

**13 SCOB [2020] HCD****HIGH COURT DIVISION**

Death Reference No. 51 of 2012

**The State**

-Versus-

**Abul Kashem and two others**

...Condemned prisoners

with

Criminal Appeal No. 6253 of 2012

Monir Hossain

...Appellant

with

Jail Appeal No. 209 of 2012

Monir Hossain

...Appellant

with

Criminal Appeal No. 7528 of 2012

Abul Kashem and another

...Appellants

with

Jail Appeal No. 208 of 2012

Abul Kashem

...Appellant

with

Jail Appeal No. 207 of 2012

Mohsin

... Appellant

-Versus-

The State

... Respondent in all the appeals

Mr. Md. Moniruzzaman (Rubel), Deputy

Attorney General with Mr. Abul Kalam

Azad Khan, Mr. Abdur Rokib and Ms.

Marufa Akhter, Assistant Attorney

Generals

... for the State

Mr. Md. Bodiuzzaman, Advocate

appearing on behalf of Fatema Begum,

Advocate

...for appellant in Cr Appeal 6253

of 2012

Dr. Md. Shamsur Rahman, Advocate

... for appellants in Cr Appeal 7528

of 2012

Judgment on 22.07.2018

**Present:****Mr. Justice Md. Ruhul Quddus****And****Mr. Justice A S M Abdul Mobin**

**The form prescribed in the Criminal Rules and Order (Practice and Procedure of Subordinate Courts), 2009 presupposes no handwritten memorandum under column No.7. However, there is a blank space for making memorandum under column No.8, which the recording Magistrate is required to fill up stating the reason of his belief regarding voluntariness of the confession. ... (Para 36)**

**If any Magistrate does not make any memorandum in his own handwriting under column No.7 of the prescribed form of confession, or does not put his signature after making memorandum under column No.8 and does not put his signature after making memorandum, if any, under column No.9, it cannot be held to be a gross illegality and fatal to the prosecution case. The purpose of making memorandum in compliance with section 164 (3) of the Code would suffice by signing the printed memorandum, provided that the precautions prescribed by the Code are duly taken by the recording Magistrate. ... (Para 37)**

**There is confusion among the members of Bar as well as the Magistrates as to whether a Magistrate is required to make handwritten memorandum at the bottom of recorded confession under column No.7. Where there is already a printed memorandum in the language of law, albeit pre-amendment, it would be an unnecessary and meaningless exercise for the Magistrates to make another memorandum thereunder in the same language. ... (Para 44)**

**Since the use of old printed memorandum with pre-amendment language and not making of memorandum by own hand of the Magistrate do not injure the accused as to their defence on merits, it would not make the confessions inadmissible. ... (Para 54)**

## JUDGMENT

### **Md. Ruhul Quddus,J:**

1. The Sessions Judge, Comilla awarded sentence of death under sections 302 and 34 of the Penal Code upon the condemned prisoners Abul Kashem, Mohsin and Monir Hossain by judgment and order dated 25.09.2012 in Session Case No. 1073 of 2011 giving rise to this Death Reference under section 374 of the Code of Criminal Procedure. Challenging the selfsame judgment the condemned prisoners preferred two criminal appeals and three jail appeals as mentioned above. All the matters have been heard together and are disposed of by this judgment.

2. The informant Nilufa Akhter (PW2) lodged a first information report (FIR) with Sadar South Police Station, Comilla on 10.07.2011 at 20:40 hours alleging, *inter alia*, that one year back her husband Abdur Rahim Charu, since deceased lent Taka 90,000/- to accused Abul Kashem. He did not repay the money or any interest thereon, though promised several times. He called away her husband to his tea stall situated at Rajpara Chowmohani on the pretext of repayment of loan money on 09.07.2011 at about 5:00 pm, wherefrom the accused persons took him elsewhere by a CNG driven auto-rickshaw. As he did not return home, she started searching for him and made several phone calls at his number but found it switched off. Next day at about 4:30 pm she came to know that police recovered a dead body from Dhalkaia forest. Then and there she along with her brother-in-law Billal (PW4) and cousin-sister Rokeya rushed the police station. In the meantime the dead body was sent to the morgue of Comilla Medical College Hospital. She, however, saw a photograph of the dead body and recognized it to be of her husband. They rushed Comilla Medical College Hospital Morgue, saw the dead body of her husband and came back to village. They informed the villagers about the occurrence, when they (villagers) caught hold of Abul Kashem and the CNG driver Mohsin. On interrogation, they disclosed that 9:00-11:00 pm on at 09.07.2011 they had killed Charu by strangulation with a piece of cloth and left the dead body in Dhalkaia forest. They also disclosed the name of Monir as their accomplice. It was further stated in the FIR that the apprehended persons were bit injured because of mass beating.

3. The police investigated the case and submitted charge sheet on 22.08.2011 against the three accused (condemned prisoners herein) under sections 302 and 34 of the Penal Code. It is mentioned that immediately after arrest, all the accused persons made confessions before the Senior Judicial Magistrate, Comilla on 11.07.2011 wherein they confessed their complicity and participation in the occurrence.

4. The case being ready for trial was sent to the Sessions Judge, Comilla. Learned Sessions Judge by order dated 29.09.2011 framed charge against the accused under sections 302 and 34 of the Penal Code. The charge was read over to them, to which they pleaded not guilty and claimed justice.

5. The prosecution in order to prove its case examined ten witnesses out of eighteen who were named as such in the charge sheet. PW 1 Md. Bahauddin Kazi, the then Senior Judicial Magistrate, Comilla stated that he had recorded confessions of accused Monir Hossain, Mohsin and Abul Kashem under section 164 of the Code of Criminal Procedure on 11.07.2011. He did it in prescribed form following the rules and procedure as laid down in section 164 of the Code. They confessed their guilt voluntarily. The recorded confessions were read over to them, and accused Abul Kashem put his left thumb impression while Monir Hossain and Mohsin put their signatures there.

