

Bench:
 Mr. Justice Md. Ruhul Quddus
 and
 Mr. Justice Bhishmadev Chakrabortty

Death Reference No.22 of 2012

The State
 -Versus-
 Md. Abdul Mazid and another
 ...Condemned-convicts
 with
Criminal Appeal No.2895 of 2012

Md. Abdul Mazid and six others
 ... Appellants
 with
Criminal Appeal No.2634 of 2012

Md. Safayet Alam alias Ishan
 ... Appellant
 with
Jail Appeal No.105 of 2012

Md. Abdul Mazid
 ... Appellant

-Versus-
 The State
 i Respondent in all the appeals

Mr. Md. Moniruzzaman (Rubel) with Mr.
 Md. Aminul Islam, Deputy Attorney
 Generals; Mr. Abul Kalam Azad Khan, and
 Ms. Marufa Akhter, Assistant Attorney
 Generals
 ... for the State

Mr. Md. Aminul Hoque, Senior Advocate
 with Mr. K B Rumi, Advocate
 ... for the condemned-prisoner and appellant
 No.1 in Cr Appeal 2895 of 2012

Ms. Hasna Begum, State Defense Lawyer to
defend the absconding condemned-convict

Mr. Md. Mahbub Ali, Senior Advocate with
Mr. Kazi Ahsan Habib, Advocate
... for appellant 2

Mr. S M Mahbubul Islam, Advocate
... for appellant 3

Mr. Md. Ahsanullah with Mr. Md. Gias
Uddin, Advocates
... for appellant 4

Mr. Md. Zahedul Haque, Advocate
... for appellants 5 and 7

Mr. Saifuddin Md. Aminur Rahim,
Advocate
... for appellant 6

Mr. Md. Safed Ali, Advocate

... for appellant in Cr Appeal 2634 of 2012

Judgment on 18.03.2018

Md. Ruhul Quddus, J:

Learned Judge of the Druto Bichar Tribunal, Rajshahi by
judgment and order dated 17.04.2012 convicted 9 (nine)
accused under sections 396, 412, 109 and 34 of the Penal Code
and sentenced two of them, namely, Md. Abdul Mazid and Md.
Samiul Islam alias Sami (absconding) to death with a fine of
Taka 50,000/- under sections 396, 109 and 34 of the Code in

Druto Bichar Tribunal Case No. 04 of 2010 arising out of Ullapara Police Station Case No.03 dated 03.03.2010 corresponding to G R No.47 of 2010 and made this reference under section 374 of the Code of Criminal Procedure for confirmation of the sentence. Learned Judge also sentenced six co-accused (appellants No.2-7 in Criminal Appeal No. 2895 of 2012) to suffer imprisonment for life with fine of Taka 50,000/= each in default to suffer rigorous imprisonment for 1 (one) year more and another co-accused Md. Safayet Alam alias Ishan (appellant in Criminal Appeal No. 2634 of 2012) to suffer rigorous imprisonment for 10 (ten) years with a fine of Taka 20,000/- in default to suffer rigorous imprisonment for another 6 (six) months under the same penal provisions. The condemned-prisoner Md. Abdul Mazid preferred Jail Appeal No.105 of 2012 and jointly preferred Criminal Appeal No.2895 of 2012 along with the six others, while the convict-accused Md. Safayet Alam alias Ishan preferred Criminal Appeal No. 2634 of 2012 separately against the selfsame judgment. All the matters have been heard together and are disposed of by this judgment.

The informant Doctor Sukumar Soor Roy (PW 1) lodged a first information report (FIR) with Ullapara police station,

Sirajgonj on 03.03.2010 at about 1.30 am against eight accused including the appellants in Criminal Appeal No.2895 of 2012 alleging, *inter alia*, that on 02.03.2010 at about 8:25 pm he was sitting in his chamber as usual, when his eldest son Sumit Soor Roy alias Niloy (PW 2) informed him over cell phone that 8/10 dacoits had committed dacoity in their house. They looted money and stabbed his mother (victim Supriya Bhadra alias Sukla) causing deadly injury on her. The informant rushed his house, called an ambulance and took his injured wife to Avicenna Hospital at Sirajgonj, where the doctor declared her dead. He learnt from his son Sumit Soor Roy that at about 8.15 pm 8/10 dacoits came to their house and called by his name, in response to which his youngest son Sudip Soor Roy (PW 3) opened the door and all the dacoits entered into the house. They asked the inmates of the house to keep silent threatening of killing them otherwise. But his son started crying and some of the dacoits held his mouth. Two of them also held the mouth of his wife, while two others took away Taka 10,000/- kept on a wardrobe in his bedroom. As his wife raised alarm, one of the dacoits dealt a knife blow on her left waist and another dacoit on her left elbow causing bleeding injuries. At one stage his neighbours started approaching the house of occurrence, when

the dacoits fled away. One of the dacoits named Md. Mominul Islam alias Masum was apprehended by the local people and on interrogation disclosed his identity as well as that of his accomplices. His two sons who were present at the time of occurrence identified the apprehended person as one of the dacoits. Some of the dacoits were speaking local dialect and some of them colloquial language of Dhaka.

The police investigated the case and submitted a charge sheet on 16.05.2010 under sections 396, 412, 109 and 34 of the Penal Code against ten accused including the FIR named eight. It is pertinent to mention that immediately after commission of the occurrence accused Mominul Islam alias Masum was apprehended by the local people of village Eastern Sreekola, while they were fleeing away. Within a short time he was handed over to police. On receipt of information from the apprehended person, the police sent a radio message to the neighbouring Kamarkhand police station informing that some of the dacoits had crossed the adjacent river and were going towards Kamarkhand. In response thereto, the Kamarkhand police made a road blockade and arrested five of the accused including the condemned-prisoner Abdul Mazid. All the

arrested accused including Masum subsequently made confessions before the Judicial Magistrates.

The case being ready for trial was sent to the Sessions Judge, Sirajgonj. Meanwhile a notification of the Government in the Ministry of Home Affairs was published transferring the case to the Druto Bichar Tribunal, Rajshahi for holding speedy trial. Learned Judge of the Tribunal by order dated 14.11.2011 framed charge against all the ten charge sheeted accused under sections 396, 412, 109 and 34 of the Penal Code. The charge was read over to eight of the accused, who were facing the trial. They pleaded not guilty and claimed justice. A state defence lawyer was also appointed by the Court to defend the case of the absconding accused Md. Samiul Islam and Md. Palash.

The prosecution examined twenty-seven witnesses out of forty, who were named as such in the charge sheet. Of them PW 1 Doctor Sukumar Soor Roy, the informant deposed supporting the FIR story mentioning his two sons as sources of knowledge. In cross-examination he stated that accused Tipu Talukder was the owner of his private chamber and denied the suggestion that because of rent dispute he had falsely implicated him (Tipu Talukder) and his son.

PW 2 Sumit Soor Roy alias Niloy, eldest son of the informant and one of the eyewitnesses stated that at on 02.03.2010 at about 8:15 pm he was studying in his room, when someone knocked the door and asked whether he was at home. His younger brother Sudip Soor Roy sensing the stranger as someone of his friends opened the door, when 8/10 unknown dacoits entered into their house. Hearing an alarm he stood up from table and searched for a stick, but getting no stick came out of his room in empty hands. He saw one of the dacoits to hold the mouth of his younger brother and another two to scuffle with his mother. At that time two other dacoits came out of his father's bedroom. The dacoits asked his mother to give them the key of *almirah*. As all of them started crying, the dacoits were about to flee, when his mother caught hold of two of them. At that time one of the dacoits gave a knife blow on her left elbow and another dacoit dealt on her left waist with a knife. He was able to hold the collar of a dacoit from the back side, but the dacoit knocked him down and managed to escape. The said dacoit was fatty in appearance. Both the brothers unsuccessfully chased the dacoits and some of their neighbours joined them. They came back and saw his mother lying on floor in critically injured condition. He made a phone call to his

father and tried to take her to hospital by a van. In the meantime, his father came and called an ambulance. They took her to Avicenna Hospital at Sirajgonj, where the doctor declared her dead and they came back with the dead body. In the meantime one of the dacoits was apprehended by the local people at village Srrekola, while he was fleeing away. He made a confession before the villagers about his complicity in the dacoity and also disclosed the names of his accomplices. Then and there he rushed the police station and saw the dacoit and could recognize him to be the person whom he had caught by collar from back, who knocked him down and managed to escape. They came to know that five more dacoits were arrested by Kamarkhand police and were handed over to Ullapara police. He rushed the police station again to see the arrested dacoits and could identify one of them, who inflicted injury on the left waist of his mother. He was the condemned-prisoner Abdul Mazid. He (PW 2) identified both the accused (Masum and Mazid) on dock.

