

Bench:

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

Death Reference No. 15 of 2019

The State ...petitioner
-Versus-

Md. Ameer Hossain ...condemned-prisoner
with

Criminal Appeal No. 2199 of 2019

and

Jail Appeal No. 53 of 2019

Md. Ameer Hossain ...convict-appellant

-Versus-

The State ...respondent

Mr. Mohammad Imam Hossain (Tarek), Deputy
Attorney General 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. Atiqul Haque with Anabil Ray Ananda, Mr.
Ruhul Amin, Mr. Monir Kamal, Mr. Mahin Momtaz
and Mr. Fahim Ahmed, Advocates

...for the condemned-prisoner

(Appellant in the appeals)

Judgment on: 01.09.2026

Bhishmadev Chakrabortty, J:

Learned Judge of Nari-o-Shishu Nirjatan Daman Tribunal-2,
Chattogram (the Tribunal) on trial in Nari-o-Shishu Case 443 of
2018 found the condemned-prisoner 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 with fine of Taka 1,00,000/- (one lac) and sent the proceedings to this Division for its confirmation. In the same trial, the Tribunal found the condemned-prisoner guilty under section 7 of the Ain and sentenced him thereunder to suffer rigorous imprisonment for life with fine of Taka 50,000/- (fifty thousand). Against the same judgment and order of conviction the condemned-prisoner filed Criminal Appeal 2199 of 2019 and Jail Appeal 53 of 2019, therefore, these have been heard together and are being disposed of by this judgment.

PW1 Abdur Rahim, maternal uncle of Juli Akter (deceased victim), lodged a first information report (FIR) with Hathazari police station at about 19.30 hours on 17.05.2008 against one Md. Jamal son of an unknown alias Mitha Bapery of village Kanchanpur Choumuhuni, Hachi Chowdurypara, House of Mitha Bepary police station Fatikchari, district Chattogram and unknown three others alleging that the husband of his younger sister namely Ayub Ali (PW5) at about 03.00 pm on 15.05.2008 hired the above named accused Jamal for reaping paddy. Victim Juli Akter went to the house of PW5 on 10.05.2008. The accused took away the victim with him at about 03.00 pm on 16.05.2008 while she was playing with other children. His brother-in-law heard the said fact from the

other children and informed it to him over telephone. The informant and his family members searched for the victim in all the roads within the police station but could not find her out. Subsequently, they heard that the accused took away the victim through a CNG taxi at about 07.00 pm from the traffic turn of Kachari road towards Fatikchari. The employee of an apparel shop told that the accused bought new clothes for the victim from their shop and went away. The informant went to the address given by the accused and asked to an unknown doctor at about 12.00 noon on 17.05.2008 who expressed that he knew the accused. But subsequently in presence of the gathering he denied the fact. He (informant) informed the fact to police of Fatikchari police station. At the time of disappearing, the victim wore a black pant and white coloured X size t-shirt. She had two earrings on her ear and a gold chain on her neck. The victim would be 3'-2" of height. He prayed for taking steps to recover the missing victim. On the aforesaid allegation Hathazari police station Case No. 19 dated 17.05.2008 corresponding to GR No. 108 under sections 7 and 30 of the Ain against one Md. Jamal and unknown three accused was started.

PW15 Md. Nurunnabi a Sub-Inspector of police was assigned investigation of the case. During investigation he recovered the

deadbody of victim at about 10.45 hours on 18.05.2008 from canal Mekhla near the land of one Shamsu within the police station Hathazari of Chattogram. He collected prosecution material, arrested one Ameer Hossain alias Jamal from the house of Md. Jamal Hossain situated at Bhuimara police station within the district of Khagrachari. He recorded the statements of witnesses under section 161 of the Code of Criminal Procedure (the Code). After collecting prosecution materials he submitted a charge sheet under section 7 and 9(2) of the Ain, 2000 on 25.08.2008 against accused Ameer Hossain but did not send up accused Md. Jamal named in the FIR.

The record of the case was then transmitted to the Tribunal and numbered as Nari-o-Shishu Case 579 of 2008. The learned Judge of the Tribunal took cognizance of offence against accused Ameer Hossain alias Jamal under the selfsame sections of the Ain. Eventually, the Tribunal framed charge against the accused on 08.10.2009 under the selfsame sections of the Ain. The charge so framed was read over to accused Ameer Hossain, to which he pleaded not guilty and claimed to be tried.

In the trial, the prosecution in all examined 19 witnesses and they were cross examined by the defence. The defence case as it transpires from the trend of cross-examining the prosecution

witnesses is that the person facing trial is Ameer Hossain having permanent address. He has committed no offence and he is not Md. Jamal as claimed by the prosecution. He did never go to the house of PW5 to do the job of reaping of paddy. He has been falsely implicated in this case only to save the real culprit named Md. Jamal.

On conclusion of examination of the prosecution witnesses, learned Judge of the Tribunal examined the accused under section 342 of the Code to which he reiterated his innocence, prayed for justice and desired to examine defence witness on his behalf. Accordingly, he examined six witnesses including himself.

However, learned Judge of the Tribunal considering the evidence and other materials on record found the condemned-prisoner guilty of offences charged under and sentenced him under both the sections as stated hearinbefore.

