

16 SCOB [2022] HCD 206**HIGH COURT DIVISION**

Death Reference No.124 of 2016 with Jail
Appeal No.327 of 2016 with Jail Appeal
No.328 of 2016

The State

-Versus-

Md. Shohag Howlader and another

Mr. M.D. Rezaul Karim, D.A.G

with

Mr. Md. Mahfuzur Rahman, A.A.G

with

Mr. Md. Altaf Hossen Amani, A.A.G

with

Mr. Md. Shariful Islam, A.A.G

... For the State.

Mr. Md. Hafizur Rahman Khan, *State
Defence Lawyer*

... For the *Condemned-Prisoner*

Mr. Md. Helal Uddin Mollah, with
Mrs. Syeda Farah Helal, *Advocates*

... (*For the Condemned-Prisoner and Jail
Appeal No.328 of 2016*)

Heard on:27.03.2022

Judgment on:28.03.2022

Present:

Mr. Justice S M Kuddus Zaman

And

Mr. Justice Mohammad Ali

Editors' Note:

In this death reference there was no eyewitness. Prosecution case relied upon two confessional statements made by two accused. In the confessional statements accused claimed that they had caused the death of the victim by strangulation. But the Inquest Report and the Post Mortem Report, though supportive of each other, did not support the statement of the confessing accused. In accordance with the post mortem report the cause of death was hemorrhagic shock. The High Court Division thus believing the confessional statements to be untrue and considering the other evidence adduced against the accused to be insufficient to prove their guilt beyond reasonable doubt, acquitted the accused.

Key Words:

Post Mortem Report; Inquest Report; Section 164 of the Code of Criminal Procedure; Section 302 of Penal Code; Confessional statement

When dead body of the victim is found in an open land mere pointing of the location of the dead body by an accused alone cannot be taken as a legal prove against him:

Three witnesses, namely P.W.3 Md. Ali, P.W.4 Mamun and P.W.5 Siraj have supported the evidence of P.W.11 S.I. Sultan Mahmud that at the showing of accused Bablu the dead body of victim Linkon was recovered. Undisputedly the dead body of victim Linkon was found in an open agricultural land which belonged to P.W.7 Mojibur. As such mere pointing of the location of the dead body by an accused alone cannot be taken as a legal prove that he committed the offence of murder unless above showing is supported by other legal evidence proving the complicity of the accused with the act of murder of victim Linkon. ... (Para 40)

Section 164 of the Code of Criminal Procedure, 1898:

It is the duty of the Judicial Magistrate to ensure that the confessional statement is made voluntarily, truthfulness will be determined by the trial Court:

While recording a confessional statement a Judicial Magistrate is not required to investigate as to the truthfulness or correctness of the statement being made before him by the accused. It is the duty of the Judicial Magistrate to ensure that the confessional statement is made voluntarily free from any form of coercion or undue influence. Determination of truthfulness or correctness of confessional statement of an accused is the duty of the learned judge of the trial court. The trial Court shall perform above duty by examining the confessional statement in the light of facts and circumstances of the case and by comparing the same with other legal evidence on record. When more than one accused person of a case give separate confessional statements the trial Court shall also examine if above statements are mutually supportive or those suffer from material contradictions. ... (Para 43)

Confessional statement if not found true cannot be given the status of legal evidence and cannot be a base for conviction:

It is crystal clear from above mentioned evidence of P.W.I Dr. Md. Shah Alam, P.W.11 S.I. Md. Sultan Mahmud, the Post Mortem report (Exhibit-8 and the Inquest report (Exhibit No.4) that the death of victim Linkon was caused due to loss of excessive blood for amputation of fingers of both hands and legs and other injuries as mentioned above and not by strangulation as have been stated by accused Bablu and Shohag in their respective confessional statement. Above confessions statements do not make any mention of above injuries let alone providing any explanation as who inflicted those injuries. Analyzing above ocular and documentary evidence on record in the light of the facts and circumstances of the case and the confessional statements made by accused Shohag and Bablu under section 164 of the Code of Criminal Procedure we are of the view that above confessional statements do not find any support from any other legal evidence on record. In above view of the materials on record we are unable to accept the confessional statements made by the accused Bablu and Shohag as true and give the same the status of legal evidence which can be the basis of an order of conviction and sentence. The learned Judge of the Druto Bichar Tribunal committed serious error in accepting above confessional statements as true and valid legal evidence which is not tenable in law. ... (Paras 51, 52 and 53)

