

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

**Death Reference No.34 of 2017**

The State

Vs.

Md. Abdus Salam Sheikh and two others.

...Condemned-Prisoners.

**With**

**Criminal Appeal No. 3188 of 2017**

Md. Abdus Salam Sheikh and another.

.. Convict-Appellants.

Vs.

The State ..Respondent.

Mr. Raghob Rauf Chowdhury,  
Advocate

...For the convict-appellants.

**With**

**Criminal Appeal No. 3459 of 2017**

Abdul Hamid Malitha.

.. Convict-Appellant.

Vs.

The State ..Respondent.

Mr. Md. Asif Hasan, Advocate

...For the convict-appellant.

**With**

**Jail Appeal No. 107 of 2017**

Md. Jamil Mondol

.. Appellant.

Vs.

The State ..Respondent.

**With**

**Jail Appeal No. 108 of 2017**

Abdul Hamid Malitha

.. Appellant.

Vs.

The State ..Respondent.

**With**

**Jail Appeal No. 109 of 2017**

Md. Abdus Salam 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.

**Heard on 01.11.2022, 13.11.2022,**  
**14.11.2022, 20.11.2022, and**  
**27.11.2022,**  
**Judgment on 4<sup>th</sup> and 5<sup>th</sup>**  
**December,2022**

**SHEIKH HASSAN ARIF, J:**

1. This Death Reference has been sent to us by the First Court of Additional Sessions Judge, Kushtia in view of the provisions under Section 374 of the Code of Criminal Procedure seeking confirmation of the Death sentence imposed on three accuseds vide its judgment and order dated 15.03.2017 passed in Sessions Case No.

437 of 2012 upon convicting them under Sections 302/34 of the Penal Code. The accused-convicts having, in the meantime, preferred Criminal Appeal No. 3188 of 2017 and 3459 of 2017 as well as Jail Appeal No. 107 of 2017, 108 of 2017 and 109 of 2017, the same have also been taken up for hearing and disposal along with the Death Reference.

## 2. **Background Facts:**

2.1 The prosecution case, in short, is that the P.W.1, wife of deceased, Khabir Uddin, a valiant freedom fighter, lodged an FIR on 08.02.2012 with the Daulatpur Police Station under Kushtia district alleging, inter-alia, that her deceased husband was a night guard of a motor house owned by Md. Bazlur Rahman, a neighbor. That, on 07.02.2012 at 07.30 pm, her husband left home for guarding the said motor house at Chorer Math area. In the next morning

at about 5.00 am, when one Aslam (P.W.6) went there for giving water, he found her husband dead. Accordingly, Aslam informed her and the people of the locality, who rushed to the spot and found her husband dead with a scarf tied around his neck. That her husband was killed in between 7.30 pm and 5.00 am of 07.02.2012 and 08.02.2012 by some unknown people by strangulation with a scarf.

2.2 Upon such FIR, the same was registered as Daulatpur Police Station Case No. 07 dated 08.02.2012 under Sections 302/34 of the Penal Code. The case was then investigated by the P.W.11 (an S.I of the Police Station), who had already rushed to the spot on the strength of a G.D entry and prepared surathal report on the dead body in presence of the witnesses and seized some materials by preparing seizure list. During investigation, he prepared sketch map

and index in respect of the place of occurrence and arrested two of the accuseds, namely Md. Abdus Salam Sheikh and Md. Jamil Mondal. Both the accuseds then gave confessional statements before Judicial Magistrate. Thus, upon finding the allegations to be established prima-facie, P.W. 11 (investigating officer) submitted charge sheet, being Charge-Sheet No. 240 dated 18.08.2012, against all the three accuseds under Sections 302/34 of the Penal Code. After submission of the charge-sheet, another accused Abdul Hamid Malitha surrendered before the Court below.

2.3 The case, being ready for trial, was sent to the Court of Sessions Judge, Kushtia and the same was registered as the Sessions Case No. 437 of 2012. The Sessions Judge concerned then took cognizance of offences against all the

accuseds and sent the case records to the First Court of Additional Sessions Judge, Kushtia for trial upon fixing date for charge hearing. The trial Court then framed charge against all the sent up accuseds vide order dated 24.03.2013 under Sections 302/ 34 of the Penal Code. The charge was read over to them, but they pleaded not guilty and demanded trial.

2.4 During trial, the prosecution produced 12 witnesses (P.W.1 to P.W.12), along with certain materials, to prove the charge. The said witnesses were examined and cross-examined by the parties. After recording of depositions of the witnesses and evidences, the trial Court examined all the accuseds under Section 342 of the Code of Criminal Procedure for the first time on 18.07.2016. Thereupon, the accuseds pleaded not guilty and refused to give any

evidence in support of their defense. Subsequently, some witnesses were recalled and the said witnesses were examined and cross examined by the parties again. The trial Court then examined the accuseds under Section 342 of the Code of Criminal Procedure again on 15.11.2016. As against which, they further pleaded not guilty and refused to give any evidence. The trial Court then, after hearing the parties, delivered the impugned judgment and order dated 15.03.2017, thereby, convicting all the accuseds under Sections 302/34 of the Penal Code and imposed death sentences on them and a fine of Tk.5000/- (five thousand) each. The trial Court then sent the case records to the High Court Division of the Supreme Court of Bangladesh for confirmation of the said death sentences in view of the provisions under Section 374 of the Code of

Criminal Procedure. The same has then been registered as Death Reference No. 34 of 2017 after necessary formalities including preparation of paper books. The convicts having, in the meantime, preferred aforementioned Criminal Appeals and Jail Appeals, the same, along with the Death Reference, have been sent to this bench for disposal.

3. **Depositions of the Witnesses:**

- 3.1 As stated above, the prosecution has produced twelve witnesses to prove the charge. Before re-assessment of the evidences as against the submissions made by the learned Advocates appearing for the parties, let us first describe, in short, the material parts of the deposition of the witnesses as produced by the prosecution before the trial Court:

**P.W.1 (Most. Urjina Begum)** is the informant and wife of the deceased. She deposed that on 7<sup>th</sup> February, 2012 at 07.30, the occurrence took place when her husband, valiant freedom fighter Khabir Uddin, was guarding a motor pump house at Chorer Math area of Goalgram village. That, in the next morning, Aslam (P.W.6) informed her that her husband had been killed. She, along with her daughter and neighbours, then rushed to the spot at the motor house of Bozlu and found the dead body of her husband lying with a scarf wrapped around his neck. That her husband was killed by someone in between 07.30 pm of the last evening and 05.00 am of the next morning by tying scarf around his neck. She then lodged the FIR after discussing with neighboring people wherein she could not give any names of the accuseds. That, subsequently, she filed a murder case in the Court by naming Salam, Mohsin, Bazlu, Fazlu, Intaz, Hamid and Mondol as

accuseds. Police then conducted investigation. She, accordingly, proved her FIR as Exhibit-1 and her signature thereon as Exhibit- 1/1. That police prepared surothal report wherein she signed and, accordingly, she proved the said surothal as exhibit-2 and her signature thereon as exhibit-2/1.

In cross-examination by accused Salam and Jamil, she deposed that about 15 days after filing of the FIR, she filed a case in the Court naming some accuseds in the murder case and she came to know that Hamid, Jamal and Salam were made accuseds in the charge-sheet. That she did not see any occurrence and admitted that she did not have any previous case against the accuseds and that her husband was working as night guard in exchange for paddy without any payment. She further deposed in cross-examination that she filed the case in the Court after discussing with the local people when

she suspected the accuseds. That police had beaten accused-Salam after arrest and that she did not have previous enmity with the accuseds.

**P.W.2 (Md. Mirajul Islam)** is the cousin of the deceased. According to his deposition, the occurrence took place on the 7<sup>th</sup> day of 2<sup>nd</sup> month of 2012 after 07.00 pm when deceased freedom fighter Khabir Uddin was guarding a motor machine at a motor house. This witness came to know in the next morning that Khabir was killed. He then rushed to the spot and found the dead body of Khabir lying with a scarf wrapped around his neck. He, subsequently, heard that three people had killed Khabir and that they admitted such killing before Magistrate; their names are Hamid, Jamil and Salam.

In cross-examination on behalf of the accused Salam and Jamil, he deposed that he met deceased

Khabir in the evening during prayer and that he did not see the occurrence. That, in the morning, he met Urjina (P.W.1) and that he did not hear the names of the accuseds on that day. That P.W.1 separately filed case before the Court and that he does not know whether he was made witness in the said case and he also does not know the names of other witnesses in the said case. He then deposed that Khabir had previous enmity with Salam and that Khabir has been guarding the motor house of Bazlu for about one year during night.

