

Netrakona.

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)**

Present:

**Mr. Justice Syed Md. Ziaul Karim
And**

**Mr. Justice K.M. Emrul Kayesh
Death Reference No. 149 of 2017**

The State

-Versus-

Seema Sarker and another,

----- Condemned-Prisoners.

With

Jail Appeal No. 454 of 2017

Seema Sarker

----- Condemned-prisoner-appellant.

-Versus-

The State,

----- Respondent.

with

Jail Appeal No. 455 of 2017

Alamgir

----- Condemned-prisoner-appellant.

-Versus-

The State,

----- Respondent.

with

Criminal Appeal No. 12707 of 2017

Seema Sarker

----- convict-appellant.

-Versus-

The State,

----- Respondent

Mr. Md. Afzal H. Khan, Advocate

. . .For the convict-appellant.

Criminal Appeal No. 14501 of 2017

Md. Alamgir

----- convict-appellant.

-Versus-

The State,

----- Respondent

Mr. Md. Afzal H. Khan, Advocate

. . .For the convict-appellant.

Mr. Mohammad Monirul Islam, Deputy-Attorney-General with

Mr. Robiul Islam, Assistant-Attorney-General,

Ms. Ayesha Flora, Assistant-Attorney-General

Mr. Md. Jahir Ahmed, Assistant-Attorney-General
and

Ms. Belgish Nafisa Hoque, Assistant-Attorney-General

---- For the State.

**Heard on. 10.12.2023, 12.12.2023,
17.12.2023, 18.12.2023, 02.01.2024,
08.01.2024, 09.01.2024, 10.01.2024**

and

Judgment delivered on: 16.01.2024.

K.M. Emrul Kayesh, J:

- (1) This Death Reference under section 374 of the Code of Criminal Procedure (hereinafter referred to as Code) has been submitted by the learned Sessions Judge, Netrakona for confirmation of the conviction and sentence of Death imposed upon the condemned prisoners namely (1) Seema Sarker, wife of late Sanjoy alias Sanju Sarker, daughter of

Somendra Sarker and (2) Alamgir, son of Fazul Haque in Sessions Case No. 324 of 2012 arising out of Durgapur Police Station Case No. 11 dated 20.01.2012, corresponding to G.R. Case No. 11(2)2012 under sections 302 and 34 of the Penal Code.

(2) By the self-same judgment the learned Sessions Judge, Netrakona another absconding accused Sohail Rana acquitted from the charge levelled under sections 302 and 34 of the Penal Code.

(3) By the above Death Reference, Appeals and Jail appeals the condemned-prisoners have challenged the legality and propriety of the judgment and order of conviction and sentence dated 07.11.2017 passed by the learned Sessions Judge, Netrakona in Sessions Case No. 324 of 2012, convicting the condemned-prisoners namely (1) Seema

Sarker, wife of late Sanjoy alias Sanju Sarker, daughter of Somendra Sarker and (2) Alamgir, son of Fazul Haque, under sections 302 and 34 of the Penal Code and sentencing them to death and also to pay a fine of Tk. 20,000/- (twenty thousand) each.

(4) The death reference and the above appeals and Jail Appeals having arisen out of a common judgment dated 07.11.2017, in Sessions Case No. 324 of 2012, these have been heard together and are being disposed of by a single judgment.

(5) The prosecution case as projected in the First Information Report (hereinafter referred to as FIR) and unfurled during the trial, in short, is that, on 20.01.2012 from 12.00 hours to 5.00 in the morning someone killed Sanjoy at any time in his house and left the dead body in the dried pond of Bhojan Master to the south-east of the house of

Dulal. At 7.00 in the morning Sumon informed his uncle (Kaka) PW-1 Rakhal Chandra Sarkar about the occurrence and after hearing the occurrence, he went to the place of occurrence and found a gathering of people. Local Commissioner Akram Hossain informed Durgapur Police Station, whereupon police came to the place of occurrence and took the Dead body after holding inquest report over the body of the deceased in his presence. Going to the house of his brother deceased Sanjoy found the shoes of his brother lying near the door and stool and urine in several parts of the house. The wife of his brother Seema Sarker was lying on the bed and accused Alamgir was sitting beside her. Alamgir and Soheli Rana used to live in the adjacent room of the deceased as tenants. The illicit relation of Seema with the accused Alamgir, came into

notice of his brother for which he cautioned her. Accused Seema filed false case against his brother. His brother had tea stall where he worked and in his absence from his house accused Alamgir and Sohail Rana engaged in illicit relation with Seema Sarker consequent to their illicit relation accused Alamgir and Sohail Rana killed his brother on such occurrence he lodged First Information Report with Durgapur Police Station upon such FIR Durgapur Police Station Case No. 11(1)2012 was started.

- (6) After lodging of the FIR the officer-in-charge of Durgapur Police Station entrusted to one Sub-inspector of police Md. Amir Hossain to hold the investigation of this case. On receiving the responsibility to hold investigation he visited the place of occurrence and prepared sketch map and index, and examined the witnesses under

section 161 of the Code. After holding investigation the investigating officer submitted charge sheet against the condemned-prisoners and another absolved accused Soheli Rana under sections 302 and 34 of the Penal Code.

- (7) Eventually the case was transmitted to the learned Sessions Judge, Netrakona, for trial and disposal, when it was registered as Sessions Case being No. 324 of 2012. Thereafter, the learned Sessions Judge, Netrakona framed charges against the condemned-prisoners and another absolved accused Soheli Rana under sections 302 and 34 of the Penal Code and it was explained and read over to the accused present on dock Seema Sarker and Alamgir to which they pleaded not guilty and claimed to be tried. As the accused Soheli Rana was absconding at the time of framing of charge.

So, the charge was not read over and explained to the absconding accused Sohel Rana.

(8) In course of trial the prosecution has examined as many as 17 witnesses out of 24 charge sheet named witnesses to bring home charge against the accused persons.

(9) After closure of the evidence of the prosecution the condemned-prisoners on dock were examined under section 342 of the Code when the trial court drew their attention to the incriminating materials appearing against them one by one and they expressed their innocence repeatedly and led no evidence as defence. But the accused Sohel Rana could not be examined under section 342 of the Code as he was in absconsion. Moreover, the absolved accused Sohel Rana was represented by the state defence lawyer during trial of the case.

(10) The defence case as it transpires from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication, it was further divulged in defence that the informant and his nephew Sumon might have killed the deceased to take over control of business and tea stall of the deceased and they implicated the accused persons falsely to save them from the case.

(11) After plenary trial of the case the learned Sessions Judge, Netrakona came to a conclusion convicted and sentenced the condemned-prisoners as mentioned above holding as under:

(a) The prosecution successfully proved the charge by producing strong circumstantial evidences and materials on record.

(b) The evidences led against the condemned-prisoners were consistent, uniform and corroborative in nature.