6. In cross-examination he reiterated that he had observed all legal formalities in recording the confessions. Accused Monir Hossain had stated that he was arrested on 10.07.2011 at 7:00 pm and also stated that he (Monir) had confessed his guilt to the villagers. He did not make any statement about physical torture on him. He (PW 1) denied the defence suggestion that because of threat of police as well as local people, accused Monir was compelled to make confession. He further denied that while recording confessions, the police was standing at the door on the plea of security, or that the accused persons made statement about police torture on them or that the confessions were not voluntary or that those were not read over to them.

7. PW 2 Nilufa Akhter, informant and widow of deceased Abdur Rahim Charu stated that accused Kashem had called away her husband to his tea stall on 09.07.2011 at about 5:00 pm for repayment of loan money. He did not return home in the following night and on several calls his phone was found switched off. Her parents-in-law, brother-in-law and other relations unsuccessfully searched for him. On the following day i.e 10.07.2011 at about 4-4:30 pm she got news that police had recovered a dead body from Dhalkaia forest at village Ekbalia and took it to police station. She rushed the police station, where police showed her a photograph of the dead body and informed that it was already sent to the Comilla Medical College Hospital Morgue for holding autopsy. She identified the dead body of her husband seeing the photocopy and went to morgue and saw the dead body. She returned home and disclosed the facts to the villagers, when the villagers caught hold of accused Kashem from his tea stall and Mohsin from his house. Both of them confessed their involvement in the occurrence in front of the villagers. She produced them to the police station with the help of others and lodged the FIR. At about 10:00 pm another accused Monir was apprehended.

8. In cross-examination she affirmed her statement made in the FIR that the accused persons were injured because of beating by the villagers, but denied the suggestions that Kashem did not owe her husband or that he did not call him away at 5:00 pm on the date of occurrence.

9. On recall for cross-examination, she further stated that Kashem had called away her husband on 09.07.2011. She and other inmates of the house saw him to call. She also informed her neighbors Ali Ashraf, Mizanur Rahman, Munir and Zaynal about the calling away. She denied that at the instance of those who had beaten the accused, she implicated them (accused) falsely in the present case.

10. PW 3 Rajib, a villager stated that he along with others caught hold of Mohsin at about 5:00 pm on 10.07.2011 from his house, where he confessed that he along with Monir and Kashem had killed Charu. Thereafter, they caught hold of Abdul Kashem from a place beside his tea stall, where he was playing carom. On interrogation Kashem disclosed that he owed Charu Taka 90,000/-, which he had taken on an undertaking on stamp paper. He called away Charu on 09.07.2011 on the pretext of repaying the loan money taking from Monir's sister. Thereafter, he took Charu to Monir's house situated at village Ekbalia with the help of Mohsin. All of them walked inside the forest and killed him by strangulation with a piece of cloth. However, the villagers handed them over to the police and apprehended Monir from village Ekbalia, who also confessed his guilt. The police took him to the police station as well.

11. In cross-examination he denied the suggestions that he had not stated to the IO what he deposed on dock, or that while they apprehended the accused, no senior citizen was there or that they had beaten Mohsin. He further denied that deceased Charu was involved in smuggling and killed by his own men.

12. PW 4 Bilal Hossain, cousin brother of deceased Charu stated that at about 11:00 pm on 09.02.2011 he learnt from his sister-in-law (informant) that Kashem had called away Charu at about 5:00 pm. At about 12 o'clock she further informed him that he (Charu) did not yet return. At afternoon on the following day he had come to know about recovery of the dead body and went to police station along with the informant and his sister. They identified the dead body of Charu seeing the photographs taken by police, went to the morgue thereafter and saw the dead body. He further stated that he was also included in the team, which apprehended accused Mohsin. He made an extra-judicial confession disclosing his involvement in the occurrence and that of accused Kashem and Monir. Thereafter they (PW 4 and villagers) apprehended accused Abdul Kashem, who also disclosed the occurrence in similar manner. Subsequently they apprehended accused Monir, who made similar extra-judicial confession and all the accused were produced to the police.

13. In cross-examination he affirmed that they had apprehended Mohsin first and he made an extra-judicial confession. He further stated that the accused persons made confessions out of fear. On recall he stated that on the following day of lodging the FIR, the informant told him that accused Kashem had called away her husband at about 4:00 pm on the previous day.

14. PW 5 Md. Russell stated that she came to know about the occurrence from the informant on 10.07.2011. She informed him that Kashem had called away her husband on 09.07.2011 at about 5:00 pm. Since then he was traceless. On the following day his dead body was found. He (PW 5) along with the villagers apprehended Mohsin. On interrogation he made an extra-judicial confession that he along with Kashem and Monir had killed Charu. Then and there they apprehended Kashem, who also made an extra-judicial confession in similar way. They had communicated the inmates of Monir's village over cell phone, who apprehended Monir.

15. In cross-examination he stated that accused Mohsin made an extra-judicial confession in a three storied building belonged to Naim.

16. PW 6 Doctor Md. Ariful Haque, Lecturer of Forensic Medicine Department, Comilla Medical College stated that he had conducted autopsy on the dead body of the deceased

victim. The dead body was brought by constable Shafique Khan. He (PW 6) found thereon one continuous circular ligature mark around his neck and one hematoma measuring 2" X 2" on the back scalp.

17. He opined that the death caused of asphyxia due to strangulation and head injury as well. The injury was antemortem and homicidal in nature. He proved the autopsy report and his signature there (exhibits-5 and 5/1).

18. PW 7 Mozammel Hoque, a local witness stated that he went to Chowmohani at the evening on 10.07.2011 and learnt that victim Charu was killed and further learnt that accused Kashem had called him away from his house on 09.07.2011 on the pretext of repayment of loan money. Since then he was missing and thereafter his dead body was found. He along with the local people apprehended Mohsin, who made an extra-judicial confession that they (accused persons) took Charu inside the forest and killed him. On the same day they (PW 7 and villagers) apprehended Kashem, who also made an extra-judicial confession in similar way. Following their statements, accused Monir was apprehended from his house at village Ekbalia.

