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

Present:
Mr. Justice Bhishmadev Chakrabortty
And
Mr. Justice K.M. Rasheduzzaman Raja

Death Reference No. 120 of 2019

The State .....petitioner
-Versus-
Abdul Hakim and others .....condemned-convicts
with
Criminal Appeal No. 11903 of 2019
And
Jail Appeal No. 244 of 2019
Abdul Hakim .....convict-appellant
-Versus-
The State .....respondent

Mr. Syed Ejaz Kabir and Ms. Nahid Hossain, Deputy Attorney Generals with Ms. Mahbuba Taslim Akhi, Mr. Ashraful Alam, Mr. Md. Abdul Motaleb, Assistant Attorney Generals
.....for the State

Ms. Shahana Sayed, Advocate
..... State defence lawyer

Mr. Siddique Azad, with
Mr. Selim Hossain and
Ms. Sabikun Nahar, Advocates
.....for the appellant

Heard on: 29.10.2026, 01.11.2026 and 02.11.2026
Judgment on 03.11.2026.

K.M. Rasheduzzaman Raja, J:

This reference has been made under section 374 of the Code of Criminal Procedure, herein after 'the Code', by the

learned Judge of the Nari-o-Shishu Nirjatan Damon Tribunal, Manikgonj hereinafter 'the Tribunal', for confirmation of the death sentence awarded by the Tribunal upon accused Abdul Hakim, Enamul, Ramjan and Faizur Hossain by the judgment and order dated 24.09.2019 passed in Nari-o-Shishu Case No. 226 of 2008 arising out of Singair Police Station Case No. 12 dated 16.07.2008 corresponding to G.R. No. 152 of 2008. Condemned-prisoner Abdul Hakim preferred Criminal Appeal No. 11903 of 2019 and Jail Appeal No. 244 of 2019 against the conviction and sentence awarded by the Tribunal upon him. All the matters were heard together and, therefore, we are to dispose of the matters by this judgment.

The prosecution case, in short, is that the deceased Romana Akter was a student of class IV in BRAC School, Chackbari Waisenagar under police station Singair, District-Manikgonj. She left the house at 7:30 a.m. on 16.07.2008 for the school with his school bag containing books and note books. It was raining cats and dogs since morning. At around 8:45 a.m. Shilpi Akter, a classmate of the deceased Romana Akter, arriving at school found the books, umbrella and *urna* of Romana Akter

but she did not find Romana Akter present in school. So, they started looking for her. Upon found Romana Akter nowhere Shilpi Akter went to their house and informed her family about her absence in school. Thereafter, the members of the family of the deceased Romana Akter started searching for her in several places. At one stage of the searching they found the dead body of Romana Akter lying in the jute field of Nurul Hoque Master of Village Waisenagar at 9:50 a.m. They found the dead body lying on her back having her neck fastened with a jute plant. P.W.1 Kadom Ali, paternal uncle of the deceased, apprehending that his niece was killed after rape at around 7:30 a.m. to 9:50 a.m. on 16.07.2008 lodged FIR with Singair Police Station.

Upon the aforesaid FIR Officer in-Charge of Singair police station registered Singair Police Station Case No. 12 dated 16.07.2008 under section 9(2) of the Ain and appointed S.I. Md. Hayder Ali investigating officer of the case.

Receiving the charge of investigation S.I. Md. Hayder Ali visited the place of occurrence prepared sketch-map with index, recorded statements of the witnesses under section 161 of the Code, seized the alamot preparing seizure list, obtained the post-

mortem report and sent the wearing skirt of the deceased for chemical examination and obtained the report. He arrested the accused and recorded their statements in video and making CD of the statements seized the same. He got the confessional statements of the accused persons recorded under section 164 of the Code. The witnesses have also given statements under section 164 of the Code to the learned Magistrate. He gathered the certificate of the deceased from her school and found that the victim was of the age of 9 years 9 months and 15 days. He seized the leather sandal of the accused Enamul from the place of occurrence. He also seized a hanging half-shirt from the verandah of the school and prepared seizure list thereof as well. After investigation he found preliminary evidence against the accused persons and filed charge sheet against them under sections 9(3) and 30 of the Ain, 2000 read with sections 201 and 212 of the Penal Code.

Having received the charge-sheet the learned Magistrate sent the case record to the learned Judge of the Tribunal. Learned Judge of the Tribunal took cognizance of offence and registered the case as Nari-o-Shishu Case No. 226 of 2008 and fixed the

case for hearing on charge. Initially charge was framed against accused Enamul, Ramjan, Faizur Hossain, Abdul Hakim, Saiful and Md. Murad Hossain under section 9(3) of the Ain, against Enamul, Ramjan, Faizur Hossain, Abdul Hakim, Saiful and Md. Morad Hossain under section 201 of the Penal Code and against accused Chan Miah under section 212 of the Penal Code. Subsequently, charge was amended adding section 30 of the Ain, against accused Enamul, Ramjan, Saiful, Md. Murad Hossain, Faizur Hossain, Abdul Hakim and Chan Miah. At the hearing of charge only accused Abdul Hakim and Chan Miah were present and the charge was explained and read over before them to which they pleaded not guilty and demanded the trial.