**P.W. 3 (Dr. Taposh Kumar Sarkar)** is the doctor who conducted post mortem on the deceased. He deposed that, on 08.02.2012 at about 12.30 noon, the dead body of deceased Khabir Uddin (65) was produced to him by one constable Sheikh Maruf Hossain and he commenced post mortem on it at 1.30 on his own and, he, accordingly, found the

cause of death as *“due to hemorrhage and shock and asphyxia as a result of blunt trauma to head and strangulation which was antemortem and homicidal in nature”*. Accordingly, he proved the said post mortem report as Exhibit-3 and his signature there on as Exhibit-3/1. In cross- examination, he deposed that as per the opinion given by him, the death was not possible by tying himself with a rope. He then denied that the death was caused due to suicide. He also deposed that he mentioned physical injury in the report.

**P.W.4 (Md. Monjurul Imam)** is the Judicial Magistrate who recorded the confessional statements of two of the accuseds, namely Md. Abdus Salam Sheikh and Md. Jamil Uddin Mondal. He deposed that, on 11.03.2012, he was working as Senior Judicial Magistrate at Kushtia when accuseds Jamil and Salam were produced to him for recording

confessional statements. He, accordingly, recorded the same in accordance with law. He first recorded the confessional statement of Jamil and then recorded confessional statement of Salam. He, accordingly, proved the confessional statement of Jamil as Exhibit-4 and six signatures there-on as Exhibit-4 series. He also proved the confessional statement of accused Salam as Exhibit-5 and six signatures on it as Exhibit-5 series.

In cross-examination, he admitted that both the accuseds were produced at the same time for recording confession. That he gave 3.30 hours time to accused Jamil for reflection and he did not mention how much time was given to accused Salam. But he deposed that he started recording deposition of Salam at 4.35 pm. In cross-examination, he further deposed that he himself examined the accuseds and did not find any sign of

police torture on their bodies. Accordingly, he did not get them examined by doctor. He denied defence suggestion that the accuseds had sign of torture on the body and that they told him that they were confessing because of police torture. He further deposed that upon seeing their signatures the accused seemed to him as literate persons. In cross-examination, he further deposed that although he did not specifically mention in the form that the confession of the accuseds were true and voluntary, he mentioned the same in different way and that the accuseds were kept in the room of steno, Rathindra Nath Ghosh, and that they were not in his Khash Kamra (private room). He denied that their confessional statements were not recorded in accordance with the Code of Criminal Procedure. He further deposed in cross-examination that he did not tell the accuseds that they would not be handed over

to police after confession because no such thing was mentioned in the Form.

**P.W. 5 (Md. Hafijul Islam)** is the nephew of the deceased. According to his deposition, his uncle, deceased Khabir, was killed in the motor house about two years back where his uncle used to stay for running the motor. That Aslam saw the incident in the morning and saw that Khabir was killed by strangulation at the throat. That he heard that Salam, Jamil and Hamid had killed Khabir. That he also heard that Salam, Jamil and Hamid admitted their guilt before Magistrate. He, accordingly, identified the accuseds on the dock. In cross-examination, he confirmed that Khabir was his full uncle and that he did not see any occurrence and that he heard that the accuseds had admitted guilt. He further deposed that he did not have any information whether the accuseds were beaten by

police. He again confirmed that accuseds did not have enmity with the deceased.

**P.W.6 (Md. Aslam Cheragi)** is the cousin of the deceased. According to his deposition, deceased was killed two years back at the motor house by strangulation with a scarf. He heard that Salam, Jamil and Hamid had killed him and that they admitted their guilt before Magistrate. He, accordingly, identified the accuseds on the dock. That he heard about killing of deceased in the next morning. In cross-examination, he confirmed that Khabir was his brother and that he did not see the occurrence or that Khabir did not have enmity with the accuseds. He further deposed that Khabir used to guard the water pump and stay at the pump house. He heard from the village people that the accused had admitted guilt, but he could not remember the names of those people. He also

deposed that he did not know whether police had beaten the accuseds.

**P.W.7 (Md. Khoaj Hossen)** was a UP Chairman at the relevant time. He deposed that he heard about the death of deceased on 08.02.2012. That he signed the surothal report and, accordingly, he identified his signature. In cross-examination, he deposed that he did not read the paper which was signed by him and that some other people also signed the same.

**P.W.8 (Monirul Islam)** is the UP Member of Goalgram. According to him, freedom fighter Khabir Uddin died two and half years back and then police prepared a surothal report which he signed. Accordingly, he identified his signature as Exhibit-2/3.

**P.W.9 (Md. Samsul Haque)** is a former UP Member. According to his deposition, freedom fighter Khabir Uddin died in February, 2012. That police then came and prepared the surothal report which he signed. Accordingly, he identified his signature as Exhibit-2/4.

**P.W.10 (Md. Shahin)** is the son of the deceased. According to his deposition, the occurrence took place on 07.02.2012. That he was working as police constable on that day in Meherpur district. He heard that his father was killed in the house of shallow machine of his area by strangulation and that he was killed in between 07.00 pm of 07.02.2012 and early morning of 08.02.2012. That he reached the place of occurrence on 08.02.2012 and saw the police. That police prepared surothal report, which he signed. He, accordingly, identified his signature as Exhibit-2/5. He further deposed that he heard that

his father was called away by Salam and that in the morning of next day, i.e. on 08.02.2012, his father's dead body was found. In cross-examination, he deposed that he came to depose as a private person and that he confirmed that he was police constable in Meherpur. He further deposed that he did not have any knowledge whether two FIRs were lodged in respect of his father's killing. He deposed that he gave statement to police during investigation and that his mother gave deposition before Court and that his sister gave statement. He confirmed that he did not see any occurrence and that his father Kabir Uddin did not have enmity with any people in the village. He also confirmed that he signed the surothal report.

**P.W.11 (S.I Sawpan Kumar Das)** was the investigating officer of the case. According to his deposition, at the relevant time, he was working at

Doulatpur Police Station on 08.02.2012 when the charge of investigation was handed over to him. Accordingly, he inspected the place of occurrence, prepared sketch map, index and surothal report and sent the dead body to the Kushtia General Hospital for post mortem to find out the cause of death. He, accordingly, seized the materials and arrested accused Salam and Jamil on suspicion and had their confessional statements recorded by a Magistrate under Section 164 of the Code of Criminal Procedure. He deposed that both the accuseds admitted that they and accused Abdul Hamid Malitha had killed victim Khabir Uddin out of previous enmity. He further deposed that he had recorded statements of the witnesses under Section 161 and, in his investigation, he found the allegation of killing against accuseds Abdus Salam, Jamil Mondal and absconding accused Abdul Hamid Malitha as prima-facie established and, accordingly,

he submitted charge-sheet against them, being Charge Sheet No. 240 dated 18.08.2012, under Sections 302/34 of the Penal Code. Accordingly, he identified his signature on the surothal report prepared by him as Exhibit-2/6. He also proved the seizure list as Exhibit-6 and his signature thereon as Exhibit 6/1. He deposed that he had seized some materials, namely a piece of brown colour jacket, piece of white check shirt, piece of white stripe lungi, piece of blue stripe scarf as Material Exhibit-I and that he found those materials with the dead body. According to his deposition, the deceased was killed by strangulation with a scarf. He, accordingly, proved the sketch map and index as Exhibits-7 and 8 and his signatures there on as Exhibits-7/1 and 8/1 respectively. He also proved the chalan of the death body as Exhibit-9 and his signature thereon as Exhibit-9/1. He then identified the accuseds Salam and Jamil on the dock. He deposed that Hamid

Malitha was absconding till submission of the charge-sheet. In cross-examination, he deposed that the FIR was recorded by O.C. Sheikh Lutfor Rahman and that this witness investigated the case. In cross-examination, he admitted that P.W.1-Urjina Begum filed a complaint before the Magistrate naming seven persons as accuseds and the said complaint was sent to him by the Court for submission of report. That Salam Sheikh, Fazlul Haque, Mohosin Ali, Entaj Ali, Moklesur Rahman and Abdul Hamid were named in the said complaint petition and that the said complaint petition was lying with the case docket. That Mohosin Sheikh was not named in the complaint petition. He deposed that he investigated both the complaint petition and the FIR side by side. He also deposed that he did not submit any final report in respect of four persons named in the complaint petition, namely Moklesur Rahman, Entaj Ali, Fazlul Haque and Mohosin Ali and he did

not submit any separate investigation report before the Magistrate in respect of the said complaint petition. But, according to him, he submitted separate report in respect of the complaint petition and that the said report was lying with the record of the complaint petition being Misc. 28/12. He confirmed that the FIR did not name any accuseds and that he arrested Jamil on the basis of a source. He also admitted in cross-examination that he did not find any eye witnesses as to the killing of the deceased. He admitted that P.W. 10-Shahin was the son of the deceased and that Shahin was employed in police department, but Shahin did not file a case on his own. He also deposed in cross-examination that he did not seize any paper in support that Khabir Uddin was a freedom fighter. He further confirmed that the piece of brown colour jacket, piece of white stripe shirt, piece of white stripe lungi and piece of blue colour scarf were seized by him.

