

Present:

Mr. Justice A S M Abdul Mobin

and

Mr. Justice Md. Mahmud Hassan Talukder

Criminal Appeal No. 7451 of 2012

Abdur Rashid

...appellant

-Versus-

The State

...respondent

Mr. Md. Al Amin, Advocate

...for the appellant

Mr. Md. Jahangir Alam, Deputy Attorney
General, with Ms. Tahmina Sultana and
Mohammad Akter Hossain, Assistant Attorney
Generals

...for the State

Judgment on 07.12.2023

ASM Abdul Mobin, J:

This appeal has been preferred against judgment and order dated 15.10.2012 passed by the learned Additional Sessions Judge, 1st Court, Chuadanga in Sessions Case No. 102 of 2008 arising out of Chuadanga Police Station Case No. 03 dated 08.02.2006 corresponding to G.R. No. 27 of 2006 convicting the appellant under sections 302/34 of the Penal Code and sentencing him to suffer rigorous imprisonment for life with a fine of Taka

1,00,000/- in default to suffer 5(five) months rigorous imprisonment more. By the same judgment and order of conviction and sentence, the learned Additional Sessions Judge, also convicted absconding accused Azim under the aforesaid section of law and sentenced him to suffer imprisonment for life with fine.

PW 1 informant Md. Mozibur Rahman lodged a first information report (FIR) with Chuadanga Police Station on 08.02.2006 stating *inter alia* that his daughter Mst. Afroza Begum aged about 14 years was a student of class six. She was found missing in the night at about 9:00 pm on 05.12.2005. He searched for his daughter far and wide and also lodged a GD entry being GD No. 717 dated 22.12.2005. At first, he thought that some miscreants could have abducted his daughter for engaging her to prostitution or she could have been murdered and her dead body was concealed at some unknown place. Later, he came to know on 08.02.2006 that his co-villager, the convict appellant Abdur Rashid was arrested by the police and on interrogation, he disclosed that he had killed his daughter and concealed her dead body in the sugarcane field of Keru and Company. On that

information, he went there. He found the convict appellant, police and other persons there. In their presence the convict appellant pointed out the place. In presence of a Magistrate, the place was dug out and dead body of his daughter was disinterred. Police held inquest and sent the dead body for post mortem examination. In the first information report, the informant further alleged that his daughter had love affair with his co-villager Azim. He (informant) had also enmity with acquitted accused Alauddin. They in collusion with each other kidnapped his daughter, killed her and concealed her dead body in the sugarcane field.

On the basis of the FIR, Chuadanga Police Station registered the case. The case was taken up for investigation. During investigation, the convict appellant was produced before the learned Magistrate where he made a confession. The investigating officer visited the place of occurrence, prepared sketch map with index and recorded statement of witnesses under section 161 of the Code of Criminal Procedure. After holding investigation, police submitted charge sheet under section 302/34 of the Penal Code against that convict appellant and others.

When the case was ready, it was sent to the Court of Additional Sessions Judge, 1st Court, Chuadanga for trial. The learned Additional Sessions Judge framed charge against the convict appellant and others under section 302/34 of the Penal Code. The convict appellant pleaded not guilty for the charge and claimed to be tried.

Prosecution in order to prove the charge examined 11 PWs.

PW 1 Md. Mojibur Rahman Mondal, the informant in his evidence stated that on the day of occurrence he went to a tea stall and returned back to his home at about 9:00 pm. While coming, he saw his daughter was talking with Azim, Nazim and Rashid. He did not find his daughter at home. Thereafter, he searched his daughter, but did not find her. On the following morning he saw accused Azim, Rashid and Nazim to come from the sugarcane field. When asked about his daughter, they told him that they did not know the whereabouts his daughter. A shalish was held, but in the shalish they also denied their involvement. He, afterwards, lodged an information with the police outpost. A few days after, the convict appellant Abdur Rashid was arrested. He was taken to police station. On interrogation, he told them that the dead body of

his daughter was buried in the Sugarcane field. He also heard it from the lips of the convict appellant Abdur Rashid. Police came there and disinterred the dead body. Thereafter, he lodged the FIR.