(12) Feeling disgruntled by and dissatisfied with the impugned Judgment and order of conviction and sentence, the condemned prisoners preferred the instant Jail appeals and regular appeals before this court.

(13) Mr. Mohammad Monirul Islam, the learned Deputy-Attorney-General assisted by Mr. Robiul Islam, Mst. Ayesha Flora, Mr. Md. Jahir Ahmed, and Ms. Belgish Nafisa Hoque, the learned Assistant-Attorney-Generals appearing for the state supports the Death reference drawing our attention to the FIR, charge sheet, evidences and materials on record. They further submits that the learned Sessions Judge has rightly convicted and sentenced of the condemned-prisoners

relying upon strong circumstantial evidences and materials on record. Therefore, the trial court came to a definite findings that all the condemned-prisoners participated in committing murder of the deceased on the date of occurrence. The prosecution has categorically established the manner of the occurrence, time, place by giving cogent, trustworthy and clinching evidences against the condemned-prisoners. They also adds that the prosecution successfully proved the charge-levelled beyond reasonable doubt against the condemned-prisoners. They candidly submit that there was no eye witness of this case. Even the dead body of the deceased was not recovered from inside the house of deceased. But the deceased used to return back in his house at night from his tea stall. On the date of occurrence the deceased came to his house. Since then

condemned-prisoners have sought for impeachment of the impugned judgment culling out points as follows:

- (a) The case is of no evidence and there was no eye witness of the case and as such the impugned judgment is not sustainable in law.
- (b) The prosecution has completely failed to prove the chain of circumstances to connect the condemned-prisoners without breaking link with circumstances by giving cogent, trustworthy and clinching of evidences, thereby the impugned Judgment is not countenance in law.
- (c) The star and vital witness of Shamim in the charge sheet was not examined in the court which cast a serious doubt over the prosecution case, therefore the

impugned judgment is liable to be set aside.

- (d) The learned court during trial of the case the condemned-prisoners were not examined properly as required under section 342 of the Code of Criminal Procedure drawing attention of the incriminating materials appearing against condemned-prisoners and as such the impugned judgment is not maintainable in law.
- (e) It has further contended that the condemned-prisoner Seema was not involved with murder of the deceased because star witness Shamim was not examined in court without offering any plausible explanation on the side of the prosecution. In spite of that the learned Sessions Judge came to a positive conclusion against the condemned-

-Vs-

Ainul Haque

. . . . Respondent
reported in 9BLC (AD) at
page-529,

(II) Zahirul Islam @ Depu (Md)

. . . Appellant

-Vs-

The State

. . . . Respondents
Reported in 20BLC (AD)
(2015) at page 129

(III) State

. . . Appellant

-Vs-

Monu Miah and others

. . . . Respondents
Reported in 54DLR (AD)
(2002) at page 60.

(19) To appreciate the evidences on record and the submissions of the learned Advocates for both the parties, we have to examine the evidences adduced by the prosecution and other materials on record as under:

(20) PW-1 Rakhal Chandra Sarkar, the informant has deposed that on 20.01.2012 from 12.00 hours at night to 5.00 in the morning someone killed Sanjay at any time in his house and left the dead body in the dry pond

of Bhajan Master to the South-East side of the house of Dulal. At 7.00 in the morning his nephew Sumon informed him the occurrence and hearing of the occurrence he went to the place of occurrence and found a gathering of people. Local Commissioner Akram Hossain informed the Police who came and took away the dead body after holding inquest over it in his presence. Going to the house of his brother deceased Sanjay, he found the shoes of his brother lying near the door and stool and urine in several parts of the house. The wife of his brother accused Seema was lying on the bed and accused Alamgir was sitting beside her. Alamgir and Sohail Rana used to live in the adjacent room of the deceased as tenants. The illicit relation of Seema with accused Alamgir came into notice of his brother for which he cautioned her. Accused Seema

filed false cases against his brother for such cautionary words. His brother had tea stall where he used to work and in his absence from his house accused Alamgir and Sohail Rana engaged in illicit relation with Seema. Consequent to their illicit relation accused Alamgir and Sohail Rana killed his brother. On such occurrence he lodged F.I.R. with Durgapur Police Station. He has proved the inquest report which has been marked as Ext. 1 and his signature thereon Ext. 1/1, the FIR as Ext. -2, and his signature thereon as ext.2/1.

(21) In cross examination he has stated that the case has been recorded at around 7.00 am on 20.01.2012 at Durgapur Police Station according to his statements. Deceased Sanjoy was his full brother. They are three brothers after death of another brother Nibaran, he and another brother lives in

their village home at Ramgar, 7/8 miles away from the house of Sanjoy and deceased Sanjoy used to live at Sadhupara under Durgapur at the place of occurrence. Sumon son of his elder brother informed him about the occurrence. Sumon was an employee in the tea stall of Sanjoy. He found a pair of shoes of Sanjoy in the house and stool outside the house. Nibaran had a dispute with him and his another brother over the ownership of the house. The part of the house of Nabaran is under lock and key. Sumon is the son of his brother Narayan. Sumon does not live in the house of Sanjoy. He lives in the tea stall and after the death of Sanjay, Sumon is enjoying earnings of the tea stall as accused Seema lives at the residence of her father with her three children. She takes nothing from the earning of the said tea stall. Seema very often used

to live in the house of her father and filed cases against Sanjoy to live separate, but she later got compromised.

He denied a suggestion that Seema had no sexual relation with Alamgir or Seema could not evict Alamgir due to refusal of Sanjoy or to grab the property of Sanjay, or they killed Sanjoy by hired goons while returning home from tea stall or they falsely implicated the accused with the case.

(22) PW-2, Bakul Rani Dey stated that Sanjoy was her brother. On 20.01.2012 at around 5.00 a.m. Jharna called her and asked her to go the house of Sanjoy. Accordingly, she went to the residence of her brother Sanjay. She found accused Alamgir sitting holding Seema. Accused Seema started weeping seeing her. At the instance of Seema, she took Alamgir with her to look for Sanjoy, but did not find the dead body of Sanjoy. Later

her son found the dead body of Sanjoy on the bank of the pond in front of the house of Dulal Pal. Thereafter, she lost his sense.

(23) In cross examination she stated that Seema called Jharna. The pond locates 30 cubits away from the house of Sanjoy.

She denied a suggestion that she did not see accused Alamgir holding Seema or Alamgir had no relation with Seema.