However, he did not mention in the seizure list that the said materials were worn by the deceased. He again deposed in cross-examination that although the dead body was sent by constable Maruf, he was not made a witness in the charge-sheet and that nobody stated in Section 161 statement that Khabir had any enmity with the accuseds. He further deposed that he could not arrest accused Hamid Malitha and that he did not know whether Hamid Malitha surrendered voluntarily or he got bail from the High Court. He then deposed that accused Salam was arrested from his own house and Jamil was arrested from Jhinaidah district with the help of Kakiladah police camp under Horinakunda Police Station on 11.03.2012. That accused Salam was also arrested on 11.03.2012. He denied the defence suggestion that being influenced by the son of deceased, accuseds Salam and Jamil were compelled by torture for giving confessional

statements. He further denied that the said accuseds were in fact produced before the Court on 13.03.2012. He also denied the suggestion that Salam and Jamil were arrested on the tip-off given by P.W. 10-Shahin. But he admitted in cross-examination that he did not make the pump owner witness in the case and that he did not seize any paper in support of Khabir's employment at the Bazlu's pump. He denied the defense suggestion that none of the witnesses said that they saw Khabir going to the pump house. He also denied the defence suggestion that since the son of the deceased was employed in police department, this witness extorted the confessional statements of the accuseds taking his side. Upon re-call, this witness replied in cross-examination that accused Jamil Uddin Mondol was arrested from village Berbinni under Harinakundu Police Station of Jhenaidah District and that accused Salam was arrested from

his house at Goalgram village under Doulatpur Police Station, and both the accuseds were produced before the Court on 11.03.2012. In cross-examination, he identified the location of Kushtia Sadar Police Station as well as the distance of Harinakundu Police Station and he admitted that the distance between the two places of arrest was 100-110 km. He denied the defence suggestion that he did not submit any report in the petition case filed by P.W.1 and deposed that he mentioned in the C.D. that he had submitted such report. He further admitted that he did not name the Magistrate, who recorded 164 statements, as a witness in the charge-sheet and, according to him, he did not feel it necessary to make him a witness. He further deposed in cross-examination that on 11.03.2012 at 11.55, both the accuseds Salam and Jamil were produced before the Magistrate for making confessional statements. He denied the defence

suggestion that he submitted perfunctory charge-sheet being influenced by the informant party.

**P.W.12 (Sheikh Maruf Hossain)** was the constable at the police station concerned. According to his deposition, on 08.02.2012 at 11.05, he rushed to the shallow machine house owned by Bazlu of Goalgram Dakkhin Char area under Doulatpur Police Station. That Chowkider Sirajul opened the door of the house and he found dead body of deceased Khabir Uddin lying on a bed with scarf being wrapped around his neck. That S.I. Sawpon (P.W-11) prepared surathal report and this witness took the body to Kushtia General Hospital for post mortem by a chalan. Accordingly, he proved the said chalan and his signature thereon as Exhibit-9/2.

#### 4. **Submissions:**

4.1 At the outset of the hearing, learned Deputy Attorney General, appearing for the State, has

placed the entire materials from the paper book as well as the materials lying with the lower Court records one after another and finally has made extensive submissions in favour of confirmation of the death sentences of all the three accuseds. On the other hand, learned Advocates, namely Mr. Raghیب Rauf Chowdhury and Mr. Md. Ashif Hasan, have made extensive submissions in favour of the appellants in the aforesaid appeals seeking their acquittal. However, for the sake of convenience, we will refer to the submissions made by the learned Advocates for the appellants first followed by the submissions of the learned Deputy Attorney General for the State.

4.2 Mr. Raghیب Rauf Chowdhury, learned Advocate appearing for the appellants-Md. Abdus Salam

Sheikh and Md. Jamil Mondol has made the following submissions:

(a) That the conviction is entirely based on confessional statements of the appellants, although the same were not recorded in accordance with law and as such the same was not true and voluntary, particularly when one of the prosecution witnesses, namely P.W.1, has categorically deposed that accused Md. Abdus Salam Sheikh was beaten by police.

(b) That there is huge doubt as regards the date of arrest of both the accuseds and that the accuseds were arrested at least 2/3 days before recording of the confessional statements and they were tortured in the police custody to make such confession because of the role

played by the son of the deceased (P.W.11), who was admittedly a Police constable at the relevant time.

(c) That it is humanly impossible to arrest both the accuseds on the same day, particularly when they were arrested from two different adjacent districts which were about 110 km away from each other. Therefore, according to him, the confessional statements cannot be regarded as voluntarily confessional statements and the same cannot be the basis of any conviction, particularly when there was no eye witness to the occurrence.

(d) Further referring to the very confessional statements of both the convicts, he submits that both the confessional statements are so similar that it may easily

be presumed that the same has been drafted by the same person. Therefore, according to him, such similarity of two confessional statements allegedly given by two accuseds cast a serious doubt about the truthfulness of the same.

(e) By referring to a complaint petition filed by the P.W.1 (informant) few days after lodging the FIR, he submits that relevant provisions of Section 205D of the Code of Criminal Procedure were not complied with by the Courts below, particularly when no report has been submitted by the investigating officer on the said petition of complaint although the same was sent to the investigating officer by the Court below.

(f) Further referring to the motive of killing indicating previous dispute between the

deceased and accused Md. Abdus Salam Sheikh, as revealed from the confessional statements, he submits that none of the prosecution witnesses deposed a single word before the trial Court as regards such previous enmity. Therefore, so far as truthfulness of the confessional statements of accuseds are concerned, the same casts serious doubt on themselves.

(g) By referring to Section 342 examination of two accuseds done by the trial Court below, he submits that the examination done by the trial Court was perfunctory in nature and it even did not refer any of the circumstances appearing in evidences to the accuseds. Therefore, according to him, the accuseds have been highly prejudiced and, accordingly, the trial was

vitiated. In support of his such submissions, he has referred to the decisions of this Court in **Habibur Rahman vs. State, 18 BLC (AD)-218, State vs. Monu Miah, 54 DLR (AD)-60 and Abdul Kashem vs. State, 49 DLR-573.**

- (h) As regards confessional statements of both the accuseds, he submits that both of them have retracted their confessional statements stating therein that the same were taken by applying force and coercion on them.
- (i) Alternatively, he submits that even if the conviction against these accuseds is affirmed, the sentence should be commuted, particularly when these accuseds do not have any record of previous criminal activity and that they are

young people and have already served in jail for 10 (ten) years including 5(five) years in condemned cell.

4.3 Mr. Md. Ashif Hasan, learned advocate appearing for the appellant- Abdul Hamid Malitha, has made the following submissions:

(I) That the conviction of this appellant is merely based on the confessional statement of the two co-accuseds and as such, according to the long standing principle established by our Apex Court, the conviction against this appellant cannot sustain in the eye of law, particularly when there was no eye witness to the occurrence and that the prosecution did not have any independent evidence to substantiate the charge against him. In support of his such submissions, he has referred to some decisions of this Court in **State Vs. Abdur**

**Rahim 10 DLR-61 and Amir Hossain  
Hawlader Vs. The State 1984 BLD (AD)-  
193.**

(II) As regards latest decision of our Appellate Division in favour of convicting an accused on the basis of confessional statement of co-accused, namely the case of **Shukur Ali Vs. State, 74 DLR (AD)-11** and **Noor Mohammad Vs. State, 74 DLR (AD)-170**, he submits that the facts of those cases decided by the Appellate Division and present case are highly distinguishable inasmuch as that in the said cases, the accused remained absconding for long time, but in the present case, this accused surrendered before the Court below immediately after submission of the charge-sheet. Therefore, according to him, the ratio

decided in the said cases cannot be applied in the present case.

(III) By referring to the retraction applications filed by the co-accuseds, Md. Abdus Salam Sheikh and Md. Jamil Mondol, he submits that the confessions given by them have in the meantime become retracted confessions. Therefore, the value of these retracted confessions as against this appellant is merely zero. In support of his such submissions, he has referred to a decision of our Appellate Division in **Amir Hossain Howlader Vs. State, 37 DLR (AD)-139.**

(IV) By referring to the Section 342 examination of this accused as done by the trial Court below, he submits that none of the incriminating materials or circumstances appearing in evidence against this accused

has been referred to him during such examination. Not only that, he submits, even the confessional statements of the accuseds, the very basis of the conviction of this accused, were not referred to him seeking his reply. Therefore, according to him, the conviction against this accused cannot be maintained on the basis of such confessional statement of co-accuseds, particularly when the said confessional statements do not come within the purview of the definition of evidence as provided by Section 3 of the Evidence Act and that this accused did not get the opportunity to cross-examine the said co-accuseds on their alleged statements in the said confessional statements. Therefore, he submits that the entire trial as against this accused has been vitiated. In support of his such submissions,

he has referred to a latest decision of our Appellate Division in **Md. Abdul Awal Khan Vs. The State, 16 SCOB [2022] AD-22.**

(V) According to him, sending the case on remand to the trial Court for doing Section 342 examination again in accordance with law will be a sheer injustice to the accuseds, particularly when they have in the meantime been in jail and condemned cell for about 10 (ten) years. Accordingly, he prays for acquittal of this accused.

