of violence on her private organ. There was no other external injury found on the person of the victim. He read over the inquest report before holding postmortem examination. Sexual intercourse was done upon the victim and thereafter she died. She denied the defence suggestion that the victim died by drowning.

PW13 Md. Abu Mokaddem, an Inspector of police and OC of Khalishpur police station at the material time stated that he filled up the FIR form and recorded the case exhibit-7. He himself investigated the case. He visited the place of occurrence, prepared sketch-map exhibit- 8 and index exhibit-

9. He recorded the statements of the witnesses under 161 of the Code. He arrested accused Kala Babul who made a confession to the learned Judicial Magistrate. Subsequently, he arrested accused Jahangir, Nazrul, Asha Mia and Jahidul Islam and forwarded them to the Court and finally finding *prima facie* case against the accused submitted a charge sheet against them. In cross-examination by the defence he stated that in the body of the FIR the name of two accused was mentioned. There was a GDE of missing diary bearing number 596 dated 15.11.2009, which was not tagged with the record. He did not know whether some accused were suspected in the said GDE. He took accused Asha Mia, Jahidul and Jahangir on remand but they did not make any confession. He prepared 3 sketch-maps including madrasa, school and another. He prepared the sketch-map of 3rd PO at the instance of accused Kalachad. He did not seize any blood from the place of occurrence. He denied the defence suggestion of preparing a perfunctory sketch-map. In cross-examination by accused Amdad and Kala Babul, he stated that he arrested accused Kala Babul from Boalmari Dighirpar at about 03.45 hours on 15.01.2010. He went out to

arrest accused Kala Babul through a GDE 564 of 2010 dated 14.01.2010 and he took assistance of Boalmari police station in arresting him. The copy of GDE was not with the CD. He sent wireless message to the OC of the said police station. He forwarded the accused to the Court at about 08.30 hours on 16.01.2010 and took him on remand for 2 days. Accused Babul made the confession on 17.01.2010 under section 164 of the Code before the learned Magistrate. He did not send accused Kala Babul as a suspected accused but he sent him as an FIR named accused. He denied the defence suggestion of arresting accused Kala Babul on 13 January from Faridpur, Boalmari. He denied of extracting the nails of the accused during torture. He denied that he was present in the room of the Magistrate at the time of recording the confession and threatened the confessor to put him under crossfire. In the inquest report the guardians did not suspect anyone as to the killer of victim. He did not know whether in the colony there were two groups namely Hakim and Khokan group and that he was biased by Khokan and falsely implicated accused Kala Babul in this case. In cross-examination by Amdad, he stated that he did not know the

occupation of accused Amdad and he made him accused at the statement made by Babul. He further denied of making him accused in the present case at the instance of the rivals of the accused.

The defence case as it appears from the trend of cross-examining the prosecution witnesses is that of simple innocence and that they have been implicated in the case falsely on rivalry between two groups of the colony.

On conclusion of the examination of the prosecution witnesses, the learned Judge of the Tribunal examined the condemned-prisoners and others under section 342 of the Code to which they reiterated their innocence and prayed for justice but did not examine any defence witness. But accused Kala Babul submitted statement in writing to the learned Judge. In the statement he brought allegation of making torture upon him and extracting the confession on duress and coercion while Amdad in his statement stated that he was implicated in the case for previous enemy with the rival group and the confession of Kala Babul was extracted implicating him in the case.

However, the learned Judge of the Tribunal found them guilty of offence under section 9(3) of the Ain and sentenced both of them to death with fine and acquitted other co-accused giving rise to this appeal and the reference.