In cross-examination he stated that he himself did not open the door but immediately after opening it, he heard the outcry of other inmates of the house. He saw one of the dacoits to hold the mouth of his younger brother and another two to

press that of his mother. He denied the defence suggestion that he did not state the material facts to the police during investigation and that he did not see 7/8 dacoits equipped with weapon, or that two of them did not came out from the bedroom of his father, or that two of them did not ask his mother for the key of *almirah* or that she did not catch hold of two dacoits or that he and his younger brother did not chase the dacoits or that he himself did not hold the collar of one dacoit or that the neighbors did not join them in chasing the dacoits.

PW 3 Sudip Soor Roy, youngest son of the informant deposed in similar line of PW 2 and further deposed that the dacoits had fled away in two groups, one towards the north and another south. He went to the police station and could identify the arrested Masum as one of the dacoits. On the next day he went to the police station again, where he could identify the arrested Masud, who had held his mouth at the time of occurrence. He (PW 3) also identified accused Masud on dock.

In cross-examination he stated that the dacoits inflicted injury on his mother before his elder brother saw them. Just at that time his brother came out of his room. He denied the defence suggestions that two of the dacoits did not held his mother or that they did not inflict injury on her or that one of

the dacoits was not apprehended immediately after commission of the dacoity or that he and his elder brother could not recognize some of them.

PW 4 Saber Hossain, a villager of Sreekola stated that on 02.03.2010 he was going back home after saying *esha* prayer. At that time a fatty person was running through the area. Some of the villagers caught hold of him beside the mosque. He was trembling out of fear. On interrogation by the local people he disclosed his name as Mominul Islam Masum and stated that he along with his friends Sohag, Mazid, Bulbul, Samiul, Masud and one/two others had committed dacoity at the house of Doctor Sukumar and injured his wife by knife blow. He (PW 4) then made a phone call to Ullapara police station, responding which a Sub-Inspector of police named Barik along with two others came there and took the arrested dacoit in his custody. Subsequently he came to know that five other dacoits were arrested by Kamarkhand police and that the injured wife of Doctor Sukumar succumbed to her injuries.

In cross-examination he stated that at that time of coming back from prayer he was accompanied by Saheb, Ohed Ali, Barik, Yasin and some other villagers. In total 20/22 villagers including Zakir, Nazrul Islam and Abdul Matin chased the

dacoit. After apprehension, he was not beaten by the villagers. At about 8:30 pm he was apprehended and the police came at about 8:40 pm and took him to the police station.

PW 5 Md. Abdul Momin, Manager of Khan Hotel, where the accused took shelter before commission of the dacoity, stated that on the date of occurrence he was on duty. At about 11:00 am the accused Mominul Islam Masum, Abdul Mazid, Shahidul Islam Sohag, Ilias Hosain Masud, Shahin Shah Bulbul, Riku Islam, Palash and Samiul came to his hotel and asked for two double bedded rooms. Accordingly he allotted them rooms No.11 and 13. Accused Bulbul paid him Taka 300/- as room fare. At about 12:30 pm accused Masud, Bulbul and Samiul left the hotel. The remaining boarders left the hotel before the evening handing him over the keys. On 21.03.2010 a Sub-Inspector of police from Ullapara police station came to his hotel along with arrested Bulbul and Masud and asked him whether he knew them or not. He could identify both of them as his boarders. The police seized the register of the hotel.

In cross-examination he stated that he was the Manager of Khan Hotel. He performed duty for 12 hours every day. On the date of occurrence he performed his duty for 12 hours from 8:00 am as usual. He affirmed his hand writing on the register

when he was on duty on 02.03.2010. He denied the defence suggestion that the Investigating Officer did not take the accused Bulbul and Masud to the hotel on 21.03.2010.

PW 6 Md. Tomsher Ali Sheikh, keeper of a shop adjacent to Khan Hotel and a witness to seizure of the hotel register deposed in favour of the seizure and proved the seizure list as exhibit-4 and his signature there as exhibit-4/1.

PW 7 Md. Saidur Rahman, a chance witness and shopkeeper, who was crossing through the road in front of the PO at the material time stated that while he reached there, saw 2/3 persons to run towards the east and 4/5 persons towards the north. Sumit was raising alarm and chasing them. He and two neighbours Ranjan Kumar Chaki and Sagor Kumar Nandi followed Sumit, but failed to catch hold of them. They came back and saw the doctor's wife lying on floor in bleeding condition. They stopped a van and started moving towards the hospital taking her thereon. At that time Doctor Sukumar came and called an ambulance. On the way the ambulance came, they shifted her there and rushed to Avicenna Hospital at Sirajgonj, where the doctor declared her dead. After coming back home they came to know that one of the dacoits named Mominul Islam Masum was apprehended at Eastern Sreekola.

PW 8 Sukhen alias Bibekananda Saha stated that at the time of occurrence he was staying at Ullapara Bazar. He received a phone call from his friend Provat at about 8.30 pm, who informed him about commission of dacoity at the house of Doctor Sukumar and injury of his wife. He rushed the PO and saw the doctor's wife in bleeding condition. At that time Sub-Inspector Barik and Councilor Shahidul Islam asked him to join them in going Eastern Sreekola. They went there together by a motor cycle and saw 15/20 persons apprehended a man, who was fatty in appearance. Sub-Inspector Barik interrogated him and he disclosed his involvement in the dacoity. They took him to the police station, where he disclosed the names of his accomplices.

PW 9 Sadhanlal Kar, a local witness stated that at the time of occurrence he was staying at Ullapara Bazar. On receipt of the news at about 8.30 pm he rushed the PO and came to know about the occurrence and further came to know that the doctor's wife was taken to hospital, where she died. After some times, doctor came back with the dead body of his wife. He (PW 9) also came to know that a dacoit was apprehended by the villagers at Eastern Sreekola. However, the police made an inquest report on the dead body of the victim, to which he was a

witness. He proved the said inquest report and his signature there. On the following day the Sub-Inspector of police came to the PO and seized a blood stained knife, another knife wrapped with a local towel (MugQar), a blood stained toy pistol and a broken artificial tooth under a seizure list. On 03.03.2010 the Investigating Officer (IO) displayed to them three mobile phone sets with SIM cards, which were seized from the arrested dacoits. After holding the autopsy, the IO seized some blood stained apparels of the victim and blood stained earth from the PO. He proved the said seizure list and his signature there and also proved the seized articles as material exhibits II series.

PW 10 Ranjan Kumar Chaki, a neighbour of the informant stated that at the time of occurrence he was staying at his home. He came out hearing an alarm and saw Sumit and Saidur Rahman (PWs 2 and 7 respectively) to run behind the dacoits. He also joined them and being failed came back. He saw the doctor's wife lying on floor in bleeding condition. They took her on a van and started for hospital. In the meantime Sumit communicated his father, who came and called an ambulance. While they were in front of Science College, the ambulance came and they shifted her there and went to

Sirajgonj. After coming back from Sirajgonj, he came to know that one of the dacoits was apprehended and taken to the police station. They rushed to the police station, where the apprehended dacoit disclosed his name and that of his accomplices.

PW 11 Uttam Kumar Soor Roy, brother of the informant stated about the occurrence what he received from his brother Doctor Sukumar by a phone call at about 9.00 pm on the date of occurrence and the subsequent events.

PW 12 Doctor A M Mochhaddek Masum of Avicenna Hospital, Sirajgonj stated that on the date of occurrence at about 9.30 pm he received the victim with serious bleeding injury. He examined her and got her dead. Because of profuse blood emission and cardiac shock she died. Accordingly, he issued a death certificate.

PW 13 Doctor Md. Abdul Awal stated that he conducted autopsy on the dead body of the victim Supriya Bhadra alias Sukla. He found one penetrating injury on the upper side of the left abdomen below the left costal margin $20X\frac{1}{2} 0X$ abdominal cavity depth, chest cavity directed upper and forward and one incised wound on back left mid forearm $20X\frac{1}{4} 0X\frac{1}{4} 0$. He (PW

13) finally opined that her death was due to shock and hemorrhage as a result of above noted injuries, which were antemortem and homicidal in nature. He proved the autopsy report, his signature and that of others thereon as exhibit 9 series.

PW 14 Md. Abu Bakar Siddique, a Senior Judicial Magistrate posted at Sirajgonj at the material time stated that at the material time he was posted at Sirajgonj. Accused Md. Abdul Mazid was produced before him on 12.03.2010. He (PW 14) gave him time for reflection in accordance with the law and thereafter recorded his confession. He proved the confession, his signatures put there and that of the accused.

In cross-examination he stated that the accused was arrested in Kamarkhand police station at about 11.30 pm on 03.03.2010 (it would be 02.03.2010). He further stated that he did not ask the accused as to why he was making the confession or that how he was treated in police custody. Even he did not assure the accused that if he did not confess, would not be taken back on police remand. He did not mention the word "true" in column 9 of the prescribed form and did not mention whether the accused made the confession voluntarily. Even he did not write whether the confession was read over to him (accused).

He, however, denied the suggestion that the accused did not make the confession voluntarily or that he (PW 14) recorded it as per the statement of the IO.