19. He denied the defence suggestion that out of enmity on share of gambled money, the victim was killed or that out of enmity he deposed falsely against the accused or that because of beating by police and local people, the accused were compelled to confess.

20. PW 8 Mahiuddin, a local witness was tendered by the prosecution and the defense declined to cross-examine him.

21. PW 9 Md. Haidar Ali, a *Habildar* of Border Guard Bangladesh (BGB) stated that he was posted to Bouhara BGB Camp on 10.07.2011. He received information that dead body of an unknown person was lying in Dhalkaia forest. After obtaining instruction of the Camp-in-charge, he along with four other members of BGB and some police personnel rushed there and saw the dead body. Its neck was tied by a local towel (গামছা). Police conducted inquest on the dead body and prepared an inquest report. He proved the said inquest report and his signature there (exhibits-6 and 6/1).

22. In cross-examination he stated that the dead body was found on no-man's-land and a flag meeting was held for taking the dead body.

23. PW 10 Md. Abu Yousuf, a Sub-Inspector of police and Investigating Officer (IO) stated that he along with police forces was on mobile duty on 10.07.2011. At about 13:00 hours he received a radio message that a dead body was found inside Dhalkaia forest. On holding a flag meeting along with the BGB personnel, they went there and saw dead body of a man. There was mark of injury on the dead body and its neck was wrapped with a piece of cloth looked like a local towel. He conducted inquest thereon and prepared an inquest report. They took photograph of the dead body and sent it for conducting autopsy through police constable Shafique Khan. He (PW10) proved the photograph as material exhibit-1. He further stated that the widow of deceased Charu produced Abdul Kashem and Mohsin to the police station and lodged the FIR. Inspector Jashim Uddin filled up the FIR form. Since he (PW 10) had served with him (Inspector Jashim Uddin), he knew his hand writing and signature. He took up the investigation of the case and immediately thereafter arrested accused Monir. He visited the place of occurrence (PO), prepared an sketch map with the index thereof. All the three accused made confessions to the Magistrate. The CNG auto rickshaw, by which Charu

was taken to forest, was also seized under a seizure list. He proved the said seizure list and his signature there (exhibits-12 and 12/1). The seized CNG driven auto rickshaw was given back in custody of its owner under order of the Court. The accused Mohsin was the driver of that auto rickshaw.

24. In cross-examination he stated that he could not seize any blood stained earth from the place of recovery as it was washed away by rainwater in the meantime. He, however, made a note to that effect in the case diary. He denied the defence suggestion that the dead body was found inside the Indian territory and brought to Bangladesh on holding flag meeting. He further denied that he had threatened the accused of cross-fire taking them to a vacant place around Comilla airport or that because of his threat and torture the accused were compelled to make confessions. He further stated that he had examined the witnesses on 11.07.2011 under section 161 of the Code of Criminal Procedure, when PW 3 Rajib stated that after mass beating the accused made extra-judicial confessions to the villagers and further stated that he recorded their statements under section 161 of the Code at about 11:40 am on 11.07.2011.

25. After closing the prosecution evidence, the accused were examined under section 342 of the Code to which all the three accused reiterated their innocence and did not examine any defence witness, but accused Mohsin and Monir made separate statement. In his statement accused Mohsin explained that he was taking shower at home, when PW 3 Rajib, PW 5 Russel, Naim, Raju and Masum (not examined) went to his house and called him to a three storied building. They beat him there and gave false hope that if he made a confession, they would send him safely to India. They had confined him for a long time and opted that if he paid them Taka 50,000/-, he would be free. Thereafter, the police took him to police station and tortured him. On the following day, police produced them to the court with threat that if they did not make confessions before the Magistrate, they would be put in danger. Accused Monir explained that at the time of apprehension by the local people, he was severely beaten. Police threatened him of cross-fire keeping foot on his chest. Still he did not make any confession to the Magistrate. Then he was taken to the General Registering Officer (GRO) and put his signature on a paper at the instance of the IO.

26. After conclusion of trial, learned Sessions Judge pronounced the judgment and order of conviction and sentence as stated above giving rise to this death reference, criminal and jail appeals.

27. Mr. Md. Moniruzzaman, learned Deputy Attorney General appearing for the State submits that according to the FIR condemned prisoner Abul Kashem called the deceased victim Abdur Rahim Charu away from his house at afternoon on the date of occurrence. PW 2, the informant in her evidence clearly affirmed this part of the FIR. PWs 4 and 5 stated that the informant had told them about calling away of the deceased victim by accused Abul Kashem at afternoon on the date of occurrence and thereby corroborated PW 2. At the following night, deceased victim Charu did not return home and on the following day his dead body was found. If this circumstance of seeing the victim lastly with accused Kashem is read together with the confessions made by the accused and background of lending money from the deceased victim, it can easily be held that accused Abul Kashem with the help of CNG driver Mohsin and his close friend Monir took the deceased victim to Dhalkaia forest and killed him by strangulation with a piece of cloth which looked like a local towel (গামছা). The postmortem report read with the evidence of PW 6 Doctor Ariful Haque shows the reason of death to be asphyxia by strangulation, which lends further corroboration to the confessions. Before making the judicial confessions, when the accused persons were

apprehended by the villagers on receiving information from the informant, they (accused persons) also made extra-judicial confessions. They were arrested in the evening on 10.07.2011 and produced before the Senior Judicial Magistrate on the following day i.e. 11.07.2011, where all of them made confessions. PW 1, the recording Magistrate himself affirmed those confessions to be true and voluntary and proved the same as exhibits 1-3 with his signatures and that of the accused put there. The case is clearly a proved one and the trial Court on proper sifting of evidence rightly passed the conviction and sentence. Since it was a pre-planned cool-blooded murder of heinous nature, learned trial Judge was fully justified in awarding the sentence of death.