Mr. Syed Ejaz Kabir, learned Deputy Attorney General taking us through the materials on record submits that the innocent school going (class III) daughter of PW1 was abused sexually and brutally strangulated to death. PW1 and 2 saw that the condemned-prisoners pointed the victim at the time of going out of house to bring spicy puffed rice and subsequently on the next day her deadbody was found floating in the pond situated near the school and madrasa. The witnesses found mark of sexual violence on the private organs of her body. Furthermore they found mark of strangulation on her throat. The above external physical condition of the victim has been proved by the corroborative evidence of prosecution witnesses including the doctor PW12 Dr. Haridas Biswas who held autopsy on the deadbody. Moreover, condemned-prisoner Babul Hossain after his arrest made a confession to PW11 S Mohammad Ali, a Judicial Magistrate who recorded it in

compliance with the provisions of law. PW11 put the accused questions in column 6 of the form and wrote answers therein. After recording the confession he made a memorandum at the bottom of the confession as to its truth and voluntariness. The above confession is found to be true and made voluntarily and disclosed the fact of killing the victim by Amdad after committing rape by Babul upon her. It is further found that the confession made by Babul alias Kala Babul is found consistent with the autopsy report exhibit-6 wherein the mark of strangulation and commission of rape were found. The doctor PW12 corroborated the autopsy report exhibit-6 in evidence. Although condemned-prisoner Amdad Hossain did not make any confession but he has been implicated in the case on the basis of the confession made by co-convict Babul. The circumstantial and oral evidence unerringly proves that he strangulated the victim to death. He was absent in his residence and area after the occurrence took place and was arrested from another district after 2 months of the occurrence. The learned Judge of the Tribunal correctly found both of them guilty of offence under section 9(3) of the Ain and awarded highest

punishment considering the culpability of the offence which may not be interfered with in this Court. The judgment and order of conviction passed by the Tribunal, therefore, should be affirmed.

Mr. Md. Iqbal Hossain, learned Advocate for condemned-prisoner Md. Babul Hossain alias Kala Babul in Criminal Appeal No. 10484 of 2019 on the other hand submits that it has come out in the FIR as well as in the evidence of witnesses that previously the informant lodged GDE to the police station as to the missing of his daughter before lodgment of the FIR. Since the GDE was first in point of time, it should be treated as FIR and the present FIR would be as statement recorded under section 161 of the Code. Since the prosecution did not bring the previous GDE into the record, therefore, the accused will get its benefit as per the *ratio* laid in Muslim Uddin's Case reported in 7 BLD (AD) 1. Mr. Hossain then refers to the confession made by condemned-prisoner Md. Babul Hossain, exhibit-5 and submits that even the statement is taken as true, the appellant had no previous intension of committing rape upon the victim. He was not involved with the

kidnapping and killing of the victim. Most of the vital witnesses including PWs 4, 5 and 6 were declared hostile which goes in favour of the condemned-prisoner. He then refers to the evidence of PWs 1 and 7 and submits that both of the witnesses in cross-examination stated that they heard that after arresting appellant Babul, police tortured him. Therefore, the confession made by him was not voluntary and equally the same was not true. Therefore, such kind of statement cannot be used against appellant Babul to convict him. Mr. Hossain then submits that prosecution could have collected blood from the place of occurrence and sent it for chemical examination or DNA report to ascertain the involvement of the condemned-prisoner appellant with the alleged offence which it did not. No spermatozoa was found into the private organ of the victim which creates a serious doubt about commission of rape. None of the witnesses had seen the condemned-prisoner in the area before or after the occurrence. None from the nearby area of the place of occurrence disclosed that they saw the victim with the appellant though the area is densely populated. The burden of proof of offence never shifts upon the defence. There are

contradictions, discrepancies, omissions in the evidence of the prosecution witnesses and the appellant is entitled to the benefit of doubt and, therefore, he is to be acquitted from the charge levelled against him. He then refers to the case of Alamgir Hossain and another Vs. the State, 22 BLC (AD) 155 and submits that the absconsion by itself cannot be the proof of guilt. Prosecution is to proof beyond reasonable doubt that the condemned-prisoner appellant Babul committed the offence.