PW 15 Nila Karmaker, another Judicial Magistrate stated that the accused Mominul Islam Masum was produced before her on 03.03.2010 and accused Md. Riku Islam, Shahin Shah Bulbul, Shahidul Islam Sohag and Ilias Ahmed Masud on 23.3.2010. Accordingly, she recorded their confessions in accordance with the law. All the accused persons put their signatures there. She proved the confessions, her signatures there and that of the accused.

In cross-examination she stated that she did not mention whether the confession of Masum was voluntary and true. She did not put her signature at the foot of columns 8 and 9 of the prescribed form. She recorded the confessions of four others on 23.03.2010. Before that the accused Md. Abdul Mazid, Shahidul Islam Sohag, Ilias Ahmed Masud, Shahin Shah Bulbul and Md. Riku Islam were produced before her on 04.03.2010 with a prayer for remand. She allowed their remand for five days on 08.03.2010. On expiry of the said period of remand, the accused persons except Abdul Mazid were taken on further remand for four days. She further stated that she did not ask the

accused persons as to why they were confessing or that how they were treated while in police custody. She assured none of them that if they did not make confessions, would not be handed over to police again. She also did not write that the recorded confessions were read over to the accused or that those were true and made voluntarily. It was not possible for her to examine the whole body of the accused. She, however, denied the defence suggestion that she did not follow the mandatory provisions of the law or that she recorded the confessions as per the statement of the IO.

PW 16 Md. Shahidul Islam, the local Ward Councilor stated that on 02.03.2010 at about 8:30 pm he was having tea sitting at a hotel, when one of his friends informed him about the occurrence over a phone call. Then and there he rushed the house of occurrence and saw a pool of blood on its floor. At that time Sub-Inspector Barik came there and received news over his phone that one of the dacoits was apprehended at Eastern Sreekola. Sub-Inspector Barik asked him to join in going there. Accordingly, they went to Eastern Sreekola and saw 20/25 persons had apprehended the accused Momin (appellant 2 herein). On query made by Sub-Inspector Barik, the apprehended Momin disclosed that accused Tipu Talukder

was his relation and he came to his house. However, they took him to the police station.

PW 17 Sagor Kumar Nandi, a neighbour of the informant stated that at the time of occurrence he heard an alarm, came out of his house and saw some persons to run towards the north and some others from east to west. The doctor's son Niloy, neighbors Saidur, Ranjan Chaki and some others were running after them. He (PW 17) also joined them. The chasing crowd failed to apprehend any of the dacoits and ultimately came back. Then he saw the doctor's wife in seriously injured condition and asked Niloy (PW 2) to call his father. They called a van and lifted the victim thereon. At that time, the doctor came there and called an ambulance. When they reached in front of Science College, the ambulance came and accordingly they shifted her there. At about 8:45 pm he learnt that one of the dacoits named Momin hailed from Keraniganj, Dhaka was apprehended. He further learnt that the doctor's wife passed away at about 10 o'clock. The doctor came back home with the dead body of his wife at about 10:30 pm. The police came to the PO at about 2:00 am and prepared an inquest report on the dead body with his (PW 17's) help. He noticed two knife injuries on her person, one on left elbow and another into the

left waist. He proved the inquest report and his signature there. At 6:00 am the police seized a one edged blood stained knife, another knife wrapped by a local towel, a toy pistol, broken part of an artificial tooth and some blood stained earth from the PO under a seizure list. He also proved the said seizure list and his signature there.

PW 18 Md. Abdullah Miah, keeper of a shop adjacent to Kamarkhand police station stated that on 02.03.2010 at about 9:30 pm he was sitting at his shop, when Sub-Inspector Shahjahan told him that an occurrence of dacoity with murder was committed at the house of Doctor Sukumar in village Jhikra. The dacoits were coming towards Kamarkhand. He would make a road barricade and solicited for his (PW 18^{os}) help. After 15/20 minutes, five persons were coming through the road. The police stopped them in their presence. They disclosed their names as Masud, Sohag, Mazid, Rinku and Bulbul. Three of them hailed from Keranigonj, Dhaka and two from Ullapara. The police recovered Taka 6069/- in total from them and a knife from Sohag. Those were seized under a seizure list. PW 18 proved the seizure list and his signature there. He also proved the knife and money as material exhibits.

PW 19 Md. Anwar, a constable of police posted to Kamarkhand police station at the material time stated that on 02.03.2010 Sub-Inspector Shahjahan informed them about commission of the dacoity with murder at Ullapara and further informed that the dacoits were coming towards Kamarkhand. Sub-Inspector Shahjahan then instructed them to install a check post on the road and accordingly they did it at about 21:30 hours. After 20/25 minutes a van with five persons was coming through the road. They were in dishabille condition with no sandal/shows on their legs. On search, a knife was recovered from Sohag and total Taka 6069/- from the accused. Those were seized under a seizure list. The arrested persons were taken to the police station. They disclosed their names as Sohag, Mazid, Rinku, Masud and Bulbul. He (PW 19) proved the seizure list and his signature there.

In cross-examination he gave a breakup of recovery of the money stating that Taka 5,000/- was recovered from Sohag, 400/- from Masud and 439/- from another.

PW 20 Jalal Uddin, another constable of police deposed in similar line of PW 19, but without specifically mentioning the names of the accused.

PW 21 Md. Shahid Kadir, another local witness, earlier who made an statement under section 164 of the Code, stated that he maintained a shop under the name and style of Rupali Store at Mukta Plaza, Sirajgonj. On 02.03.2010 two buyers came to his shop and purchased a toy pistol at the cost of Taka 100/-. One of them was tall and another was short in appearance. Subsequently on 21.03.2010 a Sub-Inspector of police went to his shop along with the said buyers. They were Masud and Bulbul. He (PW 21) proved the toy pistol as material exhibit-6.

PW 22 Doctor Md. Altaf Hossain stated that on the date of occurrence at about 8:30 pm Prabir Sarker, Assistant to Doctor Sukumar Soor Roy informed him about the occurrence and requested him to go there. Then he went to the PO, but found nobody there as in the meantime Doctor Sukumar had already started for Sirajgonj along with his injured wife. Thereafter he learnt that one of the dacoits was apprehended.

PW 23 Md. Abdus Salam Sarker, tenant of the informant stated that at the time of occurrence he was watching TV sitting at his chamber at the 1st floor of the house of occurrence. He heard an alarm with repeated utterance of the word 'dacoit'. He and his wife came down, when Niloy asked them to look after

his mother and started running after the dacoits. They saw the victim lying unconscious and bloodily injured. She was taken on a van towards the hospital. At about 9:00 pm he came to know that one of the dacoits was apprehended at village Sreekola and at about 10:00 pm he further came to know that she had passed away. At about 10.45 pm her dead body was brought home.

PW 24 Md. Abdul Barik, Sub-Inspector of police posted to Ullapara police station at the material time stated that on 02.03.2010 at about 8.30 pm he received information about commission of the dacoity and infliction of injury on the victim. He rushed the PO by a motor cycle. After reaching there, he received news over his phone that one of the dacoits was apprehended by the local people at village Eastern Sreekola. He along with Shahidul Islam (PW 16) and another (meaning PW 8) rushed there at about 9:00 pm. The apprehended dacoit disclosed his name as Mominul Islam Masum and place of origin to be Keranigonj, Dhaka. He also disclosed the names of his accomplices and stated that they were staying at the house of Tipu Talukder for two days and planned for committing the dacoity.

In cross-examination he stated that the police did not torture him in police station. Five more dacoits were arrested at Kamarkhand police station sometime after 10:00 pm and on the following day they were produced to Ullapara police station. He learnt about their arrest by a wireless message.

PW 25 Md. Abdul Kuddus, another constable of police who carried the dead body to hospital for conducting autopsy deposed to that effect and proved the *challan* and his signature there.

PW 26 Md. Shahjahan Ali, a Sub-Inspector of police posted to Kamarkhand police station at the material time and organized installation of the check post at the night of occurrence stated that at about 21:15 hours, Sub-Inspector Abdul Barik from Ullapara informed him through a radio message that an occurrence of dacoity and infliction of injury upon an inmate of the house of occurrence was committed at Ullapara. The dacoits had crossed the river Kaligonj and were going towards Kamarkhand. On receipt of the radio message, he along with forces installed a check post on the road near to the shop of Abdullah (PW 18). After 15/20 minutes they saw five persons to come from the side of Ullapara. They stopped them and saw their apparels in dishabille condition, stained

with blood and mud. On interrogation, they confessed to have committed dacoity at Ullapara and disclosed their names as Mazid, Sohag, Masud, Bulbul and Riku. On search, a knife and Taka 6069/- were recovered from them. On the following day i.e. 03.03.2010 he sent the arrested persons to Ullapara police station under an SCD (supplementary case docket). He (PW 26) exhibited the recovered articles, namely, money and knife as material exhibits.