In cross-examination he stated that his daughter had love affair with Azim. No shalish was held on their relationship. He went to the police station after 17 days. He informed the local people that he saw accused to come from the sugarcane field. He also filed a case in the Court. The dead body was disinterred at about 10:00 pm. He denied the defence suggestion that he did not see the accused coming from the sugarcane field or that the dead body was not recovered on showing of the appellant. He further denied that he falsely implicated the appellant Rashid due to previous enmity.

In cross-examination on behalf of accused Nazim, he stated that he signed the inquest report. In cross-examination on behalf of Alauddin, he stated that while he was at tea stall, Alauddin, Rabiul and others were present there.

PW 2 Dr. Paritosh Kumar stated that he held postmortem examination on the dead body. After examination he prepared a report. He did not find any injury on the dead body.

In cross-examination on behalf of Alauddin, he stated that he did not find any sign or symptom of rape on her body.

PW 3 Majida Khatun, mother of the deceased Afroja Begum stated that occurrence took place 3 years ago. She searched for her daughter but did not find her. Her father told her that he saw her daughter with Rashid and others.

In cross-examination on behalf of Nazim, she stated that accused Nazim and Azim were two brothers and accused Alauddin was her cousin. Her attention was drawn to her previous statement which she denied. She denied the defence suggestion that she falsely deposed in the case.

PW 4 Rabiul stated that about 4 years ago his brother-in-law informed him that the victim was found missing. He went to his sister's house. On the road of Keru and Company he came across with Alauddin. He asked him the whereabouts of the victim. Rashid was arrested and dead body was recovered. The dead body was sent for postmortem examination.

In cross-examination, he stated that he was present at the time of inquest. He signed the inquest report. He denied the defence suggestion that he falsely deposed in this case.

PW 5 A.S.I. Mannan stated that he went to the place of occurrence and saw the dead body. The defence declined to cross-examine him.

PW 6 Monowar Hossain was UNO (Upazila Nirbahi Officer), Jhalokati. He stated that he was posted at Chuadanga on 09.02.2006. He recorded confession of accused Abdur Rashid under section 164 of the Code of Criminal Procedure. He proved the confession before the Court.

In cross-examination, he stated that he recorded the statement on 09.02.2006. He did not ask the accused where he was before he was sent to him. He filled up the column of the form of confession. He denied the defence suggestion that confession was not correct, voluntary and true.

PW 7 Fazila stated that about 4 years ago, the victim was killed. Abdur Rashid slapped her. The defences denied to cross examine him.

PW 8 Jamat Ali stated that occurrence took place about 4 years ago. He went to the field at about 2:00 pm. He saw police and accused Rashid. The dead body was disinterred in presence of

a magistrate. Police prepared a seizure list and he signed the seizure list. The defence declined to cross-examine him.

PW 9 Md. Akram Hossain stated that occurrence took place on 08.02.2006. Police seized Alamats and prepared a seizure list. He signed the seizure list. Defence declined to cross-examine him.

PW 10 A. Rahman is a Police Inspector. He stated that he was posted at Jibon Nagar Police station on 08.02.2006. He arrested accused Abdur Rashid as a suspicious accused. On interrogation he told him that he killed a girl named Afroza and buried the dead body in the sugarcane field of Keru and Company. He took them there. Sub-inspector Faruk and Magistrate Dipankar were also there. The accused, in presence of them pointed out the place. They disinterred the dead body. Father of the victim identified the dead body.

In cross-examination he stated that he made a statement before the investigating officer. He arrested the accused in connection with another case, but he could not remember the number of the case. Sanjay Kumar Banik was the investigating officer of that case. Sanjay Kumar actually arrested him. He handed over the accused to Officer-in-charge of the Police Station.

He filed an application for disinterment of the dead body. He denied the defence suggestion that the accused did not admit the occurrence to him and the dead body was not recovered at his showing. He also denied that he falsely deposed in this case.