(24) PW-3, Sumon Sarker stated in his deposition that his Kaki (Seema) informed him at around 5.30 a.m. on 20.01.2012 that his Kaka went out from home at around 3.30 am with Tk. 10,000/- (ten thousand) in cash with him but did not return. Going to the tea stall his pishi (Bakul Rani) also informed him the same thing and left the tea stall. Later his Kaki Seema informed him the death news of his Kaka through mobile phone. Hearing the news he went home and

therefrom to the dead body and found the dead body lying on the bank of a pond contiguous to the house of Modan Pal, around 35 cubits away from the house of the deceased. Going to the house of his Kaki he found accused Alamgir sitting holding his Kaki. Police interrogated him. He signed the seizure list recovery of Mobile Phone. Tupi (an woolen cap), Sandal, Memory Card, Sim Card and a packet marked the seizure list as ext. 3, 3/1, 4, 4/1, 5 and 5/1 respectively.

(25) In his cross-examination stated that the deceased Sanjoy was his Kaka and he worked in the tea stall of his Kaka. He was of 12 years old when Sanjoy was killed. Rakhal gave Sanjoy a motorcycle on rent and Sanjoy used to drive the motorcycle. Now he runs the tea stall and the wife of informant Rakhal receives earning of the tea stall. Police took many of them including his

aunty (Seema) to police station but later released him. He does not know where the children of Sanjoy would live. Seema lives at the house of her father.

(26) In his cross-examination stated that he cannot say what items were seized. However, shoe, urna (scarf), stool was seized from the house of Sanjoy. He does not know who signed the seizure-list. Several men were present there but he cannot remember their names. He did not see when the goods were seized.

He denied a suggestion that he did not see accused Alamgir at the house of Seema or his father and Kaka killed Sanjoy by some others and they became beneficiaries of the death of Sanjoy.

(27) PW-4 Nayeb Ali Master has stated that he knows the informant and the accused. The occurrence took place at any time after

12.00 at night on 20.01.2012 at Sadhupara. They found the dead body of Sanjoy on the bank of a pond. He did not see who killed the deceased. Accused Seema is wife of deceased Sanjoy. Sanjoy and Seema used to live in the house. He heard that accused Alamgir killed Sanjoy. Police Seized an Urna(scarf) from the bed of Sanjoy and a photo in his presence. Accused Alamgir lived in the adjacent room of Sanjoy. The police found some papers of cases of Sanjoy and Seema breaking open the trunk of Alamgir on the bed of his room and seized the same along with the papers of destiny in his presence by preparing a seizure-list. He proved the seizure-list and his signature thereon marked as Ext. 6, 6/1, 7 and 7/1 respectively.

In cross-examination he has stated that he does not know where and as to how Sanjoy was killed.

(28) PW-5 Joy Chandra Dey deposed that deceased Sanjoy was his maternal uncle (mama). Jharna Rani called him and his mother at around 5.00-5.30 a.m. and told him that somebody called his maternal uncle (mama) through mobile phone since then he was missing. His mother Bakul Rani Dey took accused Alamgir to the bank of the pond but found nothing. Then, he went there and found an ear cap on the road and upon found a man lying on his chest in the corner of the pond, he raised alarm and returned towards home. Hearing his shouting all appeared and found his maternal uncle (mama) Sanjoy Sarker lying dead. Later Member, Chairman appeared and informed the police. Police took away

the dead body. He came to know that the accused killed his maternal uncle (mama) out of enmity.

(29) In cross-examination he has stated that informant Rakhal is also his maternal uncle (mama). Sumon is the son of Narayan, elder brother of the informant. Sanjoy had a tea stall and Sanjoy and Sumon used to run the tea stall. After the death of Sanjoy his wife takes nothing from the said tea stall. Sumon also runs the same.

(30) PW-6 Jayanti Rani Dey deposed that deceased Sanjoy was his brother-in-law (debor). The occurrence took place on 20.01.2012 at night. They received the information in the morning that Sanjoy was killed and his dead body left on the road near a pond. Receiving the information Police appeared and recovered the dead body. She heard that Sanjoy had a dispute

with his wife centering on having her illegitimate child and, therefore, Sanjoy was killed. On 20.01.2012 police seized a memory card, Sim card, a condom from the room of accused Alamgir and prepared a seizure list with her thumb impression.

- (31) In cross-examination she has stated that accused Seema lives in the house of her father after filing the cases. But on the date of occurrence she was at the house of Sanjoy. Seema has three children but the dispute arose for giving birth of the 1st child. She has denied a suggestion that the character of Seema is good and taking the chance of enmity of Sanjoy and Seema they have foisted a false case against the accused and took control of the property of Sanjoy.
- (32) PW-7 Dr. Neelutpaul Talukder stated that as the R.M.O. on Netrakona Sadar Hospital, he received the dead body of Sanjoy and held

post mortem examination over the dead body on 21.01.2012 and found the following injuries:

(1) One ecchymosis 01"x01" on anterior surface of upper part of neck 1/2" right lateral to the middle.

(2) One diffuse reddish swelling with two scratch marks 01/4" long each on upper left lateral side of chin.

Mouth closed, eyes closed, with congested and ocdimatous conjunctiva with subconjunctival haemorrhage. Ears-bleeding per both ears.

Deep dissection: lungs found highly congested. All other internal organs found congested.

“Opinion: the cause of death of the deceased was asphyxia resulting from throttling which was ante-mortem and homicidal in nature.”

He has prepared the report of post-mortem

by forming a three member committee and put his signature on the report.

He proved the post-mortem examination report marked as Ext.8 and his signature thereon Ext. 8/1.

(33) In his cross-examination stated that on 21.01.2012 at around 11.30 a.m. the post-mortem examination was performed by the three member board.

(34) P.W-8, Jharna Rani deposed that on 20.01.2012 at night accused Seema Sarker Rani asked her to call Bakul Rani. He got slept calling Bakul. On the following morning, she heard that the dead body of Sanjoy, husband of Seema Rani Sarker was found near the pond of Bhajan Master. She found quarrel between the husband and wife.

(35) In cross-examination she has stated that she is the neighbour of the informant. The informant Rakhal and Sanjoy are two brothers. She cannot say at what time of night Seema called her. The dead body of Sanjoy was found at 7.00 in the morning. She just heard.

(36) P.W-9, Pratima Karmakar has stated that she is the neighbour of Sanjoy and his brother, the informant. She came to know on the next day that Sanjoy was killed at around 12.00-5.00 at night. She heard that Seema used to persecute her husband Sanjoy did not cook regularly. Hearing shouting of people she found the dead body of Sanjoy going to the bank of the pond. She did not hear as to how and who killed the deceased Sanjoy.

(37) In cross-examination she has stated that Sanjoy and Seema had conjugal life for around 10 years and they have 3 children.

She denied a suggestion that they had no dispute or nothing happened on the bank of the pond.

(38) P.W.10, Bina Rani has stated in her deposition that informant Rakhal is the brother of her sister-in-law (Jaa). The occurrence took place on 20-01-2012 at deep night. At around 5.00 in the morning her sister-in-law (Jaa) Bakul Rani started crying saying that Seema has killed her husband Sanjoy. The dead body of Sanjoy was found on the bank of pond of Bhajan master. Seema used to quarrel with her husband Sanjoy.