In the premises above, the judgment and order of conviction and sentence passed by the Tribunal against the appellant cannot be sustained in law. Despite the above legal position of the case, if this Court finds appellant Babul Hossain guilty of offence under the aforesaid section, considering his post trial period of custody 2 years 2 months and 7 years 1 month in the death cell, his sentence of death may be commuted to imprisonment for life, Mr. Hossain concludes.

Mr. S.M. Shafiqul Islam, learned Advocate appointed as a State Defence Lawyer for condemned-prisoner Amdad Hossain adopts the submissions of Mr. Hossain and further submits that there was no eyewitness to the occurrence of

killing and committing rape upon the victim. Condemned-prisoner Amdad did not make any confession implicating himself with the alleged offence. In reply to the examination under section 342 of the Code he specifically alleged in writing that he was made accused in this case out of previous enmity of 2 groups of the colony. Furthermore on torture of co-convict Babul Hossain, the confession was extracted and he was implicated. It is well settled by our apex Court in numerous cases that confession of a co-accused cannot be used against another co-accused in the joint trial without any corroboration from other sources. In this case, no such corroboration from any sources is found, therefore, the conviction and sentence of Amdad on the basis of confession of co-accused Babul Hossain cannot be maintained in law and he is entitled to the acquittal. The reference, therefore, would be rejected and the condemned-prisoner be acquitted of the charge level against him.

We have considered the submissions of the learned Deputy Attorney General and the learned Advocates for the condemned-prisoners. It appears that out of 13 prosecution witnesses, PW9 Manas Ranjan Das was a Police Inspector,

PW10 Sheikh Hafizul Islam was a constable of police, PW11 S Mohammad Ali was a Judicial Magistrate, PW12 Doctor Haridas Biswas was an Assistant Professor of the hospital and PW13 Md. Abu Mokaddem was a Police Inspector and IO and all of them are formal witnesses. PW1 Md. Imam Hossain was the father of the victim and PW2 Mst. Rozina Begum was the mother of the victim. PW3 Abdul Quddus was the *Khadem* of a madrasa, PW4 Monowar Hossain, PW5 Lal Mia, PW6 Baby Begum, PW7 Md. Dulal Hossain and PW8 Md. Manik Shikder are the residents of the colony. Out of the 13 prosecution witnesses PWs 4, 5 and 6 were declared hostile and cross-examined by the prosecution.

The prosecution through evidence of PW1 and 2, the parents of the victim proved that victim Afsana Mimi, their elder daughter went out from their house at about 07.00 pm on 15.11.2009 to purchase spicy puffed rice taking money from her father. But thereafter she did not return home. It has been proved that the parents and others searched for the victim on the occurrence night. The rain and storm started immediately after victim's going out and consequently the electricity was

out. They could not find her out on that night and they lodged a GDE with the police station about the missing of their daughter. It has come out from the evidence of PW13 Md. Abu Mokaddem and PWs 1 and 2 that the GDE was about the missing news of the victim. The GDE was not brought before the Court to prove its content. The learned Advocate for the condemned-prisoner wanted to treat the GDE as FIR. In order to qualify a GDE as an FIR the requirements of section 154 of the Code are to be fulfilled which is totally absent in this case. The GDE was just about missing news of victim Afsana. In order to qualify a GDE as an FIR the information given to the police station must be of cognizable offence, it shall be reduced to writing by the Officer-in-Charge of the police station or under his direction; the same would be read over to the informant, it shall be signed by the informant and the substance thereof shall be entered into a book to be kept by such officer in the form as the government may prescribed on this behalf which is totally absent in this case. In this regard we can rely on the *ratio* laid the case of Badal and others Vs. State, 10 BLC 565. The case of Muslim Uddin as referred to by the learned

Advocate for appellant Babul Hossain reported in 7 BLD (AD) 1 shall not apply in the present case considering its facts upon which the *ratio* has been laid down. In the reported case the IO moved on the basis of GDE but subsequently he was biased and at his instance the FIR was lodged and the accuseds were implicated in that case falsely which is quite distinguishable from the present case.

