Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Biswajit Debnath

Death Reference No.32 of 2017

The State
Vs.
Md. Obaidul Islam @ Uzzal Sheikh
...Condemned-Prisoner.

With

Jail Appeal No. 105 of 2017

Md. Obaidul Islam @ Uzzal Sheikh
...... Appellant.
Vs.
The State ..Respondent.

Mr. Harunur Rashid, D A.G. with
Mr. Zahid Ahammad (Hero), A. A.G. with
Mr. Md. Altaf Hossen Amani, A.A.G with
Mr. Mohammad Shafayet Zamil, A.A.G with
Mr. Mohammad Humayun Kabir, A.A.G.
…..For the State.
Ms. Hasna Begum, Advocate
….For the Condemned Prisoner (Appellant).

Heard on 30.10.2022, 31.10.2022 and 06.11.2022,
Judgment on 08.11.2022.

SHEIKH HASSAN ARIF, J:

1. This Death Reference No. 32 of 2017 has been sent to the High Court Division in view of the

provisions under Section 374 of the of the Code of Criminal Procedure for confirmation of the death sentence imposed by the Second Court of Additional Sessions Judge, Bagerhat on accused Md. Obaydul Islam @ Uzzal Sheikh in S.C. Case No. 461 of 2013 vide judgment dated 14.03.2017 judgment, the trial Court convicted upon convicting him under Section 302 of the Penal Code. The accused having preferred Jail appeal, being Jail Appeal No. 105 of 2017, the same has also been taken up for hearing and disposal with the aforesaid death reference.

2. **<u>Background Facts:</u>**

2.1 The prosecution case is that, on 03.06.2013, P.W. 1, the husband of the deceased Mst. Shaheda Begum (52), lodged an FIR, being FIR No. 01 dated 03.06.2013, under Section

302 of the Penal Code alleging, inter alia, that on 02.06.2013 at about 11:00 AM, his son Md. Uzzal Sheikh (30) (accused-convict) was having an altercation with his mother (victim) and at one stage of such altercation, the convict started giving blows indiscriminately on the head of the victim with a kodal (local spade) causing serious incised injuries. That while the victim was trying to stop such blows with hand, nine fingers of her hands were cut-off. P.Ws. 3, 4, 5 and one Shah Alam then rushed to the spot after hearing hue and cry. The informant, along with them, rescued the bleeding victim from the grasp of the accused and took her to the Khulna Medical College Hospital, where she died at night on the same day. Thereafter, he lodged the FIR on the next day after rituals and burial of his wife.

2.2 With the registration of the above FIR, two investigating officers, including P.W. 10, conducted investigation, prepared surathal report, obtained post mortem report of the dead body, prepared sketch map of the place of occurrence, seized some incriminating materials and arranged recording of confessional statement of the accused by a judicial Magistrate after arresting him. After completion of such investigation, P.W. 10 (second investigating officer) submitted charge sheet, being Charge-Sheet No. 66 dated 06.11.2013, against accused-Md. Obaydul Islam @ Uzzal Sheikh under Section 302 of the Penal Code with a view that the allegations against him were prima-facie proved.

2.3 Thereafter, the case, being ready for trial, was sent to the Court of Sessions Judge, Bagerhat and, accordingly, was registered as Sessions

Case No. 461 of 2013. The Sessions Judge then took cognizance against the accused under Section 302 of the Penal Code and appointed a State defence lawyer to defend him as he did not engage any lawyer. The Sessions Judge, then, vide order dated 24.02.2014, framed charge against him under Section 302 of the Penal Code and read over the said charge to him, as against which the accused pleaded not guilty and demanded trial. The case was, thereafter, fixed for trial and, subsequently, transferred to the Second Court of Additional Sessions Judge, Bagerhat in order for trial. During trial, the prosecution produced 11 witnesses (P.Ws. 1-11) to prove the charge, as against which the defence produced none. The witnesses were examined and cross-examined by the parties. At one stage of the trial, one learned advocate was appointed to

represent the accused by the District Committee of the National Legal Aid, Bagerhat. After completion of depositions and recording of evidences, the trial Court examined the accused under Section 342 of the Code of Criminal Procedure, whereupon he again pleaded not guilty. The trial Court then, after hearing the parties, delivered the impugned judgment and order dated 14.03.2017 convicting the accused under Section 302 of the Penal Code taking the view that the prosecution proved the charge beyond reasonable doubt and, accordingly, sentenced him to death. The trial Court then sent the case records to the High Court Division for confirmation of the said death sentence in view of the provisions under Section 374 of the Code of Criminal Procedure. As stated above, the accused having preferred the aforesaid Jail

Appeal, the same has also been taken up for hearing by this Bench along with the death reference.

3. **Depositions of the Witnesses:**

In order for re-assessment of the evidences on record as against the submissions made on behalf of the State and the State defence lawyer representing the accused, let us first narrate the material depositions of the witnesses as they deposed before the trial Court below.