In cross-examination he stated that at the time of arresting the five accused, the Officer-in-charge Mr. Monirul Islam and 10/15 local people were there. Of them Abdullah, Alhaj and Israil helped the police. In the seizure list only Abdullah put his signature. According to the seizure list Taka 429 was recovered from Bulbul, 5000/= from Sohag and 140/= from Masud. The accused were not beaten in the police station. The IO came to Kamarkhand police station and took them to Ullapara.

PW 27 Md. Khaza Golam Kibria, Investigating Officer of the case stated that after being assigned for investigation he visited the PO, prepared a sketch map with index, an inquest report on the dead body of the victim and sent it for conducting autopsy through constable A. Kuddus. He arrested accused Md.

Mominul Islam alias Masum, A. Mazid, Shahidul Islam alias Sohag, Ilias Ahmed Masud, Shahin Shah alias Bulbul, Md. Riku Islam and Safayet Alam alias Ishan and produced them to the Court. Six of them made confessions to the Magistrates. Some of the witnesses also made statements under section 164 of the Code. He also recorded statements of the witnesses under section 161 of the Code. As the case was prima-facie proved, he submitted charge sheet against the accused. He proved the inquest report, sketch map and index, seizure lists and his signatures there.

In cross-examination he stated that accused Mominul Islam alias Masum was sent to Court on 03.03.2010 at about 9:40 am. He denied the defence suggestion that Mominul was tortured by him or that he received him in injured condition. He further stated that he had produced the five accused before the Magistrate on 04.03.2010 at about 10:30 am and prayed for taking them on remand for seven days. The Court, however, allowed five days remand by order dated 08.03.2010 and accordingly he took them on remand. On expiry of the period, he produced all of them before the Court on 12.03.2010 with a prayer for recording the confession of accused Abdul Mazid and filed an application for remand of the remaining four

accused. The Court allowed their remand for four days by order dated 18.3.2010 and he took them on 20.03.2010. One day before expiry of the period of the second remand, he produced them to the Court. He had visited the PO several times, but did not seize the drawer, wherefrom the money was looted. He recorded the statement of Sumit Soor on 05.05.2010, when he stated that he had caught hold of one of the dacoits by collar. He found the previous case and previous record (PCPR) of the accused to be nil. He did not torture the accused in custody. He denied the defence suggestion that the confessions were extracted on torture and threat.

In cross-examination by the accused Safayet Alam alias Ishan PW 27 stated that he (Ishan) was made accused only on the basis of confession of the co-accused. His name was not named in the hotel resister. His PCPR was nil and his father was the Agriculture Development Office at Ullapara.

After conclusion of the prosecution evidence, learned Judge of the Tribunal examined the accused who were facing the trial. They reiterated their innocence and some of them, namely, accused Shahidul Islam alias Sohag, Ilias Ahmed alias Masud, Md. Mominul Islam alias Masum, Md. Abdul Mazid, Md. Riku Islam alias Sakib and Shahin Shah alias Bulbul

submitted written explanation to the effect that they were going to Dhaka. On the way, the police arrested them on suspicion, inhumanly tortured them in custody and compelled them to make the confessions on threat of crossfire. After conclusion of trial, learned Judge of the Tribunal passed the impugned judgment and order of conviction and sentence as stated above giving rise to the instant death reference and connected appeals.

Mr. Aminul Islam, learned Deputy Attorney General appearing for the State submits that the planned dacoity followed by murder has been satisfactorily proved by the prosecution evidence. All the links of the chain of events i.e. the accusedø staying at Khan Hotel at Sirajgonj, coming to the PO by two CNG driven auto rickshaws, entering into the house of occurrence, looting money from bedroom of the informant, inflicting knife injuries on the victimøs left waist and elbow, fleeing away from the PO on raising alarm by the inmates of the house, apprehension of accused Masum by the villagers at Eastern Sreekola immediately thereafter, making extrajudicial confession before the villagers, arrest of five other co-accused from adjacent Kamarkhand police station while they were fleeing after crossing the river Kaligonj and subsequent inculpatory confessions have been proved by the recording

Magistrates. Their confessions have been corroborated by other prosecution evidence, exhibits and material exhibits. The injured victim was taken to Avicenna Hospital at Sirajgonj within half an hour from the time of occurrence, where she succumbed to her injuries. Her death was proved by the evidence of PW 12 Doctor A M Mochhaddek Masum, who issued the death certificate and that of Doctor Md. Abdul Awal, who conducted autopsy on her dead body and also by the evidence of PW 1 Doctor Sukumar Soor Roy, who himself was a doctor and husband of the victim. So this is a clear case of dacoity followed by murder under section 396 of the Penal Code. This was a sensational case, considering which the Government in the Ministry of Home Affairs notified it to be tried by the Druto Bichar Tribunal, Rajshahi and accordingly it was transferred and tried there. Learned Judge discussed and considered each and every piece of evidence including the confessions of six co-accused which all were inculpatory in nature and consistent with each other. Considering the gravity of offence, learned Judge sentenced two accused who gave the fatal blows, to death. There is nothing illegal to interfere with the sentence of death. The sentence of death is fully justified under the facts and circumstances of the case.

On the other hand Mr. Aminul Hoque, Senior Advocate appearing for the condemned-prisoner Abdul Mazid, appellant No.1 in Criminal Appeal No.2895 of 2012 submits that the evidence of PWs 2 and 3 if critically read with the FIR, it would be clearly understood that they were heavily tutored and in fact did not see the occurrence. The informant himself was a hearsay witness. It is not clear from the FIR as to what prevented him from taking his wife to Ullapara Health Complex, which was nearer to Avicenna Hospital. It further appears from the defence case that two of the accused, namely, Tipu Talukder and his son Shahin Shah alias Bulbul were having rent dispute with the informant. It makes the case doubtful. He also takes us through the confession of condemned-prisoner Abdul Mazid as well as the autopsy report and submits that it is simply impossible that the knife blow allegedly given by Mazid would hit the upper abdomen covering the left ventricle and cause death of the victim. If the case is considered from this medico legal aspect, the condemned-prisoner Abdul Mazid can never be held liable for the death of victim Sukla.

Mr. Hoque further submits that PW 3 Sudip Soor Roy, the youngest son of the informant clearly stated in cross-

examination that his elder brother (meaning PW 2) reached the point of occurrence after infliction of injury on his mother. Therefore, PW 2 was not an eyewitness and as such not competent to identify the accused Mazid on dock. Besides, if the statement of PW 3 as disclosed in his cross-examination regarding appearance of his elder brother Sumit (PW 2) at the scenario is considered in proper perspective, the evidence of PW 2 should be left out of consideration and if PW 3 is considered to be the only eyewitness, nothing is there as to who gave the fatal blow on the victim. In that view of the matter, the case having not been proved by any eyewitness, the accused including the condemned-prisoner Abdul Mazid are entitled to be acquitted.

Mr. Hoque then submits that the confessions made by the accused do not appear to be true and voluntary. The extrajudicial confession as reproduced in the evidence of PW 4 also cannot be the basis of conviction as in the meantime it has been settled by our Appellate Division that extrajudicial confession is a very weak type of confession and should not be the basis of conviction without any substantive evidence. In this regard Mr. Hoque refers to the case of *Abdus Salam Mollah vs The State*, 13 MLR (AD) 268.

Mr. Hoque alternatively submits that the condemned-prisoner Abdul Mazid is a young man of tender age having a very clean previous record. He is in death row for a considerable long period. Our Appellate Division in so many cases considered the above to be mitigating circumstances and commuted death sentence. In support of the alternative argument, Mr. Hoque refers to the case of Nalu vs The State, 32 BLD (AD) 247 = 17 BLC (AD) 204.

Ms. Hasna Begum, learned State Defence Lawyer appearing for defending the condemned-convict Md. Samiul Islam alias Sami submits that there are inconsistency and contradictions among the prosecution evidence, which makes the case doubtful. The prosecution withheld as many as 13 charge sheeted witnesses including one Aloka, domestic aid of the house of occurrence without any cogent reason, from which an adverse presumption can easily be drawn. From the ground reality and facts and circumstances of the case it would appear that the confessions were not made voluntarily and those cannot be the basis of conviction against the co-accused Md. Samiul Islam as those have not been corroborated by any other substantive evidence. From a careful reading of the entire evidence it clearly comes that Samiul's name is not mentioned

by any competent witness and as such the sentence of death awarded upon him is a miscarriage of justice and liable to be set aside.

Mr. Mahbub Ali, Senior Advocate appearing for the convict-appellant No.2 Md. Mominul Islam alias Masum submits that if the evidences of PWs 14-15, the Recording Magistrates are read with his so-called confession and that of five other co-accused, it would be clear that the learned Magistrate did not follow the mandatory provisions of the law in recording the confessions under section 164 of the Code. Such confessions cannot be held to be true and voluntarily made and form the basis of conviction. The extrajudicial confession allegedly made by this appellant having not been reproduced in verbatim also cannot be relied on for passing an order of conviction. In support of his submission regarding true and voluntary confession, Mr. Mahbub Ali refers to the case of *State vs Suman Saha and another*, 61 DLR 253 and on weak evidential value of extrajudicial confession the cases of *State vs Mozam alias Mozammel and other*, 9 BLC 163 and *The State vs Hasen Ali*, 19 BLD 418 = 4 BLC 582.