(39) In cross-examination she has stated that informant Rakhal and Sumon lives in the house of Sanjoy. Accused Seema had quarrel with Bakul Rani as well.

She denied a suggestion that Seema had no quarrel with her husband Sanjoy.

(40) P.W-11 Biltu Sarkar has deposed that he knows the informant, deceased Sanjoy and the accused persons. The occurrence took place on 20-01-2012 at night. Hearing shouting in the next morning he went to the place of occurrence and found the people saying that accused Seema killed her husband. The dead body was found in the bank of the pond of Bhajan Master. The quarrel took place between accused Seema and Sanjoy.

(41) In his cross-examination stated that Seema and Sanjoy have three children.

Informant Rakhal and his nephew lives in the house of Sanjoy. He does not know who killed the Sanjoy.

(42) P.W-12 Dulal Pal has deposed that he knows the informant, deceased Sanjoy and the accused. Deceased Sanjoy is the husband of accused Seema Rani Sarker. The occurrence took place on 20-01-2012 at night. He found the dead body of Sanjoy on the bank of the pond of Bhajan Master at around 7.00 in the morning coming out of the house hearing shouting. He left the place seeing the dead body. He found the people saying Sanjoy was killed by his wife Seema Rani Sarker.

In cross he has stated that the local people were saying that Seema killed Sanjoy. Rakhal, bother of Sanjay, and his

nephew Sumon would look after the house of the deceased.

(43) P.W-13 Nellima Sarker has deposed that she knows the informant Rakhal, deceased Sanjoy and accused Seema. The occurrence took place at anytime within the period of 12.00-5.00 at night on 20-01-2012. Seema used to engage in quarrel with her husband Sanjoy as she did not like her husband. Following a quarrel Seema left Sanjoy and lived at the house of her father for 6 years. Seema had two months pregnancy and her husband did not own the pregnancy of Seema and the quarrel took place on this issue. Thereafter, they reached reconciliation and they got two children. The quarrel took place within this period also. Seema agreed to rent the house to

none other than the bachelor. The dead body of Sanjoy was found on the bank of the pond of Bhajan Master after the night of the occurrence. The local people say Seema Rani Sarker killed Sanjoy for these reasons. Accused Seema used to chase her husband holding lathi, Jharu (sweeping broom).

(44) In cross-examination she has stated that informant Rakhal is her husband, accused Seema is her sister-in-law (Jaa) and deceased Sanjoy was her brother-in-law (debor). During the time of marriage Seema had 2 months pregnancy and she gave birth a child in 8 months after her pregnancy. For this reason Sanjoy had caused suspicion over the character of Seema. Sanjoy married Seema 10 years prior to the murder of Sanjoy. Accused

Seema used to pick up quarrel with him as well and she would spread many things involving her character and Sanjoy. They live in the house of Sanjoy in their part. Sumon runs the tea stall on rent.

She denied a suggestion that her husband and Sumon killed Sanjoy to grab his property and thereafter falsely implicated the accused with this case.

(45) P.W-14 Bani Chakraborti has deposed that she knows the informant, deceased and accused Seema. She does not know the name of the two other male accused. The occurrence took place at anytime within the period of 12.00-5.00 am at night on 20.01.2012. They found marks of stool in the house of Sanjay Sarkar @ Sanju. The dead body of Sanjoy was

found on the bank of the pond of Dulal. She was woman Councilor of the Municipality. She entered the house of the deceased and found a scarf (urna). She also found vile smell of stool there. She found Seema, wife of the deceased, chewing betel leaf having taken a bath. She had quarrel with the accused since the beginning of their marriage. The deceased wanted to rent their house to family but his wife wanted to rent to bachelor. Police seized a wet mattress from the cot of the deceased and seized the same preparing a seizure-list with her signature. She proved the seizure-list which has been marked as Ext.-9 and her signature thereon as Ext.-9/1.

(46) In cross-examination she has stated that it requires 10 minutes to reach the house

of the deceased on foot from her house. She heard about the happening of quarrel between the deceased and the accused. No quarrel took place in her presence. She heard about the happening of quarrel centering on renting the house either to family or bachelor. Hearing the incidence of killing of Sanjoy, she went to the place of occurrence and she came to know that his wife Seema killed Sanjoy. She went to house of the accused at first and found vermilion on the forehead of the accused. Later she went to the bank of the pond of Bhajan Master. She also found mark of stool near the kitchen. Seema has been affected by the death of Sanjoy. The house of Sanjoy is under lock and key. She denied that she did not hear about the killing of Sanjoy by his wife or the

persons who enjoy the property of Sanjoy have killed him.

(47) P.W-15 Chandha Chakraborty has deposed that she knows the informant, deceased Sanjoy and accused Seema. Accused Seema is the wife of Sanjoy. She used to live in the house of Sanjoy as tenant $1 \frac{1}{2}$ years before the killing of Sanjoy. Sanjoy was killed on 20.01.2012 at deep night. On the next day she heard that Seema killed her husband and left him on the bank of a pond. She did not go to see the dead body of Sanjoy. She visited the house of the deceased after cremation of Sanjoy. She found mark of stool in the house and the bed of Sanjoy was wet. She found the wife of Sanjoy chewing betel leaf wearing vermilion on

her forehead. They used to pick up quarrel centering on renting their house either to family or bachelor.

(48) In cross-examination she has stated that she used to live in the house on rent with her daughter Toma. She visited the house of Sanjoy on the next day of recovery of his dead body and found stool outside the house and vile smell was coming out from inside the house.

She denied that she did not see stool or Seema did not kill her husband or accused Seema drove them from her house vilifying her and her daughter's character were not good.

(49) P.W-16, Poresh Chandra Dutta has deposed that he knows the informant, accused Seema and deceased Sanjoy Sarker. On 20.01.2012 Sanjoy was killed

at night. He went to see his dead body in the morning hearing that the dead body was found on the bank of the pond of Bhajan Master. After a while he came to know that his wife Seema Rani Sarker killed Sanjoy and Police took her to police Station.

(50) In cross-examination he has stated that after the arrest he came to know that Seema killed her husband. He did not hear it earlier.

(51) P.W-17, Inspector Amir Hossain, Investigating Officer of the case has deposed that while working as Sub-inspector in the Durgapur Police Station, he visited the place of occurrence receiving the information of the occurrence, held inquest report over the dead body of the deceased, sent the dead

body for holding post-mortem examination. By this time he was appointed as Investigating Officer and being appointed Investigating Officer, he prepared sketch-map, index, recorded the statements of the witnesses under section 161 of the Code, seized the alamot, prepared seizure list thereof and collected the signatures of the witnesses and finally submitted charge-sheet against the accused upon finding prima-facie evidence against the accused. He has marked the sketch-map as Ext.10, his signature thereon as Ext.-10/1, the index as Ext.-11, and his signature thereon as Ext.-11/1, his signature on the inquest report as Ext.-2/2, his signatures on the seizure-lists as Exts.-3/2, 4/2, 5/2, 6/2, 7/2 another seizure-list prepared on

01.03.2012 as Ext.-12 and his signature thereon as Ext.-12/1.