According to the FIR lodged in this case PW1 implicated two persons with the offence i.e., the condemned-prisoners Babul and Amdad. In the FIR and in evidence PW1 stated that accused Amdad winked the victim at the event of victim's going out from the house to purchase spicy puffed rice. He heard it from his wife PW2, the mother of the victim who witnessed the winking of the victim as, "মেয়ে বাড়ীর বাইরে গেলে ইমদাদ ও কালা বাবু ইশারা দেয়।" After missing of the victim her parents PWs 1 and 2 searched for her but they failed to trace her out because there was rain with storm and the electricity was out. On the next day victim's deadbody was found floating on the water of a pond. Hearing the news, informant PW1 and his wife PW2 rushed there. PW9 Manas Ranjan Das and others

appeared and held inquest on the deadbody. In the inquest exhibit-3 police found a ligature mark on the throat of victim. They found mark of bite on her breast. They further found the victim's private organ ravished. Police sent the deadbody to the morgue and PW12 after autopsy found the following marks or the throat as well as on the private organ of the victim.

1. One circular ligature mark was found at the level of thyroid cartilage of neck measuring 14"×1$\frac{1}{2}$"

2. One Circular bite mark was found on the upper part of left breast measuring 1$\frac{1}{2}$" in diameter.

প্রজনন অঙ্গসমূহ, বাহিরের এবং ভিতরেরঃ-

1. One lacerate owned found on the left side of labia majora- $\frac{1}{2}$"×$\frac{1}{2}$"
2. One tear was found on the post vaginal wall $\frac{1}{3}$"×$\frac{1}{4}$.

   Hymen ruptured antemortem clotted blood found on the vaginal canal. uterus small.

And finally opined that the death was due to asphyxia as a result of strangulation which was antemortem and homicidal in nature following forceful sexual intercourse. PW12 doctor

Haridas Biswas in evidence supported his autopsy report, exhibit-6. So, we can conclude that the victim was rapped and, thereafter, strangulated to death and the deadbody was thrown in to the pond.

Now we have to examine who committed the rape and strangulated her to death. This fact came out from the confession made by condemned-prisoner Babul Hossain, exhibit-5 and circumstantial evidence of witnesses. Babul Hossain was arrested on 15.01.2010 from Boalmari, Faridpur. He was produced before the Magistrate on 16.01.2010 and was taken for 2 days remand. On the next day, i.e., on 17.01.2010 he was produced before learned Magistrate PW11 S Mohammad Ali for recording his confession which was accordingly recorded. On assessment of the evidence of PW11 as well as the confession exhibit-5, we find that the learned Magistrate in compliance with the provisions of law as required under sections 164 and 364 of the Code recorded the confession. He made a memorandum that the confession was true and made voluntarily. The confession is reproduced below:

"গত ১৫/১১/০৯ ইং তারিখে রাত ১১:৪৫ মিনিটের সময় জাহাঙ্গীরের চায়ের দোকানে দাড়িয়ে টিভি দেখছিলাম। তখন নাইট গার্ড নজরন্নল এসে আমাকে বলে চারটি লোক একটি মেয়েকে নিয়ে গেছে। আমি ও নজরন্নল মেয়েটির খোঁজে বাস্ত্মহারা মাধ্যমিক স্কুলের সিড়ি ঘরে যাই। সেখানে গিয়ে দেখি এমদাদ, আশা, জাহিদ ও জাহাঙ্গীর সিড়ি রন্নমে দাড়িয়ে আছে। তাদের সামনে একটি মেয়ে ফ্লোরে মুখ বাধা অবস্থায় পড়ে আছে। মেয়েটির পরনে পায়জামা ছিল না। নজরন্নল মেয়েটির সাথে সম্ভবত যৌন কাজ করে। তারপরে আমি মেয়েটিকে ধর্ষণ করি। এমদাদ মেয়েটির মুখের বাঁধন খুলতে গেলে মেয়েটি বলে যে অমি সবকিছু বলে দিব। এমদাদ তখন মেয়েটির গলায় ফাঁস দেয় এবং মেয়েটিকে মেরে ফেলে। এমদাদ মেয়েটিকে কোলে করে নিয়ে পুকুরে ফেলে দেয়। জাহিদ ও আশা পুকুরে নেমে মেয়েটির লাশ পা দিয়ে কাদার ভিতরে পুতে রাখে। পরদিন দুপুর বেলা মেয়েটির লাশ ভেসে উঠে। মেয়েটির নাম আফসানা। তার পিতার নাম ইমাম হোসেন।"(*emphasis supplied*)