Learned Judge of the Tribunal appointed state defence lawyer for the absconded accused. The prosecution adduced 15 witnesses to prove the charge brought against the accused persons. Thereafter, accused Abdul Hakim and Chan Miah were examined under section 342 of the Code whereupon they claimed their innocence and expressed their desire not to adduce any counter evidence.

The defence case as transpires from the trend of cross-examination is that of innocence and the accused have been falsely implicated with the case. The further defence case is that P.W.1 Kadom Ali had illicit relation with P.W.3 Momotaz, mother of the deceased. As deceased Romana witnessed their objectionable relation and threatened to disclose to her father they managed to kill her.

Hearing both sides the learned Tribunal awarded death sentence to the accused Enamul, Ramjan, Faizur and Abdul Hakim under section 9(3) and 30 of the Ain, 2000 by the aforesaid judgment and order and sent the record to this Division for confirmation of the sentence.

Ms. Nahid Hossain, learned Deputy Attorney General, appearing for the State has taken us through the materials on record and submits that the prosecution has successfully connected the responsibility of the accused persons including the condemned-prisoner Abdul Hakim with the occurrence by adducing 15 witnesses. Accused Faizur and Hakim have given confessional statements implicating themselves with the occurrence even though they were not taken to police remand.

Although, P.W.10 Dr. Saiful Islam did not mention about commission of rape on the victim in autopsy report but P.Ws.1, 2, 4, 6, 7 and 8 witnessed the dead body closely and they have found all signs and symptoms of rape on the victim. Specially, P.W.7 and P.W.8 have given vivid descriptions of the private part of the deceased which proves that the accused brutally abused the victim sexually before killing her. Inquest report also supported injury in the private part of the deceased. The wearing skirt of the deceased also contained the semen of man. Finally the post-mortem report supported that the victim was killed by strangulation with a jute plant. Moreover, the condemned-accused, except the condemned-prisoner Abdul Hakim, have gone into hiding after getting bail which indicates their guilty mind as well. Such being the case, learned Deputy Attorney General submits, the reference should be accepted. Learned Deputy Attorney General has relied on the principles enunciated in the cases of State Vs. Md. Moinul Hoque and others 21 BLD (HCD) 2001, The State Vs. Md. Saiful Islam and another 10 SCOB (2018) HCD 249, Santosh Mia Vs. State 42 DLR (1990)

171 and Md. Shukur Ali and others Vs. The State 16 SCOB (2022) AD 62.

Ms. Shahana Sayed, the State defence lawyer, appearing on behalf of the absconding condemned-convicts has opposed the submissions of the learned Deputy Attorney General submitting that although the condemned-convict Faizur has given a confession but that is not voluntary and true. Faizur allegedly has stated in his confession that he pressed hold of the head of the deceased on the ground along with the other accused persons who pressed hold the other organs of the deceased but there was no mark of mud in the seized skirt of the deceased. The learned Magistrate did not record the confessions following the Rules. Since, recording of the confessional statements are found to be questionable and the recording Magistrate could not be examined, such confessions can get no legal force or weight. Moreover, condemned-convict Faizur has retracted his confession. Since there is no eye witness, awarding maximum punishment upon the condemned-convicts relying on the faulty confessions cannot be sustained. It is not safe to convict the other co-accused on the basis of the confession of a co-accused which

has been recorded by the learned Magistrate in violation of the Rule. The autopsy report mentioned nothing about the commission of rape upon the deceased. Absconsion of the accused itself is not evidence of their guilt. Therefore, learned State defence lawyer Ms. Shahana Sayed submits, the reference should be rejected. Ms. Sayed has relied on the decisions of the cases of Alamigr Hossain and anr Vs. State 22 BLC (AD) 155, Babul Vs. The State 42 DLR (AD) 186 and Syed Nurul Azim Babar Vs. The State 29 BLD (AD) 66.