(52) In cross-examination he has stated that he visited the place of occurrence on 20.01.2012 for the 1st time and held inquest report on the dead body of Sanjoy. He was not appointed as Investigating Officer at that time. He has marked as the place of occurrence as "Ka" which was the dry place in the north-eastern corner of the pond. The house of Dulal Pal stands to the north of the pond. The house of the deceased stands around 150 yards north to the place of occurrence. He seized the scarf (urna) from the cot (Khaat) of the accused on 20.01.2012. When he visited the place of occurrence for the 1st time he did not find the alamat scarf (urna). He seized it later

coming to know from the accused during her interrogation on remand. On 03.04.2012 he seized the papers of Family Suit No.12 of 2006 filed and finally disposed of between the deceased and the accused Seema. Accused Seema used to live in the house of both her father and husband. On the date of occurrence Seema was at the house of her husband. He arrested Seema from the house of the deceased. Sanjoy had a tea stall. Deceased Sanjoy and his nephew Sumon used to run the tea stall. During investigation he found the tea stall closed. He has denied a suggestion that Sumon and Rakhal being benefited with the murder of Sanjoy and have falsely implicated the accused persons.

(53) On recall he has marked the seized Sandal of Sanjoy, woolen ear cap, Mobile phone, 2 Sims, memory card of accused Soheli along with an urna, C.D., call list which has been marked as material Ext. I (series).

(54) In cross examination he has stated that he did not mention what talks took place between accused Seema and Soheli.

(55) This is in all evidences produced on behalf of the prosecution. We have categorized the witnesses for convenience of understanding of the case. PW-1 Rakhal Chandra Sarker is the brother of the deceased Sanjoy. PW-2 Bokul Rani Das is the sister of the deceased Sanjoy. PW-3 Sumon is the nephew of the deceased. PW-4 Nayeb Ali Master, is the neighbour of the deceased. PW-5 Joy

Chandra Dey is the nephew of the deceased. PW-6 Joyanti Rani Dey is the Bhabi of the deceased. PW-7 Doctor Nilutpol Talukder is the post mortem performing doctor. PW-8 Jhorna Rani is the neighbour of the informant, PW-9 Protima Karmakar is also the neighbour of the informant. PW-10 Bina Rani is the distant relative of the deceased, PW-11 Biltu Sarker is the neighbour of the informant. PW-12 Dulal Pal is the neighbour of the deceased. PW-13 Nilima Sarker is wife of the informant. PW-14 Bina Chokraborti is also the neighbour of the deceased. PW-15 Chandra Chokraborti is neighbour and also used to live of the house of deceased Sanjoy as tenant. PW-16, Poresh Chandra Dutta is the resident of the same village of

Sadhupara and PW-17 Sub-inspector Amir Hossain is the investigating officer of this case.

(56) Now the questions call for consideration as to how far the prosecution proved the charge levelled against the condemned-prisoners.

(57) Heard the submissions of the learned Advocates for both the parties and perused the evidences and materials on record.

(58) The principal arguments advanced by the learned Advocate for the condemned-prisoners that there was no eye witness of this case rather the case squarely rest upon circumstantial evidences and that the prosecution could not establish the case beyond reasonable doubt. We should address moot points raised by the learned Advocate for the accused by discussing evidence and materials on record.

(59) On a careful consideration of the prosecution evidences that there is no eye witness of this case. PW-1 Rakhal Chandra Sarker deposed that the deceased Sanjoy had been killed on 20.01.2012 between 12.00 at night to 5.00 in the morning by someone in his house Sadhupara under Durgapur Police Station. That the dead body of the deceased was found on a dry place in the north-eastern corner of a pond of Bhajan Master near the house of Dulal Pal on 20.01.2012 at around 5.30 am. On the date of occurrence the accused Seema and accused Alamgir was found in the house of the deceased in the morning on 20.01.2012. The case is admittedly husband killing case.

(60) Let us now examine whether the deceased Sanjoy was staying with his wife accused Seema in the same house at the night of the

date of occurrence or the deceased Sanjoy was killed in his house.

On the other hand the defence has given specific suggestion that Sanjoy was not killed by the accused persons rather he was killed on his way back home from his tea stall by some unidentified miscreants.

(61) PW-1 Rakhal Chandra Sarker as informant stated in his deposition that accused Seema had no good terms with her husband deceased Sanjoy. On receiving the news of death of his brother Sanjoy on 20.01.2012 at 7.00 am he went to the house of deceased at Sadhupara. When he found the accused Seema was lying in a bed and accused Alamgir was sitting by her side. He suspected that the accused Seema and accused Alamgir might have killed the deceased Sanjoy out of their deep extra marital relationship.

(62) PW-2 Bokul Rani Dey, PW-3 Sumon, PW-5 Joy Chandra Dey, PW-6 Joyanti Rani Dey, PW-8 Jhorna Rani, PW-9 Protima Karmakar, PW-10 Bina Rani stated with one voice that the accused Seema and accused Alamgir and Sohel Rana had extra marital relationship. Thereafter, they jointly killed the deceased Sanjoy at his residence and then dead body of Sanjoy fell in the place of occurrence at dead of night. It appears from minutely perusal of the evidences of relative of Sanjoy has not ascertained that the deceased had come to his house on the date of occurrence.

(63) Even, PW-17 investigating officer has not confirmed the presence of the deceased in his house on the date of occurrence. PW-3 Sumon in his cross-examination stated that he used to work in the tea stall of Sanjoy at Durgapur. But he did not mention in his

deposition that the deceased Sanjoy came to his house at Sadhupara from his tea stall. All the witnesses categorically stated that the accused Seema and accused Alamgir and Soheli Rana out of their extra marital relationship killed the deceased in his residence.

(64) PW-3 has clearly stated that his paternal aunt Bokul Rani came to his tea stall and informed him about missing the deceased Sanjoy from his house in the morning on 20.01.2012, which indicates that PW-3 was staying at the tea stall of Sanjoy.

PW-1, PW14 and PW-15 have stated that they went to the house of Sanjoy and found faeces inside of his house and outside of his house.

(65) PW-14 Bina Chakraborti stated in her deposition that she went to the house of deceased Sanjoy in the morning on

20.01.2012 at 7.00 am to 8.00 am and found stool inside the house of Sanjoy.

(66) In cross-examination she stated that she found stool nearby the kitchen of Sanjoy. She further stated that she found vermilion on the forehead of Seema.