JUDGMENT

S M Kuddus Zaman, J:

1. This Death Reference under section 374 of the Code of Criminal Procedure, 1989 (hereinafter referred to as the Case) has been submitted by the learned Bicharak (District and Sessions Judge), Druto Bichar Tribunal No.4, Dhaka for confirmation of the death sentence imposed upon the accused (1) Md. Shohag Howlader and (2) Md. Atabur Rahman @ Bablu under section 302/34 of the Penal Code in Druto Bichar Tribunal Case NO.05 of 2015 arising out of Palong P.S. Case No.33(6)13 corresponding to G.R. No.192 of 2013 vide judgment and order of conviction and sentence dated 07.09.2016.

2. As against the aforesaid judgment and order of conviction and sentence dated 07.09.2016, the condemned-prisoner Md. Shohag Howlader preferred Jail Appeal No.328 of

2016 and condemned-prisoner Md. Atabur Rahman @ Bablu prepared Jail Appeal No.327 of 2016.

3. The above mentioned Death Reference and the Jail Appeals have emerged out of the self-same judgment and order of conviction and sentence and the questions of law and facts involved in all above Reference and Appeals are same and hence, those have been heard together and are being disposed of by this single consolidated judgment.

4. In short, the prosecution case is that on 28.06.2013 at 0.15 hours P.W.1 Mozammel Kha lodged an FIR with Palong P.S. stating that on 25.06.2013 at 3.00 p.m. condemned-accused Shohag and Bablu and not sent up accused Babul abducted his son victim Md. Linkon along with motor cycle from his dwelling house. The mobile phone of victim Linkon was found switched off. One Arif informed that above accused-persons attempted to sale above motor cycle but failed and the motor cycle was recovered and kept in the Madaripur Police Station. It was apprehended that above accused-persons have murdered his son by administering narcotics to grab his motor cycle.

5. On the basis of above ejahar P.W.10 Abul Kashem Officer-in-Charge of Palong Police Station initiated Palong P.S. Case No.33 dated 28.06.2013. Accused Atabur Rahman Bablu was arrested by police from Lalbagh, Dhaka on 28.06.2013 at 07.00 a.m. and at his showing the dead body of victim Linkon was recovered. P.W.11 Md. Sultan Mahmud performed inquest of the dead body of victim Linkon and sent the same for post mortem examination.

6. The investigation of the case was assigned to P.W.11 Sultan Mahmud who in course of investigation visited the place of occurrence, prepared a sketch map of the same along with an index thereof, seized alams by dint of seizure lists in presence of witnesses, produced accused Bablu and accused Shohag before P.W.8 Md. Aminul Islam, a judicial Magistrate, for recording of their confessional statements under section 164 of the Code of Criminal Procedure and recorded statement of witnesses under section 161 of the Code of Criminal Procedure. In the above investigation offence punishable under section 364/328/201/302/379/411/34 of the Penal Code having prima facie proved he submitted charge sheet No.172 dated 15.09.2013 against the condemned prisoners namely Sohag and Bablu and finding no address of accused Md. Babul did not send him to stand trial.

7. The learned Session Judge of Shariatpur framed charge against the condemned accused-persons namely Md. Sohag Howlader and Md. Atabur Rahman@Bablu under sections 364/328/302/201/379/411/34 of the Penal Code and read over the same to the accused-persons who pleaded not guilty and demanded trial.