Mr. Siddique Azad appearing for the condemned-prisoner Abdul Hakim has vehemently opposed the reference submitting that there is no cogent evidence and materials on record to connect the responsibility of the condemned-prisoner Abdul Hakim with this unfortunate occurrence. There is no eyewitness and no preponderance of evidence to prosecute the condemned-prisoner in this case. The PWs have contradicted each other over the physical condition of the dead body. The descriptions of the dead body given by the witnesses do not support either the inquest report or the autopsy report. The case was initially recorded by the Officer in-Charge of the Singair police station

under section 9(2) of the Ain but subsequently it was embellished and sections 9(3) and 30 of the Ain was imported only to connect the other accused persons including the condemned-prisoner. The confession of the condemned-prisoner Abdul Hakim is very much faulty as the basic Rules such as, regarding the custody of the accused before giving confession, reflection period, starting time of the recording of confessions and sending the accused after recording confession were very much questionable. Learned Magistrate has violated the provision of Rule 78 of the Criminal Rules and Orders to record the confessions of the condemned-prisoner Abdul Hakim. Moreover, the recording Magistrate and the I.O. could not be cross-examined by the accused persons. In this circumstance, the acceptance of the reference would be highly prejudicial to the condemned-prisoner. Therefore, Mr. Azad submits, the reference should be rejected. Mr. Azad has relied on the principles laid down in the cases of Syed Nurul Azim Vs. The State 29 BLD (AD) 66, Helaluddin Vs. Nazimuddin 22 BLC (AD) 155, Angur Vs. The State 41 DLR 66, Sanu Mia Vs. The State 3 BLC 441 and ACC Vs. Haji Md. Salim 20 BLC (AD) 129.

We have heard the learned Deputy Attorney General, the learned state defence lawyer and the learned Advocate for the condemned-prisoner Abdul Hakim in length and perused the materials on record. We have already found that the prosecution has examined 15 witnesses to prove the charge brought against the accused persons. Let us examine the some and substance of the evidence of the prosecution witnesses.

P.W.1 Kadom Ali, the informant, has deposed that deceased Romana was his niece and she started for school from the house at 7:30 a.m. on 16.07.2008. At around 8:30 a.m. her classmate Shilpi appeared at their house and informed them that the book, note books and umbrella of Romana were found in school but they did not find her. Getting such information, they went to the school and started looking for Romana and after searching for sometimes they found the dead body of Romana lying in the jute field of Nurul Hoque Master, 200 yards away from the school. They found the dead body of Romana in nude condition with a jute plant fastening around her throat. Instantly he informed the police. Police and the local people arrived at the place of occurrence. A sandal of the accused Enamul was found

stuck in the mud near the place of occurrence and the wearing shirt of the accused Ramjan was found in the window of the verandah of the school. The dead body of Romana was taken to police camp. On query, the mother of Ramjan admitted that the shirt was of his son Ramjan. The wife of Ramjan also admitted that her husband owned the shirt. Police apprehended accused Hakim who confessed in their presence that accused Enamul committed rape on Romana. Faizur pressed hold of her mouth, Ramjan pressed hold of her leg and Hakim himself pressed hold of her hand. After Enamul and Faizur accused Ramjan also committed rape on the victim. When Faizur was committing rape on the victim accused Enamul pressed hold of her mouth. As Romana Stated that she would disclose the occurrence to her mother, accused Enamul, Ramjan, Faizur and Hakim killed Romana fastening a jute plant around her throat. On such occurrence he lodged FIR with Singair police station. He has marked the FIR and his signature thereon as exhibits. He has also identified the sized sandal of the accused Enamul, wearing shirt of the accused Ramjan and wearing skirt, blouse and an umbrella of the deceased and marked those articles as material exhibits. In

cross-examination he has stated that Chan Miah, father of the deceased, works abroad and he is his full brother. S.I. Ali Hayder typed the FIR and took his signature. All the accused are of his village and they have admitted the occurrence. Accused Faizur is married and he is a carpenter. At the time of occurrence the jute plant of the field was long to the height of a man. They searched Romana around the school and found her dead body in the jute field. They have learned the occurrence from the confessions of the accused who confessed the occurrence in their presence. He saw accused Ramjan grazing the cattle wearing the shirt which was found in the window of the verandah of the school. He has denied that accused Faizur and Abdul Hakim were subjected to torture and, therefore, they gave confessional statements or he had illicit relation with the mother of the deceased and they have arranged the killing of the deceased of Romana as she witnessed their objectionable relation.

P.W.2 Mohammad Ali has deposed that on 16.07.2008 he saw people in the house of the deceased Romana and going there he learned that some people killed the daughter of Chan Miah, Romana. He went to BRAC school with the people and found a

shirt and a sandal. The people were saying that the owners of the shirt and the sandal have killed the deceased Romana. Later police appeared and with the police he went to the jute field of Nurul Hoque and saw the dead body of Romana. Police seized the shirt, the sandal and the *urna* of the victim. He went to police station. Accused Hakim was arrested by police and in their presence he admitted that the accused Enamul committed rape on Romana. He asked the accused Hakim about the occurrence and Hakim stated that Ramjan pressed hold of the leg of Romana and when Ramjan went to commit rape on her he himself pressed hold of the leg of Romana and Enamul pressed hold of her mouth. When Romana threatened that she would disclose the occurrence to her mother, the accused Enamul killed her. Accused Faizur was also arrested by police who also disclosed the same occurrence in their presence. In cross-examination he has stated that he did not see Romana going to school. Police also went to school but at that time there were no students and teachers. Police found a shirt, a *urna,* and an umbrella in the school. Police did not assault the accused Hakim at the time of interrogation. He has denied that he did not visit the police

station or the accused Hakim did not admit anything in his presence. He has stated that earlier he saw the seized sandal with the feet of the accused Enamul. The shirt of the accused Ramjan and the sandal of the accused Enamul were found before arrival of the police. He has denied that he deposed falsely.