Mohammad Imam Hossain (Tarek), learned Deputy Attorney General taking us through the materials on record submits that the condemned-prisoner disclosing his name as Md. Jamal took work in the house of PW5. He spent one night in the house and at about 03.00 pm on the next day he and victim with PW4 Md. Arafat and PW12 Shakhi Akter went out from the house and at one stage

keeping both PWs 4 and 12 near a bridge moved forward taking victim Juli with him and, thereafter, the victim and the accused were found missing. Victim's deadbody was recovered from a canal on 18.05.2008 with marks of injuries on her person and there were signs of committing rape upon her. The informant and PW5 searched for the accused in the address given by him but did not find him out. But subsequently at the assistance of police he was arrested from Bhuimara within the district of Khagrachari and he disclosed that his actual name was Ameer Hossain. In front of people gathered there, the accused disclosed that he in the name of Md. Jamal went to the house of PW5, took work there and on the day of occurrence throttled the victim to death after committing rape upon her. The prosecution by corroborative evidence of PWs 1, 4, 5, 6 and 12 proved that the condemned-prisoner Ameer Hossain was Md. Jamal who committed the offence. Apart from that he made a judicial confession to PW7 admitting of committing the offence. The Tribunal on correct assessment of evidence found the condemned-prisoner guilty of the offences and sentenced him to death. Therefore, the reference would be accepted and the appeals be dismissed.

Mr. Md. Atiqul Haque, learned Advocate for the condemned-prisoner in Criminal Appeal No. 2199 of 2019 submits that PW5,

father of the victim brought one Md. Jamal having address of Kanchanpur, Choumuhuni within police station Fatikchari, district Chattogram to work in his house as manual labour. But the case has been filed by PW1 Abdur Rahim who resided 22 kilometers away from the house of the PW5. He did not at all see accused Md. Jamal. According to the prosecution story the hired Md. Jamal spent only one night in the house of PW5 and it was difficult to identify accused Md. Jamal after long lapse of time even by PWs 4, 5, 6 and 12. PW4 was a child of three years at the time of occurrence. At the time of deposing in the Court he was a boy of 8 years and as such his evidence is to be considered by the Court very carefully as per the provisions of section 118 of the Evidence Act. But in evidence PW4 failed to cross the hurdle to accept his evidence. In the same way PW12 another child who accompanied the victim up to the bridge did not state to anyone that accused Md. Jamal called away her, Juli and Arafat to anywhere. In the premises above, it remains only evidence of PW5 who hired Md. Jamal but his evidence is not corroborative with the evidence of other witnesses. Because in cross-examination he stated that he came to the Court with informant Abdur Rahim for several occasions and at that time he saw the accused in the dock. The IO PW15 mysteriously did not send up accused Md. Jamal son of late Yousuf Chowdhury alias

Mitha Bepary of Manikpur, Kanchanpur, Fatikchari, Chattogram although he found him lived in that address. The IO being biased made accused this condemned-prisoner Md. Ameer Hossain as accused in the charge sheet keeping the real offender out of the seen. The confession made by the condemned-prisoner was extracted on serious torture. His parents, sisters and brothers were confined in the lockup of police station. He only put his signature on the papers which was produced before him. On such allegation he retracted the confession. He took similar defence by putting suggestions to the Magistrate PW7 and the IO PW15. The confession recorded by PW7 is neither true nor voluntary and it cannot be the basis of condemned-prisoner's conviction. The learned Judge failed to assess the evidence of witnesses in its legal perspective and thereby seriously erred in law. The judgment and order of conviction and sentence is, therefore, required to be interfered with by this Court. The reference, therefore, would be rejected and the appeals be allowed.

To dispose of the reference by addressing the submissions of the learned Deputy Attorney General and the learned Advocate for the appellant, let us have a blink on the prosecution witnesses.

PW1 Abdur Rahim, informant stated that accused Ameer Hossain took work in the house of PW5 disclosing him as Jamal. The occurrence took place at about 03.00 on 16.05.2008 in the father in law's house of his younger sister. The victim went to visit that house on 10.05.2008 with her maternal grandmother. The husband of his younger sister PW5 appointed the accused to look after his household works. At the retiring time of work, the accused used to make play with Juli and the children of similar age. The accused took his lunch at about 03.00 pm on 16.05.2008 and went out for his work. The children went with him. He kept the other children near the bridge and left the place taking victim Juli with him. Thereafter, the victim was found missing. He received a mobile phone call from the house of PW5, went there and searched for the victim. They got information that the accused purchased cloths from a shop of Hathazari bazar and left the place towards Fatikchari through a CNG taxi. They searched for the accused in the address supplied by him. But an unknown doctor considering the physical structure and colour of the accused told them that he was the son of Mitha Bepary. But while people gathered there, he (the doctor) refused his earlier statement. They found some clothes and papers of a mobile company of the accused kept into a polythene bag in the house of PW5 and made a phone call to the accused which was received by