Mr. Mahbub Ali then takes us through the statement made by the appellant at the time of his examination under

section 342 of the Code as well as the points brought into his notice during such examination and submits that it is a well settled principle of law that an accused has every right to know about the incriminating evidence recorded and collected against him while he would be examined under section 342 of the Code. This is a sort of natural justice so that an accused standing on dock can explain any evidence that has been adduced against him. If he is not properly examined under the said provision of law, the trial would be vitiated and the accused would be acquitted on this point alone. Moreover, the appellant Masum had no overt act and he was not holding any arms. He is a young man having a clean previous record. If the confession allegedly made by him is left out of consideration, the conviction and sentence passed against him would have no leg to stand.

Mr. Mahbubul Islam, learned Advocate appearing for the convict-appellant No.3 Shahidul Islam alias Sohag submits that in order to prove an offence under section 396 of the Penal Code, it is essential to prove two ingredients: one is dacoity and another is murder at the time of dacoity. In the present case neither the offence of dacoity nor murder by the accused has been proved. It appears from the FIR as well as the evidence of

the claimed eyewitnesses that the accused persons had no plan even to assault the victim. Only when they were caught by her, gave the knife blows just to free themselves from her clutch without any intention of killing. Their action even if taken as true can at best constitute the offence of culpable homicide not amounting to murder under section 304, part II of the Code. It has also not been proved that they took any money from the house of dacoity. Although it has been stated in the FIR that two of the dacoits entered into the bedroom of the informant and took away Taka 10,000/- kept on a wardrobe, but none of the witnesses deposed anything like this and as such the allegation of dacoity has not been proved by any credible evidence. The instant case is mainly based on confessions, but none of the confessing accused in their confessions stated anything about looting of the money. None of the eyewitnesses or any other witness identified the accused Sohag. His confession if critically considered along with the evidence of the Recording Magistrates (PWs 14 and 15), it would be clear that his confession was extracted on torture and was not recorded following the mandatory provisions of law. Such confession cannot be the basis of conviction even against the

accused who made it. The appellant Sohag is, therefore, entitled to be acquitted.

Mr. Ahsanullah, learned Advocate for the convict-appellant No. 4 Md. Ilias Ahmed alias Masud submits that the appellant along with three others were taken on remand for the 2nd time and was compelled to make the confession after a prolonged custody. They were taken on remand for 4 (four) days, but before completion of the period, they were produced to the Court with a prayer for recording confessions. It gave a clear indication that if they did not make the confessions, would be taken back for the remaining day and tortured again. This type of confessions cannot be considered as voluntary and can also not form the basis of conviction. Taka 140/- only was recovered from this appellant, which by any stretch of imagination cannot be held to be the looted money. There was no occasion to distribute the money at the time they were fleeing away. From simple common sense it can be understood that the recovered money was actually his pocket money. The amount of Taka 10,000/- allegedly looted from the house of occurrence was at all not recovered. The knives and toy pistol, which were allegedly recovered from the place of occurrence, were not examined by an expert to find out the fingerprint of

any accused there. It is also mysterious as to why the victim in so serious condition was taken to Avicenna Hospital at Sirajgonj, a place far from the PO instead of taking her to the local Health Complex and give her quick treatment.

Mr. Ahsanullah further submits that according to the extrajudicial confession of accused Masum, the names of other accused were collected by the informant and inserted in the FIR. But it was very unlikely that the fathersø names of the accused would be known to him and even if it was known to him, he would disclose it. It gives an indication of concoction and fabrication of the *ejahar* story and supports the defence case that out of rent dispute the case was falsely initiated. It is also highly improbable and unbelievable that some young men having full common sense would commit dacoity in early evening at the house of a person who is a tenant of one of them without having any musk or colour.

Mr. Ahsanullah lastly takes us through the statements of the accused made while they were examined under section 342 of the Code and submits that the learned Judge of the Tribunal in convicting the appellants largely based on the confessions, but did not bring it into their notice at the time of their examination under section 342 of the Code so that they could

defend themselves properly. Still the accused by giving written statements explained under what circumstances they were compelled to make the confessions on threat and torture in police custody, but the trial Judge did not at all consider their explanations, which vitiated the trial.

Mr. Zahedul Haque, learned Advocate appearing for Shahin Shah alias Bulbul and Md. Palash Ali alias Palash, the convict-appellants No. 5 and 7 respectively submits that there is nothing on record except the confessions of the co-accused against the appellant No. 7 Palash. It is a well settled principle of law that an accused cannot be convicted only on the basis of confession made by co-accused without any corroborative evidence. Since there is no corroborating evidence against the accused Palash, the conviction and sentence passed against him is apparently illegal and liable to be set aside.

Mr. Haque further submits that admittedly no money or article was recovered from the appellant Shahin Shah alias Bulbul. He was not identified by any of the eyewitnesses or inmates of the house. He was compelled to make the confession under inhuman torture and threat, which he brought into the notice of the Court at the time of his examination under section 342 of the Code, but the learned Judge of the Tribunal without

considering the statement convicted and sentenced him and thereby committed gross illegality. More so, he is the son of co-accused Tipu Talukder, land lord of the informant having rent dispute with him. In such a position, his (appellants) false implication can easily be presumed.

Mr. S M Aminur Rahim, learned Advocate appearing for the convict-appellant No. 6 Md. Riku Islam alias Sakib adopts the submissions already made by the learned Advocates for the co-appellants and further submits that if the confessions are recorded without following the mandatory provisions of the law, these will be left out of consideration. Then only the extrajudicial confession made by co-accused Masum would be there to draw a factual inference. The present appellant Riku Islam is not named in the said extrajudicial confession. He was not identified by any of the inmates of the house of occurrence nor was the looted money or article recovered from him. There is no reason to connect him with the alleged occurrence and as such he is entitled to be acquitted.

Mr. Md. Safed Ali, learned Advocate appearing for the convict-appellant Safayet Alam alias Ishan in Criminal Appeal 2634 of 2012 submits that names of 8 (eight) dacoits have been mentioned in the FIR, but his name did not appear there. His

name was included in the charge sheet only on the basis confessions made by the co-accused. It is a settled proposition of law that an accused cannot be convicted on the basis of confession of co-accused without any corroborative evidence. The appellant's name does not appear in the extrajudicial confession of co-accused Masum or in the register of Khan Boarding or in the evidence of its Manager (PW 5). According to the so-called confessions, he was not present at the PO. In such a position there is no basis of his conviction. The conviction and sentence passed against him is out and out illegal and liable to be set aside.

In turn of reply Mr. Aminul Islam, learned Deputy Attorney General submits that in taking consideration of an extrajudicial confession there is no legal requirement of reproducing the same in the exact words uttered by its maker. On this point he refers to the cases of *State vs Jatindra Kumar Suuutttradhar alias Dhana*, 20 DLR 526; *Krishna Nandan Prasad Verma vs The State* AIR (1958) Patna 167 and *Bhagwan Das and another vs State*, AIR 1968 All 9. Learned Deputy Attorney General also refers to *Mezanur Rahman and others vs State*, 2 BLC (AD) 27 and submits that since the recording Magistrate were examined in presence of the accused

and subsequently they explained about the confessions in their statements made under section 342 of the Code, non-mentioning of the confessions by the trial Judge at the time of their examination under section 342 of the Code would not prejudice the accused or adversely affect the prosecution case.

We have considered the submissions of the learned Advocates of both the sides, carefully examined the evidence and other materials on record and gone through the decisions cited. In the case of Abdus Salam Molla (*ibid*), two of the dacoits, namely, Idris Ali Sheikh and Rabiul Molla were apprehended by the local people while they were fleeing away immediately after commission of dacoity followed by murder. One of them, namely, Idris Ali Sheikh made extrajudicial confession before the villagers involving himself and disclosing the names of his accomplices including Abdus Salam Molla. Another accused named Abdus Samad Molla (member) alias Samad Khan made judicial confession. The trial Court convicted and sentenced the two confessing accused to death and six others including Abdus Salam Molla to imprisonment for life with fine. A death reference and two appeals arose from the judgment. The High Court Division rejected the death reference with commutation of sentence of death against the

two to imprisonment for life with fine, and further commuted the sentence of three others including Abdus Salam Molla to imprisonment for 10 (ten) years with fine. The Appellate Division on hearing of an appeal by leave, acquitted the appellant Abdus Salam Molla on the grounds:

"As it has already been mentioned hereinbefore the settled law is that confession of a co-accused in a trial when more persons than one are being tried jointly for the same offence, the confession made by one of such persons affecting himself and some other who were put on trial with confessing accused is proved the confession of such an accused may be taken into consideration as against such other persons along with the substantive evidence in finding the non-confessing accused guilty of the offence tried. In the instant case it is seen from the materials on record that there is no substantive evidence against the appellant implicating him in the commission of the offence for which he along with others including the confessing accused put on trial for the same offence.... (para 30)