P.W.3 Momotaz, mother of the deceased, has deposed that at around 7:30 a.m. on 16.07.2008 it was raining and her daughter Romana went to school. After a while Shilpi informed them that the books, note books and umbrella of Romana were lying in the school but Romana was absent. Getting such information, they rushed to the school and started searching for her daughter Romana. They found a sandal stuck in the mud near the school. They also found a shirt hanging in the school. They found the dead body of Romana lying in the jute field of Nurul Hoque. She was found nude and her throat was found fastened with a green jute plant. She lost her sense seeing the dead body. Police arrived and seizing the shirt and the sandal went to the house of the accused Chan Miah and, thereafter, went to the house of the accused Ramjan. The mother and the wife of Ramjan identified the shirt and admitted that Ranjan owned the

shirt. The accused were apprehended by police and brought to the police camp. Accused Hakim stated that Enamul and Ramjan committed rape on Romana. Hakim and Faizur pressed hold of her. When Romana stated that she would disclose the occurrence, the accused persons killed her and fled. Earlier, deceased Romana disclosed to her that accused Enamul used to give her bad proposal but she did not pay heed to it as Romana was a minor girl. In cross-examination she has stated that her husband resides in Saudi Arabia for 06 months. She and her brother-in-law P.W.1 Kadom Ali live in the same house. They found the dead body of Romana at 9:0 a.m. Before recovery of the dead body they found the sandal of the accused Enamul. One of the sandals was found near the nearby thrashing floor of paddy and another was found in the mud. Upon found the sandal the people were saying that the accused committed the occurrence. She saw the accused Enamul going by the side of their house putting on the sandal which was found. Daroga took the sandal from them and seized the same. Accused Enamul, Hakim, Faizur have admitted the occurrence in the police station. She has denied that the accused Enamul did not commit rape on

her daughter or Romana is the prey of their illicit relation or accused Faizur did not admit anything.

P.W.4 Jabed Ali Chowkider has deposed that hearing about the death of a girl he went to the place of occurrence with police. Police inspected the dead body by turning all sides. He found the clotted blood on the thigh of the dead body. The dead body was found fastened with a green jute plant. They found a nose-pin in the nose of the victim. They also found a sandal lying beside the dead body. They found another sandal near the thrashing floor of paddy, a little bit away from the place of occurrence. They visited the school where the deceased read and found an umbrella, books and a half shirt. They inquired about the owner of the shirt and the present people disclosed that accused Ramaja owned the shirt. He has indentified the sandal and marked the same as material exhibit. In cross-examination he has stated that the accused Faizur is a carpenter and his father has business of cloth. Accused Enamul used to work in the Chittagong Jute Mills. He did not see the accused Enamul putting on the sandal. The local people were saying that Enamul was the owner of the sandal. They found the shirt in the verandah

of the school. Daroga seized the shirt and the sandal and prepared a seizure-list with his signature. He has denied that Daroga did not seize any alamot.

P.W.5 Nurul Islam has deposed that he knows the accused and the informant. The occurrence took place at around 9:00 to 9:30 a.m. on 16.07.2008. They went to see the dead body and found a jute plant fastening around the throat of the dead body. The dead body had a skirt and a wrist watch. Daroga seized a half shirt in his presence and prepared a seizure list thereof with his thumb impression. He only knows that a girl was killed but he cannot say who killed her.

P.W.6 Md. Mohiuddin Pathan has deposed that it was raining on the date of occurrence. He got information that Romana was not found in the school although her book, umbrella and note books were there. All the villagers went to search for Romana and found her dead body lying in the jute field of Nurul Hoque. The dead body was found nude with blood on her thigh. The dead body was clad with a skirt and a red blouse. Receiving the phone call police arrived. The police arrested the accused and took them to the police station. In cross-examination he has

stated that his son Monir also reads in the same class of Romana. He got information from his son that Romana was missing. Getting such information he went to the school along with others and started searching for Romana. Thereafter, they found the dead body of Roman in the jute field. He has denied that he was not present in the police camp when the accused were interrogated. A sandal was recovered from near the thrashing floor of paddy in his presence.