P.W. 1 (Md. Fazlur Rahman) is the father of the accused and informant of the case. He deposed that the victim was his wife and that the occurrence took place on 18 or 28 in the month of Joistho and the day was Sunday. That he was not at home at that time as he left for work in the morning. That at about 9:00 AM, he came to know that his son (accused) was creating problem at home. He then rushed

back, but did not find his wife at home. He heard that his wife was taken for treatment to Bagerhat. That the people present told him that his son Uzzal had killed his wife. That on the next day, police recovered the kodal (local spade) by which his son gave blows to the victim. That his wife was taken for better treatment to 250 beds Hospital at Khulna, but at about 09:00 PM, she succumbed to injuries. He then saw the dead body and found two fingers of the victim detached and two incised wounds on two sides of the head. He then took his wife back home after post mortem at Khulna and buried her. That his son was at home and he was taken away by Mannan daroga (police Mannan) from home. That, thereafter, he lodged the FIR with the police station. Accordingly, he proved the said FIR and his signature thereon as Exhibits 1and 1/1.

In cross-examination on behalf of the accused, he deposed that he did not see the occurrence and that there were lots of people at his house. According to him, his son had been behaving abnormally for 4/5 years (আবোল তাবোল করে). That his son was unemployed and he was taken to doctor at different places including Khulna. That during medication, he used to remain okay, but again his condition used to deteriorate. That on different occasions, he broke the door of the house with the axe. He further deposed that he did not see whether his son had killed the victim, he just heard it and that all the witnesses were his relatives.

P.W. 2 (Mizanur Rahman) is the neighbour of the informant. According to him, his house was half km away from the place of occurrence and that the occurrence took place about one year back. That it takes only four/five minutes to reach the place of

occurrence from his house straight away. According to him, on the date of occurrence at about 11/12 o'clock, he heard that accused Uzzal chopped his mother. He then rushed to the spot and took the injured victim to the Hospital. He, subsequently, heard that the victim had died. That, on the next day, police Mannan visited the place of occurrence and recovered a kodal (local spade) and the same was recovered by seizure list, whereupon his signature was taken. Accordingly, he proved the said seizure list as Exhibit-2 and his signature thereon as Exhibit-2/1. He also proved the said material (kodal) as material Exhibit-I. He deposed that accused-Uzzal was known to him and he, accordingly, identified accused on the dock.

In cross-examination, he deposed that he did not see the occurrence and that the people were murmuring that Uzzal had chopped his mother. In

cross examination, he further deposed that he knew since before that Uzzal was mad and also he heard and knew that Uzzal was taken to different places for treatment. He, accordingly, denied the defence suggestion that he did not hear that Uzzal had killed his mother or that he was giving false blame on mad Uzzal.

P.W. 3 (Md. Younus Shiekh @ Enus) is the relative of informant. According to him, informant was his uncle and accused was his cousin. That the occurrence took place about one year ago during day time when he was not at home. He heard that the wife (sic.) of his brother had died (শুনেছি ভাই বউ মারা গেছে). He also heard that his bother chopped his wife (sic.). He further deposed that he had not heard who did it, but he then deposed that accused Uzzal beat his mother with kodal (local spade). According to him, police, subsequently, seized the said kodal

(local spade) and some cloths by a seizure list and took his signatures thereon. Accordingly, he proved the same as Exhibit-3, 2/2 and 3/1. He also proved the said kodal (local spade) and cloths as material Exhibit-II series. He deposed that he visited the 250 bed Khulna Hospital and received the dead body and signed surathal report. He, accordingly, proved the said paper by which he received the dead body as Exhibit-3 and his signature thereon as Exhibit-3/1. He also proved the surathal report as Exhibit-4 and his signature thereon as Exhibit-4/1. He then deposed that he brought back the dead body of the wife (sic.) of his brother and buried it.

In cross-examination, he deposed that he did not see the occurrence and that he could not say as to from whom he had heard of it. He also deposed in cross-examination that he knew from since before that Uzzal was mad and that he knew that Uzzal

used to behave abnormally on streets (রাস্ড়্র ঘাটে পাগলামি করতো জানতাম). He then denied the defence suggestion that he was giving false information as because informant was his cousin or that he did not hear from any one that Uzzal beat his mother.

P.W. 4 (Delwar Shiekh) is the brother of the informant. He, accordingly, confirmed it by saying that informant was his brother and the name of the victim was Shahida who was his sister-in-law. According to him, the occurrence took place in the morning about one year ago and he was not at home at that time as he was working in the field. That he heard hue and cry from the field and rushed back to home and found his sister-in-law lying and bleeding. That the people present then were telling that Uzzal had chopped his mother. That Uzzal was at home at that time. He then took the dead body of his sister-in-law to the hospital. That police

recovered the said kodal (local spade) and blood stained cloths by seizure list. Accordingly, he proved his signatures on the said seizure list as Exhibit-2/3 and 3/2. He also identified the said kodal (local spade) and blood stained cloths. According to him, two seizure lists were prepared on two days and Uzzal was arrested on the same day.

In cross-examination, he deposed that he did not see Uzzal beating his mother and that he didn't know as to from whom he had heard it. That Uzzal used to behave abnormally (উজ্জ্বল পাগল-পাগল ভাব করে) and he was given treatment at different places. He also deposed that because of such madness, Uzzal's wife abandoned him.

P.W. 5 (Md. Sahadat Sheikh) is also brother of the informant. Accordingly, he confirmed it in his deposition. He deposed that Uzzal was the son of

his brother and victim Shahida. That the occurrence took place at about 10/11 o'clock in the morning about one year back. That his house was a little bit away and he heard from people that Uzzal had beaten his mother. He then rushed to the spot and found that all people had already left. He also heard that Uzzal was taken away by police. That his brother took the body to hospital and filed the case as informant.