an unknown man. The person who received the phone call asked him the reason of making such call while the informant technically wanted to know the whereabouts of Md. Jamal. The man told him that they used to do work together in the same house and supplied the address of the house to the informant. They went to the same address which is situated at Fatikchari, village Dhuramkul, the house of tractor Mahbub. On query tractor Mahbub told them that accused left his house taking his dues. Tractor Mahbub was subsequently taken to the police station for interrogation. In the meantime, the deadbody of the victim was recovered from a canal. He rushed to the place and found the victim floating on the water. He found blood in her private organ. Police held an inquest and prepared a report exhibit-1 and he put his signature thereon. Police also seized the wearing apparel and other articles of the accused under a seizure exhibit-2. Thereafter he made another phone call to the number of the accused which was received by someone Alal. He wanted to know the whereabouts of the accused but Alal told him to go to tractor Mahbub again because he knew the accused. He recorded the conversation with Alal and handed it over to the OC and police moved to the house of the accused with tractor Mahbub. Subsequently police arrested the accused from the house of his relative situated at Bhuimara. On interrogation, the accused

disclosed his name as Ameer Hossain but he was known as Jamal in his work places. The accused made a confession before the learned Magistrate. He proved the FIR exhibit-3 and identified his signature thereon. He identified the accused in the dock. In cross-examination by the defence he stated that he did not see the accused before his arrest. He did not know the name of doctor who told him that he knew Jamal son of Mitha Bepary. Alal and tractor Mahbub were not made witness in this case. There was a man named Jamal in the house of Mitha Bepary and they found that Jamal lived in village Kanchanpur within Fatikchari police station. He denied the defence suggestion that accused Ameer Hossain and Jamal are not the same person and Ameer Hossain did never take work in the house of PW5. He further denied that he, the IO and local Chairman collusively planted this case against Ameer Hossain. He further denied that he took illegal advantage from accused Md. Jamal and implicated this accused in the case falsely. He denied that he took photograph of Ameer Hossain earlier and showed it to the other witnesses to identify him.

PW2 Md. Mizanur Rahman, an Assistant Sub-Inspector of police who verified the name and address of accused Ameer Hossain through enquiry slip exhibit-4. He stated that he found the address of Ameer Hossain alias Jamal son of Omar Ali of village Shapmara

Fokirar Tila. In cross-examination he stated that he found the character of accused Ameer Hossain alias Jamal good and he heard the nick name of Ameer Hossain as Jamal from the Sarder of that Tila. But he could not collect the aforesaid fact from the Chairman in writing. He did not ask Chairman Habibur Rahman whether Ameer Hossain was called as Jamal. He failed to state the name of the persons who told him that the nick name of Ameer Hossain was Jamal. He had full address and name of the accused at the time of verifying the enquiry slip.

PW3 Motahar Hossain alias Motaher Hossain, a constable of police of Hathazari police station was a witness to the inquest and seizure of wearing apparel of the victim, exhibit-5 and exhibit-6 respectively. He took the deadbody to the hospital for holding autopsy and after holding autopsy handed it over to the relatives of the victim.

PW4 Md. Arafat alias Md. Arfat, a cousin of the victim stated that he was a student of class-III at the time of deposing. Victim Juli was the daughter of his maternal uncle Zubal Hossain. He, victim Juli and Saki were playing on the bank of the pond. At that time the accused called away all of them towards the beel. After going a little bit away, the accused told him and Saki to sit near a bridge. His

mother came there and asked the whereabouts of victim Juli. He told the fact to her who took them to their house but victim Juli did not return with them. In cross-examination by the defence he stated that his age was at 8 years. But five years ago he was 3 years and he could not remember anything. He came to the Court with his father Ayub Ali. Someday ago he had come to the Court with his father PW5 and PW1. He also came to the Court 3-4 days ago and was sitting inside the Court with them. On that day his maternal uncle PW1 identified the accused to him.

PW5 Md. Ayub Ali alias Md. Ayub, uncle of the victim stated that he brought the accused standing in the dock from Hathazari to do agricultural work and he was appointed as a day labour. The accused disclosed his address at Fatikchari. The accused have his dinner at his house on 15.04.2008. He (accused) made a mobile phone call with his relative disclosing him as Jamal. He went to Ichapur bazar on friday to sell bananas. His nephew Abdullah through a mobile phone call at about 03.30-04.00 pm informed him that the day labour take away victim Juli with him. They searched for the victim and the accused but could not find them out. They informed it to the police station on saturday but on sunday they found the deadbody of the victim floating on the water of a canal. He became senseless. On the next day police came and seized some

clothes and articles of the accused from their house under a seizure exhibit-7. They also seized the wearing apparel of the accused under seizure exhibit-8. He subsequently came to learn that the name of the accused was Ameer Hossain. After his (accused's) arrest he admitted that he was Ameer Hossain. In cross-examination by the defence he stated that he used to do business of banana. He used to cultivate land of others as a share holder. He has *viti* land with his brother but subsequently he told that he sold out his paddy land and it remains only a pond and a *viti* land for him. He used to do business of fruits for the whole year. He came to the Court with informant Rahim. Previously, he came to the Court and then saw the accused in the dock.

PW6 Nur Nahar Begum, wife of PW5 and aunt of the victim stated that PW5 brought accused Ameer Hossain to their house on 15.05.2008 to do agricultural work. The accused disclosed him as Jamal. He came to her at about 02.00 pm on 16.05.2008 and asked about victim Juli Akter. In reply she told that she had been sleeping and consequently he left away. She came out to search the victim and her son at about 04.00 pm on 16.05.2008. She found her son Arafat near the bridge. She asked him about Juli and in reply he told her that Ameer Hossain alias Jamal called away Juli with him. They started searching the victim but could not find her out. She returned

home. She heard at about 09.00-10.00 am on 18.05.2008 that deadbody of the victim was found floating on the water of a canal. They went to the place of occurrence and identified the deadbody. Accused Ameer Hossain alias Jamal killed the victim after committing rape. In cross-examination by the defence she stated that she came to the Court on 5 dates with his brother Abdur Rahim. She denied the defence suggestion that her informant brother identified the accused to her with the photograph preserved in his mobile phone set. She denied that her informant brother was a litigator. She further denied that actually they had no need of worker.