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

(a) That this is a case of strong circumstantial evidence as there is admittedly no eye witness to the

occurrence. By drawing this Court's attention to the case dairy lying with the lower Court records as well as date and time of arrest of the accuseds Md. Abdus Salam Sheikh and Md. Jamil Mondol, he submits that there is no impossibility in arresting both the accuseds on the same day, particularly when Salam was arrested at 2.05 am and Jamil was arrested about two and half hours later from an adjacent district in the midnight following 11.03.2012. Therefore, according to him, since both of them were arrested in the midnight when there was no traffic on the road, it was quite possible by police to arrest them from two adjacent districts which are away from one another by 110 km. Thus, he submits that the submission of

the learned Advocate for the said two accuseds as regards time and date of arrest has no substance.

(b) He further submits that since the arresting officer or investigating officer was not specifically cross examined by the defense lawyers on this point of date and time of arrest, the appellants cannot raise this issue before this appellate Court at all, particularly when they were produced before the learned Magistrate on 12.03.2012 i.e. within the quickest possible time. Therefore, he submits that the allegation of torture or any irregularity in arresting or producing the said accuseds before the Magistrate do not have any substance.

(c) As regards similarity of both the confessions, learned DAG submits that

this similarity further proves that the confessing accuseds revealed the truth and this will go in favour of the prosecution, particularly when the recording Magistrate (P.W.4) deposed before the trial Court that he did not find any sign of torture on the body of the confessing accuseds.

(d) By referring to the retraction application of the accuseds Md. Abdus Salam Sheikh and Md. Jamil Mondol, learned DAG submits that they were not even signed by the accuseds. Rather, they were the product of an advocate representing them, who merely filed an application of retraction by signing it himself and the same did not come through the proper jail authority. Therefore, such retraction application

should not be treated at all as retraction application of the accuseds.

(e) By referring to the Section 342 examination of accuseds- Salam and Jamil, he submits that their confessional statements were referred to them during Section 342 examinations. Therefore, to that extent, no illegality has been committed. In support of his such submissions, he has referred to the case of **Khalil Mia Vs. State, 4 BLC (AD)-223.**

(f) That during the entire trial, all the three accuseds saw and heard the entire evidences produced by the prosecution and their advocates extensively cross-examined the prosecution witnesses before their very eyes in Court. Therefore, they cannot raise the point of

prejudice as regards Section 342 examination on the ground that those evidences were not referred to them during such examination.

(g) By referring to the latest decisions of our Appellate Division in **Shukur Ali Vs. State, 74 DLR (AD)-11** and **Noor Mohammad Vs. State, 74 DLR (AD)-170**, learned DAG submits that our Appellate Division has in the meantime repeatedly held that an accused may be convicted on the basis of confessional statement of co-accused, if such confession is believed to be the true. Therefore, according to him, accused Abdul Hamid Malitha also does not have any case before this Court for acquittal.

(h) That defect or irregularity, if any, in Section 342 examination done by the

trial judge cannot be attributable to the fault on the part of the prosecution and such defects are mere procedural irregularity and the same can be cured by sending the case on remand for doing Section 342 examination again. In support of his such submissions, he has referred to the cases decided by our Appellate Division in **Sohel Vs. State, 63 DLR (AD)-125** and the majority decision of our Appellate Division in **Criminal Appeal No. 40 of 2008.**

## 5. **Scrutiny of Evidences:**

5.1 There is no dispute in this case that the deceased is valiant freedom fighter Khabir Uddin and, according to the post mortem report, he ended up with an unnatural death by throttling and/or blunt trauma on the head which were

ante-mortem and homicidal in nature. The identification of the dead body of the deceased was also not disputed in this case P.W.1 and P.W.2 deposed before the Court that they saw the dead body in the next morning in the motor house owned by Bazlur Rahman and that the neck of the deceased was tied up with scarf. The injuries found in the post mortem report (Exhibit-3) also are supported by surothal report findings (Exhibit-2). The said surothal report has been proved by various prosecution witnesses, namely P.W.1, P.W. 2, P.Ws. 7-11 and the doctor (P.W. 3), who had conducted post mortem on the dead body, also proved the said post mortem report and findings therein. Therefore, it has been proved by the prosecution beyond reasonable doubt that this is a case of killing of valiant freedom fighter Khabir Uddin.

5.2 However, admitted position is that nobody saw as to who killed the deceased as the occurrence took place in a dreadful night at Choror Math in a motor house. The details as to the manner of occurrence were disclosed from the confessional statements of accuseds Salam and Jamil. Therefore, if the prosecution can establish that those two confessional statements are voluntary and true in nature, the same may be used against the confessing accuseds and the non-confessing co-accused (to some extent) for their convictions. Besides, since the copy of the petition of complaint was filed by P.W.1 (informant) was sent to the investigating officer, no complaint case was instituted or registered. Thus Section 205D of the Code does not have any manner of application in this case. This being so, let us first examine whether the said confessional statements as well as other

evidences on record have established the guilt of the accused Salam and Jamil.

**Md. Abdus Salam Sheikh and Md. Jamil Mondol:**

5.3 It may, at the outset, be noted that the said confessional statements of the said two accuseds were proved by the Magistrate, who recorded the same, as P.W.4. Jamil's confession was proved as exhibit-4 and Abdus Salam's confession was proved as exhibit-5. The signatures of the accuseds as well as the Magistrate concerned were also identified by the said Magistrate before the trial Court and they were also marked by the trial Court as exhibits. The said confessional statements (Exhibit-4 and 5) are reproduced below:

**Confession of Jamil:**

আমি রাজমিস্ত্রির কাজ করি। ঘটনার প্রায় ২৪/২৫ দিন আগে নিহত মুক্তিযোদ্ধা খবিরের ভতিজা জাকেরের সাথে আমার মামাত ভাই আব্দুস সালামের গোলযোগ হয়। ছালাম জাকেরকে হাসুয়া দিয়ে ৩/৪ টা কোপ

মারে। খবির এই নিয়ে থানায় নালিশ দিলে সেখানে শালিশ হয়। শালিশে আব্দুস সালামের ১০০০০/- টাকা জারিমানা হয়। কিন্তু তার পর ও খবির (নিহত) সালামকে গালি গালাজ করে। খবির সালামের চাচার পানির পাম্প চালাত। বিধায় খবির সালামকে বকাবকি করায় সে বলে আমার চাচার খাবে, পরবে অর আমাকে বকবে তা হবে না। সে প্রতিশোধ নিতে যায়। তখন আসামী ছালাম, হামিদ, পিতা-নজির মালিখা, এরা যুক্তি করে। আমি তখন ঝিনেদাতে শ্রমিকের কাজ করছিলাম। ছালাম আমাকে ফোন করে এবং জিজ্ঞাসা করে আমি বাড়ীতে আসব কিনা। আমি বলি কাজের চাপ আছে পরে আসব। অতঃপর ৫/৬ দিন পরে আমার মেয়ে অসুস্থ হলে আমি বাড়ী চলে আসি। ছালাম ঘটনার দিন (৭/২/১২ তারিখে) রাত ৮/৯ টার দিকে আমাকে ডাকে এবং শ্যালো ম্যাশিনের ঐখানে চরের মাঠে যেতে বললে আমি যাই। সেখানে যেয়ে ছালাম, হামেদ, খবিরকে (মুক্তিযোদ্ধা) দেখি। ছালাম মুক্তিযোদ্ধা খবিরকে শ্যালো মেশিনের ঘরে যেয়ে ঘুমাতে বলে। তখন খবির ঘরে যেয়ে শুয়ে পড়ে। খানিক পরে ছালাম ঐ ঘরে প্রবেশ করে। ৫/১০ মিনিট মত পরে হামেদ ও ঘরে যায়। আমাকে ওরা ডাকে। যেয়ে দেখি হামেদ খবির (মুক্তিযোদ্ধার) হাতে ও মুখ চেপে ধরেছে। আমাকে বলে পা ধরতে আমি পা ধরি। ছালাম গলায় মাফলার দিয়ে পেচিয়ে ধরে মেরে ফেলে। আমরা চলে আসি। আমি পরের দিন ঝিনেদা চলে যাই। হামিদ আমাকে ধরে নিয়ে আসে। এই আমার জবানবন্দি।