In cross-examination, he deposed that he did not see the occurrence by his own eyes and he did not remember from whom he had heard of it. He also deposed in cross-examination that Uzzal had mental problem (মাথায় সমস্যা) for three years and because of that his wife abandoned him. That Uzzal was taken to doctor and he used to become bad intermittently.

P.W. 6 (Firoza) is a neighbour of the informant. According to her, informant is his brother-in-law (ভাসুর) and the victim was her sister-in-law (জা হতেন) and accused-Uzzal was her son. That the occurrence took place about one year ago while she was collecting leaves at a garden. That occurrence took place at 09:00/10:00 o'clock in the morning and she rushed to the place of occurrence. Upon her arrival, she found that the victim was already taken to doctor. She saw the blood and the said kodal (local spade) at the place where the victim was beaten. She saw Uzzal at home. According to her, Uzzal was taken away by police and he confessed in presence of all that he gave blows to his mother with the kodal (local spade). In cross-examination, she deposed that she did not see Uzzal giving any blows and that people were murmuring that Uzzal gave such blows. She also deposed in cross-examination that Uzzal was mad for 4/5 years and for that he was

given treatment and because of that his wife abandoned him.

P.W. 7 (Jalil Sheikh) is also brother of the informant and, accordingly, he confirmed such relationship by saying that accused is his nephew. According to him, the occurrence took place about 1-1$\frac{1}{2}$ years ago and he heard that the accused killed his mother by chopping with a kodal (local spade). That, thereafter, his brother filed the case. He, accordingly, identified the accused. He deposed that he gave statement to the police, but he did not see anything. He also deposed that he signed the surathal report. Accordingly, he proved his signature on the surathal report as Exhibit- 5/2.

In cross-examination, he deposed that his nephew had been mad for 2/3 years and for which he was taken to doctor. He also deposed in cross-

examination that he heard about chopping of the victim, but could not say as to from whom he had heard it. He deposed that he was a van driver.

P.W. 8 (Mujibor Shiekh @ Mojibor) is another brother of the informant. Accordingly, he deposed that the deceased was his sister-in-law. According to him, the occurrence took place about 1 and $\frac{1}{2}$ years ago when he went for farming. Upon his return, he heard that accused-Uzzal caused the said incident. That his sister-in-law was taken to 250 bed hospital at Khulna and she succumbed to injuries on that night. According to him, the occurrence took place at about 2-3 o'clock. He, accordingly, gave statement to the police.

In cross-examination, he deposed that he did not see anything and did not remember as to from whom he had heard of. He further deposed in cross-

examination that the accused was mad even before the occurrence.

P.W. 9 (Swapon Kumar Sarker) is the judicial Magistrate, who recorded the confessional statement of the accused. According to him, he was Additional Chief Judicial Magistrate of Bagerhat on 04.06.2013 when accused-Uzzal Shiekh was taken to him to his khash kamra by GRO. He, accordingly, asked the name of the accused and asked him whether he would make confessional statement and gave him three hours time. He deposed that he recorded the confessional statement of the accused in a prescribed form when the accused agreed to confess. That the written confessional statement was read over to the accused. According to him, he did not find any sign of injury on the body of the accused after examination and that the confession was made voluntarily. That he signed the

confessional statement and took the signatures of the accused thereon. Accordingly, he proved the said signatures as Exhibits-6, 6/1, 6/2, 6/3 and 6/4.

In cross-examination, he deposed that the accused was presented to him by Court GRO. According to him, accused replied in the negative when he was asked as to whether he was threatened by anyone. He, accordingly, denied the defence suggestion that the accused was mad or that he was mentally ill or that he confessed under the threat of the police or that he recorded a fake confessional statement.

P.W. 10 (Bodhon Chandra Biswas) was the second investigating officer (10) of the case. According to him, when he was working at Kochua Police Station, he was given the charge of investigation by O.C. on 11.09.2013 as the previous I.O., Abdul Mannan, became sick. That he received

the C.D on 12.09.2013 and examined it. He recorded the statements of the witnesses and inspected the place of occurrence. That since the allegations against the accused were established during his investigation, he submitted Charge Sheet, being Charge Sheet No. 66 dated 06.11.2013, under Section 302 of the Penal Code.

In cross-examination, he deposed that he visited the place of occurrence on three occasions, namely on 18.09.2013, 01.10.2013 and 14.10.2013. That the previous I.O prepared the draft sketch map and index. He, accordingly, verified the same. He further deposed that he did not know whether accused was mental patient and that he did not do any enquiry about it. He then denied the defence suggestion that he did not record any statement or that he did not do the investigation properly.

P.W. 11 (Md. Bacchu Mia @ Md. Bacchu Mollah) is a police constable. According to him, on 03.06.2013, he was working at Sonadanga Model Police Station and, at 11:00 A.M, he went to the Freezer of the Khulna Medical College with one A.S.I. Milon. That he found the dead body of the victim in the freezer and took the dead body to Khulna Medical College for post mortem and handed over the dead body to the husband of the victim after such post mortem. In cross-examination, he deposed that he did not know anything about the occurrence or the case.