P.W.7 Janota has deposed that hearing the cry of Momotaz he went to the place of occurrence beside the BRAC school and found the nude dead body of the deceased Romana having her throat fastened with a jute plant. The skirt of Romana was thrown a little bit away. Going there they made the dead body tidy. They found blood coming out from the private part of the deceased and they also found the canal of the private part of the victim extruding. Thereafter, the police arrived at the place of occurrence. They also found the *urna* of Romana and shirt of the accused Ramjan in the window of the school. They found one sandal of the accused Enamul beside the dead body and another sandal near the thrashing floor of paddy, a little bit away. Letter

the dead body was sent for autopsy. The people told the names of Romjan and Enamul as the owners of the seized shirt and sandal respectively. He saw the accused Enamul going to Hat and Bazar putting on the same sandal. The local people were also saying that Enamul used to put on those sandals. Accused Ramjan was married and he had children. He saw the accused Ramjan wearing the seized shirt. He has denied that Ramjan did not own the shirt. He did not hear that police assaulted accused Faizur.

P.W.8 Mahila has deposed that she knew everybody. Hearing the crying of the mother of Romana she went to the place of occurrence and found the nude dead body of Romana. Blood were coming out from the private part of Romana and the canal of the private part was also found extruding. She lifted the dead body on the police van at the instance of the police. He found blood rolling down from the back side of the private part of the deceased. She found the *urna* of the deceased and shirt of the accused in the verandah of the school. In cross-examination she has stated that accused Faizur was of their locality and he was married. He did not see Faizur on the date of occurrence.

P.W.9 Constable No. 662 Md. Abdul Hakim has deposed that he carried the dead body of Romana to morgue. He has marked the chalan form and his signature thereon as exhibits. He has indentified the seized skirt of the deceased and marked his signature on the seizure list as exhibits.

P.W.10 Dr. Md. Saiful Islam has deposed that he was posted in Manikgonj Sador Hospital on 16.07.2008 as the Medical Officer. Upon found the dead body of Romana Akter he held autopsy thereupon and found the following injuries -

> "One continuous ligature mark present round the mid neck. Eccymosis present on both side of the ligature mark. On dissection subcutaneous soft tissue, larynx, trachea found congested. "বাকযন্ত্র ও শ্বাসনালী ডান ফুসফুস, বাম ফুসফুস Found congested. মুখ, শ্বাসনালী ও অন্ননালী Found congested পাকস্থলীতে 200 ml partially digested খাবার পাওয়া যায়।"
>
> In his opinion cause of death was due to asphyxia resulting from strangulation which was ante mortem and homicidal in nature.

It was mentioned in the viscera report that semen of man was found in the skirt. He found the sexual organ of the victim intact. He has marked the post-mortem report and his signature thereon as exhibits. In cross-examination he has stated that he

received the dead body for holding autopsy at 4:30 p.m. on 16.07.2008. The private part and other organs of the victim were found intact. The victim was killed by strangulation. He has denied that he did not prepare the autopsy report following the rules of medical jurisprudence. He, however, has stated that the form of the post-mortem report was filled-up by Dr. Monir Hossain Torofdar.

P.W.11 Abdul Mannan Miah has deposed that he was a witness to the inquest report of the dead body. Police held inquest over the dead body in his presence and prepared a report with his signature. The dead body was found wearing a skirt and having a jute plant around her neck. He found the shoe, *urna*, umbrella and books of the deceased in the school.

P.W.12 Md. Selim Abbas has deposed that he was present at the time of holding inquest over the dead body. He witnessed the dead body with a jute plant around her throat. The root of the jute plant was into the ground. The wearing cloths of the dead body were found untidy. The dead body had a wrist watch in hand. He did not hear how the deceased was killed. Later he heard that somebody picked up the deceased from her school and

killed her after committing rape on her. He heard that the accused present in the dock killed the deceased after committing rape on her. In cross-examination he has stated that after the arrival of police from the police station he went to visit the place of occurrence with them. Initially, he did not come to know how the deceased was killed. Who committed rape on her, he did not know. From the people of the locality he came to know that the accused persons killed the deceased after committing rape on her. The accused persons are of his village.

P.W.13 Abdul Quddus has deposed that the inquest was held in his presence and the report was prepared with his signature. Hearing the news of murder he went to the place of occurrence. Going there he found daroga Lutfor Rahman and others present. In his presence the books, bag, umbrella and shoes of the deceased were seized from the verandah of the school. He found the dead body having a jute plant fastened around her neck. In cross-examination he has stated that he cannot remember the date of occurrence. He heard that the dead body was nude but he found the dead body covered. He cannot

say who killed the deceased. Later he came to know that the accused persons killed the decease after committing rape on her.