### Confessional of Md. Abdus Salam:

আমি আমার বাবার সাথে কাঠের ব্যবসা করতাম। মুক্তিযোদ্ধা খবির আমার চাচা বজলুর পানির পাম্প চালাত। আমি মাঠে ঘাস কাটতে গেলে মুক্তিযোদ্ধা খবিরের ভাতিজা জাকিরের সাথে আমার মারামারি হয়। আমি

হাসুয়া দিয়া ৪/৫ টা কোপ দিলে ওর শরীর কেটে যায়। খবির থানায় নালিশ দিলে থানায় শালিশ হয়। সেখানে আমাকে ১০,০০০/- টাকা জরিমানা করে। তারপরও খবির আমাকে গালিগালাজ করতে থাকে। আমার জমিতেও ঠিকমত পানি দিত না। তাই আমি ওর উপর প্রতিশোধ নেওয়ার সিদ্ধান্ত নিই। আমি আমার প্রতিবেশী হামেদের সাথে কথা বলি এবং খবিরকে মেরে ফেলার সিদ্ধান্ত নিই। অতঃপর আমি আমার ফুফাত ভাই জামেলের সাথে মোবাইলে কথা বলি ও তাকে গ্রামে আসতে বলি। ও আসতে অস্বীকার করে। ২/৩ দিন পর জামিলের মেয়ে অসুস্থ হলে ০৭/২/১২ তারিখে জামিল বাড়ী আসে। ঐ দিন রাত ০৮ টার দিকে খবির মাঠে যায়। তার পরে আমি হামেদের নিয়ে ঐ মাঠে পানির পাম্পের কাছে যাই। জামিলকে রাত ৮.৪৫ টার দিকে ফোন দিই। জামিল ৯.০০ টার দিকে ঐ খানে পৌঁছিলে আমরা কথা বলি। খবিরকে পাম্পের ঘরে যেয়ে আমি ঘুমাতে বলি। খবির ঘরে যেয়ে শুয়ে পড়ে। কিছুক্ষন পরে আমি সেখানে যাই। রাত ১০.০০/১১.০০ টার মধ্যে আমি হামিদকে ডাকি। হামিদুল খবির (মুক্তিযোদ্ধার) হাত ও মাথা চেপে ধরে। জামিল ওর পা চেপে ধরে। আমি ওর গলায় থাকা মাফলার দিয়ে পেচিয়ে ধরে ফাঁস লাগিয়ে হত্যা করি। খবির মারা গেলে আমি সহ সবাই বাইরে আসি। আমি একটি বিশেষ কায়দায় বাহীর থেকে ভিতরের ছিটকিনি আটকে দিই। আমি মুক্তিযোদ্ধার জানাজায় অংশ গ্রহন করি। আমি অন্যায় করেছি ক্ষমা প্রার্থনা করি। এই আমরা জবানবন্দী।

5.4 It appears from the case dairy and the said confessional statements that accused Salam was arrested at 2.05 am, which is technically on

12.03.2012, i.e. the midnight followed by 11.03.2012, and accused Jamil was arrested after two and half hours from an adjacent district, namely Jhinaidah. Since the distance between two places of arrest is admittedly about 110 km, learned advocate for the appellant has posed a doubt that such arrest of two persons from two different districts within two and half hours was not humanly possible.

5.5 Admittedly, they were arrested at midnight following the day of 11.03.2012. Salam was arrested at 2.05 am from his house in Kushtia district and Jamil was arrested at about 4.35 am from Jhenaidah district with the help of the local police of Jhenaidah, and both of them were produced before the Magistrate in the morning at about 11.00 am on 12.03.2012. Since the time of such arrest was midnight and it is quite understandable that at a place like Kushtia and

Jhenaidah the traffic would be very minimum at that time, particularly on the highways, we do not find any substance in the submission of the learned advocate that it was not humanly possible to arrest both of them from two different adjacent districts within a span of time of two and half hours.

5.6 As regards alleged torture or coercion, we have checked the very confessional statements of both the accuseds, wherein the Magistrate categorically stated that he did not find any such sign of torture. He gave specific memo in the said confessional statements to that effect. In cross- examination of the said Magistrate before the trial Court, such position could not be shaken by the defense lawyers. Therefore, so far as the time of arrest of the accuseds, their production before the Magistrate and recording of their confessional statements are concerned,

we have not found any major irregularity which may be regarded as vitiating the said process of recording confessional statements as well as the said very confessions. Therefore, we have no option but to hold that the said accuseds gave such confessional statements voluntarily.

5.7 Now, the question of truthfulness of the said confessional statements. It appears that in fact the contents of both the confessional statements are more or less similar. However, this similarity itself cannot suggest that the same was drafted or dictated by same person before making such confessional statements as suggested by the learned advocate appearing for the accuseds. In the retraction application, although filed by a lawyer, it has not been stated that the said confessional statements were drafted or dictated by somebody else and that the accuseds just copied the same. Therefore, it appears that this

submission of similarity of the confessional statements as well as drafting of the same by the same person is an afterthought argument as devised by the learned advocate appearing for the appellants. Therefore, we cannot give too much attention to the said submission as the same does not seem to have any substance in the facts and materials on record. On the other hand, it appears that the manner of occurrence, as stated in the said confessional statements and supported by the surothal report as well as the post mortem report, have been duly proved by the witnesses. Therefore, we have no option but to hold that the contents of the said confessional statements are also true. Accordingly, we hold that the said confessional statements of the said two accuseds are voluntary and true in nature. Therefore, the said two confessing accuseds may be convicted

solely on the basis of the said confessional statements with minimum corroborative evidences.

**Abdul Hamid Malitha:**

5.8 Now, the question is whether on the basis of the said confessions of the two co-accuseds, the conviction on Malitha may be sustained. It is true that we have long line of decisions of our Apex Court that the confession of co-accused is not a substantive piece of evidence and the same does not come within the purview of the definition of the term 'evidence' as provided by Section 3 of the Evidence Act. Therefore, it has been consistently held by the superior Courts of this subcontinent that an accused cannot be convicted on the basis of such confessional statement of co-accused. Rather, such confessional statement of co-accused may be

taken into consideration in view of the provisions under Section 30 of the Evidence Act when there are substantive and independent evidences to convict an accused. Only then, the confessional statement of co-accused may be taken as aid or corroboration to strengthen the independent evidences already found in favour of guilt of an accused. Such ratio has been repeated in the decisions cited by the learned advocate appearing for this accused, namely the decision in **State vs. Abdur Rahim, 10 DLR (1958)-61**, the decisions of our Appellate Division in **Amir Hossain Hawlader vs. The State, 1984 BLD (AD)-193** and **Majid Sheikh vs. State, 11 BLC (AD)-149**. In Majid Sheikh, it has been observed by our Appellate Division in the following terms:

*“We are surprised to find that the High Court Division per in curium affirmed the judgment of conviction of four other accused appellants namely, (1) Reza Mollah, (2) Haider Ali, (3)*

*Saken Sarder and (4) Pathar Ali though except confessional statement of co-accused Zinnah there is no evidence against them. The learned Deputy Attorney-General, in such circumstances, also found it difficult to oppose their appeal. We disapprove such treatment of using confessional statement of co-accused against other accused to base their conviction without any other evidence against them.”*

5.9 There are several other decisions of our Superior Courts supporting this ratio. However, the Appellant Division has recently taken a different approach which has been reflected for the first time in the above referred **Sukur Ali’s case, reported in 74 DLR (AD)-11** followed by above referred **Noor Mohammad’s Case, 74 DLR (AD)-170** it has been held therein that the confessional statement of a co-accused can be used for the purpose crime control against other accused persons even if there is a little bit of corroboration of that confessional statement

by any sort of evidence either direct or circumstantial. It appears that in deciding the above referred **Sukur Ali and Noor Mohammad's Case**, the Appellate Division did not clearly overrule its previous decisions on the same point. Nor did it specifically distinguished **Sukur Ali and Noor Mohammad's Case** from the cases decided by it earlier on the same points. Nevertheless, absence of such clear message from the Appellate Division in the said two cases do not bother us that much in this case, particularly when it appears that the learned advocate appearing for the Abdul Hamid Malitha has taken up a different point thereby distinguishing his case from the cases decided by the Appellate Division in **Sukur Ali and Noor Mohammad Case**. According to him, in the present case, the confessions of co-accuseds

were retracted confessions. Although, there are some irregularities, as pointed out above, in such retraction of the said confessional statements, it cannot be denied that retraction applications were filed on behalf of the said confessing accuseds retracting their confessions. Therefore, we clearly find this case distinguishable from the cases decided by the Appellate Division in **Sukur Ali and Noor Mohammad's Case**.