PW7 Md. Moshir Rahman Khan, a Senior Judicial Magistrate who was posted to Chattogram Judicial Magistracy at the material time recorded the confession of the convict. In evidence he stated that he allowed the accused 3 hours time for reflection. He made the accused to understand the questions of the prescribed form and thereafter recorded his confession. He proved the confession exhibit-9 and identified the signatures thereon. In cross-examination by the defence he stated that the accused told his name as Ameer Hossain son of Omar Ali, Bhujpur, Shapmara, Fakir Tila, Chattogram. He asked him 3 questions prescribed in page 3. He did not ask any question to the accused whether police tortured him. He did not ask him how many days he was kept in police custody. The

accused did not state his name as Jamal. He denied the defence suggestion that police tortured him, pulled out the nails of his foot and he was unable to stand for the pain of his waist. He denied the defence suggestion that the confession was not true and made voluntarily or it was not recorded in compliance with the provisions of section 364 of the Code.

PW8 Zabel Hossain, step brother of informant PW1 and father of the victim stated that after the death of victim he became ill and consequently his brother lodged the FIR. Accused Ameer Hossain alias Jamal abducted his daughter and killed her after committing rape. In cross-examination he stated that he talked to police after arresting of the accused. He could not remember whether police examined him after 66 days of the occurrence. He denied the defence suggestion that the fact is false and as such he did not lodge the case. He further denied that the accused present in the dock is not Jamal.

PW9 Shiru Akter, mother of the victim stated that 4-5 days before the occurrence victim Juli Akter went to visit the house of her brother-in-law PW5. He came to learn from his brother-in-law PW1 at about 04.30 pm on 16.05.2008 that victim Juli was found missing. They searched for the victim but could not find her out.

The deadbody of the victim was found at about 09.00-10.00 am on 18.05.2008. She received a news on 29.05.2008 that police arrested accused Jamal. She went to the police station and found the accused. Accused disclosed that he is Ameer Hossain and further admitted that he committed rape upon the victim and killed her. In cross-examination by the defence he denied the suggestion that the accused did not commit rape upon the victim and killed her.

PW10 Shamsul Alam alias Shamshul Alam, maternal uncle of the victim stated that the occurrence took place on 16.05.2008. He heard that the day labour of Ayub took away his niece Juli. They looked for the victim but could not find her out. Subsequently they found the deadbody of the victim in the canal on 18.05.2008. Police arrested accused Ameer Hossain who killed the victim after committing rape. He was a witness to the inquest exhibit-1. In cross-examination he stated that he met police on the day of filing the case. He denied the defence suggestion that police recorded his statement after 73 days of the occurrence. He further denied that Ameer Hossain and Jamal were not the same man or that the accused did not commit rape upon the victim or killed her.

PW11 Md. Jagir Ahmad, a maternal uncle of the victim was a witness to the inquest exhibit-1. He stated that the deadbody of the

victim was recovered from a canal on 18.05.2008. He heard that accused Jamal killed the victim after committing rape upon her and left the deadbody into the canal. The accused admitted the killing in front of men appeared there. In cross-examination by the defence he stated that police did not examine him under section 161 of the Code. He did not witness the occurrence.

PW12 Sakhi Akter alias Shaki Akter, a cousin of the victim stated that she and victim Juli Akter were playing at about 03.00 pm on 16.05.2008 and at that time accused Jamal called away Juli, Arafat and her. He kept her and Arafat sitting near the bridge and went away with Juli. Her aunt asked the whereabouts of Juli while she told the fact that accused Jamal called away the victim. She identified the accused in the dock. In cross-examination she stated that police did not examine her under section 161 of the Code. She came to the Court with informant Rahim. She did not tell before that at about 03.00 pm on 16.05.2008 accused Jamal called away Juli, Arafat and her. She denied the defence suggestion that the informant identified the accused to her today in the Court.

PW13 Hosne Ara Begum, a neighbour of the informant stated the similar fact as stated by PW1. She was a witness to the inquest exhibit-1 and a witness to the seizure of wearing apparel of accused

under exhibit-7. She stated that accused Jamal admitted that he killed the victim after committing rape. In cross-examination she denied the defence suggestion that accused Jamal did not confess his guilt in her presence. Previously, she came to the Court and saw the accused. She denied that she did not see the accused before the previous fixed date. She denied all other material suggestions put to her.

PW14 Muhammad Forkan, a nephew of PW5 stated in the similar line of PW13. He was a witness to the inquest exhibit-1. He further stated that on 29.05.2008 he heard that police arrested accused Md. Jamal. He went to the police station and saw accused Jamal. In his presence the accused admitted of committing the offence. Subsequently, he came to learn that name of the accused was Ameer Hossain. In cross-examination by the defence he stated that he heard the name of the accused from Rahim. He came to the Court on the previous day. He denied the defence suggestion that he came to the Court for several days and identified the accused as shown by the informant.