P.W.14 Abdul Motaleb has deposed that he knows the informant and the accused. The occurrence took place 5/7 years ago. He was in the mosque after saying his prayer up to 8:00 a.m. They could not come out of the mosque as it was raining outside. After the recession of rain he came out of the mosque and having breakfast started for Bazar. Seeing several people with police he went to the place of occurrence and saw the dead body of Romana and, thereafter, he went to the Bazar. In cross-examination he has stated that he heard nothing about the occurrence.

P.W.15 S.I. Md. Lutfor Rahman has deposed that he was in-charge of Santipur Police Camp on 16.07.2008. At 9:00 a.m. he got information that a dead body of a girl was lying in the jute field of Nurul Hoque of the village of Waisenagar. Informing the occurrence to the officer in-charge of the police station he went to the place of occurrence and held inquest over the dead body at 12:05 p.m. and prepared a report with the signatures of the witnesses. He sent the dead body to Manikgonj Sador Hospital

for holding autopsy. After filing of the case S.I. Ali Hayder being appointed investigating officer investigated the case. S.I. Ali Hider is dead. As he worked with S.I. Ali Hayder in the same station he knew is signature. S.I. Ali Hayder prepared the sketch-map with index. He has identified the signatures of S.I. Ali Hayder on the sketch-map and marked the same as exhibits. He has marked the inquest report prepared by him as exhibits. Going to the place of occurrence he seized a 6 feet long jute plant, a pair of plastic sandal of the deceased, and marked those articles as material exhibits. In cross-examination he has stated that he just prepared the inquest report. S.I. Ali Hayder investigated the case but he died. He has prepared the inquest report and seizure list in the jute field of Nurul Hoque Master. He has denied that the investigating officer did not die or he did not prepare the seizure list properly.

Apart from the aforesaid evidence of the prosecution witness condemned-convict Faizur and condemned-prisoner Abdul Hakim made two confessional statements. Learned Judge of the Tribunal convicted and sentenced the accused persons including the condemned-prisoner Abdul Hakim basically

relying on those confessional statements of the accused Faizur and Hakim. There is no eyewitness as usual in the instant case of rape. So, the confessional statements bear great importance in deciding the culpability of the accused persons. It is now settled that the confession must be voluntary and true to use the same for determination of the guilt of the confession making accused persons. The confessions of the instant case have been retracted by the makers, not after long time. Considering the importance of the confessions let us examine the confessional statements and the recording process of the confessions adopted by the learned Magistrate.

On perusal of the confession of the condemned-prisoner Abdul Hakim it appears that it has been mentioned by the learned Senior Judicial Magistrate that the accused was brought before her by S.I. Ali Hayder on 26.07.2008 at 5:10. She did not mention whether at 5.10 a.m. or p.m. Learned Magistrate mentioned nowhere of the form the period of time he allowed for reflection before making confession by the accused. She also did not mention to whose custody accused Abdul Hakim was placed before recording the confession. It is surprising enough to note

that in column No. 10 learned Magistrate has just mentioned that he forwarded the accused to Manikgonj Jail Khana at 5:15 hours (বিকাল). If we assume that she received the accused for recording his confession at 5:10 p.m. on 26.07.2008 but she forwarded him to Manikgonj Jail Khana after only 5 minutes. The pertinent question arises; how she had completed the recording of the confessions within only 5 minutes? The question remained unanswered as the Magistrate could not be examined by producing before the Tribunal as a witness. So, it is totally a non-sense recording confessional statement by the learned Magistrate.

On perusal of the confession of Md. Faizur Hossain, it appears that he was produced before the learned Magistrate by S.I. Ali Hayder at 2:30 either a.m. or p.m. on 31.07.2008. In the form of his confession the learned Magistrate also did not state whether she allowed any reflection time to the accused before recording his confession. It was also not mentioned in the form in whose custody the accused was placed before recoding his confession. In column No. 10 the recording Magistrate has just

stated that the accused was forwarded to Manikgonj Jail without mentioning the date or time.

On perusal of the forms of the confessions of the two accused persons it appears that the recording Magistrate has hopelessly failed to follow the Rules in recording the confessional statements of the accused. Confessional statements should not be used as a tool for children's play. Since, the capital sentence rests upon the confessional statements, the recording Magistrate should show her or his utmost care and diligence in recording the statements so that the accused person cannot be prejudiced at any stage of the trial. The learned recording Magistrate failed in every aspect to record the confessional statements in accordance with the Rules, resulting in a futile exercise. We have found that the learned Magistrate left the service, and therefore, she could not be produced before the Court as a witness. In this circumstance, we are unable to determine whether the confessional statements were voluntary and true in absence of legal formalities of its recording process.