28. Mr. Md. Bodiuzzaman, learned Advocate appears on behalf of Ms. Fatema Begum, Advocate engaged for Monir Hossain, one of the condemned prisoners and appellant in Criminal Appeal No. 6253 of 2012 submits that the Magistrate who recorded confessions of the accused did not tell them that they would not be sent back to police custody even if they did not make any confessions and also did not make any memorandum as required by section 164 (3) of the Code. Without such memorandum a confession cannot be treated to be true and voluntary. Referring to the postmortem report, which shows an antemortem and homicidal head injury on the dead body, Mr. Bodiuzzaman further submits that the said injury having not been mentioned in either confession, it cannot be said to have been corroborated by the postmortem report. Besides, there are major contradictions between the confessions made by the three accused, which discarded the truthfulness of each other. It would be evident from the last line of the FIR as well as cross-examination of PWs 1, 4 and 10 read with the statement of PW 3 made under section 161 of the Code that before making the so called extra-judicial confessions, the accused persons were beaten by mass people. The forwarding report by which the police produced them before the Magistrate also shows injuries on their persons. Still the Magistrate in the prescribed form of confessions stated that he did not find any such injury. It clearly indicates that the Magistrate mechanically recorded their statements and did not at all satisfy himself that those were made voluntarily. Such confessions can never form the basis of conviction.

29. Mr. Bodiuzzaman further submits that it would be clear from the evidence of PWs 3, 4, 5 and 7 that the villagers apprehended accused Mohsin first. If the accused Abul Kashem had called away the deceased victim from his house and it was the only clue, then usual course of human conduct suggests that they would apprehend Abul Kashem first, interrogate him and on extracting information from him would go for further apprehension of his accomplices, namely, Mohsin and Monir. Since they apprehended accused Mohsin first, it indicates that there was a plan to implicate the accused persons, which makes the case seriously doubtful.

30. Mr. Bodiuzzaman lastly submits that the demeanor of accused Monir does not indicate his complicity in the occurrence and he had no reason to be involved therein. No motive on his part was disclosed by the prosecution. The prosecution failed to prove the case on that count as well.

31. Mr. Shamsur Rahman, learned Advocate appearing for two others condemned prisoners and appellants in Criminal Appeal No. 7528 of 2012 refers to the FIR and submits that it is not clearly mentioned whether the informant herself saw accused Kashem to call away her husband. It rather gives an impression that after making extra-judicial confessions, she came to learn about the facts and lodged the FIR, but in her evidence on recall she posed herself to be an eyewitness to the calling away of her husband to make out a case that the

accused was last seen with the deceased victim. This is nothing, but subsequent embellishment by way of deposition. None of the villagers saw the victim to go with accused Abul Kashem or by the CNG driven auto rickshaw of accused Mohsin, none of the inmates from the house of deceased victim except the informant came forward to depose that accused Abul Kashem actually had called him away. In such a position it is really difficult to believe that the calling away of deceased Charu by the principal accused Abul Kashem has been proved. According to PW 3 Rajib, accused Kashem was playing carom beside his tea stall before apprehension. According to the confession made by accused Mohsin, he was taking shower at his home, wherefrom he was taken to a three storied building. It is quite unusual and against criminal psychology that after recovery of the dead body, the real offenders would not be alert or go in hiding. So, the demeanor of the appellants does not support their complicity in the occurrence.

32. Mr. Rahman lastly submits that the recording Magistrate did not make any memorandum at the foot of the recorded confession in his own hand, even the printed language of the memorandum does not contain the words provided in section 164 (3) of the Code and as such the confessions cannot be treated to be true and voluntary and form the basis of conviction. In support of his submission on this point, he refers to the case of State vs Babul Miah, 63 DLR (AD) 10.

33. In reply thereto, learned Deputy Attorney General submits that the Magistrate recorded confession on a prescribed form. The form was prescribed in the General Rules and Circular Orders (Criminal) framed by the High Court Division under article 107 of the Constitution and supplied to all the Magistrates. There is no scope for a Magistrate to make a hand written memorandum except that under column No.8 of the prescribed form. At the foot of recorded confession under column No.7, there is already a printed memorandum, under which the Magistrate already put his signature. Where there is already a printed form of making memorandum in the language of the statute and the place of putting signature is also pointed, the Magistrate has no scope to make a new memorandum of his own. In this case, the Magistrate filled up all necessary blank places, put his signatures on the required places, it was read over to the accused and on clear understanding of the contents thereof one of the accused put his left thumb impression and two of them put signatures there. The Magistrate himself deposed on oath supporting the procedural correctness, truthfulness and voluntariness of the confessions and proved the same. In such a position there is no scope to invalidate the confessions for not making a hand written memorandum by the Magistrate himself. Even if the Magistrate did not put his signature under column No. 7, it would be valid in the event of his deposition in support of recording the same by him.

34. Learned Deputy Attorney General further submits that in 63 DLR (AD) 10, their lordships of the Appellate Division did not consider its own judgment passed earlier in the bunch cases of Major Bazlul Huda (Artillery) vs State, 62 DLR (AD) 1 and also did not consider the legal implication of section 533 of the Code. In case of non-compliance with any of the provisions of section 164 or section 364 of the Code, if the recording Magistrate deposes in support of the correctness of recording the statement, and if it does not affect the merit of the defence case, the confession is admissible in evidence. Such confession can form the basis of conviction without any second thought, if it is true and voluntary.

35. We have considered the submissions of the learned Advocates of both the sides, carefully examined the evidence and other materials on record and gone through the decisions cited and some other decisions on the points raised. Learned Advocate raises



objection against validity of the confessions as the memorandum was not written by own hand of the recording Magistrate and its language did not exactly match that of section 164 (3) of the Code.