PW 11 Md. Nasir Uddin, Sub-inspector of Police stated that he was present at the time of recovery of dead body. The dead body was disinterred from a sugarcane field. The place was pointed out by the accused Rashid. S.I. Faruk prepared the inquest report. He further stated that the accused admitted to have kidnapped the deceased and killed her.

In cross-examination he stated that he along with others went to the place of recovery of dead body. He saw the accused Rashid first at the police in the evening on 08.02.2006. He was examined by the investigating officer on 20.02.2006. He could not say the date, time and place of arrest of accused Rashid. The dead body was disinterred on 08.02.2006. He denied the defence suggestion that he was not present at the place of recovery of dead body and the accused Rashid did not point out the place.

After recording of evidence of prosecution witnesses the convict appellant was examined under section 342 of the Code of

Criminal Procedure. As he declined to adduce defence evidence the learned Additional Sessions Judge closed the recording of evidence and heard the argument of the parties. Thereafter, pronounced the impugned judgment and order of conviction and sentence as stated above.

Mr. Md. Al Amin, the learned advocate for the convict appellant submits that the very fact of recovery of dead body at the instance of the convict appellant has not been established. The learned advocate submits that it is stated in the inquest report as well as in the evidence of the witnesses that Magistrate Mr. Dipankar was present at the time of recovery of dead body. He was also a cited witness in the charge sheet, but the said Magistrate was not examined. As such the very recovery of dead body at the instance of the convict appellant is at least doubtful.

The learned advocate further submits that confession of the accused is not voluntary. The accused appellant was arrested on 07.02.2006 at about 3:30 pm and he was produced before the learned Magistrate at about 12:30 pm on 09.02.2006. He was illegally detained in police custody for about 2 days before recording his confession. In such circumstances, his confession

should be taken to be extracted for him on torture and should be discarded as being involuntary.

The learned advocate again submits that in this case there is no eye witness of the occurrence. The victim was found missing on 05.12.2005 and her dead body was recovered on 08.02.2006, long after her missing. In the postmortem report though decomposition of dead body was noted but in the facts and circumstances of the case, the dead body was not supposed to be found on such condition. As such the prosecution case is doubtful and unreliable.

The learned advocate submits that the prosecution has hopelessly failed to establish the charge of murder against the convict appellant. He further submits that the convict appellant was arrested on 07.02.2006 and he was never granted bail. He, meanwhile, has already served out more than 18 years from his sentence. Considering the facts and circumstances of the case as well as other materials on record, the convict appellant may kindly be acquitted from the charge leveled against him.

Mr. Md. Jahangir Alam, the learned Deputy Attorney General for the state submits that the accused appellant was

convicted on his confession. His confession was true and voluntary. In his confession, he categorically confessed that he along with others killed the deceased and afterwards, buried the dead body at the sugarcane field of Keru and Company. It is now settled principle of law that an accused can be convicted on his confession alone. In the instant case the learned Additional Sessions Judge has rightly convicted him on his confession.

The learned Deputy Attorney General further submits that apart from his confession, it is evident from the evidence of PW 1, PW 4, PW 8, PW 10 and PW 11 that he led them to the place of recovery of dead body and he pointed out the place and the dead body was accordingly disinterred. The very fact of recovery of dead body at his instance has been established by the evidence of those witnesses. This evidence is alone sufficient for his conviction. Accordingly, he submits that the learned Additional Sessions Judge has rightly convicted and sentenced him.

He again submits that the defence has failed to elicit any piece of material in cross-examination of the witnesses and has also failed to adduce any evidence to create doubt as to his involvement in the killing. In the facts and circumstances of the

case the learned Additional Sessions Judge has rightly convicted and sentenced him. The learned Deputy Attorney General also refers to the case of *The State Vs Rokeya Begum and another*, 11 MLR (HCD) 63.