Apart from the aforesaid judicial confessions there are extra judicial confessions of the accused persons including the

condemned-prisoner Abdul Hakim as well. P.W.1 Kadom Ali, P.W.2 Mohammad Ali, P.W.3 Momotaz, P.W. 6 Md. Mohiuddin Pathan have deposed that in their presence the accused Faizur and Hakim admitted in the local Police Camp that they killed the deceased after committing rape on her. According to section 26 of the Evidence Act such kind of admission or confession in the custody of police cannot be proved against the accused. It has been provided in section 27 of the Evidence Act, that such admission can be proved against the accused if any fact is discovered in consequence of such confession. In the instant case after the alleged confession in presence of police no sort of recovery was made or any other incriminating article was found or recovered following their confession. So, we also hold that the extra judicial confession of accused Faizur Hossain and Abdul Hakim are not admissible in this case. Therefore, we are unable to hold any of the accused guilty on the basis only of the confessions, either judicial or extra judicial, of the accused including condemned-prisoner Abdul Hakim. Now the question arises, whether there are any other evidence on record to implicate the accused persons with the occurrence. Let us

examine, whether the responsibility of the accused persons including the condemned-prisoner Abdul Hakim can be connected with the commission of offence of the case on the basis of other evidence.

The informant mentioned none as the accused at the time of lodging FIR. It has not been mentioned by any witness why police apprehended accused Abdul Hakim and Faizur Hossain. P.W.1 Kadom Ali, P.W. 2 Mohammad Ali, P.W.3 Momotaz, P.W.4 Jabed Ali and P.W. 7 Janota have cohesively deposed that hearing about the missing of victim Romana they went to the place of occurrence. The *urna* and a shirt was found hanging in the window of the school. A sandal was found stuck in the mud near the nearby thrashing floor of paddy near the school and another sandal of the same pair was found beside the dead body in the jute field of the place of occurrence. Such recovery was made before the alleged confessions of the accused Faizur Hossain and Abdul Hakim. The PWs have stated that the present people opined that the owners of the shirt and the sandal had committed such occurrence. Having enquiry they identified the owners of the shirt and sandals as the accused Ramjan and

Enamul Hoque respectively. It has come out from the evidence of those witnesses of the prosecution that the mother and wife of the accused Ramjan have identified the shirt admitting that Ramjan owned the same. On the other hand, P.W.2 Mohammad Ali has stated that he found the seized sandal with the feet of the accused Enamul. P.W.1 Kadom Ali has stated that he saw the accused Ramjan grazing cattle wearing the seized shirt. P.W.2 Mohammad Ali has categorically stated that the shirt of Ramjan and the sandal of Enamul were seized before arrival of the police. P.W.3 Momotaz has also stated that they found the sandal of Enamul before recovery of the dead body. She also found Enamul frequenting around their house putting on the seized sandal. So, it appears that before arrival of police at the place of occurrence and arrest of the accused Faizur and Ramjan the shirt and sandal were recovered. Since the present witnesses indentified the owners of those shirt and sandal therefore, the police should have arrested the said owners accused Ramjan and Enamul. But police arrested accused Abdul Hakim and Faizur without showing any ground. They visited the house of Ramjan along with the witnesses and confirmed him as the owner of the

seized shirt. Thereafter, the investigating officer submitted charged-sheet against the accused persons including the condemned-prisoner Abdul Hakim. Although the investigating officer could not be examined as he was dead but the defence put no significant suggestions to the P.Ws. requiring examination of the investigating officer to prove any contradiction. So, non examination of the I.O. is not found to be a fatal defect in this case.

Having already rejected the confessions of the condemned prisoner Abdul Hakim and condemned-convict Faizur Hossain on the grounds mentioned above, and finding the circumstances of their arrest unconvincing, we cannot rely on those statements. Consequently, we are unable to implicate condemned prisoners Abdul Hakim and Faizur Hossain with the offence on the basis of those confessions. None of the seized incriminating articles belonged to the accused Faizur Hossain and Abdul Hakim. On the basis of the recovery of sandal and shirt only accused Enamul Hoque and Ramjan can be validly held as the perpetrators of the offence. The other accused persons are not necessarily required to assist the commission of such a heinous offence of rape on

around a 10 years old girl. The place of occurrence is to be examined carefully to ascertain the number of perpetrators in committing the offence. If we assume that the victim was raped in the jute field of the place of occurrence, definitely there would have remained other proof such as, broken jute plants in the radius of an area of the place of occurrence and in that case the investigating office might have seized a lot of broken jute plants. But in this case only one jute plant of 6 feet height was seized; nothing else. On the other hand, the shirt of the accused Ramjan and the *urna* of the deceased were found hanging in the window of the verandah of the school. Had not the victim been raped in the school in a foul weather, the shirt and the *urna* would not have been kept hanging there. On the other hand, had the victim been raped in the jute field, apart from more broken jute plants, the wearing skirt of the deceased also would have been smeared with mud as it was raining heavily on the date of occurrence. In this circumstance, we can safely hold that in fact, the victim was raped in the school and she was taken to the jute field only to kill or keep the dead body hiding. Accordingly, the victim was

supposed to be killed by fastening her throat with a green jute plant which has been supported by the port-mortem report.