"It may be mentioned that except in an exceptional case the extrajudicial confession of an accused on being

apprehended is not voluntarily made and hence keeping that circumstance in view the Court is required to be cautious in proceeding to find an accused guilty of an offence on the basis of such extra judicial confession. Unless the Court is convinced in the background of reliable evidence that the extrajudicial confession was free from the infirmities as mentioned hereinbefore, the extrajudicial confession should not be made basis in finding an accused guilty of offence said to have committed and confessed....” (para 32)

In the above case, the confessing accused apprehended by the villagers were not acquitted and conviction of the non-confessing accused Abdus Salam Molla was based only on confession made by the two co-accused and there was no other substantive evidence to corroborate the confession. The inmates of the house of occurrence could not recognize them and there was no eyewitness. But in the instant case, the accused Masum was apprehended by the villagers of adjacent village while he was fleeing away just after the occurrence. He himself made the extrajudicial confession in front of the villagers including PW 4 Saber Hossain who asserted that the villagers did not beat him. There were other circumstances which corroborated his

extrajudicial confession. Besides, he was identified by an eyewitness, namely, PW 2 Sumit Soor Roy who attempted to catch hold of him by his collar while escaping from the PO.

For better appreciation, it would be profitable to quote the relevant part of the evidence of PW 2 Sumit Soor Roy, which runs as follows:

...H mgq Avgvi covi x̄ej **wk** Avgvi ḡx̄i **wi** **wi** ej qv
PrKvi t̄b**x̄** c̄B| ZLb Avg covi **wi**ej **wk** j̄w*d***x̄** DiW Ges
n̄x̄i K̄x̄ j̄W L̄R̄ _**wK**| j̄W L̄R̄ bv **wk** L̄w̄j n̄x̄B WwB̄bs
īx̄ **wi****ox̄** Avgm| Ḡx̄ **wi** K̄x̄KRb **rk̄i** WwKvZ N̄xi ḡx̄
Aē **Ki****x̄** Z̄x̄i ḡx̄ GKRB Avgvi **wi** f̄B Gi ḡx̄ **wk** ax̄
Avg Ges **β**Rb Avgvi ḡvi m̄x̄ ā **wi** **Ki****x̄** | **wK** H ḡx̄[©]Avgvi
evevi **wi**g **wk** **β**Rb **wi****wi** n̄x̄ x̄L| H mgq **wi** **β**Rb ḡvi
m̄x̄ ā **wi** **Ki**Qj Z̄v̄ Avgvi ḡx̄ **wk** **wi** qv Avj ḡvxi P̄v̄e Pvq| ḡv
Qov **wk** WwKvZ WwKvZ ē **x̄** PrKvi **Ki****x̄** **wk** | Avgl **wi** m̄x̄
PrKvi K̄vi | Avgv̄x̄i PrKv̄x̄ WwKv̄x̄i h̄vi h̄vi ḡZ c̄vj **wk** **wk** |
ZLb Avgi ḡv **β**Rb WwKvZ **wk** **β**n̄x̄ Svc*wk* ax̄| H **β**R̄i
GKRb ḡvi evg n̄x̄i K̄b*x̄* **wk** QoKvNvZ **Kx̄** | Ges Z̄x̄i ḡv
Z̄x̄i bv Qo*x̄* Aci WwKvZ Z̄vi n̄x̄ **wi** Qov **wk** Avgvi ḡvi ē **x̄** evg
c̄R̄x̄ X̄K̄x̄ **wi** | Avg GB NUbvi AvKvMvZ vq n̄Zf̄x̄ n̄x̄ c̄lo Ges
PrKvi **Ki****x̄** **Ki****x̄** WwKvZ **x̄**i **wk** Qo*x̄* avl qv K̄vi | Avgvi **wi** f̄vBI

॥C~~K~~ ॥C~~K~~ avl qv K~~K~~ | GK ch~~K~~ evox~~K~~ v~~B~~b ~~W~~~~K~~i K~~K~~ M~~K~~
 GKRb v~~U~~v gZb W~~K~~Z ~~W~~~~W~~CQb w` K ~~W~~~~K~~ mv~~K~~^o Kj vi ~~W~~~~K~~ awi |
~~W~~~~Avgvi~~~~K~~ av^o v w` qv ~~W~~~~K~~~~K~~ w` ~~K~~ cvj v~~K~~ _v~~K~~ |
 ॥...x~~K~~ g~~K~~ i b~~K~~ c~~B~~ k~~K~~~~K~~j v ce^oc~~V~~ov M~~K~~ GKRb W~~K~~Z RbZvi
 n~~K~~ ai v c~~K~~~~K~~ | Ges ~~W~~~~RbM~~~~K~~i mv~~K~~ Avgvi~~K~~ evox~~K~~ W~~K~~~~W~~Zi
 mv~~K~~ R~~W~~Z _v~~K~~i K_v_ -~~K~~~~K~~i K~~K~~~~K~~ | c~~K~~ c~~j~~ k Z~~K~~ _v~~bvq~~ ~~b~~~~K~~
~~W~~~~K~~ | evox~~K~~ Avgvi ci Avg, ever, ~~W~~~~U~~ f~~V~~B, K~~V~~Kz I Avi I A~~K~~~~K~~
 GK mv~~K~~ _v~~bvq~~ h~~V~~B | _v~~bvq~~ M~~Q~~v H a~~Z~~W~~K~~Z~~K~~ Avg ~~Pb~~~~K~~ c~~w~~i | H
 W~~K~~Z~~K~~B Avg ~~W~~~~K~~i K~~K~~ Zvi mv~~K~~^o Kj vi ~~W~~~~K~~ a~~K~~ ~~Q~~j vg |
~~W~~~~Avgvi~~~~K~~ _v~~bvq~~ ~~W~~~~RbVq~~ Zvi bvg v~~g~~gbj Bmj vg g~~V~~mg |
 ॥...x~~j~~ v 11.00 Uvi w` ~~K~~ c~~j~~ k R~~bvq~~ ~~W~~~~K~~gv~~i~~ L~~S~~ Lv~~bvq~~ 5Rb W~~K~~Z
 ai v c~~K~~~~K~~ | Ges Z~~K~~i ~~W~~~~D~~j v~~C~~ov _v~~bvq~~ n` ~~T~~~~W~~~~K~~i v nBq~~K~~ | H
 Lei ~~W~~~~K~~, ever, Avg, ~~W~~~~U~~ f~~V~~B | Avi I K~~K~~KRb _v~~bvq~~ h~~V~~B | _v~~bvq~~
 M~~K~~, H a~~Z~~W~~K~~Z~~K~~ ~~W~~~~K~~ c~~B~~ | Z~~K~~i g~~K~~ GKRB Avg ~~Pb~~~~K~~
 c~~w~~i | ~~W~~~~Avgvi~~ g~~v~~i cvR~~K~~Q~~j~~ X~~K~~~~K~~ w` ~~K~~~~K~~ | H Avgvgx ZLb Zvi bvg
 0g~~W~~~~R~~^o e~~K~~ R~~bvq~~ | ॥

PW 3 Sudip Soor Roy, another star witness in this case narrated the facts and appearance of his elder brother Sumit Soor Roy (PW 2) inside the room of occurrence as follows:

oMZ Bs 2/3/10Bs Z~~w~~i L Avgvi evmvq W~~B~~bs ~~W~~~~K~~ ex~~K~~
 c~~W~~~~K~~~~Q~~j vg | Avgvi `v` v mgxZ ZLb Zvi covi N~~K~~ co~~Q~~j | gv ZLb

Nxi vix cwi - i KiQj | ZLb ivix Abgib 8.15 ngt wB mgq
 evoxi m` i ` i Rvq bK Kx| ZLb `v`vi bvg ax e x wmgxZ evmjq
 AvQ wK? Avg ZrPbvZ `v`vi eÜg x Kx ` i Rv Lx wB | m x m x
 8/10 Rb - m - i WkVZ Avgv x i Wbbs i, x c x Kx| mevB x P
 Kx _ Kx e x| vix vij vi fq wvq| gv | Avgiv `B fvB f x
 wPrKvi w x Zvxi GKRb Avgvi g j w x ax| `BRb Avgvi gvi g j
 w x ax xB `BRb gvi g j w x w x gvi Kx Avgvi gvi x
 UvKv Pvq Ges - Y sKvi Pvq| gv ZLb wPrKvi w Ges `BRb
 WkVZ x `B nvZ w x Rvcw x ax| Avgvi `v`v | gvi wPrKv x
 WkVziv cvj v x _ v x| gv w `BRb WkVZ x RvcUvBqv ax wQj
 Zvxi v i g v x w n x x | Avgvi `v`v
 WkVZ WkVZ e x Zvxi w x avl qv Kx| `v`v x w k Avgi Zvxi
 wQ x avl qv Kvi | Zvxi xD wD evoxi D E i | `v`v x cvj vB x
 _ v x | 00

In cross-examination he (PW 3) stated:

WfvB x i m x w v n l qv Avg x B g v x WkVziv v x x | ZLb fvBqv
 Zvi i g v x w n x x | 00

From a combined reading of the evidence of PWs 2 and 3 it is clearly understood that at the time of inflicting injury on the victim, PW 2 already came out of his room and was inside

the room of occurrence and in a position to watch infliction of injury on his mother. It is quite usual that in the event of scuffling with mother, her son would come out to protect her and see the dacoits from a close proximity. It cannot be said that he (PW 2) did not see the occurrence.