We have considered the submissions of the learned advocates, perused the evidence and materials on record. In this case prosecution has examined 11 PWs and also produced some other documents and materials. Besides the evidence of witnesses and other materials, prosecution has also tried to establish the charge by proof of the confession of the convict appellant. Since the prosecution has relied upon his confession, it is better to quote the confession which runs as follows:

“আমার নাম আঃ রশিদ গত প্রায় ০২ মাস আগে। মৃত আফরোজা বেগমের সাথে যাকে হত্যা করা হয়েছে। আজিমের সাথে আফরোজার ভালবাসা ছিল। আফরোজার মায়ের সাথে আলা উদ্দিনের ভালবাসা ছিল। তারপর আফরোজার মায়ের সাথে আলা উদ্দিনের টাকা নিয়ে গ্যানজাম হয়। তারপরে সে আফরোজাদের তাড়ানোর চেষ্টা করে। আলা উদ্দিন আফরোজার চাচাত মামা। আলাউদ্দিন বাড়ী ও আফরোজার বাড়ী সামান্য তফাৎ। আজিমের সাথে আফরোজার সাথে সম্পর্ক থাকায় আলাউদ্দিন সুযোগ পায়। আলা উদ্দিনের সাথে আমরা ৪ জন যাই। আমি দৌড়ে দেই নাই। মেয়ে আফরোজা সাথে ছিল। সোজা মাঠে যখনই আখ ক্ষেতে

যাই। আমি সামান্য দূরে দাড়াই এবং ওরা ৪ জন আফরোজাকে মাঝ খানে নিয়ে কুকুরের মত কাড়া কামড়ি করে। আমি পা ধরি, আফরোজাকে ফেলে দেওয়ার পরে আমি পা চেপে ধরি। তারপরে ওরা উলঙ্গ ও বুকু চেপে ধরে। আমি ধর্ষণ করি। ওরা কেউ ধর্ষণ করে নাই। আলা উদ্দিন ধর্ষণ করেছে। আমি টাকা পাই নাই। আমি লাশ রেখে মাটি চাপা দেই। আমি মেয়ের গায়ে হাত দেই নাই।”

Before we are going over the evidence of the witnesses, we do need to examine the confession of the convict appellant thoroughly.

In the form used for recording the confession, it is noted that the convict appellant was arrested at about 3:30 am on 07.02.2006 and he was taken to police station at about 5:00 am on the same day. Thereafter, he was produced before the Magistrate on 09.02.2006. PW 11 Md. Nasir Uddin, a Sub-inspector of police in his evidence stated that he could not say when, wherefrom and how the accused appellant was arrested. On the other hand PW 10 A. Rahman, a Police Inspector stated that the accused appellant was arrested in connection with another case. Sanjay Kumar arrested him, but he could not know whether the papers relating to his arrest was produced in the case or not. On these evidence and materials, it appears that the accused appellant was arrested long

before he was produced before the Magistrate and he was detained illegally in police custody more than 48 hours in violation of section 61 and 167 of the Code of Criminal Procedure. It further appears that the entire process of his arrest and his production before the learned Magistrate had been done in smoke and mirrors. In the case of *Shafar Ali and others vs State*, 1983 BLD 385, it was held:

“Prolong police custody immediately preceding the making confession is sufficient if not otherwise properly explained to stand it as involuntary.”

Further, in the case of *Belal alias Bellal and two others vs State*, 54 DLR 80 it was held:

“In the instant case appellant Bellal, Ramjan and Saidur Rahman were arrested on 28.07.1989 at 6:00 pm from Champatala and were taken to Saidpur Police Station at 8:00 pm on 28.07.1989 and were brought to the Court of Mr. Abdul Azam Mia, Magistrate from Syedpur on 30.07.1989 for recording their confessional statement which shows that the appellants were detained in police custody more than 48 hours and there is no evidence and

materials on record to show that the appellants were detained in police custody under an order of remand of any Magistrate and hence custody of the appellants beyond 24 hours in police custody is unauthorized and illegal and in such circumstances we treat the aforesaid confessional statement as involuntary.”