In view of the above discussions, we hold that only the accused Ramjan and Enamul committed the offence. It is not the case that the victim Romana Akter was died as the direct consequence of commission of rape on her. The post-mortem report does not bear any opinion about the commission of rape on the victim but the ocular witnesses such as P.W.4 Jabed Ali Chowkider, P.W.7 Janota and P.W.8 Mohela had directly witnessed the physical state of the dead body and they have found the ravished private part of the deceased. They did not make any contradiction in giving such descriptions of the private part of the deceased. The wearing skirt of the deceased was found with the stain of semen of man in chemical examination. The inquest report also supports the presence of injury in the private part of the victim. Although Mr. Azad submits that in case of inconsistency between the post-mortem report and the inquest report the post-mortem report shall prevail but in this case not only the inquest report, the ocular witnesses of the dead body have also supported the ravished violation of the victim.

The chemical examination also supports the presence of semen in the wearing skirt of the deceased. So, in this case not only the inquest report, the ocular witnesses and the chemical examination report also support the commission of rape on the victim. Although the post-mortem report did not mention about the commission of rape but it appears that P.W. 10 Dr. Saiful Islam has stated that Dr. Monirul Hossain Torofdar has filled-up the form of the post-mortem report but this Dr. Monir Hossain Torofdar is none of the members of the medical Board. Moreover, the post-mortem report itself did not clearly state the condition of the other organs of the deceased. In the case of Santosh Mia Vs. State 42 DLR 171 it was opined that—

> Generally evidence of a doctor is considered to be independent and more reliable and in case of conflict preference can be given to ocular evidence. But this is not always true as there are always exceptions to it and there can be cases where ocular evidence can be given preference over medical evidence. Of course no generalisation is possible in this behalf.

> The statement of the doctor stands on the same footing as that of any other witness. Medical evidence is not sacrosanct and where it is contradicted by ocular evidence it may not be accepted.

From the above discussions we have found the postmortem report faulty as it was filled-up by a doctor who was not a member of the medical board. The ocular witnesses did not support the postmortem report regarding absence of injury in the private part of the deceased or its intactness. The witnesses have found the private part of the deceased ravished which is supportive to the inquest report, Ext. 10. Therefore, in view of the principle laid down in the case of *Santosh Mia (supra)* we cannot rely on the postmortem report, Ext.-8, to the extent of commission of rape on the deceased preferring to the well corroborated inquest report. However, it can be relied on to the extent of killing the victim by strangulation with a green jute plant as it has been corroborated by the witnesses. As such, we find no substance in the submissions of the learned Advocate Mr. Azad as mentioned above. With such conclusion we also reject

the defence case being just a baseless stigma upon the uncle and mother of the victim. Now, let us determine the propriety of the sentence awarded upon the accused Enamul Hoque and Ramjan.

Although it has been circumstantially proved that both Ramjan and Enamul Hoque committed rape on the victim, Romana Akter, medical evidence establishes that she did not die as a consequence of the rape. However, the discovery of Enamul Hoque's sandal near the dead body proves that he alone took the deceased to the jute field and killed her. So, we hold that the accused Enamul Houqe killed the deceased by strangulation after commission of rape and that strangulation is 'অন্যবিধ কার্যকলাপ' as mentioned in section 9(2) of the Ain, 2000. On the other hand, since Ramjan cannot be connected with the killing of the deceased, he can be sentenced under section 9(1) of the Ain. Moreover, accused Ramjan and Enamul have been absconded after getting bail which sufficiently indicates their guilty mind. In this circumstance, we hold that the condemned-convict Enamul Hoque should be sentenced to death under section 9(2) of the Ain and condemned-convict Ramjan Ali should be sentenced for imprisonment for life under section 9(1) of the Ain. Since, we

find no culpability of the appellant condemned-prisoner Abdul Hakim and Faizur (absconding), they should be acquitted of the charge brought against them. Accordingly, they are acquitted. Consequently, the death reference is accepted in part, so far it relates to the sentence of the condemned-convict Enamul Hoque. The Reference is rejected against the condemned-convict Ramjan, Faizure Hossain and condemned-prisoner Abdul Hakim. Therefore, the Criminal Appeal No. 11903 of 2019 filed by the condemned-prisoner Abdul Hakim is allowed. Jail Appeal No. 244 of 2019 is accordingly disposed of. The sentence of the condemned-convict Ramjan Ali is commuted to imprisonment for life. The death sentence of Enamul is confirmed.

Let the condemned-prisoner Abdul Hakim be set at liberty at once, if not wanted in connection with any other case. The warrant of arrest against convict Md. Faizur Hossain (absconding), if any, shall be recalled.

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

Bhishmadev Chakrabortty, J:

I agree.