The confession is found inculpatory and as per it confessor committed rape upon the victim. In his confession he did not state that he strangulated the victim to death but stated that condemned-prisoner Amdad did it and left the deadbody to the pond. By cross-examining PW11, the Magistrate, the defence failed to bring out anything adverse as to the truth and voluntariness of the confession. So, the confession alone may be based to convict its maker. Although PWs 1 and 7 in cross-

examination stated that they heard the confessor was assaulted in the police station, but it does not help in any way to disbelieve the truth and voluntariness of the confession.

Now we have to decide whether co-accused condemned-prisoner Amdad Hossain can be convicted on the basis of the confession of a co-accused Babul which is inculpatory and found to be true and made voluntarily. Yes, it is well settled by our Apex Court in numerous cases that only a confession of co-accused cannot be the basis of conviction of another co-accused in joint trial without any corroboration from independent sources. In this case, we find that in the confession, the confessor Babul told, "এমদাদ মেয়েটির মুখের বাঁধন খুলতে গেলে মেয়েটি বলে যে অমি সবকিছু বলে দিব। এমদাদ তখন মেয়েটির গলায় ফাঁস দেয় এবং মেয়েটিকে মেরে ফেলে। এমদাদ মেয়েটিকে কোলে করে নিয়ে পুকুরে ফেলে দেয়।" The above facts of strangulation tallies with the autopsy report exhibit-6 which has been corroborated by the evidence of doctor, PW12. Moreover, the deadbody of the victim was recovered from pond in the same condition.

Apart from the aforesaid fact, the circumstantial evidence of the witnesses is enough to hold that the condemned-prisoner

Amdad Hossain was all along involved with the offence including killing of the victim. It is found in the evidence of PW1 that at the time of victim's going out from the house Amdad winked her which he heard from PW2. PW2 is the mother of the victim who stated that Amdad and Babul winked the victim at the event of his going out from home. In evidence PW2 further stated, "আমরা জাহাঙ্গীরের বাড়ী, ইমদাদের বাড়ী, কালার বাড়ী, ইমদাদের বাড়ী যাই। মেয়েকে কোথাও পাইনি।..... কালা বাবু আর এমদাদ এলাকা ছেড়ে পালিয়ে যায়।" It has further come out in the cross-examination of PW1 that 'ছোট মেয়েকে তুলে নেবে তাই ১০৭ ধারায় মামলা করি। সাত ধারায় মামলা করি এই নারী শিশু মামলার পরে' which proves that the accused persons including the condemned-prisoners after obtaining bail in this case threatened the informant and in consequence thereof PWs 4, 5 and 6 were declared hostile. It is now well settled in the case of Sukkur Ali Vs. State, 74 DLR (AD) 11 that relying on an inculpatory confession of a co-accused and believing the strong circumstantial evidence, the other co-accused may be convicted safely in a joint trial. Here, by the aid of circumstantial evidence of winking the victim at the time of her going out from house, his leaving the area after

the occurrence, his arrest from far away, recovery of the deadbody from the pond in the condition as described in the confession and relying on the confession of condemned-prisoner Babul Hossain, we can hold that co-convict Amdad Hossain committed the murder of victim by strangulation.