8. The case was transferred to the learned Judge of Drubo Bichar Tribunal No.4, Dhaka for trial. At trial prosecution examined 11 witnesses who were cross examined by the defense. Documents and materials produced and proved by the prosecution were marked as Exhibit No. 1-13 series and Material Exhibit No. Ka.

9. On conclusion of recording of prosecution evidence both the accused-persons were examined separately under section 342 of the Code of Criminal Procedure in which the accused-persons reiterated their claim of not guilty and declined to adduce any evidence.

10. On consideration of facts and circumstances of the case and evidence on record the learned Judge of Druto Bichar Tribunal convicted accused Shohag and Bablu under section

302/34 of the Penal Code and sentenced them thereunder to death and also a fine of Tk.20,000/- each as mentioned above.

11. Mr. M.D. Rezaul Karim, the learned Deputy Attorney General appearing on behalf of the State submits that accused Bablu and Shohag called out victim Linkon from his house and subsequently his dead body was found at the showing of accused Bablu. Accused Babul and Shohag both have given separate confessional statement under section 164 of the Code of Criminal Procedure to P.W.8 Md. Aminul Islam a judicial Magistrate confessing their guilt in the commission of murder of victim Linkon by swallowing sleeping tablets and strangulation. P.W.8 Md. Aminul Islam has consistently stated in his evidence that he recorded above confessional statements of accused Bablu and Shohag on fulfillment of all legal requirements and those were made voluntarily. P.W.1 Mozammel Kha, P.W.2 Rashida Begum and P.W.3 Md. Ali Hossain Khan have given consistent and mutually corroborative evidence proving that above accused-persons called out victim Linkon from his home.

12. On consideration of above facts and circumstances of the case and legal evidence on record the learned Judge of the Tribunal has rightly held that the confessional statements given by above two accused-persons were true, mutually supportive and corroborated by others evidence on record and on the basis of above legal evidence rightly convicted the condemned accused-persons. This is a gruesome murder of an innocent young person and after above murder the dead body of the victim was dumped in an unrecognizable place. As such the learned Judge has rightly handed down the highest penalty against the condemned accused-persons as provided by law.

13. As such this Court may accept the reference made by the learned Judge of the Tribunal and dismiss both the appeals preferred by the condemned accused persons.

14. On the other hand, Mr. Md. Hafizur Rahman Khan, the learned Advocate appointed by the State for condemned-prisoner Babul submits that while giving evidence as P.W.1 informant Mozammel Kha did not mention that the accused-persons abducted victim Linkon. In the ejarah it has been stated that the Motor bike of victim Lincon was in the possession of accused Bablu and Shohag and they attempted to sale out the same. But above claim of the FIR remained not proved. There is no eye witness of the occurrence of murder of victim Lincon. It is true that accused Shohag and Bablu have made two separate confessional statements under section 164 of the Code of Criminal Procedure but those statements were extracted by physical torture and both the accused persons had retracted above confession.

15. The learned Judge committed serious illegality in convicting accused Bablu on the basis of the same. The learned Advocate lastly submits that no independent witness to the inquest report has corroborated the evidence of P.W.11 Md. Sultan Mahmud that the dead body of victim Linkon was recovered at the showing of accused Bablu. There is no legal evidence on record to prove the charge leveled against accused Bablu under section 302/34 of the Penal Code. As such, above death reference is liable to be rejected and the Jail Appeal preferred by condemned prisoner Bablu deserves to be allowed and condemned prisoner Bablu is entitled to be acquitted.

16. Mr. Md. Helal Uddin Mollah with Mrs. Syeda Farah Helal the learned Advocate for condemned-prisoner Shohag adopted the submissions made by the State appointed learned Advocate for co-accused Bablu and submitted that in this case there is only one piece of evidence against accused Shohag which is the confessional statement allegedly given by

accused Shohag under section 164 of the Code of Criminal Procedure before a judicial Magistrate. But above confessional statement of accused Shohag was obtained by torture and abuse and above confessional statement contradicts the confessional statement made by co-accused Bablu on materials points and above confessional statement is not true at all.