36. It appears that the learned Magistrate filled up the blank spaces in columns No.1-4 of the prescribed form of confession and put tick mark on every explanation under column No.5 in his own hand writing. He put questions to the accused whether he (accused) knew that he was not bound to make any confession and if he made any confession, it would be used as evidence against him. The accused made replies thereto in affirmative. The Magistrate noted all the questions and the replies of the accused in his own handwriting under column No.6. He also recorded the confessional statement under column No.7 in the same way, took a signature of the accused just thereunder and put his own signature at the place below as fixed in the form. He put his signature at the bottom of recorded confession on the additional sheet and took that of the accused. Just below to his signature under column No. 7 of the form there is a printed memorandum and next to that another space is fixed for putting his (Magistrate's) another signature. There is no blank space for making any memorandum in own handwriting of the Magistrate in between the printed memorandum and the place fixed for his signature. This type of prescribed form presupposes no handwritten memorandum under column No.7. However, there is a blank space for making memorandum under column No.8, which the recording Magistrate is required to fill up stating the reason of his belief regarding voluntariness of the confession. Accordingly, the Magistrate made a memorandum in his own handwriting recording his satisfaction towards the voluntariness of the confession. Since there is no place fixed for his signature under column No.8, he did not sign the memorandum.

37. There is another blank space under column No.9 to record the reason of discontinuing the proceeding under section 164 of the Code, if it appears to the Magistrate that the confession of the accused is not voluntary. There is also no place fixed for putting the Magistrate's signature. But at the extreme bottom of the form and under column No.10 there is a place fixed for putting his last signature. So, if any Magistrate does not make any memorandum in his own handwriting under column No.7, or does not put his signature after making memorandum under column No.8 and does not put his signature after making memorandum, if any, under column No.9, it cannot be held to be a gross illegality and fatal to the prosecution case. The purpose of making memorandum in compliance with section 164 (3) of the Code would suffice by signing the printed memorandum, provided that the precautions prescribed by the Code are duly taken by the recording Magistrate.

38. The Magistrate himself deposed on oath as PW 1 and asserted that he had recorded the confession in accordance with the provisions of section 164 of the Code and proved the recorded confessions, his signatures and that of the accused put there.

39. For better appreciation of the above discussion, part of the prescribed form with recorded confession of accused Abul Kashem is reproduced below:

“6. In order to ascertain whether the accused is prepared to make a statement of his own free will, he is next examined as follows:-

*Questions.*

*Answers and any further  
Statement made by the  
accused.*

১। আমি পুলিশ নই ম্যাজিস্ট্রেট, জানেন কি? জি হা।

২। আপনি দোষ স্বীকার করতে বাধ্য নন। জানেন কি? হা।

৩। আপনি দোষ স্বীকার করলে তা স্বাক্ষে আপনার বিরুদ্ধে ব্যবহৃত হবে, জানেন কি?  
জি হা।

৪। আপনি অন্যের শেখানো মতে কিছু বলবেন না তো? জি না।

৫। আপনি অসত্য কিছু বলবেন না তো? জি না।

7. Record of statement made-

The statement of আবুল কাশেম aged about ৩০  
years, made in the বাংলা language.

My name is আবুল কাশেম

My father's name is মৃত-তাজুল ইসলাম

I am by caste মুসলমান

and by occupation চায়ের দোকান

My home is at Mauza রাজাপাড়া

Police-station সদর দক্ষিণ

District কুমিল্লা

I reside at রাজাপাড়া

রাজাপাড়া চৌমুহনী বাজারে আমার চায়ের দোকান আছে। মনির আমার বন্ধু। মহসিন CNG ড্রাইভার, সে জানতোনা। রহিম @ চারু আমার কাছ থেকে ৪৫,০০০ টাকা পাওনা ছিল। সুদে আসলে তারা ৯০ হাজার টাকা দাবী করে। মনির বলেছে তার বোনের জামাইর কাছ থেকে ৫০ হাজার টাকা হাওলাত দিবে। মনির আমাকে বলে যে, রহিমকে সাথে করে নিয়ে গেলে ৫০ হাজার টাকা দিবে। C.N.G. ড্রাইভার মহসিনকে নিয়ে মনিরের বাড়ী একবালিয়া যাই। এর ১০/১২ দিন আগে আমি ও মনির রহিম @ চারুকে মারার পরিকল্পনা করি। রাত ১০.০০/১০.৩০ এর সময় আমি, মহসীন ও রহিম @ চারু মনিরের বাসায় পৌছি। মনিরের বাড়ীর পাশে C.N.G. রাখি। মনিরের বাড়ী থেকে বাগানে যাই। রাত অনুমান ১১.০০ এর সময় ধলকাইয়া ফরেস্ট বাগানে মনির রহিম @ চারুর গলা ও পরে মুখ চেপে ধরে। মহসীন বুকের উপর উঠে। আমি ২ পায়ে ধরে রাখি। কিছুক্ষণ পর রহিম @ চারু মারা যায়। আমরা বাগান হতে চলে আসি। মনির তার বাড়ীতে চলে যায় আমি ও মহসীন আমার দোকানে ঘুমাই। এলাকার লোকজন জিজ্ঞাসা করায় আমি ঘটনা স্বীকার করি। এ আমার জবানবন্দী।

*Statement*

[Note-This should be taken down as nearly as possible in the words of the accused and whenever a question is put to him the question should be recorded together with the answer. If the statement is long, foolscap sheets serially numbered may be inserted here for the purpose, provided the statement begins and also ends and is signed on the form itself.]

Sd/=

(Signature mark of the accused.)

Sd/=

(Signature of Magistrate)

40. I have studied carefully the provisions of Rule 23 of the High Court's General Rules and Circular Orders Chapter I, Volume I (Criminal), and have observed strictly the directions therein. I have also applied strictly the provisions of section 164 of the Criminal Procedure Code.

41. I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

Sd/=

(Signature of Magistrate.)