4. **Submissions**:

4.1 As stated above, the accused-appellant is represented by State defence lawyer Ms. Hasna Begum. At the outset of the hearing, Mr. Harunur Rashid, learned Deputy Attorney General, along with Mr. Zahid Ahammad (Hero), learned

Assistant Attorney General, has placed the entire depositions of the witnesses and other materials on record including the materials in the lower Court records. Learned advocates from both the sides have made extensive submissions thereafter. However, for the sake of convenience, we are going to refer the submissions of the State defence lawyer first followed by the learned Deputy Attorney General.

4.2 Ms. Hasna Begum, learned State defence lawyer, has made the following submissions on behalf of the accused:

(a) That, admittedly, no eye witnesses have deposed before the trial Court and the entire evidence of the prosecution is hearsay evidence and as such the same is not admissible in view of the provisions under

Section 60 of the Evidence Act. By referring to the deposition of P.W. 1 (informant), in particular the deposition as regards staying of the accused at home after the alleged occurrence, she submits that the accused did not have any *mens rea* or criminal mind as because he did not flee away immediately after the occurrence.

(b) Further referring to different deposition of the prosecution witnesses, she submits that almost all witnesses have consistently deposed that the accused was a mad man at the relevant time and that he was given treatment at different places/hospitals. Therefore, according to her, this case will come clearly under the exception as provided by Section 84 of the Penal Code and as such the offence allegedly committed

by the accused should be treated as no offence in the eye of law.

(c) That at the time of making confessional statement, the accused was suffering from withdrawal syndrome as because he was a regular addict of gaza (hemp) which is reflected in the confessional statement itself. Therefore, according to her, such confessional statement cannot be taken as lawful confessional statement in order to base any conviction on the same.

(d) Further referring to the application filed on behalf of the accused before the trial Court and different prescriptions of hospitals as lying with the lower Court records including the letters of Jail Super, she submits that it is apparent from record that even during investigation of the case, the accused was

found to be of abnormal mind and as such he was taken to hospital at the instance of the jail authority for his treatment. However, neither any proper enquiry as to his mental condition at the time of the alleged occurrence was done, nor any enquiry during investigation and trial was done in view of the provisions under Sections 464 and 465 of the Code in order to determine his mental capability to provide proper defence and as such, according to her, the trial against the accused was vitiated for non-compliance of such mandatory provisions. In support of her such submissions, she has referred to two decisions of the High Court Division in **Nikhil Chandra Halder vs. State, 54 DLR (2002)-148** and **Wally Ahmed vs. State, 58 DLR (2006)-433.**

(e) That Section 342 examination of the accused was highly defective one inasmuch as that the very confessional statement of the accused was not referred to him during such examination and as such, according to her, the trial vitiated in so far as the accused is concerned.

4.3 As against above submissions, Mr. Harunur Rashid, learned Deputy Attorney General, has made the following submissions:

(i) That FIR lodged by the father of the accused does not give any minimum indication as to his mental abnormality. Therefore, the defence case of mental abnormality is a subsequent embellishment by his relatives and neighbours in order to save him. Accordingly, such depositions of the

witnesses should not be considered by the Court.

(ii) By referring to the confessional statement of the accused, in particular different columns of the same, he submits that it is apparent from such confessional statement that the same was recorded in strict compliance with law and rules made thereunder as supported by P.W. 9 during his deposition before the Court. Thus, the said confessional statement having remained unshakened by cross-examination of the defence, it can be the only basis for conviction of the accused, particularly when there are consistent depositions before the trial Court that almost all the witnesses heard that it was the accused-Uzzal who had chopped his mother with kodal (local spade).

(iii) By referring to two seizure lists (Exhibit-2 and Exhibit-3), he submits that the said seizure lists and the materials recovered, namely iron spade, bed sheet and clothes of the victim, having been proved by P.Ws. 2, 3 and 4, the same are enough to corroborate the confession made by the accused himself in order for reaching a decision of conviction under Section 302 of the Code, particularly when the injuries inflicted by the said kodal (local spade) are supported by the surathal report (Exhibit-5) and the post mortem report. Accordingly, he submits that the conviction and sentence of the accused should sustain.

(iv) That the mental abnormality and unsoundness of the accused is a plea to be taken by the defence and has to be proved

by the defence and the onus on the defence is to prove that such unsoundness of the accused was prevailing at a point of time when the occurrence took place. Only then the accused may get benefit of Section 84 of the Penal Code. According to him, since the defence in this case has miserably failed to prove such plea of abnormality or unsoundness, such alleged unsoundness of the accused cannot be taken into consideration in the facts and circumstances of the case. In support of his such submissions, he has referred to a decision of Pakistan Supreme Court in **Ziaul Hasan vs. State, 1998 S C M R 1582**.

(v) As regards defects in Section 342 examination of the accused, he submits that such irregularity has not caused any

prejudice to the defence and as such, according to him, such irregularity is curable under Section 537 of the Code of Criminal Procedure.