PW15 Md. Nurunnabi, a Sub-Inspector of police and the IO stated that he prepared the sketch map with index exhibit-10, held inquest exhibit-1, sent the deadbody to the morgue for holding

autopsy, seized alamots, recorded the statements of witnesses under section 161 of the Code, arrested the accused namely Ameer Hossain alias Jamal and forwarded him to the learned Magistrate for recording his confession under section 164 of Code. He collected the post mortem examination report and finding *prima facie* allegation against the accused to be true submitted a charge sheet. In cross-examination by the defence he stated that in the FIR the name of the accused was written as Md. Jamal son of unknown alias Mitha Bepary village Kanchanpur Choumuhuni, Mitha Beparir Bari, police station Fatikchari and during investigation he found the address of the said accused correct but he went abroad. The local Chairman Md. Khairul Bashar gave a certificate to that effect. Accused Jamal left for United Arab Emirates on 15.05.2008. But he (IO) did not make any enquiry in the immigration department as to the authenticity of the said news. He did not cite anyone from the neighbour's of accused Jamal as witness. In the packet of SIM card there was a mobile phone number but he did not ascertain the ownership of the SIM finding it not unnecessary. He recorded the statements of witnesses 8, 9 and 17 under section 161 of the Code after 2 months of the occurrence. He did not cite Alal as witness. He did not seize the documents related to Jamal's departure from this country. He denied the defence suggestion that being biased by the

Chairman he saved Jamal who was the actual offender. He denied that he extracted the confession on coercion, inducement and allurement. The house of tractor Mahbub was situated in Dhuramkul village within police station Fatikchari. He interrogated Mahbub about accused Jamal who told that accused Jamal left his house taking his payment. He recorded the statements of Alal and handed it over OC of Fatikchari police station. In her statement recorded under section 161 witness Nur Nahar did not state that accused disclosed his name as Jamal. PW5 Ayub Ali was a businessman of banana. He did not know whether Ayub Ali had any paddy land. He denied the defence suggestion that they wanted to save real accused Jamal.

PW16 Md. Alamgir Hossain was the Officer-in-Charge of Hathazari police station who filled up the FIR form and recorded the case.

PW17 Amena Khatun is the grandmother of the victim. She stated that she accompanied the victim to the house of PW5. She further stated that the victim was found missing and subsequently on 18.05.2008 they found her deadbody into the canal. Police came and took the deadbody and arrested accused Jamal on 29.05.2008. Accused Jamal in front of the men appeared there admitted that he

killed the victim after committing rape. In cross-examination by the defence she stated that police recorded her statement after 2 months of the occurrence. She came to the Court 7-8 occasions and then she saw the accused. She denied the defence suggestion that the informant identified the accused to him. She further denied that in order to save actual accused Jamal her son planted the case falsely against this accused.

PW18 Mozaffar Ahmmad, a Constable of police carried the deadbody to the morgue. In his presence the inquest was done and he took the deadbody to the hospital for holding autopsy. He was a witness to the seizure of wearing apparel of the victim.

PW19 Md. Habibur Rahman, a doctor of Forensic Medicine Department stated that his colleague doctor held post mortem examination of the deadbody and he came to depose on his behalf at the order of the higher authority. He identified the hand writing and signature put by doctor Rabbi in the report. He proved the autopsy report exhibit-12. In the report they found blood under right side of the scalp and in the brain. Hymen was torn and they passed opinion that the death was due to combined effect of head injury and Asphyxia as a result of drowning which was antemortem and homicidal in nature. There were positive signs of sexual intercourse

having been performed on her. In cross-examination by the defence he stated that in case of decomposition of deadbody rigor mortis might have not found. In the deadbody there was no rigor mortis. Sperm was not found in the vagina. There was no mark of injury in the lower part of the abdomen. The chest wall was intact. There was mark of injury on the upper part of right parietal region. There was marks of nail in the neck and alamots were of committing rape and drowning. He denied the defence suggestion that the report was not correct.

DW1 Md. Ameer Hossain stated that he was not the son of deceased Yousuf Chowdhury and nobody knew him in the name of Jamal. He has national ID and other documents in support of his name Ameer Hossain. He denied of abducting a girl and killing her after committing rape. It may be done by so called Jamal. He did not know victim Juli Akter or Jamal son of Yousuf Chowdhury. In the statement recorded by the Magistrate, his name has been written as Ameer Hossain. Before recording statement by the Magistrate he was in the police custody. There were marks of injuries on her body. IO Nurunnabi punctured his waist through drill machine and gave electric shock on his private organ which was done only for the purpose of disclosing his name as so called Jamal to the Magistrate. The name written in the police report as Ameer Hossain alias Jamal

son Omar Ali is not correct. The IO did not verify his actual address. In cross-examination by the prosecution he stated that while he was produced before the learned Magistrate, he was seriously ill. He just put his signature. Police was present in front of the learned Magistrate. Before his arrest, he was a student of Fatikchari Madrasha and used to look after the land of his father. He denied the defence suggestion that he made any statement implicating himself with commission of rape and murder of victim Juli. He was unable to speak at the material time for police torture.