8. Brief statement of Magistrate's reason for believing that the statement was voluntarily made.

[Note-Any complaints of ill-treatment or injuries noticed on the accused or referred to by the accused should appear under paragraphs 6 and 7 but should be specifically noticed here and the action taken by the Magistrate thereon should be mentioned. When the confession is recorded otherwise than in the Court building and during Court hours the Magistrate's reasons are likewise to be recorded here.]

আসামীকে reflection এর জন্য ৩ ঘন্টা সময় প্রদান করা হয়। তাকে CrPC এর ১৬৪ ধারার বিধান ব্যাখ্যা করা হয়। আসামী পুলিশি নির্যাতনের অভিযোগ করেনি, তার শরীরে নির্যাতনের চিহ্ন পাওয়া যায়নি। বেআইনী হেফাজতে ছিল না। তাই জবানবন্দী স্বেচ্ছায় হয়েছে।

9. If at any stage it shall appear to the Magistrate that the statement made or about to be made by the accused is not voluntary, the Magistrate shall forthwith record an order hereunder discontinuing the proceeding under section 164, Criminal Procedure Code, and stating reasons therefor.

10. The accused is forwarded to কুমিল্লা কেন্দ্রীয় কারাগার

Sd/=

(Signature of Magistrate)

[Note. The Form to be used by Magistrates recording confessions is the one which contains the appropriate Rules in margin.] ”

(emphasis supplied)

42. The above quoted form of recording confession is a statutory form, which was prescribed in the General Rules and Circular Orders (Criminal). The memorandum appended under column No.7 of the form was printed in the language of section 164 (3) of the Code that was in force before its amendment by the Code of Criminal Procedure (Amendment) Act, 1923 (Act XVIII of 1923). By the said amendment, the words “I believe” at the bottom of section 164 (3) were substituted by “I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe”, but no ancillary modification was made to the General Rules and Circular Orders (Criminal) or in the form of confession prescribed and printed thereunder. As a result the old prescribed forms were supplied to the Magistrates with the

same language used in section 164 (3) of the Code before its amendment in 1923. Even after repeal of the General Rules and Circular Orders (Criminal) by the Criminal Rules and Orders (Practice and Procedure of Subordinate Courts), 2009 and prescribing a modified form under the title “Form No. M (45)” the same pre-amendment language is printed in the memorandum.

43. We have collected a form printed in 2017-18 to examine the present position and found that the old title “Form No. M (84)” instead of “Form No. M (45)” is still printed at the top of the form and also at the margin of front page. Similarly the reference of rule “23” instead of “78” and section 24 to 28 of the “Indian Evidence Act” instead of the “Evidence Act” at the top of margin of the front page and “rule 23 of the General Rules and Circular Orders, Chapter I, Volume I (Criminal)” instead of “rule 78 of the Criminal Rules and Orders (Practice and Procedure of Subordinate Courts), 2009” in the memorandum under column No.7 on page 4 are still printed. These are inconsistent with the form prescribed in the existing Rules. This defective form is being supplied to the Magistrates, and they have been recording confessions there.

44. It thus appears that there was/is inconsistency between the law and form of confession including the printed memorandum to be signed by the Magistrate as prescribed under the repealed/existing Rules. There is also inconsistency between the form prescribed under the existing Rules and the printed form, which is now available to the Magistrates. It creates confusion among the members of Bar as well as the recording Magistrates as to whether the Magistrate is required to make handwritten memorandum at the bottom of recorded confession under column No.7. Where there is already a printed memorandum in the language of law, albeit pre-amendment, it would be an unnecessary and meaningless exercise for the Magistrates to make another memorandum thereunder in the same language.

45. The purpose of making memorandum, issuing certificate or sanction or writing application in a prescribed form is to do it perfectly so that no mistake takes place. When a prescribed form for a particular purpose is provided within the Criminal Rules and Orders, there is no scope to deviate therefrom and make something new by the Magistrate himself, even if the form is defective and not yet corrected/amended/modified by proper authority.

46. The effect of non-compliance with any of the provisions of section 164 or section 364 of the Code has been decided in the bunch cases of *Major Bazlul Huda (Artillery) vs State*, 62 DLR (AD) 1 in the light of section 533 of the Code. In the said case, S K Sinha, J (as his lordship then was) speaking for the Court observed:

*“641. In this particular case we are concerned with section 533 of the Code. The first learned Judge has wrongly noticed section 537 of the Code in considering any error or omission or irregularities that occurs while recording confessional statement by a Magistrate. Section 533 reads as follows:*

*‘533. Non-compliance with provisions of section 164 or 364(1)- If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.*

*(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.’*

“642. This section provides a mode for the rectification of an error arising from noncompliance with any of the provisions of section 164 or section 364. The object is to prevent justice being frustrated by reason of such non-compliance. If any of the provisions of this section have not been complied with by a Magistrate, the document may be admitted under this section upon taking evidence that the statement recorded was duly made, if non-compliance has not injured the accused to his defence on the merit. If the record of the confession or the statement is inadmissible owing to the failure to comply with any of the provisions of section 164 or section 364, intrinsic evidence notwithstanding anything in section 91 of the Evidence Act may be given to show that the accused person duly made the statement and the statement, when so proved may be admitted and used as evidence of the case, if non-compliance has not injured the accused. The non-compliance with the provisions is cured only when there is no injury caused to the accused as to his defence on merit.” (emphasis supplied)

47. In deciding the above case, his lordship relied on the views expressed in *Mohammad Ali vs Emperor*, 35 CrLJ 385 (FB); *Kehar Sing and other vs The State (Delhi Admin)* AIR 1988 SC 1883 and in the bunch cases of *State vs Nalini and others*, 1999 5 SCC 253.

48. We have also gone through some other cases from Indian jurisdiction including *Chavadappa Pujari and others vs Emperor*, AIR 1945 (Bom) 292; *Tukaram Khandu Koli vs Emperor*, AIR 1933 (Bom) (Full Bench) 145 and *Mussamat Aimna vs Emperor*, 32 CrLJ 1931, 579.