5. **Scrutiny of Evidences**:

5.1 Since the allegation against accused-appellant is under Section 302 of the Penal Code, let us first examine whether the prosecution has succeeded in proving that it was a murder case or that the victim of the case was in fact killed by someone. In this regard, it appears that the prosecution has successfully proved the surathal report (inquest report) as Exhibit-5 and the same was proved by P.Ws. 3, 7, and 11. Not only that, the prosecution also proved the chalan as regards transfer of the dead body by P.W. 11, although the said chalan was not given any exhibit mark. In addition, it appears from the post mortem report, which was also not given

any exhibit mark by the trial Court, that it reveals the presence of the following injuries on the dead body:

> *"(1) One chop wound in the left side of the head extending from left eye brow to occipital region 10" long and stitches.*
>
> *(2) One incised wound in the right frontal region to frontal region wound 10" lone e 8 stitches"*

5.2. On further examination, the doctor found hematoma present all over the scalp of the left temporal, parital and occipital bone. The brain of the victim was also found lacerated in the left frontal, parital and occipital region and it was opined by the doctor concerned in the said post mortem report that the said injuries were caused by heavily sharp cutting weapon. Finally, the doctor opined in the said post mortem report that the death in his opinion was

caused by hemorrhage and shock resulting from the said injuries which were antemortem and homicidal in nature.

5.3. However, admitted position is that the said doctor, namely Dr. Md. Ataur Rahman, was not produced by the prosecution on the ground that he was dead at the relevant time of his production and necessary paper in support of his such death is lying with the lower court record. Therefore, learned D.A.G. submits that this situation is covered by the provisions under Section 509A of the Code of Criminal Procedure as inserted in 1982. According to the said provision, when the doctor who prepared post mortem dies subsequently before his deposition, the said post mortem report may be used as evidence. Therefore, we are of the view that we can safely regard this post mortem report as evidence, although the same was not

exhibited. Relying on the said post mortem report as a substantive piece of evidences as corroborated by the surathal report, chalan etc., as proved by the prosecution witnesses, as well as the depositions of P.Ws. 1-8 that the victim Shaheda was killed, we can safely hold that the prosecution has succeeded in proving that this is a case of killing of victim Shaheda.

5.4. The further prosecution case is that it was the convict who killed the victim. To examine that aspect of the prosecution case, we have examined the depositions of P.W. 1 to P.W. 8, who were either father, cousin or uncles of the accused. It appears from the said depositions that they heard about the incident and that it was accused-Uzzal who had chopped the victim with kodal. However, none of the prosecution witnesses deposed anything as to from whom they had heard it or as to whether

the person from whom they had heard it had in fact saw the occurrence taking place. None of the prosecution witnesses deposed that he/she saw the incident taking place or somebody else saw the incident taking place. They only deposed that people were murmuring that it was Uzzal who had chopped the victim with kodal. Therefore, it appears that this part of the prosecution case is entirely based on hearsay evidence. The provision under Section 60 of the Evidence Act is very much pertinent to be referred here. Accordingly, the relevant part of the same is reproduced below:

> *"60. Oral evidence must, in all cases whatever, be direct; that is to say-*
>
> *if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;*
>
> *if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;*

> *If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;"*

5.5. It appears from the above quoted provision under Section 60 of the Evidence Act that in order to rely on any oral evidence, such oral evidence must be direct, that is to say, if the fact could be seen, it must be the evidence of the witness who says he saw it or if the fact which could be heard, it must be the evidence of a witness who says he heard it or if the fact which could be perceived by any other sense or any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner. As against this provision of the Evidence Act, if we examine the depositions of the prosecution witnesses, it will be evident that none of their oral evidences was direct. None of them said before the Court

that he or she saw the incident or that he or she heard about the incident from someone who saw the incident. However, there is a distinguishing feature in the deposition of P.W. 6, who, in addition to her other depositions, deposed that Uzzal made an extra-judicial confession in presence of all (উজ্জল বাড়ী থেকে সকলের সামনে বলে সে তার মাকে কোদাল দিয়ে মেরেছে). We will examine this extra-judicial confession of Uzzal subsequently, along with his judicial confessional statement, to determine whether such confession could be relied upon or not. Therefore, apart from this alleged extra-judicial confession of Uzzal, it appears that there is no legal evidence on record which may be accepted as oral evidence or hearsay evidence in view of the provisions under Section 60 of the Evidence Act and as such we are of the view that the prosecution has failed to prove

this aspect of the prosecution case inasmuch as that such hearsay evidences of the prosecution witnesses cannot be relied upon for basing any conviction on the accused in a case under Section 302 of the Penal Code.

6. **Confessional Statement**:

6.1. Now, let us examine the confessional statement of the accused. As stated above, the accused has made two confessions, one extra-judicial and the other judicial. According to P.W. 6, the accused made an extra-judicial confession upon her arrival at the place of occurrence. According to this witness, Uzzal declared in presence of the people that he had beaten his mother with kodal. Apart from above, the accused also made a judicial confession (Exhibit-6) which is reproduced below:

"আমি বেকার। কোন কাজকর্ম করি না। নেশা করি। বন্ধুদের সাথে গাজা খাই। যে কারনে আমার স্ত্রী ৪ বছর আগে আমাকে ছেড়ে চলে গেছে। আমার একটি বাচ্চা আছে। আব্বা আম্মার কাছে থাকে। নেশার টাকা এবং হাত খরচ যোগার করার জন্য আমি বাড়ীর কচু, কলা, নাড়কেল চুরি করে বিক্রি করি। এইটা আম্মা আব্বাকে বলে দেয়। যে কারনে আব্বা ও আম্মা আমাকে বকাঝকা করে। আব্বা/আম্মার কাছে টাকা চাইলে দেয় না। তাদেরকে আমি জাকির মামার বাড়ি ৩০০০ টাকা বেতনে কাজ করতে বললেও তারা করে না। পরের বাড়ী কাজ করে আমাকে টাকা দিতে বলি। আব্বা আম্মা রাজী হয় না। গত ০২-০৬-১৩ ইং তাং দুপুর ১২.০০ টার দিকে মাকে জাকির মামার বাড়ী গিয়ে থাকতে বলি। মা আমাকে আজেবাজে কথা বলে গালিগালাজ করায় তাকে খুন করার সিদ্ধান্ড় নেই। দা খুজতে থাকি। দা পাইনা। কোদাল পাই যা দিয়ে মাথায় ৩/৪ টা কোপ দেই। মা হাত দিয়ে মাথার কোপ ঠেকাতে গেলে হাতের আঙ্গুল কেটে পড়ে যায়। মা না কোপানোর জন্য অনুরোধ করে। আমি শুনিনি। আমার চোখ দিয়ে পানি পড়েনি কারন তাতে আমি দুর্বল হয়ে যাব। আমাকে শাসন করার জন্য এটা করেছি। এ আমার জবানবন্দি"।

6.2. It may be noted here that this confessional statement (Exhibit-6) was proved by the judicial Magistrate himself before the trial Court. It appears from the same that according

to the accused he was unemployed and he was drug-addict and used to take gaza with friends for which his wife left him four years ago. That he had a child, who was kept with his parents. He further stated that in order to generate money for his drug and pocket expenses, he used to steal banana, coconut etc. from the house and sell it and the same was communicated to his father by his victim mother and for which his father and mother scolded him. He also sought money from his parents, but was refused. He asked them to work at the house of his Zakir uncle in exchange for Tk. 3,000 salary to cover his expenses, but they refused. That on the date of the occurrence i.e. on 02.06.2013 at 12:00 noon, he asked his mother to work at Zakir uncle's house when his mother scolded him in a very bad way. Then he took decision to kill

his mother. He then started searching for dao but did not find it. He then found kodal and gave 3/4 blows with it on his mother's head. His mother tried to stop him with her hands, which resulted in cutting off her fingers. Her mother requested her not to chop, but he did not listen. That no tears came out from his eyes because it would make him weak and then he did it to regulate his mother.

6.3. On a plain reading, this judicial confessional statement does not suffer from any major irregularity/infirmity. However, if we examine this confessional statement as against the depositions of prosecution witnesses, in particular P.W. 1-8, it will tend to make out a case of unsoundness of mind of the accused at the time of occurrence. Each of the P.Ws. 1-8 deposed in clear terms before the trial Court in reply to the cross-examination that the accused

was mentally unfit. Some said he was mad for 3/4 years before the occurrence; some said he used to behave abnormally. P.W. 1 even deposed that he broke the door of the house by chopping with axe. These depositions of the prosecution witnesses have not been challenged by the prosecution by declaring them hostile or by cross-examining them. The trial judge himself also did not put any question to these witnesses in order to get a clarification from them as to the mental condition of the accused at the relevant time of the occurrence. This situation has led us to examine the provision under Section 84 of the Penal Code along with the provisions under Chapter-34 of the Code of Criminal Procedure. The Provision under Section 84 of the Penal Code is reproduced below for our ready reference:

> *"Section 84- Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law".*

6.4. Since this provision comes under the Chapter-4 of the Penal Code which provides for general exceptions, in the normal course such exception-plea, or the plea of unsoundness, is to be taken by the accused and it is the accused who is required to prove such plea. The superior Courts of this subcontinent has repeatedly held that the onus is on the accused who claims benefit of such exception to prove that his mental condition at the crucial point of time of killing was such that he was mentally not in a position of knowing the nature of the act or that what he was doing was wrong or contrary to law. However, the standard of such burden of proof on the accused is not as high as the

prosecution. Unlike the prosecution, such burden of the accused may be discharged by preponderance of probability like a civil case. The decision of Indian Supreme Court in **Siddhapal Kamala Yadav vs. State of Maharashtra, 2009 CriLJ 372 (SC)** may be referred to as a persuasive authority on that point.

6.5. Again, when the evidences on record raise a reasonable doubt in the mind of the Court that the accused might have been in such condition when he or she committed the offence, the accused should be given the benefit under Section 84 of the Penal Code. This position has been supported by a decision of the Bombay High Court in **Ms. Leena Balkrishna Nair vs. State of Maharashtra, 2010 (3) Cri LJ 3292 (Bom).** In **Durga Domar vs. State of Madhya**

Pradesh, 2002 (10) SCC 193 (SC), the convict killed five persons all of them children (including a one and half year old female child and a five year old male child) in a very ferocious manner and the said children were close-relatives. But the mental condition of the accused was not considered at any stage of the entire proceedings including the High Court Division in death reference. The accused even could not engage a lawyer of his own during trial and death reference hearing. In such a case, the Indian Supreme Court directed the head of department of psychiatric of a government medical college to keep the accused in the hospital under observation for such period as they find necessary for forming the opinion as regards the mental condition of the accused at the relevant time of such killing.