DW2 Omar Ali, father of DW1 stated that he had 4 sons and 3 daughters. Ameer Hossain (condemned-prisoner) is his middle son. At the time of arresting him, he was at the age of 15 years. His full name is Ameer Hossain not Jamal. He could submit the certificate of Chairman and birth certificate in support of the name of his son Ameer Hossain. The father's name of Jamal was Yousuf Chowdhury and Ameer Hossain is his (DW2's) son and he is ready to face DNA test. The IO never came to him to justify that Jamal shown as Ameer Hossain was not his son. The IO never visited their area. His son was physically fit but after his arrest he found the nails of his son cracked. He found punctured sign in his waist. The occurrence took place 30-40 kilometers away from their house. There was a man named Jamal in the house of Mitha Bepary and

police submitted charge sheet in the name of his son in place of Jamal. Jamal is still in the house of Mitha Bepary. He wanted Jamal to appear as witness in the case. In cross-examination by the prosecution he denied the suggestion that his son had worked in different houses. His son used to stay in Madrasha and came to his house in the weekend. He denied that his son was arrested from Bhuimara but his son was arrested from Matiranga. He denied all other material suggestions put to him.

DW3 Md. Abul Hossain stated that the accused present in the dock is Ameer Hossain son of Omar Ali. He was never called as Jamal. He did not hear that Ameer Hossain committed rape upon any girl.

DW4 Nur Islam stated that the accused standing in dock is Ameer Hossain who is the son of Omar Ali. He had no relation with Omar Ali. The house of Mitha Bepary is far away from their area. Ameer Hossain was a student of Madrasha and he was a student before his arrest. He (accused) was always busy with his study. He never heard that Ameer Hossain committed rape upon one Juli Akter. In cross-examination by the prosecution he stated that he did not know when Ameer Hossain was arrested.

DW5 Sabina, mother of the accused stated that accused present in the dock is her son Ameer Hossain and he was never called as Jamal. Her son never worked as day labour to anywhere. He was a student of Madrasha and used to reside in the house. Police arrested her son saying him Jamal. She went to meet with her son and found marks of injuries on his eyes, hands, legs and nails. Police did not verify his name as Ameer Hossain. In cross-examination by the prosecution she stated that her son was arrested from Matiranga and she went there to visit a relative's house. DW6 Mostafa was tendered by the defence and the prosecution declined to cross-examine him.

We have considered the submissions of the learned Deputy Attorney General and the learned Advocate for the appellant condemned-prisoner.

It is admitted fact that the deadbody of the victim girl Juli, daughter of PWs 8 and 9, aged about 10 years was recovered from a canal near the abandoned land of one Shamsu of village east Mekhla within police station Hathazari. Accordingly, police held inquest in presence of PWs 1, 10, 11, 13 and 14. In the inquest some injuries including tongue bite by teeth, face disfigured, both sides of throat was swelling and blood was coming out from her private organ were

found. Post mortem examination was held by a doctor of hospital and report under exhibit-12 was issued. PW19 Dr. Mohammad Habib in support of it led evidence. In the autopsy the doctor found body fully decomposed, scalp-haematoma right frontal 2"x1", skull intact, right and left lungs oedematous and finally opined that "the death was due to combined effect of head injury and Asphyxia as a result of drowning which was antemortem and homicidal in nature. There were positive signs of sexual intercourse having been performed on her." From the aforesaid autopsy report it is found that the death was due to combined effect of head injury and Asphyxia as a result of drowning. They also found signs of sexual intercourse performed on her. The case of drowning is supported by dissection of the deadbody because the left and right lungs were found oedematous. Although, some marks of injuries were found on the private organ of the victim but the opinion passed by the doctor do not expressly disclose that she was raped or sexual intercourse was forceful. The doctor found positive signs of sexual intercourse having been performed on her. On going through the autopsy report and the evidence of doctor Md. Habibur Rahman PW19 we may hold finally that the death was due to combined effect of head injury and Asphyxia as a result of drowning. Practically, as it appears that the victim was killed whatever may its manner.

In this case the prosecution has to prove who had committed the offence, Md. Jamal or Ameer Hossain or Jamal alias Ameer Hossain? The prosecution alleged that PW5 employed one Md. Jamal son of unknown alias Mitha Bepary of village Kanchanpur Choumuhuni Hachi Chowdurypara, house of Mitha Bepary, police station Fatikchari of district Chattogram for reaping paddy or doing agricultural work in his house. He was hired or employed for the aforesaid purpose at about 03.00 pm on 15.05.2008. He (Jamal) spent one night in the house of PW5. The prosecution further alleged that Md. Jamal as mentioned in the FIR at about 03.00 pm on 16.05.2008 called away PW4 Md. Arafat, victim Juli and PW12 Shakhi Akter with him. They moved together but at one stage after reaching near a bridge keeping PW4 and PW12 there accused Jamal went away taking victim Juli with him towards the beel and thereafter the victim including the accused was found missing. PW1 informant and others looked for the victim but did not find her out. Subsequently, the deadbody of the victim was found in the place floating on the water of the canal as mentioned hereinabove. Therefore, as per prosecution case nobody except PW4 Arafat and PW12 Shakhi Akter had seen Jamal taking away victim Juli with him.

It has come out in evidence that the IO with the help of PWs 1 and 5 attempted to arrest accused Md. Jamal named in the FIR in his address but failed. They tried to arrest accused Jamal on the basis of mobile phone number kept in a bag which was left in the house of PW5 by him. They went to tractor Mahbub where accused Jamal alleged to have worked but did not find him out or failed to arrest him. Finally police arrested the condemned-prisoner Ameer Hossain from Matiranga, Khagrachari from a house of his relative and expressed that this Ameer Hossain was actually day labour Jamal appointed by PW5 in his house.