5.10. Additionally, we find support of the submission of the learned advocate appearing for accused Abdul Hamid Malitha in the case decided by our Appellate Division in **Amir Hossain Howlader vs. State, 37 DLR (AD)-13**, wherein the Appellate Division has clearly held that as against the co-accused, the evidential value of a retracted confession is practically nil and in absence of strong independent evidence, it is

totally useless. Therefore, we are of the view that this case is not covered by the ratio decided by the Appellate Division in the above referrer two cases, namely **Sukur Ali's case** and **Noor Mohammad's Case**.

5.11 Admittedly, there is no independent incriminating evidence which attracts this accused closer to the crime. No incriminating article was recovered from his possession or on the discloser of this accused in view of Section 27 of the Evidence Act. This accused surrendered voluntarily immediately after submission of the charge sheet and faced the entire trial during which he was on bail. There is no allegation of misuse of privilege of bail suggesting his criminal mind. Therefore, we are of the view that merely because of his involvement being mentioned in the confessional statements of co-accuseds, he

cannot be convicted particularly when there is no independent or substantive evidence against him which attracts him or connects him to the crime. Therefore, we are in full agreement with the submission of the learned advocate appearing for accused Abdul Hamid Malitha that those confessional statements of co-accuseds do not at all come within the purview of the definition of the 'evidence' as provided by Section 3 of the Evidence Act, particularly when this accused did not have any opportunity to cross examine those co-accuseds on the contents of their confessional statements. Accordingly, we hold that this accused should get the benefit of doubt in this case and we have no option but to hold that the prosecution has failed to prove the charge against him with any substantive or legal piece of evidence beyond reasonable doubt.

**Section 342 Examination of the Accuseds:**

5.12. It appears from record that although the accuseds were examined twice by the trial Court under Section 342 of the Code of Criminal Procedure, the circumstances appearing in the evidence against them during trial were not at all put to their attention in order to seek their explanation in view of the provisions under Section 342 of the Code. The Legislature has very carefully used the words in Sub-section (1) of Section 342 of the Code to the effect that *“any circumstances appearing in the evidence against him”* should be put to the attention of the accused so that he is able to explain such circumstances. That is the only opportunity formally given by the statute to the accused to defend himself and, through such examination, he is entitled to support his defense or give explanation as against the said

circumstances appearing in the evidences against him.

5.13. In this regard, it should be noted that this Court has in the meantime elaborately discussed different views of the superior Courts of the sub-continent including our Appellate Division in an unreported Death Reference case, namely in Death Reference No. 136 of 2016 (State Vs. Md. Nurul Islam). In doing so, this Court has clearly held that the first test in such a situation is to determine whether because of non-compliance of the provisions under Section 342 of the Code, any prejudice has occurred to the defense of the accused and, upon such test, if it is found that in fact the defense has been prejudiced because of such non-compliance, only then the Court has some options open to it. Namely, it may send the case on remand to the trial Court for re-

examination of the accused under Section 342 of the Code, as the said approach has been approved by the Appellate Division in **Shohel Vs. State, 63 DLR (AD)-105** and in unreported majority decision of the Appellate Division in **Criminal Appeal No. 40 of 2008**. However, at the time of delivery of the said judgment, this Court did not notice another decision of our Appellate Division, namely the judgment delivered on 14.07.2021 in **Md. Abdul Awal Khan vs. The State, 16 SCOB [2022] AD-22**, wherein the majority view of the Appellate Division was that such non-compliance would in some cases vitiate the trial. It may again be mentioned here that each case is decided on its unique facts. Therefore, the cases decided by the Appellate Division on different set of facts cannot be exactly applied to the facts in this case. In the above referred **Md. Abdul**

**Awal Khan's case**, apart from non-compliance of Section 342 of the Code, there was another vital missing point in the prosecution evidences, namely that the prosecution failed to prove the minimum presence of the accused at home when his wife was allegedly killed by him.

5.14. In the present case, admittedly, none of the circumstances appearing in the evidence against any of the accuseds was referred to them during the said examination under Section 342 of the Code. In case of accuseds Salam and Jamil, the trial Court only mentioned that they had made confessional statements. However, the contents of the said confessional statements were not put to their attention seeking their explanation. In case of accused Malitha, even the confessional statements of his co-accuseds were not referred to him, although that were the only basis for his

conviction. Therefore, such examination by the trial Court in such a slipshod manner cannot in anyway be held to be compliance of the mandatory provisions of Section 342 of the Code. Although, some of the defects in Section 342 examination are curable under Section 537 of the Code if it is found that such non-compliance did not cause any prejudice to the defense of accused, in the present case, we have no doubt to hold that the nature or extent of non-compliance has in fact caused prejudice to the defense of the accuseds during trial.

5.15. However, the mistake causing such defect was done by the trial judge himself and not by the prosecution or by anybody involved in the said trial. It is frustrating to note that a senior judge like an Additional Sessions Judge in the present case has even not read properly the provisions of Section 342 of the Code and he

has miserably failed to comply with the said provisions. A mistake committed by the trial judge has got nothing to do with the victim or any party to the case before trial Court, namely the State. We are of the view that the parties to the case should not suffer because of the mistake or incompetence of the trial judge concerned. In this regard, we have come across a decision of the Indian Supreme Court in **Shivaji vs. State of Maharashtra, A.I.R., 1973 S.C.-2622** and the author judge of same was none other than the late legend Justice V.R. Krishna Iyer. In elaborating several aspects of such non-compliance of Section 342 by the trial judge, his Lordship has observed that such lacuna or loop-holes caused because of the mistake of the trial judge may be filled up during appeal hearing by asking the learned advocates appearing for the convicts before the

appellate Court as to the probable reply of the convict to such circumstances appeared in evidences against him. The relevant observation of his lordship Mr. Justice V.R. Krishna Iyer in paragraph 16 of the said reported case may be reproduced below:

*“16..... We may notice here a serious omission committed by the trial Judge and not noticed by either court. The pants allegedly worn at the time of the attack by the second accused has stains of blood relatable to the group of the deceased. This circumstance binds him to the crime a little closer but it is unfortunate that no specific question about this circumstance has been put to him by the court. It is trite law, nevertheless fundamental, that the prisoner’s attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by*

*such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr.P.C., the omission has not been shown to have caused prejudice to the accused. In the present case, however, the High Court, though not the trial court has relied upon the presence of blood on the pants of the blood group of the deceased. We have not been shown what explanation the accused could have offered to this*

*chemical finding particularly when we remember that his answer to the question regarding the human blood on the blade of the knife was 'I do not know'. Counsel for the appellants could not make out any intelligent explanation and the 'blood' testimony takes the crime closer to the accused. However, we are not inclined to rely over much on this evidentiary circumstance, although we should emphasize how this inadvertence of the trial court had led to a relevant fact being argued as unavailable to the prosecution. Great care is expected of Sessions Judges who try grave cases to collect every incriminating circumstance and put it to the accused even though at the end of a long trial the Judge may be a little fagged out."*

5.16. We also find support of this approach in a recent decision of the Indian Supreme Court in **Nar Singh vs. State of Haryana (2015) 1SCC-496**. In Nar Singh, the Indian Supreme Court, after examining all the previous decisions on the point, has held as follows:

*30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:*

*30.1. Whenever a plea of non-compliance with Section 3.13 CrPC is raised, it is within the power of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstances, the court may assume that the accused has no acceptable explanation to offer.*

*30.2 In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.*

*30.3 If the appellate court is of the opinion that non-compliance with the provisions of Section 313 CrPC has occasioned or is likely to have occasioned prejudiced to the accused, the appellate Court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and disposed of the matter afresh.*

*30.4. The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.*

5.17. As stated above, our view is that the victim, state or any of the parties to a criminal case should not suffer because of the mistake of the trial judge and such mistake of the trial judge should be allowed to be cured by the judge or judges hearing appeal against judgment delivered by such judge. Therefore, in the course of hearing, we have allowed the learned advocates appearing for the appellants to seek instructions from their clients and to file written reply on their behalf by way of affidavit as against the circumstances appeared in the evidences against them during trial. Accordingly, the appellants have filed three written replies by way of affidavit through their nearest Todbirkars in the following way:

(a) On behalf of the appellant Md. Abdus Salam Sheikh, his father Md. Mohasin Ali has shown

affidavit and forwarded the reply of the appellant in the following terms:

“আমার নাম মোঃ আঃ সালাম শেখ, পিতা মোঃ মহসিন শেখ, সাকিন গোয়ালখাম, থানা দৌলতপুর, জেলাঃ কুষ্টিয়া। আমি পেশায় একজন কৃষক। অত্র মামলায় আমি সম্পূর্ণ নির্দোষ। আমি রাত্রি কালীন নিজ ঘরে শুয়ে ঘুমাচ্ছিলাম হঠাৎ দরজা খুলতে বলে আমি দরজা খুলে দিই এবং ঘরের বাহিরে এসে দেখি শাহিন ও তিনজন ডিবি পুলিশ পরিচয় দেয়, আমাকে চোখ বেধে নিয়ে যায়। ১১/০৩/২০২২ ইং তারিখে আমাকে প্রথমে এক বাড়িতে নিয়ে প্রচুর মারধর করে এবং হাতের আঙ্গুলে সুঁই ঢোকানি বলে বল আমি খবিরকে মেরেছি না হলে তোকে মেরে ফেলবো আমি তখন জ্ঞান শূন্য অবস্থায় কি বলেছি তা আমি জানিনা। আবার অন্য বাড়িতে নিয়ে যায় আবারো মারধর করে। তোকে আমরা মেরেছি একথা ম্যাজিস্ট্রেটের কাছে বললে রিমান্ডে নিয়ে আরও মারবো। তাই আমি মারের ভয়ে স্বীকার করি কিন্তু আমি কি বলেছি তাহা নিজে বলতে পরবোনা। তারা নিজেরা লিখে আমাকে সহি করতে বলে তখন আমার জ্ঞান ছিল। আমি সহি না করিতে চাইলে আবারো মারধর করে কাগজে সহি করিয়া নেয়। আমার আব্বা আমাকে জেল খানা দেখতে গিয়ে জিজ্ঞাসা করে কোথায় ছিলে? আমি আব্বাকে বলি দুই তিন বাড়িতে নিয়ে ছিল কিন্তু কোন কোন গ্রাম তা বলতে পারিবোনা। গত ১০/০৩/২০১২ তারিখে পুলিশ আমাকে গ্রেফতার করে থানায় আটক করে অমানুষিক নির্যাতন করতে থাকে এবং খবির উদ্দিন হত্যার সাথে আমি জড়িত মর্মে স্বীকারোক্তি প্রদান করতে বলে।

দৌলতপুর থানার দারোগা এস আই স্বপন কুমার দাস এবং মৃত খবির উদ্দিনের সন্তান স্বপনের ইশারায় ও যোগসাজসে আমাকে থানায় আটক করে মারপিঠ নির্যাতন করে এবং আমি এই হত্যাকাণ্ডের কোন কিছুই জানিনা মর্মে বললে পুলিশ আমাকে ক্রস ফায়ারের ভয় দেখায়।

মৃত খবির উদ্দিনের হত্যাকাণ্ডের কিছু দিন পূর্বে খবির উদ্দিনের ভাতিজা জাকিরের সাথে আমার মারামারি হয় এবং তাহা স্থানীয় ভাবে মিমাংসা হয়ে যায় পরবর্তীতে আমি ভুলে যাই কিন্তু খবির উদ্দিনের ছেলে মোঃ শাহিন আমাকে শাসায় এবং বলে যে তোদের সময়মত জেলের ভাত খাওয়ানো, আমি পুলিশে চাকুরী করি। তোদের শায়েস্তা করতে আমার কাছে কোন ব্যাপারই না।

থানায় আটক করে আমার উপর যে অত্যাচার হতে থাকে তাহা সহ্য করতে না পেরে আমি অজ্ঞান হয়ে পড়ি একাধিকবার অতপর আমি স্বীকারোক্তি করতে রাজি হই যা সম্পূর্ণ আমার স্বেচ্ছা প্রনোদিত ছিল না, শুধুমাত্র পুলিশের অত্যাচার হতে ভয়ে তাহা করেছিলাম এবং পরবর্তীতে আমি তাহা প্রত্যাহার করি।

বিচারিক আদালতে আমি ন্যায় বিচার পাই নাই। বিচার শেষে সকল সাক্ষী শেষ হইবার পর বিচারক কোন কোন সাক্ষীই তাদের সাক্ষ্য দ্বারা প্রমান করতে পারে নাই। এমনকি আমার স্বীকারোক্তির কারনেই এই মামলার সাজা হতে যাচ্ছে তাহাও পড়িয়া শোনায় নাই।

শুধুমাত্র স্বীকারোক্তির কারনেই অত্র মামলায় অভিযুক্ত হয়েছি যাহা প্রত্যাহারকৃত এবং স্বেচ্ছাপ্রনোদিত নয়। আমি স্বীকারোক্তির ফল বা পরিণাম না বুঝিয়াই ম্যাজিস্ট্রেটের নিকট স্বীকারোক্তি করি। যাহা পুলিশ আমাকে জোর করে করিয়েছিল।

অতএব শুধুমাত্র স্বীকারোক্তির উপর ভিত্তি করে আনিত অভিযোগ মিথ্যা এবং আমি নির্দোষ।”

(b) In case of accused Md. Jamil Mondol, his niece Mst. Rohima Khatun has sworn affidavit and forwarded his reply in the following terms:

“মোঃ জামিল উদ্দিন, পিতাঃ মোঃ হৈমুদ্দিন মন্ডল, সাং- গোয়ালগ্রাম, থানা- দৌলতপুর, জেলা-কুষ্টিয়া।

এই মর্মে আবেদন করিতেছি যে, দৌলতপুর থানার পুলিশ ও মৃত খবির উদ্দিন এর ছেলে মোঃ শাহিন ও তাদের ইশারায় গত ৭/৩/২০১২ তারিখে আমাকে থানায় লইয়া যায় এবং গোপনভাবে থানায় আটক করে রাখে। অতঃপর থানার ভিতরে স্বপন দারোগার হুকুমে ও ইশারায় পুলিশ আমাকে মারপিট, নির্যাতন করে এবং অনবরত চাপ প্রয়োগ করতে থাকে, এই বলে যে, আমি স্বীকারোক্তি না করিলে আমাকে ক্রস ফায়ারে দিয়ে দিবে, কাজেই “আমরা; যেইভাবে বলি সেইভাবে ম্যাজিস্ট্রেট এর নিকট খবিরকে হত্যা করেছি” মর্মে স্বীকারোক্তি দিতে বলে।

আমি থানায় দারোগার নিকট একাধিকবার অস্বীকার করি যে, উক্ত হত্যাকাণ্ড সম্পর্কে আমি কিছুই জানি না, আমার মামাত ভাই আঃ সালামের সাথে মৃত

খবির উদ্দীনের ভাতিজা জাকিরের সামান্য ঝামেলা হয়। কিন্তু তাহা সালিশের মাধ্যমে শেষ হইলেও মৃত খবির উদ্দীনের ছেলে মোঃ শাহিন যিনি পুলিশের চাকুরী করে সে আমাকে ও আমার মামাত ভাই সালামকে শাসায় এবং বলে তোদের সকলকে দেখিয়া ছাড়বো, আমি পুলিশে চাকুরী করি বলে মারামারি করতে না পারলেও সুযোগের অপেক্ষায় আছি, ভবিষ্যতে তোদের আমি জেলের ভাত খাওয়ায়ে ছাড়বো। অতপর পুলিশের দারোগা আমার কোন কথা না শুনিয়া আমাকে বেদম প্রহার ও অমানুষিক অত্যাচার মারপিট করতে থাকে এবং কয়েকবার অজ্ঞান হয়ে যাই। আমাকে কোন প্রকার খাবার এমনকি পানি পর্যন্ত পান করতে দেয় না। আমি নিরুপায় হয়ে স্বীকারোক্তি করি এবং এর ফলে আমার কি হতে পারে সেই সম্পর্কে আমার কোনরূপ ধারণাই নাই, আমি জীবনে এই প্রথম এই শব্দ শুনিয়াছি, আমি মনে করি যে, স্বীকারোক্তি করলে যদি এদের হাত হতে অন্তত জীবনটা রক্ষা পাবে তাই নিরুপায় হয়ে স্বীকারোক্তি করতে আমি রাজি হই, আমি যদি স্বীকারোক্তির ফল বা পরিণাম বুঝিতে পারিতাম তাহলে এই স্বীকারোক্তি করতাম না। অতঃপর আমি উক্ত স্বীকারোক্তি প্রত্যাহার করি কেননা এই হত্যাকাণ্ডের সহিত কোন ভাবেই জড়িত নহে।

অতঃপর বিচার চলাকালীন সাক্ষীর সাক্ষ্য গ্রহনকালে কোন সাক্ষীই আমার সম্পর্কে কোন প্রকার সাক্ষ্য প্রমানদি উপস্থাপন করতে পারে নাই কেননা, আমার বিরুদ্ধে আনীত সকল অভিযোগ মিথ্যা ও বানোয়াট, আমাকে দিয়ে যে স্বীকারোক্তি করায় যাহা স্বৈচ্ছাপ্রণোদিত নহে এবং আমার সম্পূর্ণ ইচ্ছার বিরুদ্ধে করানো হয়। আমি শুধুমাত্র স্বীকারোক্তির দরস্ন অত্র মামলায় আসামী হয়েছি, সাক্ষ্য গ্রহণ শেষে বিচারিক আদালত আমাকে আমার স্বীকারোক্তি পাঠ করিয়া শুনাইলে আমি লিখিত জবাব পেশ করিতাম সুতরাং আমি অত্র মামলায় সম্পর্কে কিছুই জানি না এবং আমি নির্দোষ।”