49. In the case of *Chavadappa Pujari* (ibid), the Magistrate did not record confessions of two accused in his own handwriting and also did not make any memorandum. In deciding the case, Divatia, J observed:

“Then as to the contention that the confession was not taken by the Magistrate in his own handwriting and had not made any memorandum thereof, the learned Magistrate admits that he did not make any memorandum of the confession in English, but that the confession was recorded in the vernacular in his presence and he has appended this certificate at the end of the confession. No doubt under S. 164 read with S. 364 the Magistrate has to make a memorandum in his own handwriting, but that defect, as we have recently held is cured by the provisions of sub-s. (1) of S. 533 when the Magistrate is examined in the case. As the Magistrate has been examined and has given a satisfactory explanation of the same, I do not think the omission to make the memorandum in the Magistrate’s own handwriting makes the confession inadmissible in evidence. Lastly, the contention that there were two certificates at the end of the confession instead of one has no force in it. Really speaking, a note has been added to the certificate which is attached to the confession, and the note simply states what the Magistrate did after the accused was produced before him. That note is not a part of the certificate. There is, therefore, no substance in that contention. In our opinion, the confession of accused I must be regarded as true as well as voluntary and it is undoubtedly evidence against him.” (emphasis supplied)

50. In *Tukaram Khandu Koli* (ibid), the same point was referred to a Full Bench, wherein it was observed:

“It cannot reasonably be inferred from S. 364 that the memorandum at the foot of the confession prescribed by S. 164(3) must also be in the Magistrate’s own hand. He has only to make the memorandum and that is sufficiently done by signing it. The form of the memorandum being prescribed by the Code itself, it would surely be futile to

*require the Magistrate to copy the words from the book, and to make the admissibility of the confession depend upon his having done so. As regard the third point urged by Mr. Rele, independently of the judgment in Emperor vs Housabai (2), namely, that the memorandum, was appended at the foot of the English record of the confession and not at the foot of the vernacular record of it, I agree with my learned brother Baker that if this is an irregularity at all, it is a mere technicality and of no consequence. In the present case I am satisfied by the record of the confession and the Magistrate's certificate at the foot thereof that the precautions prescribed by the Code were duly taken, that the accused was warned that he was not bound to confess, and that the Magistrate satisfied himself by all reasonable and necessary means that the confession was voluntary. I hold therefore that it is admissible." (emphasis supplied)*

51. In *Mussamat Aimna* (ibid), the question of using the old form before amendment of section 164 of the Code in 1923 was raised. In deciding the issue, Coldstream, J observed:

*"Objection is taken by Counsel for appellants to the evidence of the confessions at Sitpur on the ground that the Honorary Magistrate did not append to his records certificates that he had explained to the accused that their confessions might be used as evidence against them, the certificates appended being on the old form prescribed before the amendment of section 164 of the Code of Criminal Procedure in 1923. The irregularity has not injured the appellants as to their defence on the merits and has been duly cured by the evidence of the Magistrate himself who as a witness testified that he had, as a fact, made the necessary explanation before recording the statements." (emphasis supplied)*

52. In *State vs Babul Miah*, 63 DLR (AD) 10 as cited by the learned Advocate for the appellant, no one was named even suspected in the FIR and no allegation of stealing any articles was there. Accused Babul Miah, who held the leg of deceased victim Dhan Miah, was convicted under section 302/34 of the Penal Code and sentenced to death, but another accused named Jabbar who killed the deceased victim by throttling followed by strangulation was acquitted for want of legal evidence. On an appeal, the High Court Division acquitted him (Babul Miah) on the grounds that the extrajudicial confessions as evidenced by PWs 3, 4 and 6 were subsequent embellishment and not reliable, and that the judicial confessions being recorded after three months lost its force apart from being obtained by means of torture and intimidation. The Appellate Division affirmed the said judgment of acquittal passed by the High Court Division disbelieving recovery of some articles including a tape recorder and current jack, and found the allegation of stealing those articles to be concocted and also observed that the Magistrate while recording judicial confession did not make any memorandum under column No.7 as required by law.

53. In the present case, the accused were specifically named in the FIR. They made confessions just on the next day of their arrest and without going on remand i.e. at the earliest possible time, and their confessions appear to be partly true. Their extrajudicial confessions are not subsequent embellishment and appear to be true on the material fact of taking the deceased victim inside the forest and killing him there, but not voluntary as being extracted under mass beating. The principal accused has also not been acquitted here. So, the case of *Babul Miah* (ibid) and the present one are distinguishable on facts and circumstances. It also appears that the Bar failed to bring into notice of the Hon'ble Court the curing effect of section 533 of the Code in case of non-compliance with any of the provisions of section 164 or section 364 thereof and also failed to bring into its notice the inconsistency between the law and prescribed form of confession, and relevant decisions on the points involved.

54. Since the use of old printed memorandum with pre-amendment language and not making of memorandum by own hand of the Magistrate do not injure the accused as to their defence on merits, it would not make the confessions inadmissible in the case in hand. At the same time we are of the view that the apparent inconsistency, irregularity and ambiguity in the printed form as discussed above should not continue for indefinite period. Under article 107 of the Constitution read with section 554 (2) (b) (c) of the Code of Criminal Procedure it is duty of the Supreme Court to frame Rules, or amend the existing Criminal Rules and Orders in conformity with the law and prescribe a correct and unambiguous form of confession so that no confusion arises on the part of the Magistrates in recording confessions under section 164 of the Code. The legal debate on the procedure of recording confessions in prescribed form should also be decided once for all. It is expected that the Rule Committee constituted under rule 7A of the Supreme Court of Bangladesh (High Court Division) Rules, 1973 (as amended up to date on 12 November, 2012) will look into the matter and make necessary recommendation for consideration of the Full Court.