We find in the charge sheet and in the evidence of PW15 IO Nurunnabi that Md. Jamal son of Yousuf Chowdhury alias Mitha Bepary of village Manikpur Kanchanpur Hachi Chowdhurypara known as the house of Mitha Bepary of police station Fatikchari, Chattogram was not sent up in the charge sheet but this condemned-prisoner Ameer Hossain alias Jamal son of Omar Ali, Shapmara Fakirer Tila, thana Bhujpur of district Chattagram was sent up in the charge sheet as accused treating him Md. Jamal alleging that he committed the offence of rape and murder. The IO PW15 Nurunnabi in the investigation found Md. Jamal son of Yousuf Chowdhury in the address but stated that he left the country on 15.05.2008 but did not verify it through immigration department. By cross-examining

all the prosecution witnesses the defence brought a positive case that condemned-prisoner is Ameer Hossain not Md. Jamal and his address is different and he was not a day labour or did not go to work in the house of PW5. He did never commit offence of rape and murder victim Juli.

It is true that the condemned-prisoner was arrested on 29.05.2008 and he made a confession implicating himself with the alleged offence. For brevity of discussion the confession made by the condemned-prisoner is reproduced below:

“আমি ১৫/০৫/২০০৮ ইংরেজী তারিখ জুলিদের বাড়ীতে ধান কাটতে যাই। ঘটনার দিন আমি মালিককে বলি আমি কাজ করবনা চলে যাব। আমার একা ভাল লাগে না। মালিক আমাকে ছাড়ে নাই। জুলি ও একটি ছেলেকে পাহাড়া বসায়। আমি বিকাল ৩টার সময় বলি আমি চলে যাব এবং রওনা হই। জুলি ও তার ভাই আমার সাথে যায়। মেয়ে ও ছেলে যাওয়ার পথে কিছুদূর গেলে ছেলে বলে যে সাথে যাবে না। আমি আগাইয়া গেলে মেয়েটিও আমার সাথে আগাইয়া যায়। মেয়েটিকে একা পেয়ে আমি খালের পাশে ধর্ষন করি। মেয়েটি মা বলে চিৎকার করে। আমি তখন জুলির গলা টিপে ধরি শোয়া অবস্থায় জুলি মারা যায়। মারা যাবার পর আমি খালের পানিতে লাশ ফেলে দিয়া বাড়ীতে চলে যাই। বাড়ীতে পুলিশ খুঁজতে গেলে মুসলিম পাড়ায় যাই। সেখান হতে পুলিশ ধৃত করে।”

The condemned-prisoner retracted the confession on 24.06.2008 alleging that he went to his maternal aunt's house at

Matiranga wherefrom police arrested him and took him to Hathazari police station. He found his parents and younger brothers and sisters in the lockup of the police station and IO by torture and showing fear compelled him to make a confession as wanted by them otherwise he would suffer a lot. Finding no other alternative he put in signatures on the paper as wanted by him. Defence cross-examined PW7 Magistrate in the same line. In reply to the cross-examination PW7 stated, “পুলিশ নির্যাতন করেছে কিনা- নির্দিষ্ট কোন প্রশ্ন করি নাই বা কয়দিন কাষ্টডীতে রাখা হয় প্রশ্ন করি নাই। জামাল শব্দটি সে বলে নাই। ইহা সত্য নয় যে, পুলিশী নির্যাতনে আসামীর পায়ের নখ তুলে ফেলে বা কোমরে আঘাত থাকায় দাঁড়াতে পারছিল না বা স্বেচ্ছাপ্রণোদিত ও সত্য জবানবন্দী দেয় নাই।” PW15 Nurunnabi the IO was cross-examined in the similar line while he replied- সত্য নহে অন্যায় বলপ্রয়োগ, নির্যাতন করে আসামীর ১৬৪ ধারার জবানবন্দী নিয়াছি, কি ঐ সাক্ষ্য স্বেচ্ছা প্রদত্ত নহে। In order number 44 dated 03.10.2012 passed by the Tribunal, we find that this condemned-prisoner made an application in the Tribunal that police tortured him and pulled off his nails of toe on 29.05.2008 while he was arrested and he was provided treatment for it. He prayed for producing the medical certificate or prescription as to his treatment which was rejected by the learned Judge on flimsy ground that the Magistrate found the confession true and voluntary. Moreover, in recording the confession the mandatory provisions of law of making memorandum at the bottom of column

7 as to the truth and voluntariness of confession was not complied with. Under sub-section 3 of section 164 of the Code it is the solemn duty of the learned Magistrate to make a memorandum at the bottom of column 7 as to his satisfaction about the truth and voluntariness of the confession [reliance placed on Babul Vs. State, 63 DLR AD 10]. Since all along, the condemned-prisoner brought out a definite case that the confession was extracted on duress, torture and coercion and the learned Magistrate did not comply with the provisions of section 164 sub-section 3 of the Code, we cannot accept the so called confession as true and made voluntarily. If it is not made true and voluntarily it cannot be used against the condemned-prisoner to pass conviction. Moreover, the confession is found inconsistent with the autopsy report as to the death of the victim. In the confession, the condemned-prisoner told that he committed rape upon the victim, throttled her to death and then thrown the body into the canal. But as per autopsy report the death was found as to the combined effect of head injury and Asphyxia as a result of drowning. As per confession the trachea of the victim must be found congested which is totally absent here. The autopsy report does not disclose that the victim was raped or there was any forceful sexual intercourse. So, we cannot use the confession against the condemned-prisoner.