There is no dispute that the occurrence took place at about 8.15 pm on 02.03.2010 and the informant had to go Sirajgonj with his injured wife for better treatment. He came back Ullapara at about 10:00 pm and arranged cremation of the dead body, which took reasonable time. He also gathered information from his two sons and then lodged the FIR at 1.30 am on 03.03.2010 within the shortest possible time. Specific statements regarding apprehension of accused Masum, disclosure of the names of his accomplices in an extrajudicial confession, mentioning of the names of PWs 2-3 as eyewitnesses to the occurrence and all other material particulars having been made in the FIR, it is also very difficult to say that there was any subsequent embellishment in the FIR or in the evidence of PWs 2-3.

The autopsy report (exhibits 9 series) shows that there was one penetrating injury on the left upper abdomen of the victim, which was directed upper and forward and another was

on the left forearm. Her left ventricle of heart was also found injured. Abdomen is commonly called the belly, which is the space between the thorax and pelvis. It is separated from chest by diaphragm and placed closely to the chest. If a knife with eight inches long blade is penetrated into the upper abdomen of a woman towards the upper direction, it would easily touch her left ventricle of heart and cause death within a very short time. The submission advanced by Mr. Hoque that it was impossible on the part of the condemned-prisoner to give a knife blow that would penetrate into the upper abdomen of the victim and touch the left ventricle of heart, is therefore, not tenable.

It appears from the confession made by the convict-appellant Shahin Shah alias Bulbul that at the time of commission of the occurrence his face was covered with a local towel (*MugQri*) and he took place behind a door. It can logically be presumed that he did it so that the inmates of the house could not identify him. Under the attending facts and circumstances, this part of his confession appears to be true. Whether his confession was made in accordance with the law, is a technical question of law, which we shall discuss later.

In *Mezanur Rahman and others vs State*, 2 BLC (AD) 27 the trial Court convicted 4 (four) accused under sections 302/34

of the Penal Code and sentenced 3 (three) of them to death and one to imprisonment for life. The High Court Division upheld the conviction, however, commuted the sentence of death to imprisonment for life. All the 4 (four) convicts jointly took the matter to the Appellate Division on the ground amongst others that during examination of the accused under section 342 of the Code, the confessional statements which were main evidence in the case, were not specifically mentioned and their attention was not drawn thereto and as such they were prejudiced. The Appellate Division did not accept the contention and summarily dismissed the leave petition. In so doing ATM Afzal, CJ observed:

“The learned Judges noticed that although the learned Sessions Judge did not mention anything about the confessional statements at the time of examination of the accused as aforesaid, they (the accused), in whose presence the evidence was recorded, in their reply stated that the confessions were obtained from them by the police by torture and inducement. They were thus aware of their confessional statements which they had claimed to be involuntary and thus the omission on the part of the learned Sessions Judge to draw their attention to the

confessional statements had neither caused any prejudice to them nor vitiated the trial. The learned Judges, therefore, found no cogent reason to send the case on remand for a proper examination of the accused under section 342 CrPC.”

In the present case, most of the accused were present at the time of recording the evidence of PW 4 Saber Hossain, who reiterated the extrajudicial confession of accused Masum; PWs 14 and 15 Md. Abu Bakar Siddique and Nila Karmaker, two Magistrates who recorded the confessions of the accused; PWs 24 and 26 A Barik and Md Shahjahan Ali, two Sub-Inspectors of Police who arrested the accused and asserted in their depositions that the accused were not tortured in police custody and PW 27 Md Khwja Golam Kibria, the Investigating Officer who produced them before the Magistrates for recording confessions. In such a position, the view taken by the Appellate Division in the case of Mezanur Rahman (*ibid*) would be applicable and non-mentioning of the confessions during their examinations under section 342 of the Code would not vitiate the trial.

In State vs Mozam alias Mozammel and others (*ibid*) the prosecution was based on judicial as well as extrajudicial

confessions made by accused Rojab Ali and Mohammad Ali. PWs 1, 2 and 4 were examined to prove the extrajudicial confessions, but their evidences were found inconsistent and contradictory, and that was also belied by the evidence of PW 5. According to the evidence of Investigating Officer (PW 13) none of them disclosed the names of the accused in their statements made under section 161 of the Code. Moreover, the judicial confessions made by the accused were found to be exculpatory in nature. Both the features of that case regarding confessions and extrajudicial confessions are totally absent in the instant case. Here the extrajudicial confession is supported by the circumstance of apprehension of its maker by the villagers while he was fleeing away immediately after commission of the dacoity and also by arrest of his five accomplices by Kamarkhand police, whose names he disclosed in his extrajudicial confession. The said Masum was also identified and mentioned in the evidence of PW 2, an important eyewitness in the case. From a careful reading of his confession it appears that PW 4 reproduced his (Masum's) extrajudicial confession partly in his language and partly in the exact words used by the accused. For better appreciation, the relevant part of his evidence is quoted below:

ଓGkvi bvgvxi ci ။ exq gmlR` wuk evoxi w` x hujj vg| ZLb
 vutvZ GKRb ywK cik w` x wox hvq| ။ exq wKQy ywK wox
 wox H ywKwux gmlRx i crx AvUK Kx| ZLb H ywKuv fx
 Kicx _vx| ZLb wvDëv crëv K_v ej x _vx| ZLb H ywKuv
 ex w Zvi bvg vngbj Bmj vg gvmg-Zvi m/wq eÜy wvM, gR` ,
 ej ej , mwgDj , gvmj mn Avi I `B GKRb| Avgiv mevB wgx i Kgv
 Wvx i evokx wKvZx Kix hvB Ges wvx Zviv mKgvxi ။
 Qj KvnZ Kx ej qv Dxl Kx|

In cross-examination he asserted:

oAvmvgxk aKivi ci wb gvi ai Kiv nq bvB|ö

Under the facts and circumstance of the present case, the above quoted extrajudicial confession, if gets support from other evidence, can be the basis of conviction. Besides, there is no earthly reason to disbelieve the evidence of PW 4.

In State vs Hasen Ali (*ibid*), the condemned-prisoner Hasen Ali was suspected in the FIR, but not made specifically accused. The informant (PW 1) lodged the FIR on hearing the fact from Habibur Rahman (PW 8), the only eyewitness to the occurrence who did not disclose any name to the informant. But at the time of deposition, he (PW 8) stated that while chasing the assailant he could recognize him. In cross-examination he

admitted that the night of occurrence was dark. There were other inconsistency and contradictions in his evidence and as such he was not considered to be a reliable witness. In that case the condemned-prisoner was being taken by the Chowkider in arrested condition, when he allegedly made extrajudicial confession. A Chowkider having the same power of arrest as that of a Police Officer, is also a Police Officer within the meaning of section 26 of the Evidence Act. An extrajudicial confession made before a Chowkider is, therefore, not admissible in law (reliance placed on *The Crown vs Rustom Ali Sikder*, 7 DLR 209). In the present case, the confessing accused Masum was apprehended by the villagers of the adjacent village within a very short time of commission of the dacoity, while he was fleeing away and made the extrajudicial confession before the police came. PW 4 Saber Hossain, in whose presence he made the extrajudicial confession, does not appear to be inclined to the informant party nor does he appear to be hostile to the accused. He reproduced the extrajudicial confession partly in the exact words of its maker and partly in his (PW 4&8) own language. His evidence is also clearly understandable. The case of *Hasen Ali* as cited by Mr. Mahbub Ali is thus distinguishable.

In *State vs Jatindra Kumar Sutradhar alias Dhana*, 20 DLR (1968) 526 this Division held that “*mere inability of a witness to give the exact words of the confession does not make it inadmissible in the evidence or valueless.*” The same view is reflected in *Krishna Nandan Prasad Verma vs The State*, AIR 1958 Patna 166. The case of State vs Jatindra Kumar Sutradhar alias Dhana (*ibid*) being an earlier decision of the same jurisdiction was not referred to in the subsequent cases of *Hasen Ali or Mozam alias Mozammel and others*.