55. It appears from the record that the Sub-Inspector of Police Md. Abu Yousuf, who produced the arrested accused before the Magistrate on 11.07.2011, in his application for recording the confessions stated that since accused Abul Kashem and Mohsin were beaten and injured by the local people, they were medically treated by Doctor. A medical certificate to that effect was also attached with the application. In the lower Court's file, we also find a prescription issued by the Doctor, which shows that the arrested persons were medically treated at the outdoor of General Hospital at Comilla and was prescribed to take medicines including capsule Tetracycline 200 mg. The prescription of an anti-biotic to the accused presupposes some wounds on their persons. Statement about mass beating of the accused was also made in the FIR as well as in the evidence of PWs 1, 4 and 10. Attention of PWs 3 and 10 was drawn about his (PW 3's) statement made under section 161 of the Code that the accused made extrajudicial confession after they were beaten.

56. In section 164 of the Code, in the Rules framed under article 107 of the Constitution read with section 554 of the Code and in so many decisions of the Supreme Court, the Magistrates have been cautioned that at the time of recording confession, the precautions prescribed by law must be taken and they must be satisfied about the truthfulness and voluntariness of confession. Where an accused is produced by police, the Magistrate would not only satisfy himself about the truthfulness and voluntariness from the declaration of the accused, but also from an attentive observation of his demeanour. In the present case the Magistrate recorded that he did not find any injury caused by the police on the accused, but he ought to have applied his mind into the contents of the forwarding application and carefully observed their demeanour and made an explanation about the injury found on their persons, and made further inquiry on the injuries and recorded his satisfaction whether the injuries were caused by mass beating or custodial torture and whether they were still under fear of beating. Besides, there are some other inconsistencies in the prosecution case, which need to be considered to arrive at a correct decision. According to the FIR and evidence of PW 2, accused Kashem called away deceased Charu from his house. Therefore, the suspicion raised among the informant and villagers should be directed towards Kashem and it was quite natural that after the dead body was found, the villagers would apprehend and interrogate him first. But from the evidence of PWs 3, 4, 5 and 7 it appears that condemned prisoner Mohsin was apprehended first. It is not clear what prompted the villagers to apprehend Mohsin before extracting any information from accused Kashem. At the same time it appears from the postmortem report as well as the evidence of PW 6 that there was a head injury on the dead

body and according to the expert witness (PW 6) that injury was also a cause of his death, which was antemortem and homicidal. How this injury was caused on the head of the deceased is not explained and the confessing accused did not make any statement about the said injury.

57. Under the above circumstances, we are of the view that the confessions appear to be partly true, but not voluntary. This type of confessions cannot form the sole basis of conviction unless it is corroborated by some other piece of evidence.

58. This is true that the accused persons were arrested in the evening on 10.07.2011 and produced before the Magistrate at 12 o'clock on the next day i.e. at the earliest opportunity and they made the confessions before the Magistrate without going on remand. The recording Magistrate is still required to be objectively satisfied about the truthfulness and voluntariness of the confessions, otherwise it cannot be the sole basis of conviction under the facts and circumstances already stated.

59. In that view of the matter, we have also to examine whether there is any corroboration to the confessions. The informant herself deposed in support of statement made in the FIR that accused Kashem had called away her husband, which was corroborated by PWs 4 and 5. PW 7 Mozammel Hoque, apparently an independent witness also stated in his deposition that at the afternoon on 09.07.2011 he heard that accused Kashem had called away victim Charu on the pretext of repayment of loan. This part of his evidence has got circumstantial value, although he did not mention any specific name who had told him about the calling away. Nowhere in the defence case we find that somewhere at some point of time victim Charu was departed from accused Abul Kashem. On the following day his dead body was found at Dhalkaia forest. This circumstance corroborates the confession of accused Kashem. The background of taking loan and not repaying the same despite repeated demand also appears to be believable. So, it has been proved that accused Kashem had taken loan from the deceased victim and he called him away at the afternoon on the day of occurrence. We thus find that the confession made by Abul Kashem has been corroborated by the circumstance of his calling away of the deceased victim at the afternoon on the day of occurrence and as such his confession can be based for his conviction. But so far it relates to accused Mohsin and Monir, we do not find any other prosecution evidence that they were seen with the deceased victim before or after the occurrence, or to go together with Kashem by the auto rickshaw or enter into the forest or come out therefrom at the material time. So, their confessions, which do not appear to be voluntarily made and not corroborated by any other direct or circumstantial evidence, are not sufficient to base their conviction. This is correct that there are strong reasons to suspect them to be involved in the occurrence, but this suspicion whatever strong is cannot be the substitute of legal evidence. We are, therefore, of the view that the charges so far it relates to accused Mohsin and Monir have not been proved by legal evidence. However, accused Abul Kashem is in imprisonment for seven years and in the death row for about six years. At the time of commission of occurrence he was a young man of 30 (thirty) years age and his previous record appears to be clean. In such a position we also think that the sentence of death awarded upon him should be commuted.

60. Accordingly the Death Reference is rejected. The Criminal Appeal No. 6253 of 2012 is allowed and Criminal Appeal No. 7528 of 2012 is allowed in part so far it relates to appellant No.2 Mohsin, and it is dismissed with modification of the judgment and order so far it relates to appellant No.1 Abul Kashem. The judgment and order dated 25.09.2012 passed in Session Case No. 1073 of 2011, so far it relates to condemned prisoners Mohsin and Monir



Hossain, is set aside. The judgment and order so far it relates to conviction of Abul Kashem passed under section 302 of the Penal Code is upheld, but the sentence of death awarded upon him (Abul Kashem) is commuted to imprisonment for life. The jail appeals are accordingly disposed of.

61. The condemned prisoner Abul Kashem is to be shifted from condemned cell and Mohsin and Monir Hossain are to be set at liberty forthwith if not wanted in any other case.

62. Let a copy of this judgment be placed before the learned Members of the Rule Committee.

63. Send down the lower Court's record.