But it is found that the Tribunal passed conviction and sentence under section 9(3) of the Nari-o-Shishu Nirjatan Daman Ain, 2000 which reads as follows:

"যদি একাধিক ব্যক্তি দলবদ্ধভাবে [4][বা সংঘবদ্ধভাবে] কোন নারী বা শিশুকে ধর্ষণ করেন এবং ধর্ষণের ফলে উক্ত নারী বা শিশুর মৃত্যু ঘটে বা তিনি আহত হন, তাহা হইলে ঐ দলের প্রত্যেক ব্যক্তি মৃত্যুদণ্ডে বা যাবজ্জীবন সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত [5][অন্যূন দুই লক্ষ টাকা] অর্থদণ্ডেও দণ্ডনীয় হইবেন।"

From the confession of the condemned-prisoner Babul, it is difficult to ascertain whether the victim was raped except convict Babul. The confessor alleged that 'নজরুল মেয়েটির সাথে সম্ভবত যৌন কাজ করে' which is not conclusive that Nazrul did it or other co-accused Amdad, Asha, Jahid and Jahangir committed rape upon the victim. The law of the aforesaid section 9(3) prescribes punishment for gang rape and death for its consequence. Although all of them were acquitted except Amdad but as per the confession of the condemned-prisoner

Babul Hossain, he may safely be convicted under section 9(1) of the Ain as soul perpetrator of committing rape. If it is not proved that more than one person committed the rape than section 9(3) of the Ain, shall not attract. It will be risky to implicate other co-accused or Nazrul in the commission of rape only on the word told by the confessor.

Therefore, we find that although the Tribunal convicted the condemned-prisoner Babul Hossain under section 9(3) of the Ain, it is required to be converted under section 9(1) of the Ain.

Now the question comes whether the sentence of death imposed upon the condemned-prisoner Babul Hossain may be commuted to imprisonment for life. As per the confession he has committed rape upon the victim by chance not in a preplanned way and the victim did not die and inconsequence of rape. Furthermore, he has been in jail for more than 9 years including 7 years in condemned cell for which his sentence of death may be commuted to imprisonment for life.

But the circumstantial evidence and the confession of the condemned-prisoner proves that Amdad was in the place of occurrence from before and he strangulated the victim to death

with *urna*, took the deadbody to the pond and dumped it there. After committing the offence he remained absconding and was subsequently arrested on 05.08.2010. Moreover, evidence of PW4 proves that there was quarreled between mother of Afsana and Amdad 8-10 days before the occurrence took place which proves that the murder was premeditated. In the premises above, we find no reason to commute the sentence of death imposed upon condemned-prisoner Amdad. But it has not been proved that he committed rape, therefore, conviction and sentence under section 9(3) of the Ain passed against him cannot be sustained. It shall be altered under section 302 of the Penal Code.

In view of the aforesaid premises, the reference is accepted in part, so far it relates to Amdad Hossain and rejected for Md. Babul Hossain alias Kala Babul. The conviction under section 9(3) passed against condemned-prisoner Babul Hossain is converted to section 9(1) of the same Ain and his sentence of death is commuted to imprisonment for life. The conviction and sentence passed against condemned-prisoner Amdad Hossain under section 9(3) of the Ain is also converted to section 302 of

the Penal Code and his sentence of death is confirmed. Consequently, Criminal Appeal No. 10484 of 2019 is dismissed with modification of sentence. Jail Appeal 260 of 2019 preferred by Md Babul Hossain is disposed of and Jail Appeal 259 of 2019 preferred Amdad Hossain is dismissed.

Condemned-prisoner Md. Babul Hossain alias Kala Babul be shifted from the condemned cell to the cell ment for the prisoners alike.

Communicate the judgment and send down the records of the Tribunal.

K.M. Rasheduzzaman Raja, J:

I agree

Shohel ABO