Let us now examine whether the confession made by accused Masum before the Judicial Magistrate Nila Karmaker (PW 15) was true and voluntary and were recorded following the procedural law strictly, and if not what is the evidential value of the confession and its legal consequence. The accused Masum was apprehended by the villagers at about 8.30 pm on 02.03.2010 just after fifteen minutes of the occurrence and made the extrajudicial confession as discussed above. He was produced before the Court at 1:00 pm on the next day, where he made an inculpatory confession before the Judicial Magistrate without going on police remand. It appears from the prescribed form of confession that PW 15 by her own hand filled up the columns 1-5 with necessary information and column 6 with

affirmative statements of the accused. She recorded his confession at column 7 and put her signature at the foot. Accused Masum also put his signature there. Although she made a memorandum in her own hand at the foot of column 8, did not sign it and the memorandum also did not contain all statements as provided in section 164 (3) of the Code regarding her satisfaction about the voluntariness and truthfulness of the confession. But in her deposition recorded on 19.01.2012 she made negative statements about the queries towards her satisfaction. Since the evidence was made on oath, it would prevail in case of inconsistency between her evidence and prescribed form of confession.

The confessions of 4 (four) other co-accused, namely, Md. Riku Islam, Shahin Shah Bulbul, Shahidul Islam alias Sohag and Ilias Ahmed alias Masud were recorded by the same Magistrate on 23.03.2010 after a longer custody with the same mistakes.

PW 14 Abu Bakar Siddique, another judicial Magistrate who recorded the confession of the condemned-prisoner Abdul Mazid deposed in the same confusing manner and recorded the confessions with the same procedural mistakes.

In *State vs Babul Miah*, 63 DLR (AD) 10, S K Sinha, J

(as his lordship was then) speaking for the Court observed:

It is a mandatory requirement that after recording a confessional statement the recording Magistrate is required to make a memorandum to the confession containing a clause to the effect that he had warned the accused that he was not bound to make a confession, that if he makes a confession, it would be used against him, that the statement was true and voluntary, that it was recorded as per version of the maker and that it was read over to the maker after his statement was recorded which was the true and correct version and it contained a full and true account of statement made by the maker. Such a record is conclusive, in the absence of anything to the contrary, as to the fact that such warning was given before the confession was recorded.

The act of recording confession is a very solemn act and in discharging his duties, the Magistrate must take care to see that the requirements of sub-section (2) of section 164 are fully satisfied. It would, of course, be necessary in every case to put question prescribed by the High Court Division circulars. No element of casualness

should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary. The provisions of sub-section (3) of section 164 is mandatory and therefore he is required to fill up column 7 of the form of recording confession which is a column for recording a brief statement of the Magistrate's reason for believing that the statement was voluntarily made. The question or questions, whatever the form, must be designed to show whether the accused is making the statement voluntarily. The Magistrate should be fully satisfied that the confessional statement is in fact and in substance voluntary....ö (paragraphs 14 and 15)

All the queries and cautions as mentioned in the above quoted decision of the Appellate Division having not been made and taken in making the memorandum at the foot of column 8 and no memorandum having been made at the foot of column 7 of the prescribed form of confession, it cannot be said to have been recorded in accordance with the law. In such a situation, although the confessions purportedly made under section 164 of the Code by the 6 (six) accused appear to be true

under the attending facts and circumstances, it cannot be the sole basis of conviction. The confessions, however, can be used to lend support to other evidence available on record.

Earlier in a similar situation we took the same view in our judgment passed in Death Reference No. 60 of 2011 (State vs Faizul Islam). It would be suitable to quote the relevant passage, which runs as follows:

oir *Although the confession made by the accused appears to be true in view of the way of narration of facts and natural description of the events, and its careful reading with the evidence of PWs 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 18 and 19, it having not been recorded in accordance with the mandatory provisions of law cannot be the basis of conviction against its maker. But being a true confession signed by the accused and affirmed on oath by the recording Magistrate and also adduced in evidence by marking as an exhibit without any objection, it can be considered for lending support to the substantive evidence either direct or circumstantialí .ö*

(emphasis supplied)

The conviction of the appellants No.1-6 in Criminal Appeal No.2895 of 2012 and that of the non-appealing

condemned-convict Md. Samiul Islam alias Sami are logically based on direct evidence of PWs 2-3 read with the evidence of PWs 1, 5-11, 16-22 and 24-26; the extrajudicial confession made by the convict-appellant Mominul Islam alias Masum as reproduced in the evidence of PW 4, and the circumstances of his apprehension by the villagers just after fifteen minutes of the occurrence and arrest of appellants No.1 and 3-6 by Kamarkhand police after two hours or thereabout, recovery of one knife from appellant No.3 Shaidul Islam alias Sohag. In view of the above quoted decision passed by this bench in Death Reference No.60 of 2011 as well as the merit of the instant case, we do not find anything wrong in their conviction.

On a further sifting of evidence, it appears that there is nothing on record against appellant No.7 Md. Palash Ali alias Palash except the confessions of the co-accused. His name did not appear in the extrajudicial confession of co-accused Masum. We also find that the name of convict-appellant Md. Shafayet Alam alias Ishan did not appear in the FIR. He was included in the charge sheet only on the basis of confessions made by the co-accused, evidential value of which, we have already discussed. His name did not appear in the extrajudicial confession or in the Register of Khan Hotel or in the evidence

of its Manager (PW 5). It is a well settled proposition of law that an accused cannot be convicted on the basis of confession of a co-accused without any corroborative evidence. The conviction of the convict-appellants Md. Palash Ali alias Palash and Md. Shafayet Alam alias Ishan is, therefore, not sustainable in law.

The offence under section 396 of the Penal Code is actually a combination of two offences, namely, dacoity under section 395 and murder under section 302 of the Code. The offence of dacoity by default is an offence to be committed conjointly and when it is proved against one member of the dacoits' team, automatically it is proved against the other, if his participation is proved in any manner whatsoever. But in case of murder it is not an offence to be committed conjointly always. It depends on the manner of occurrence. Sometimes it may be committed conjointly and sometimes it may be committed individually. In commission of an offence of dacoity, if a member of the team commits the offence of murder, the liability so far it relates to murder will not automatically attract all the members. Here the question of individual culpability in an offence under section 396 of the Penal Code comes into play. Where the victim is unprotected

and defenceless and where she/he is violent and aggressive, the culpability of offence would also be different. It thus differs from one fact to another.

In *Akbar Ali Lalu alias Roni vs State*, 66 DLR 134 Moynul Islam Chowdhury, J speaking for the Court observed:

As there are three options in respect of awarding of sentence in section 396 of the Penal Code, it lies at the discretion of the Court to award an appropriate sentence to each of the accused, regard being had to his individual culpability and role in the commission of the offence, though dacoity is a conjoint offence. The measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim.

In the instant case, it appears that the inmates of the house of occurrence raised alarm and the victim caught hold of two dacoits. In order to make themselves free from her clutch, condemned-prisoner Mazid had inflicted injury on her upper abdomen, which caused her unfortunate death and the condemned-convict Sami inflicted another injury of simple nature on her elbow. The other accused had no individual role in her murder. The convict-appellants are young men of tender

age having no criminal background. Their actions and activities appear to be adventurous and they appear to be fully amateurs. None of them are hardened criminals. These circumstances may lessen the culpability of offence on their part. In a case like the present one, purpose of sentence should be corrective, not that much punitive or revengive. The condemned-prisoner Md. Abdul Mazid is in prison for more than 8 (eight) years and in death row for more than 6 (six) years. The other appellants were also in prison for a considerable long time.

Under the above, we are inclined to take a lenient view towards the convict-appellants as well as the non-appealing condemned-convict by commuting their sentence to a minimum limit. But since the fatal knife blow on a sensitive organ of the victim's body was inflicted by the condemned-prisoner Md. Abdul Mazid, we do not have any scope to commute his sentence to lesser than imprisonment for life.

Accordingly, the death reference is rejected. The sentence of death awarded upon the condemned-prisoner Abdul Mazid is commuted to imprisonment for life. The sentence of death awarded on the condemned-convict Md. Samiul Islam (absconding) is also commuted to rigorous imprisonment for 10 (ten) years. Criminal Appeal No.2895 of 2012 is allowed in part

and Criminal Appeal No. 2634 of 2012 is allowed. The impugned judgment and order dated 17.04.2012 passed by the Druto Bichar Tribunal, Rajshahi in Druto Bichar Tribunal Case No.04 of 2010 arising out of Ullapara Police Station Case No.03 dated 03.03.2010 corresponding to G R No. 47 of 2010 so far it relates to conviction and sentence of Md. Palash Ali alias Palash and Md. Safayet Alam alias Ishan is set aside and they are acquitted of the charge leveled against them. The sentence of imprisonment for life awarded upon the convictó appellants Md. Mominul Islam alias Masum, Md. Shahidul Islam alias Sohag, Md. Ilias Ahmed alias Masud, Md. Shahin Shah alias Bulbul and Md. Riku Islam alias Shakib is reduced to the term of imprisonment, which they have already served out. They are discharged from their bail bonds. The impugned judgment and order is modified to that effect. Jail Appeal No.105 of 2012 is accordingly disposed of.

Send down the record.

Bhishmadev Chakrabortty, J:

I agree.