17. The learned Judge of the Tribunal most illegally accepted above confessional statement as true and voluntarily made and convicted and sentenced accused Shohag on the basis of the same which is not tenable in law. As such the Death Reference may be rejected and the Jail Appeal of convict Shohag may be allowed and he may be acquitted.

18. In order to appreciate the legal validity of the arguments advanced by the learned Advocates for the respective parties and to examine whether the trial Court was justified in passing the impugned judgment and order of conviction and sentence we turn to examine and discuss the evidence adduced by the prosecution in this case.

19. As mentioned above prosecution has examined 11 witnesses to bring home the charge brought under section 302/34 of the Penal Code against accused Bablu and Sohag.

20. P.W.1 Mozammel Kha is the father of victim Linkon and informant of this case. He stated that on 25.06.2013 at 3.00 p.m. accused Shohag and Bablu called out victim Linkon from his home. The mobile phone of victim Linkon was found switched off. Arif informed that the motor cycle of victim Linkon was kept in Madaripur police station. He went to above police station and identified motor cycle of his son. Accused Bablu was arrested by police and he confessed to have murdered his son and dumped his dead body beside a palm tree. Accused Shohag also confessed to have murdered his son by administering narcotics mixed milk and by strangulation. The witness proved the FIR, seizure list and his signatures on above documents which were marked as exhibit-1, 1/1, 2, 2/1, 3 and 3/1 respectively. In his cross-examination the witness denied that his son did not go with accused Shohag with his motor bike nor the accused-persons murdered his son or he gave false evidence.

21. P.W.2 Rashida Begum is the mother of victim Linkon. She stated that on 25th at about 3.00 p.m. accused Shohag and Bablu came to her home and took away victim Linkon riding his motor bike. On the next day Rasel disclosed that the match light of victim Linkon was in the possession of accused Bablu. Accused Bablu was arrested by police and he confessed to have murdered victim Linkon and at his showing the dead body of his son was recovered. Subsequently the maternal aunt and uncle of accused Shohag apprehended him and handed him over to police. Accused Sohag also confessed to the Magistrate that he had murdered victim Linkon by strangulation. In cross-examination she denied that Rasel did not mention to her that the match light of victim Linkon was in possession of accused Bablu.

22. P.W.3 Md. Ali Hossain Khan is the brother of P.W.1 Mozammel. He stated that he heard from P.W.1 Mozammel on 26.06.2013 that Accused Shohag and Bablu called out victim Linkon from his home. He heard that motor bike of victim Linkon was in Madaripur Police Station. He went there and found the Motor Bike of victim Linkon. Accused Bablu confessed to police and at his showing dead body of victim Linkon was found. Police prepared inquest report of the dead body of victim Linkon and seized wearing apparels of the victim and blood stained mud of the occurrence place by a seizer list and he gave signatures on above documents. The witness proved the inquest report, seizure list and his signature on above documents and those were marked as Exhibit No. 3, 3/1 and 3/2 respectively. In cross-

examination he stated that he heard of the occurrence at 5.00 p.m. on 26.06.2013 and the name of the accused persons were not mentioned in the inquest report.

23. P.W.4 Mamun Khan stated that on 26.06.2013 P.W.1 Mozammel stated to him that victim Linkon was missing and his mobile phone was switched off. He heard that a motor bike was found in the Madaripur Police Station. He went there and identified the motor cycle of victim Linkon. Police arrested accused Bablu and at his showing dead body of victim Linkon was recovered. Accused Bablu and Shohag murdered victim Linkon and dumped his dead body in the field. In cross-examination he stated that victim Linkon was his cousin brother. Accused Shohag is a poor man who lives in Dhaka for last 9 years. He denied that about two months before the date of occurrence victim Linkon went to Dhaka. No G.D.E was entered in the Police Station before institution of this case. He lastly stated that he did not burn the house of Accused Shohag by fire.