(67) PW-15 Chandra Chakraborti stated that she was tenant under Sanjoy $1\frac{1}{2}$ years back from the date of occurrence. She further stated that she heard the accused Seema killed her husband Sanjoy and fell the dead body of the deceased Sanjoy on the bank of a pond. She further stated that she went to the house of Sanjoy having had his cremation, while she found the accused Seema was chewing betel leaf putting vermilion on her forehead.

(68) PW-3 Sumon clearly stated in his deposition that Kaki (Seema) was taken by the police from the house of deceased Sanjoy in the

early morning on 20.01.2012. Whereupon we have carefully scrutinized the post mortem report ext. 8 and 8/1 respectively. Wherein the doctor (PW-7) who performed the autopsy of the deceased stated that post mortem examination of the deceased was held on 21.01.2012 at 11.30 hours. Thereafter, the dead body of Sanjoy was handed over to his relative for performing cremation.

(69) PW-15 Chandra Chokraborty stated in her deposition that she went to the house of Sanjoy after his cremation. She further stated that she found the accused Seema wife of Sanjoy was chewing betel leaf putting vermilion on her forehead. But PW-15 was telling a lie in view of the evidence of PW-3. Because accused Seema was arrested by the police in the morning on 20.01.2012.

(70) It further appears from the record the accused Seema was arrested on 20.01.2012 and was produced her before the Magistrate on 21.01.2012.

(71) The learned Deputy Attorney General strongly submits that the deceased Sanjoy usually used to back his house at 12.00 hours regularly from his tea stall. But none of the prosecution witnesses stated that the deceased had returned back his house on the date of occurrence.

(72) PW-5 Joy Chandra Dey stated in his deposition that on 20.01.2012 at 5.00 am to 5.30 am Jharna Rani called him and his mother and requested them to meet with accused Seema. Bokul Rani was told that the deceased Sanjoy was missing from his house. Thereafter his mother Bokul Rani and accused Alamgir went out from the house of Sanjoy for searching him but could

not find him out, When he further went to search for his maternal uncle Sanjoy and he found an wollen ear cap lying on the road nearby the house of his maternal uncle whereupon he proceeded a little bit to the place of occurrence and found a dead body of Sanjoy on prone-condition in the place of occurrence. On screaming in the place of occurrence and from there he returned back to the house of Sanjoy. Local people rushed to the place of occurrence and found the dead body of Sanjoy.

(73) PW-1 testified that having heard the news of death of his brother Sanjoy he went to the place of occurrence and found a huge crowd. When local commissioner Akram Hossain informed the police for which the police of Durgapur police Station came to the place of occurrence and SI Amir Hossain prepared an inquest report over the cadaver of Sanjoy

and then he took the dead body of the deceased.

(74) PW-17 proved the inquest report and his signature thereon as ext. 2/2. Whereafter three members committee formed for performing post mortem examination over the dead body of Sanjoy.

(75) PW-7 doctor Nilutpol Talukder proved the post mortem report and his signature thereon ext. 8, 8/1 respectively. On scrutinization of ext. 8, wherein the post mortem performing doctor clearly opined that-

“In our opinion the cause of death of the deceased is asphyxia resulting from throttling which was ante-mortem and homicidal in nature”.

(76) It appears from the post mortem examination report ext. 8 that the death was

caused of the deceased from throttling. On a scrutiny of inquest report that (ext. 2/2) blood mixed froth was emitting from the mouth of the deceased. It further appears from minute reading to the inquest report blood was also oozing from the ear of the deceased also.

(77) PW-5 Joy Chandra Dey stated in his deposition that a wollen ear cap was recovered from the road which was belonging to deceased Sanjoy and one pair of Sandal was recovered from inside the room of deceased. Thereafter, the investigating officer PW-17 seized those articles by preparing a seizure list ext. 12, wherein those articles were seized by the production of Joy Chandra Dey. Which appears from the seizure list prepared on 20.01.2012 at 16.10 hours.

(78) PW-5 clearly stated that he got the cap of Sanjoy from the road while, he was looking for his maternal uncle. Thereafter, he produced it to the investigating officer. It reveals from a careful perusal of the seizure list prepared on 20.01.2012 that those alamats were not recovered by the investigating officer himself.

(79) It further appears from the evidence of prosecution that a mattress was seized from the house of the deceased Sanjoy, which was seized by the investigating officer preparing a seizure list on 29.02.2012. But the First Information Report was lodged on 20.01.2012 with Durgapur police station. The investigating officer ought to have seized the alamats very beginning of the investigation of this case, for showing credibility of his investigation.

(80) PW-1, PW-5 has deposed in court that they found faeces and wet mattress inside of the house of Sanjoy but the prosecution suspected the condemned-prisoners might have killed the deceased.

(81) PW-15 stated in her deposition that she found faeces near the kitchen of Sanjoy and then she came to know that the stool was the child of Seema Sarker.

(82) It appears from the inquest report ext. 2/2 that stool was found in the annus of the deceased but a lungi was recovered from wearing of the deceased then it was seized by the investigating officer preparing a seizure list on 20.01.2012. But no stool was besmirched on it. If the deceased would have killed inside of his house why stool was not besmirched with his lungi? Moreover, one woolen ear cap was recovered from the road which indicates if the deceased would have

been killed by the condemned-prisoners why they did not remove the wollen ear cap from his ear. It indicates that the deceased was not killed inside of his house. If it would have wore a woolen cap over the ear, then it would very natural to besmirch blood on the ear cap. But the cap was recovered without besmirching blood on it.

(83) Summary of the findings of conviction by the sessions Judge are as follows:

The accused Seema had rancorous relation with her husband. She had questionable character and had developed intimate relation with accused Alamgir. Sanjoy was living with her wife in the same room at the relevant night, Sandal was recovered from his room and woolen ear cap was recovered from a road near the house of Sanjoy. Stool was present in the room of the deceased of

Sanjoy. Seema did not take any step to file a case for killing of her husband Sanjoy.

(84) The learned Court below found complicity of the condemned-prisoners in the murder of deceased Sanjoy. We are to examine evidences on record in order to ascertain the legality of the observation made in the impugned Judgment and order of conviction and sentence and material on record couple with submissions of the learned Advocate for the condemned-prisoners.

(85) As regards the presence of the condemned-prisoner Seema in the place of occurrence at the relevant time death of her husband, the trial court drew an inference on the basis that her husband Sanjoy came to his house in the ordinary course of nature, which requires to be proved through direct evidence. But none of the witnesses deposed that they saw the condemned-prisoner

Seema was present with her husband Sanjoy at the relevant time in their house.

(86) It further appears from the impugned judgment that the deceased came back to his house in the ordinary course of nature at the night of the incident of murder, which has been absolutely dogmatized by the trial court without any direct evidence of prosecution witnesses.