6.6. As stated above, the prosecution witnesses repeatedly deposed before the trial Court that the accused was mad and he used to behave abnormally for a period of 3/4 years. The lower Court record suggests that even during investigation period after his arrest, he was behaving abnormally. The judicial confessional statement of the accused was recorded on 04.06.2013. It appears from a prescription lying with the lower Court record, being attested by the jail super of Bagerhat District jail on 07.02.2014, that the accused was treated for his mental condition on 17.06.2013 at the outdoor of the Khulna Medical College Hospital and he was found to be disoriented with psychological problem. He was, accordingly, given medicines for such problem. He was again treated in the said hospital during such investigation period on 09.08.2013 for his

mental problem and he was asked to come after two months again after giving him some medicines.

6.7. However, since the first investigating officer having not been produced by the prosecution as a witness, the defence has been deprived of asking him anything about such mental condition of the accused at that relevant time of investigation. When the second investigating officer was questioned by the defence side before the trial Court as regards such mental condition, he replied that he did not have any knowledge about it or that he did not do any inquiry.

6.8. It further appears from letters dated 06.02.2014, as written by the Assistant Civil Surgeon of Jail Hospital, Bagerhat to the Civil Surgeon, Bagerhat as attested by Jail Super,

Bagerhat, District Jail, that the Civil Surgeon office had clear knowledge about such mental condition of the accused and that he was being treated by specialist doctors. Such information was clearly communicated by the Jail Super, Bagerhat District Jail to the Sessions Judge, Bagerhat vide letter dated 07.02.2014 lying with the lower Court record and the same appears to have been seen by the judge concerned and was kept with the record.

6.9. On the other hand, a specific application was filed on behalf of the accused for his medical examination on 14.07.2014 and the copy of the said application was kept with the record on the same day. The said application was heard by the trial Court after about one and half months, i.e. on 31.08.2014, wherein he observed as follows:

> "এজাহারে, মামলার তদন্তকালে কিংবা ১৪-৭-১৪ ইং তারিখের পূর্ব পর্যন্ত আসামীর নিকট আত্মীয় এজাহারকারীসহ কেহই আসামী পাগল তদমর্মে দরখাস্ত আনয়ন করেন নাই।"

However, as stated above, record shows that he was found mentally abnormal even during investigation period and he was treated accordingly by the Khulna Medical College Hospital. But the trial Court rejected the said application taking the view that he observed the accused for two days and he did not see any kind of sign of abnormality. Therefore, he concluded that there was no necessity for examination of the accused by the civil surgeon or any medical officer.

6.10. Section 464 and 465 under Chapter 34 of the Code of Criminal Procedure have given special procedure for determining unsoundness of the accused by the Magistrate or by the Court.

Section 464 has specifically mandated that the Magistrate shall inquire into the fact of such unsoundness and shall cause such person to be examined by the Civil Surgeon of the district and thereupon shall examine such Civil Surgeon or other officers as a witness, and shall reduce the examination to writing. On the other hand, Section 465 provides that the Sessions Judge shall, in the first instance, try the fact of such unsoundness and incapacity, and if the court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.

6.11. It appears from record and orders of Courts below that neither the Magistrate nor the Sessions Judge has complied with the said provision as mandated by Sections 464 and 465 of the Code, particularly when the

prosecution witnesses repeatedly deposed that the accused was suffering from madness or mental unsoundness as supported by the prescriptions of the doctors of Khulna Medical College Hospital lying with the lower Court records. We fail to understand as to how the trial judge concerned has determined the soundness of the accused by mere observing him on the dock for 2/3 days when such examination of mental condition necessitates examination by expert doctors, sometimes by a board of expert doctors.

6.12. It has already been held by a division bench of this Court in **Wally Ahmed vs. State, 58 DLR (2006)-433** that the provisions under Section 465 of the Code of Criminal Procedure are mandatory and failure to comply with such provision by the trial Court renders the entire

subsequent proceedings illegal. Consequently, such failure vitiates the conviction and sentence. Therefore, it appears that although there were enough materials on record which clearly indicated that the cognitive faculty of the accused was not properly operative at the relevant time of occurrence and that the accused was not of sound mind in order to give defence, neither the Magistrate nor the trial Court has taken recourse to the provisions of Section 464 and 465 of the Code for conducting a proper enquiry with the help of expert doctors to determine such condition of the accused either at the time of occurrence and/or at the time of trial. Therefore, on both counts, the benefit of such failure will go in favour of the accused, particularly when government medical prescriptions, lying with the lower Court record, and the letters of the

civil surgeon office categorically show that the accused was of unsound mind at least during investigation. In addition, the prosecution witnesses deposed before the trial Court that he was unsound mind even for 4/5 years period before the date of occurrence and such deposition of the prosecution witnesses remained unchallenged by the prosecution itself. Therefore, it may be held that the prosecution before the trial Court has in fact accepted the defence position that the accused was of unsound mind at the time of occurrence. Otherwise, they would have challenged such depositions of prosecution witnesses by declaring the said witnesses as hostile.

6.13. Apart from above circumstances, it appears from the very judicial confessional statement of the accused as quoted above that he started

his statement by saying that he was a drug addict and that he used to sell everything for arranging money in order to purchase gaza. He even was trying to compel his parents to work in somebody else's house to pay him money for gaza and when his mother started scolding him in a bad way, he decided to kill his mother and gave 3/4 blows with the kodal he found. He even stated that no tears came out from his eyes, because it would make him weak. This statements also suggest that an adult sound man cannot confess in this way. When a witness may tell lies, circumstances cannot. It is admitted position that immediately after the chopping of the victim, the accused did not flee. He was staying at home and he allowed the police to arrest him from his house, which is not a normal behavior of a normal criminal or accused. He even did not repent the chopping

of his mother in his confessional statement. He did not show any remorse or compunction in such statement. Can someone say now that this can be the normal behavior of a normal human being? The answer is No. Even if he decided to kill and chopped his mother at the hit of the moment, he would have realized subsequently that he had committed a big mistake and he would have cried or he would have shown remorse, or fled away. But we do not see any such conduct from him.