24. P.W.5 Siraj Baga is a village police and a witness to the inquest report of the dead body of victim Linkon. The witness proved his signature on the seizure list and the inquest report which were marked as Exhibit-2/3 and 4/2 respectively. In cross-examination he stated that he was a village police of Ward NO.7 and the dead body of victim Linkon was found in the ward of another Union Parishad.

25. P.W.6 Jashim Sarder is another witness to the inquest report of the dead body of victim Linkon. The witness proved his signature on the inquest report which was marked as Exhibit-4/3. He stated that at the time of occurrence accused Babul was present and he heard that accused Bablu and Shohag murdered victim Linkon by administering something with juice.

26. P.W.7 Mujibur Rahman Sarder stated that on 28.06.2013 the dead body of victim Linkon was found in his land. Police recovered above dead body at the showing of the person who dumped the same. He heard that accused Shohag and Bablu murdered victim Linkon by administering intoxicating substance. In cross-examination the witness stated that at 12.00 o'clock he came to know that above dead body was lying in his land.

27. P.W.8 Md. Aminul Islam is the judicial Magistrate who recorded confessional statements of accused Bablu and Shohag under Section 164 of the Code of Criminal procedure. He stated that the Investigation Officer produced before him accused Bablu on 02.07.2013 and he gave him enough time before accused Bablu voluntarily agreed to give a confessional statement. He recorded his statement and read over the same to the accused who endorsed the same as true and gave two signatures on the same. The witness proved above confessional statement, his signatures and the Signature of accused Bablu on the same which were marked as Exhibit-5 and 5/1 series respectively. The confessional statement of accused Bablu is reproduced below:

“গত ২৫/০৬/১৩ ইং সোহাগ এর সাথে আমি ও বাবুল শরীয়তপুর জেলার ডামুড্যা থানায় আসি। সেখানে সোহাগের শ্বশুর বাড়ী। আমাদের দুজনকে ঐ বাড়ি নেয় নি। দোকানে বসা থাকি। চা, সিগারেট খাই। তিনটার দিকে সোহাগ, লিংকনকে ফোন করে আসতে বলায় লিংকন গাড়ি (মোটর সাইকেল) নিয়ে আসে। কিছুক্ষন পর আমরা চারজন লিংকনের হোন্ডায় উঠে কিছুদূর আসার পর একটা বাজারে আমাকে ও বাবুল -কে নামিয়ে দেয়। সোহাগ, লিংকন মোট সাইকেলের মেরামত করা লাগবে বিধায় মাদারীপুর চলে যায়। বাবুল সোহাগের কাছে কিছুক্ষন পর ফোন করে। আমাদের দুজনকে ফেরিঘাট আসতে বলায় আমরা একটা গাড়িতে ফেরিঘাট এসে অপেক্ষা করতে থাকি। সন্কার পর সোহাগ লিংকন তার গাড়ী নিয়ে মাদারীপুর থেকে ফিরে এসে আমাদের দুইজনকে ও ঐ হুন্ডায় উঠাইয়া নেয়। কিছুদূর এসে একটা স্টীল ব্রীজ এর কাছে এসে বাবুল ঠাণ্ডা জুস নিয়ে আসে। সোহাগ টাকা দেয়। চারজনই চারটি জুস খাই। আর একটু সামনে এসে আমি একটা Sheikh সিগারেট খাই। লিংকন গাঁজার একটা স্টীক খায়। গাড়ী ঘুরিয়ে গ্রামের ভিতর দিয়ে একটা পাকা রাস্তায় ঢুকি আমরা। সিগারেট খাওয়ার পর লিংকনের গ্যাসলাইট আমার কাছে রাখি। লিংকন গাড়ী চালানো অবস্থায় সে পড়ে যাবে যাবে ভাব হয়। সে পড়ে যাওয়ার উপক্রম হলে সোহাগ হুন্ডা চালায় ও লিংকনকে আমাদের মাঝে রাখি। কিছুদূর গিয়ে হোন্ডা থামিয়ে দেয় সোহাগ, সবাই নামি। রাস্তার উপর থেকে