(87) PW-1 and PW-15 stated in their deposition that the stool passed at the time of killing of the deceased Sanjoy. But investigating officer did not seize or collect stool from the place of occurrence. Rather PW-14 stated in her cross-examination that she came to know stool was spreading inside and outside of the room of Sanjoy was the stool of a child. It appears from the order of the Magistrate on 10.05.2012, a female child of Seema aged about two years was taken

Jimmah by the mother of Seema, where we find support that a female child of Seema was with her on the date of occurrence. It is not denied by the prosecution.

(88) But the learned court below came to a conclusion emphasizing, for recovery of stool from inside of room of the deceased Sanjoy. Though it was not seized. The orna was recovered from inside of the room of Sanjoy, thereby the prosecution claimed that the deceased was killed by using scarf around the neck of the deceased which does not support by the post mortem report.

(89) It further appears from the post mortem examination report prepared on 20.01.2012 by the doctor PW-7 which marked as ext. 8 and 8/1 respectively. From where it appears that the stomach of Sanjoy was found empty. As per medical science MODI, "A Texbook of Medical Jurisprudence and

Toxicology” (25th Edition) at page-362 clearly mentioned that digestion of food will require 4-5 hours from the time of taking food. As the deposition of prosecution witnesses that death was caused between 12.00 hours to 5.00 hours at night. So, if the deceased would have come back his house from the tea stall at 12.00 hours on 20.01.2012 then it was not supposed to get the stomach empty at the time of performing post mortem examination over the cadaver of the deceased. As the doctor found the stomach empty it indicates that deceased would not have come in his house in the night of the date of occurrence. All the prosecution witnesses stated that Seema had strained relation with her husband but none stated about any specific incident to that effect. All the prosecution witnesses are interested witnesses because after death of Sanjoy, the

informant, his wife and his son (PW-3) enjoys the income from the property of Sanjoy.

(90) The condemned-prisoner Seema did not lodge a FIR with Durgapur Police Station but PW-3 stated in his deposition that the condemned-prisoner Seema was arrested in the morning on 20.01.2012. So, she had no scope to file a case for murdering of her husband. In a murder case for non-lodging of FIR by the condemned-prisoner is not to be considered as an incriminating factor. Since, it is open to other also.

(91) It was further observed by the trial court that the case based on circumstantial evidence and the prosecution has established the evidence of circumstances and the prosecution has been able to establish the link of circumstances without breaking link in the chain of circumstances. But the

prosecution could not establish the circumstances that the deceased came to his house and he was last seen with his wife Seema Sarker. There is no witness produced by the prosecution to the effect that witnesses saw the deceased came to his house.

(92) Rather the learned court below came to a conclusion on mere surmise and conjecture that it was in the ordinary course of nature that husband of Seema will come back his house having had his business hour from his tea stall which finding is not based on legal evidences at all.

(93) In the case of Mamun @ Mamun-Ar Rashid
(Md) Appellant (Supra)
-Vs-
State Respondents
reported in 74DLR(AD)(2022) at
page-36, wherein your lordships
observed as under:
Evidence Act (1 of 1872)

Section 106

“when wife dies within the custody of her husband, the husband is to explain the cause of her death. The deceased was admittedly living with the condemned-appellant at the relevant time and thus the condemned-appellant was obliged to give an explanation as to how his wife had met with her death although normally an accused is under no obligation to account for the death for which he is on trial.”

(94) The facts involved in the cited case is distinguishable from the present case because prosecution could not prove presence of the deceased in his house in the relevant night.

(96) It was observed that the dead body of Sanjoy was fallen by the condemned-prisoner Seema and another condemned-prisoner

Alamgir on the bank of a pond belonged to Bhojan Master. But it was not humanly possible to carry a dead body by a man and a woman from the house of the deceased without any notice of the neighbour, which was 30/35 cubits away from the house of the deceased. Condemned-prisoner did neither make Judicial confession nor extra-judicial confession regarding either murder of the deceased or their complicity whatsoever in that incident. All the witnesses of prosecution stated that the condemned-prisoner Seema had unhappy and strained relation with her husband PW-17 stated some case connecting papers of "Seema-Vs-Sanjoy" and condom was recovered from the drawer of a table of condemned-prisoner Alamgir.

(96) It appears from the seizure list prepared by investigating officer on 25.01.2012 those

alamats were recovered in the absence of Alamgir from his room and his trunk. But it was supposed to seize those alamats in presence of the condemned-prisoner by the investigating officer.

(97) The trial court did not consider that the said alamats were recovered in absence of the condemned-prisoner. Even the investigating officer was supposed to know the ownership of trunk and table recovered from rented room of Alamgir. But the learned court below ought to have taken his notice that alamats were not supplied by the condemned-prisoner Alamgir or at the identification of the accused Alamgir. So, the prosecution has completely failed to establish the chain of circumstances to connect the condemned-prisoner with murder of deceased Sanjoy.

(98) It has been observed further as the wollen ear cap was recovered from the way to the

place of occurrence. The dead body of Sanjoy was carried from the house of the deceased and then dumped it to the place of occurrence. Upon perusal of the sketch map and index thereto (Ext. 10 and 11). On a careful scrutiny of the sketch map (ext.-10), it appears that a road emerges from the western side and runs eastwards by the side of the house of the deceased and thereafter takes turn into south side and forming an intersection (marked as “জ”). It further appears from (Ext.-10) that the said road did not originate from in front of the house of deceased non-ended at the western corner of the house of deceased, rather it is open. So, the observation made by the court below that the dead body of the deceased was carried from his house is not supported by the sketch map of the case. It would have been accepted if there was no way to come in

the place of occurrence except from the house of the deceased. We have further found from the impugned judgment that the learned court below held the murder of Sanjoy was committed in his house by the condemned-prisoners. On a minute scrutiny of the index (Ext.-11) wherein a house of Tudi Rani has been identified as “३”. As per index Tudi Rani was next door neighbour of the deceased and she was cited witness in the charge sheet. But the prosecution did not produce her in court as witness without offering any explanation. As the learned court below came to a specific finding that the deceased was killed inside the house of deceased. Even vital witnesses were not examined in court during trial. But the witness examined in court in favour of the prosecution was not examined of his next door neighbour as witnesses. Which cast a

doubt over the prosecution story. A scarf (Orna) of Seema was recovered from inside the house of Sanjoy. Whereupon the court below held that PW-3 Sumon stated in his examination in chief that his Kaki (Seema) told him that his uncle (Sanjoy) went out from his house at 3.30 am on 20.01.2012 wearing her scarf (orna) and taking Tk. 10,000/-(Ten thousand) in cash with him. We have gone through the evidence of PW-3 Sumon wherein he did not mention that Seema told him that his (Sumon) uncle went out from his house wearing her scarf (orna) taking Tk. 10000/- in cash along with him. So, the findings in the impugned judgment on that point is based on absolute surmises and conjecture. Moreover, in this regard the learned court below misquoted the evidence to the effect.