6.14. Therefore, on a combined analysis of these circumstances, it cannot be said that he was a man of sound mind at the time of occurrence or at the time of entire proceedings. Rather, there is every possibility that he was a man of unsound mind at the time of occurrence. However, the investigating officer, the

Magistrate and the Court have failed to do any proper inquiry in this regard. This being so, the benefit of such failure will go definitely in favour of the accused.

6.15. There is another twist in this case, which is the examination of the accused under Section 342 of the Code. It appears from such examination of the accused by the trial Court that the trial Judge even does not have any elementary knowledge about the examination of an accused under Section 342 of the Code. He just mentioned the fact of giving evidence by P.W. 1 to P.W. 11 without narrating anything as to what those witnesses said. No reference of incriminating materials as contained in those depositions of the witnesses were referred to the accused as mandated by Article 342 of the Code. Most unfortunately, the very confessional

statement, namely the very basis of the conviction, was not referred to him. This irresponsible conduct of the trial judge should not go unnoticed by the concerned authorities. If necessary, this trial judge should be sent for further training at JATI or any other institution before he is given the responsibility of conducting any trial in criminal cases. However, we leave this to the authority concerned as we do not want to cause any harm to a judge without hearing him. As noted above, the examination of the accused under Section 342 of the Code in this case is not an examination at all under the law. Rather, it was a blow to the legal provisions contained in the statute book. Therefore, such examination being perfunctory examination should also vitiate the trial as the same has highly prejudiced the defence of the accused.

6.16. In view of above discussions of law and facts, we are of the view that although the accused committed the murder of his mother, he did it while he was suffering from unsoundness of mind. Accordingly, he should get benefit under Section 84 of the Penal Code and as such his offence should be treated as no offence in the eye of law. Accordingly, we are of the view that he should be detained in safe custody in view of the provisions under Section 471 of the Code and should be treated properly by the doctors concerned to determine the extent of his unsoundness, and until and unless he is found to be of no threat to himself and to others, he should not be released.

6.17. Since, in the meantime, Mental Health Act, 2018 has been enacted by the Parliament upon repealing The Lunacy Act, 1912, and in the

said new Act special provisions have been made for taking care of such persons under the supervision of the Mental Health Review and Monitoring Committee of the District concerned in view of Section 5 of the said Act, we are of the view that the said committee of Bagerhat District may be entrusted with the responsibility of taking care of the appellant during his custody in any mental facility under Khulna Medical College Hospital, or any other better place, to be decided by the said committee. If there is no such committee by this time in Bagerhat, the Deputy Commissioner of Bagerhat, being the designated Chairman of the said Committee, should perform such functions of the committee.

7. **Orders of the Court**:

7.1. In view of above discussions law and facts, the orders of the Court are as follows:

1) This Death Reference No. 32 of 2017 is rejected. The Jail Appeal No. 105 of 2017 is allowed. The impugned judgment and order dated 14.03.2017, as delivered in Sessions Case No. 461 of 2013, convicting the appellant under Section 302 of the Penal Code and sentencing him to death are hereby set aside. Accordingly, the appellant, **Md. Obaydul Islam @ Uzzal Sheikh, son of Md. Fazlur Rahman Sheikh of village-Norendrapur, Police Station-Kochua, District-Bagerhat,** is acquitted.

2) However, the authorities concerned, including the Jail Authority, are directed to withdraw the appellant from the condemned cell and hand him over to the charge of Mental Health Review and Monitoring Committee, Bagerhat headed by the Deputy Commissioner of Bagerhat, as constituted under Section 5 of the Mental Health Act, 2018 (Act No. 60 of 2018). The Committee shall then keep him detained at a mental health facility in Bagerhat or Khulna, or any other better place, so that he cannot pose any threat to himself and others.

3) The said Monitoring Committee of Bagerhat is also directed to make arrangements in such mental health facility for proper assessment and treatment of the mental condition of the appellant and keep him under such detention for certain period until it is satisfied, on the report of the specialist doctors concerned, that he is mentally sound and is no more a threat to himself and to the society including his father and child. Upon such satisfaction in favour of his such soundness of mind, the appellant shall be released immediately.

4) In case no Monitoring Committee is constituted yet, the Deputy Commissioner, Bagerhat shall comply with the above directions as regards mental condition and release of the appellant.

7.2. Let an advance order containing above result and directions be sent to the jail authority and the Jail Super, Bagerhat and Deputy Commissioner, Bagerhat for immediate necessary actions.

7.3. Let a copy of the judgment be sent to the Law Secretary, Ministry of Law, Justice and Parliamentary Affairs and Registrar General of the Supreme Court for their necessary information as regards the failure of the trial Judge concerned to comply with the provisions under Sections 465 and 342 of the Code of Criminal Procedure so that he may be properly trained in line of our observation in the judgment.

Send down the lower Court records.

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(Sheikh Hassan Arif, J)

I agree.

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(Biswajit Debnath, J)