Moreover, a confession should not only be voluntary, it must also be true. In the confession the convict appellant stated that he had committed rape upon the victim, but no sign and symptom of rape was found in the postmortem examination. From that point of view, the confession is not fully true. Since the convict appellant was detained illegally more than 48 hours in police custody proceeding to his recording confession, we are unable to accept the confession as voluntary and it should be taken to be extracted by undue pressure and as such should be left out of consideration.

Other than confession, the prosecution has relied upon the fact of recovery of dead body at the showing of accused appellant. In the first information report as well as in the evidence of PW 1, PW 4, PW 10 and PW 11, it is stated that the accused appellant

was arrested and on interrogation he disclosed the commission of murder and burial of the dead body. He took the witnesses to the place of recovery and pointed the place and at his pointing the place was dug out and the dead body was disinterred.

PW 10 in his evidence stated that he filed an application before the learned Magistrate for disinterment of the dead body but neither the said application nor the order of the learned Magistrate was produced in this case. From this piece of evidence it raises a question as to whether the said application for disinterment of the dead body was made before the alleged extra judicial confession of the convict appellant. In the first information report it is stated that the informant came to know about the arrest of the accused at about 7:45 pm on 08.02.2006 and in his evidence he stated that the dead body disinterred at about 10:00 pm, but on perusal of the confessional statement, we have found that the accused was arrested much earlier at about 3:30 am on 07.02.2006.

It also appears from the evidence of PW 1, PW 10 and PW 11 that the dead body was disinterred in presence of a Magistrate and it was also noted in the inquest report, but the said Magistrate

was not examined. Moreover, it also appears from the evidence of PW 1 that he filed a case in Court for missing his daughter, but no scratch of paper was produced about the said case.

From the above evidence and materials, time of arrest of the convict appellant as alleged by the prosecution is very much doubtful. If time of his arrest is doubtful, then his alleged extra judicial confession of admission of killing and burial of the dead body and subsequent recovery of dead body at his instance are also doubtful. So, we are not in a position to rely the evidence of PWs with regard to the pointing or showing the place of recovery of dead body by the convict appellant. Prosecution has miserably failed to prove the fact of pointing or showing the place by the accused appellant by legal and reliable evidence.

In this case nobody has claimed to have seen the murder. It is an unseen murder. In this type of cases motive is important, but prosecution has failed to assign any motive against this particular convict appellant for his involvement in the murder.

In this case prosecution has mainly relied upon the confession of the convict appellant and the circumstances i.e. fact of pointing out the place of recovery of dead body by the

appellant, but the prosecution has miserably failed to establish it. Besides, confession of the convict appellant is found to be involuntary and not true.

The learned Deputy Attorney General has relied upon the case of *Rokeya Begum alias Rokaya Begum and another vs State*, 11 MLR 63. In that case, prosecution case was that Rokeya Begum and co-convict Faridur Rahman used to stay together and they themselves claimed to be *Dharma Ma and Dharma Putro*, but they carried out an illicit relationship. Surja Begum, the deceased and daughter of Rokeya Begum did not like their relationship. As such both the convicts wanted to wipe out Surja Begum from the world. In order to kill her they took her on the bank of Kaliganga river and killed her and kept the dead body in a sugarcane field. Rokeya Begum and Faridur Rahman made confessions. In that case, there was also other circumstantial evidence. In that fact and circumstances of the case their conviction and sentence were upheld. But the facts of the present case are altogether different. Therefore, the principle enunciated in that case is not applicable in the present fact and circumstances of the case.

Since, we do not find any other evidence and materials, we are of the view that the learned Additional Sessions Judge has failed to appreciate the evidence and materials on record to their true perspective and has illegally and erroneously convicted and sentenced the appellant.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence is set aside.

The convict appellant is acquitted of the charge levelled against him. He be set at liberty at once if not connected with any other case.

Send down the lower Court's record.

Md. Mahmud Hassan Talukder, J:

I agree.