(99) It further appears from the deposition of PW-3 Sumon that his Kaki (Seema) contacted with him through a mobile phone. Though a cell phone has been shown to have been seized but no call list supporting the alleged conversation between PW-3 and Seema has been produced in evidence in court. Hence, the alleged conversation between PW-3 and Seema has not been proved through legal evidences. A pair of Sandals of Sanjoy was allegedly recovered from inside the house of deceased Sanjoy in seizure list (Ext. -4). PW-3 has not stated in his deposition that the said sandals were in the worn of Sanjoy while he was working in his tea stall at Durgapur. The trial court observed a pair of Sandals were recovered from the house of Sanjoy. Which indicates the deceased Sanjoy was murdered inside his

house and then fell his dead body in the place of occurrence. The findings of the court below in this regard is not supported by the evidence of prosecution witnesses as such the findings of the court below in this regard is not based on legal evidences.

(100) The Trial court further arrived at a conclusion that the prosecution has been able to establish the chain of circumstance connecting the condemned-prisoners with murder of the deceased by giving cogent and clinching evidences. The circumstances arising out from the evidences produced by prosecution do not establish the hypotheses of guilt of the condemned-prisoners. Rather lead to the hypotheses of the innocence of the condemned-prisoners. So, the case before us does not deserve conviction and sentence of condemned-prisoners.

(101) The learned court below convicted the condemned-prisoners under sections 302 and 34 and sentenced them thereunder thereafter which were not supported by legal evidence of prosecution.

(102) In the case of Syed Nurul Azim Babor

. . . Appellant (Supra)
-Vs-
State

. . . Respondent
reported in 14BLC (AD)
at page-161
and
State

. . . Appellant
-Vs-
Ainul Haque

. . . Respondent
reported in 9BLC (AD) at
page-529, wherein your
lordships observed as
under:

“It has been consistently laid down by this court that where a case rest squarely on circumstantial evidence, inference of guilt can be

justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of another person.

(103) The case as cited above the learned court below without coming to a conclusion the deceased came in his house on the date of occurrence convicted and sentenced the condemned-prisoners under sections 302 and 34 of the Penal Code on dogmatization.

(104) The facts involved in the cited case is holding good with fact of the present case.

(105) Last contention raised by the learned Advocate for the condemned-prisoners that the star witnesses of the case Shamim was not examined in court wherefore cast a doubt over the prosecution case. Whereupon we have perused the record

that one Shamim was cited witness in the charge sheet but the prosecution did not produce him before the court without offering any plausible explanation in this regard, which further cast a doubt if had he been produced in court, he would not have supported the prosecution case.

(106) In the case of Zahirul Islam @ Depu (Md)

. . . Appellant (Supra)

-Vs-

The State

. . . . Respondents

Reported in 20BLC (AD) (2015) at
page 129

Wherein your lordship observed as
under:

Evidence Act (I of 1872)

Section 114(g)

“It is undoubtedly the duty of the prosecution in a case involving capital sentence to place before the court all available witnesses irrespective of their evidence being favourable or unfavourable. Where a necessary witness mysteriously not cited as witness, the court may

properly draw an inference adverse, to the prosecution. If a material witness has been deliberately kept back, then a serious reflection cast on the validity of the conviction. A grave and heinous crime has been committed but there is no satisfactory proof of the guilt we have no option but to give the benefit of doubt to the accused.”

(107) It appears from plain reading of the case cited above, that the duty of the prosecution to produce the star witness Shamim and Tudi Rani before the court to substantiate this case. In the case in hand Shamim was cited witness in the charge sheet but he was not produced before the court, whereupon a doubt has created upon the prosecution case and thereby the accused will get the benefit of doubt of the case and, the fact of the cited case is congruent with the fact of the instant case.

Therefore, the learned court below ought to have given benefit of doubt in favour of the condemned-prisoners.

(108) In the case of Taslimuddin alias Tasir and 3 others
... .. condemned-prisoners Appellants
-Vs-
State

... .. Respondents
reported in 44DLR(AD) at page-
136, wherein your lordships
observed as under:

Evidence Act (1 of 1872)

Section 3

‘The fundamental principle of Criminal Jurisprudence is that circumstantial evidence should inevitably be to the conclusion that the accused only were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused.’

(109) In the instant case the prosecution could not prove the case against the condemned-

prisoners beyond reasonable doubt. So, the fact of the cited decision is not applicable with the fact of the instant case.

(110) Next point raised by the learned Advocate for the condemned-prisoners that the condemned-prisoners were not examined properly under section 342 of the Code because all the evidences of the prosecution witnesses were not brought into notice appearing during trial against the condemned-prisoners. Whereupon, we have perused the materials on record and found that the condemned-prisoners were present all through the trial of the case.

(111) In the case of State

. . . Appellant (Supra)

-Vs-

Monu Miah and others

. . . . Respondents

Reported in 54DLR (AD)

(2002) at page 60

Wherein your lordship

observed as under:

Code of Criminal Procedure (V
of 1898)

Section 342

“Incriminating evidence or circumstances sought to be proved by the prosecution must be put to the accused during examination under section 342 CrPC otherwise it would cause miscarriage of justice.”

(112) The learned Advocate for the State-defence submits that the trial court did not bring the evidences appearing against the condemned-prisoners to their notice upon perusal of the form of examination of the accused, it appears that the trial court acted in conformity with the provision of Section 342 of the Code.

(113) Thus, the cited decision has no manner of application to the present case and the submissions of the learned lawyer is having no substance.

(114) Therefore, the impugned judgment is not sustainable in law and requires interfere by the court. Considering the facts and circumstances and materials on record we are of the view that the prosecution has completely failed to prove the charge levelled brought against the condemned-prisoners. Therefore, we find substances of the submission led by the learned Advocate for the condemned prisoners and therefore having merits the appeals succeed.

In the result:-

1. The Death Reference No. 149 of 2017 is rejected.
2. Criminal Appeal No. 12707 of 2017, Criminal Appeal No. 14501 of 2017, Jail Appeal No. 454 of 2017 and Jail Appeal No. 455 of 2017 are allowed.
3. The impugned judgment and order of conviction and sentence dated 07.11.2017

passed by the learned Sessions Judge, Netrakona in Sessions Case No. 324 of 2012 is hereby set-aside.

4. All the condemned-prisoners namely (1) Seema Sarker, wife of late Sanjoy @ Sanju Sarker and (2) Alamgir, son of Fazul Haque are acquitted from the charge levelled brought home against them and they be released forthwith if they are not wanted any other case.
5. The Office is directed to send down the records along with a copy of the judgment communication at once.

(Justice K.M. Emrul Kayesh)

Syed Md. Ziaul Karim, J:

I agree.