Now we have to examine whether Md. Jamal who was appointed by PW5 to work in his house and worked for only one day is Ameer Hossain who has been convicted in this case. If it is proved that Ameer Hossain is Jamal who took away the victim with him and she did not depart safely from his custody then Jamal or Ameer Hossain would be responsible for the death of victim. In this case, we find that Jamal Hossain was appointed in the house of PW5 at about 03.00 pm on 15.05.2008 and he remained there only one night. Just on the next day as per the prosecution case PWs 4, 12 and the victim went out with Jamal.

At the material time PW4 Md. Arafat was a child of three years. Although he stated the fact in his examination-in-chief but in cross-examination he stated, “আজ থেকে ০৫ বছর আগে আমার বয়স ০৩ বছর ছিল। তখন খুব ছোট ছিলাম। কোন কিছু মনে রাখতে পারতাম না। আজকে আমার আব্বু মোঃ আইয়ুব আলীর সাথে আদালতে এসেছি। গত কয়েকদিন আগে আব্বুর সংগে এসেছিলাম সাথে আমার মামা আঃ রহিম ছিল। ৩/৪ দিন আগে মামা সহ অনেকক্ষণ কোর্টে বসে ছিলাম। ঐ দিন আদালতে আসামীকে আমার মামা আঃ রহিম চিনিয়ে দিয়েছিল।” According to his evidence, we cannot believe the recognition and identification of the accused Jamal alias Ameer. He failed to make rational answers to the questions put to him. The note of the learned Judge as to the admissibility of his evidence is therefore rejected. Therefore, his

evidence is not admissible under the provisions of section 118 of the Evidence Act. Moreover, PW1 identified the condemned-prisoner to him in the Court on the previous day. In the similar way PW12 was a girl of 6 years at the material time and alleged that she was with the victim up to the bridge at the date of occurrence. Although in her examination-in-chief she stated the fact as claimed by the prosecution but in cross-examinations she stated that police did not record her statement under section 161 of the Code. She stated, “১৬/০৫/২০০৮ ইং বিকাল ৩টায় খেলার সময় আসামী জামাল জুলি, আরাফাত ও আমাকে ডেকে নিয়ে যায়- এই কথা আগে কোনদিন বলি নাই।” Therefore, the prosecution hopelessly failed to prove that Jamal or Ameer Hossain called away victim Juli with him in the time and day of occurrence. Therefore, Ameer Hossain or Jamal cannot be held responsible for victim’s death. The evidence of PWs 5 and 6 who can identify Jamal as condemned-prisoner Ameer Hossain is found shaky and unbelievable. PW5 appointed Jamal Hossain as a day labour. He did not lodge the FIR. Although in evidence he identified condemned-prisoner Ameer Hossain in the dock as accused but in cross-examination he stated, “আমার পিছনে বাদী আঃ রহিম দাড়ানো ছিল। বাদী রহিম এর সাথে এসেছি। সাক্ষী দেয়ার আগে একবার কোর্টে এসেছি। ঐ সময় আসামীকে ডেকে দেখেছি।” In the similar way PW6 Nur Nahar Begum in cross-examination stated, “আমি ৫টি তারিখ কোর্টে এসেছি। আমার ভাই আব্দুর রহিম সাথে

এসেছে। ইহা সত্য নয় যে, আসামীকে আমার ভাই চেনায়ে দেয় বা মোবাইলে ছবি নিয়া আমাকে দেখায়।” Admittedly, Abdur Rahim is the informant of the case and brother of PW6 who was not at all acquainted with Jamal or Ameer Hossain or of the fact of taking away the victim. Therefore, the identification of Ameer Hosssain as Jamal has not been proved in evidence also.

From the above evidence of vital witnesses, we find that prosecution failed to prove that Ameer Hossain, the condemned-prisoner was actually Jamal who was employed by PW5 and has been made accused in the case and convicted.

The prosecution hopelessly failed to prove the charges under both the sections against the condemned-prisoner. We find that the condemned-prisoner Ameer Hossain was implicated in this case as accused in place of Md. Jamal son of late Yousuf Chowdhury alias Mitha Bepari of Fatikchari Chattogram at the instance of informant and IO only to save Md. Jamal who might have committed the offence. We find no legal evidence against the condemned-prisoner to pass conviction against him. In such a case the condemned-prisoner has been languishing in jail for more than 18 years including 7 years in the condemned-cell. We find that the

condemned-prisoner is entitled to the acquittal as a matter of right not as of grace.

In view of the discussions made hereinabove, we find no ground to accept death reference. Accordingly, the reference is rejected. The criminal Appeal is allowed and the Jail Appeal is disposed of. The judgment and order of conviction and sentence passed by the Tribunal against the condemned-prisoner is hereby set aside and he is acquitted of the charges levelled against him.

The concerned authority is directed to release the condemned-prisoner from jail forthwith, if not wanted in any other cases.

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

K.M. Rasheduzzaman Raja, J:

I agree