(C) In case of accused Abdul Hamid Malitha, the son of the appellant, Md. Sojibur Rahman, has sworn affidavit and forwarded his reply in following terms:

“বজলু আসামী হামিদ মালিথার ফুফাতো ভাই। বজলুর মটর ঘরে মৃত খবির পাহারা দিতো। খবিরের আগে আসামী সালাম এই মটর ঘর পাহারা দিতো। আসামী সালাম আর বজলু চাচা-ভাতিজা। পাইকার বংশের ছেলের সাথে আসামী সালামের মারামারি হয়। তার নাম জাকির। সেটা নিয়ে পরে সালিশ হয় উক্ত সালিশে হামিদ মালিথা জাকিরের পক্ষে কথা বলে এবং সালামের সাথে সেখানেই কথা কাটাকাটি হয়। তখন থেকেই সালামের সাথে হামিদ মালিথার শত্রুতা ছিল এবং সালাম প্রতিশোধ নেয়ার কথা বলতো। অপরদিকে সালাম জামিলের নিকটাত্মীয় এবং সব সময় একসাথে চলতো। এই অবস্থায় যখন খবির উদ্দিন মার্ভার হয় এবং সালাম ও জামিল পুলিশের হাতে ধৃত হয়, তখন তারা দুজনেই পরামর্শ করেই হামিদ মালিথার নাম তাদের স্বীকারোক্তিমূলক জবানবন্দীতে বলে। আসামী হামিদ মালিথার বড় ভাই ওসমান গনি বিদেশে থাকে। উক্ত ওসমান গনি বিদেশে থাকায় কাজিম মাষ্টারের বড় ছেলে হেলালের সাথে ওসমান গনির স্ত্রীর অবৈধ প্রেমের সম্পর্ক তৈরী হয়। সেটা পরে জানাজানি হওয়ার কারণে কাজিম মাষ্টারের সাথে হামিদ মালিথার শত্রুতার সৃষ্টি হয়। কাজিম মাষ্টার পাইকার বংশের মাতুব্বর এবং পাইকার বংশের সব কিছু সামাজিক ভাবে পরিচালিত হয়ে কাজিম মাষ্টারের নেতৃত্বে। এখানে উল্লেখ্য যে, মৃত খবিরও পাইকার বংশের লোক। যেহেতু কাজিম মাষ্টারের সাথে আগে থেকেই আসামী হামিদ মালিথায় একটা শত্রুতার ছিলো, সে কারণে উক্ত কাজিম মাষ্টারের ইন্ধনে বাদী (খবিরের স্ত্রী) ঘটনার ৮ দিন পরে অন্য আসামীদের সাথে এই আসামীর নাম উল্লেখ করে অভিযোগ দায়ের করে। প্রকৃতপক্ষে, আসামী হামিদ মালিথা অত্র ঘটনার সাথে জড়িত না।”

5.18. In the above replies given by the accuseds Salam and Jamil, they have reiterated their

same position that they were innocent and that they were tortured for the purpose of giving confessional statements and that they were illegally detained. However, this aspect of their allegation has already been addressed in detail by this Court in our judgment and we have held that we have not found anything on record in support of such allegation. The further reply of accuseds Salam and Jamil is that the son of deceased was a police constable and as such he influenced the police against them or that he was present at the time of arrest. We have already described the deposition of the son of the deceased, namely Md. Shaheen (P.W.10). The defence got ample opportunity to cross examine him as well as the investigating officer (P.W.11), but could not extort anything in support of their such allegation. Again they have mentioned about retraction of their

confessional statements. This aspect has also been addressed by this Court in our judgment in detail. Therefore, we are of the view that by this written reply before this appellate Court in view of the provisions under Section 342 of the Code of Criminal Procedure, they have not pointed out anything which should be addressed by us separately. Accordingly, we have no option but to hold now that they were in fact not prejudiced by non-compliance of Section 342 by the trial Court.

5.19. In the reply given by or on behalf of accused Abdul Hamid Malidha, it has been stated that because of previous enmity with accused Salam, Malitha was implicated in the confessional statement and that he was not involved in the alleged offence at all. Since we have already observed that the prosecution has failed to prove the charge against Malitha

beyond reasonable doubt on the basis of any independent evidence and that Malitha is entitled to get benefit of doubt, we are of the view that his present reply is not that much material for reaching our conclusion. Accordingly, we refrain from making any observation on such reply of Malitha.

5.20. It may be noted that we have adopted the above approach thereby seeking explanations from the appellants in the course of appeal hearing only to avoid further injustice to the parties to the case. If we hold that because of such non-compliance, defence has been prejudiced and as such the trial has been vitiated, the convicts will get undue benefit of acquittal which will cause injustice to the victim and the State. On the other hand, if we take the approach of sending the case on remand to the

trial Court for re-examination of the appellants under Section 342 of the Code, that will cause further delay, particularly when the appellants have already been in jail for about ten years including five years in condemned cell. To avoid such injustice which may be caused to either of the parties or the victims, we are of the view that the Appellate Courts should, from now on, take recourse to this approach in order to avoid further injustice to the parties given that the mistake was in fact caused by the trial judge and such mistake should be allowed to be corrected by the judges sitting on the Appellate Court.

5.21. Upon considering and examining the explanations given by the appellants by way of affidavits, we are finally of the view that because of non-compliance of Section 342 of the Code, no prejudice has in fact occurred to

the defense of the convicts. Accordingly, such defects or non-compliance is curable under Section 537 of the Code of Criminal Procedure and, accordingly, the same is cured at this appellate stage.

**Conclusion:**

5.22. In view of facts and law discussed above, we are of the view that the prosecution has successfully proved the charges against accuseds Md. Abdus Salam Sheikh and Md. Jamil Mondol beyond reasonable doubt and as such we do not find any material to interfere into their convictions under Sections 302/34 of the Penal Code. However, considering the admitted position that they have already spent ten years in jail including their imprisonment of near about 06 (six) years in condemned cell because of prolonged trial as well as delay in death reference hearing and that they are of

tender age, we are of the view that sentences of death on them as imposed by the trial Court should be commuted to life imprisonment. On the other hand, since the prosecution has failed to prove the charge against accused Abdul Hamid Malitha beyond reasonable doubt, his conviction and sentence should be set aside and, accordingly, he should be acquitted and released.

**Orders of the Court:**

- 1) This Death Reference No. 34 of 2017 in respect of all the convicts is rejected.
- 2) The Criminal Appeal No. 3188 of 2017, as preferred by the appellant **Md. Abdus Salam Sheikh** and **Md. Jamil Mondol**, is dismissed. Thus, the conviction under Sections 302/34 of the Penal Code against them is, hereby, affirmed. However, the sentence of death, as

imposed by the trial Court on them, is commuted to the sentences of life imprisonment and the convicts shall get the benefit of Section 35A of the Code of Criminal Procedure for the period they have been in custody in the meantime. The jail appeals, being Jail Appeal No. 107 of 2017 and Jail Appeal No. 109 of 2017, as preferred by them are disposed of accordingly.

- 3) The authorities concerned, including the Jail Authority, are directed to withdraw the convicts, **Md. Abdus Salam Sheikh**, son of late Md. Mohashin Sheikh of Village-Gowalgram, Police Station-Daulatpur, District-Kushtia and **Md. Jamil Mondol**, son of Md. Joymuddin Mondol of Village-Gowalgram, Police Station-Daulatpur, District-Kushtia, from the

condemned cell immediately and shift them to the general prison.

4) The Criminal Appeal No. 3459 of 2017, as preferred by the appellant **Abdul Hamid Malitha**, is allowed. Accordingly, the impugned judgment and order dated 15.03.2017, as delivered in Sessions Case No. 437 of 2012 convicting this appellant under Sections 302/34 of the Penal Code and sentencing him to death, are hereby set aside. Accordingly, the appellant **Abdul Hamid Malitha** is acquitted. His jail appeal, being Jail Appeal No. 108 of 2017, is, thus, disposed of.

5) The authorities concerned, including the Jail Authority, are directed to release the appellant **Abdul Hamid Malitha**, son of late Nazir Malitha of village-Gowalgram, Police Station-

Daulatpur, District-Kushtia immediately, if he is not wanted in connection with any other case.

Let an advance order be issued communicating the above result.

Send down the lower Court records immediately.

.....  
**(Sheikh Hassan Arif, J)**

I agree.

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**(Biswajit Debnath, J)**