লিংকনকে ধরাধরি করে পাটক্ষেতের পাশে নিয়ে যায় ওরা দুজন আমি, দাড়িয়ে থাকি রাস্তায়। আমাকে বাবুল ডাক দেয়। আমিও সেখানে যাই। লিংকনকে শোয়ানো অবস্থায় দেখি। আমি তার পা ধরে রাখি। বাবুল সোহাগ, শার্ট দিয়ে গলা পেচিয়ে লিংকনের মৃত্যু নিশ্চিত করে। আমরা তিনজন উঠে আসি। ঐ খান থেকে সোহাগ হোন্ডা চালিয়ে আমাদের দুজন সহ বাবুল এর নানী বাড়ী যাই। রাতে থেকে পরদিন সকালে মোস্তফাপুর, মাদারীপুর যাই আমরা। বাবুল ও সোহাগ হোন্ডা বিক্রির চেষ্টা করে। পুলিশ ও স্থানীয় লোকজন চ্যালেঞ্জ করে। তারা দুজনে একপর্যায়ে পালিয়ে যায়। হোন্ডা বিক্রি করতে পারেনি। আমাকে ও পরে পুলিশ জিজ্ঞাসাবাদ করে। আমাকে তারা আর ধরেনি। আমি পরে গাড়িতে করে ঢাকা চলেই যাই। মেসে উঠি। আমার কাছে লিংকনের দিয়াশলাই ছিল। মেসের একজন রাসেল আমাকে দিয়াশলাই এর কথা জিজ্ঞাসা করে। আমি মিথ্যা বলি। পরদিন সকালে উঠে কাজে যাই। এর পর ২৮/০৬/১৩ইং আমাকে পুলিশ ধরে লালবাগ থানায় নিয়ে যায়। পরে আমাকে পুলিশ শরীয়তপুর নিয়ে আসায় আমার দেখানো মতে লাশ ঐখানেই পায়। পুলিশ লাশ নিয়ে যায়। আমাকে থানায় নিয়ে আসে। এই আমার জবানবন্দি।”

28. The witness further stated that the investigating officer produced accused Shohag before him on 03.07.2013 and he gave the accused enough time for refreshment of memory. The accused voluntarily agreed to give a confessional statement and he recorded his confessional statement after fulfillment of all legal requirements. He read over above statement to the accused who accepted the same as true and gave two signatures on the same. The witness proved above confessional statement of accused Shohag and signatures of above accused and his six signatures on the same which were marked as Exhibit-6 and 6/1 series respectively. Above confessional statement of accused Shohag is reproduced below:

লিংকনের সাথে আমার কোন শত্রুতা ছিল না। ছিল ওর বাবার সাথে। সে এলাকায় বিচার শালিশী করত। কয়েকটা বিচারে আমার বিরুদ্ধে সিদ্ধান্ত দেয়। এরপর আমি ঢাকা চলে যাই বউ বাচ্চা সহ। সেখানে আমি অপরাধ জগতের সাথে জড়িয়ে যাই। ঘটনার কিছুদিন পূর্বে লিংকন ঢাকার লালবাগ আমি যে মেসে থাকি সেখানে যায়। সে আমার সাথে কাজ করবে বলে জানায়। আমার পূর্বের কথা মনে পরায় ওর দামী মোটর সাইকেল আছে জানালে আমার লোভ হয়। প্রতিশোধও নেয়া হবে মনে হওয়ায় আমি চিন্তায় থাকি। শ্বশুর বাড়ী ডামুড্যা থাকায় আমি শবে বরাতের পরদিন বাবুল, বাবলু সহ আমি ডামুড্যা আসি। লিংকনকে অন্য তথ্য দিয়ে ঐখানে আনি। ওর হোন্ডায় কাজ করানো দরকার হবে বলে জানালে আমি ও লিংকন সহ চারজন হোন্ডায় উঠি। বাবুল ও বাবলুকে আঙ্গুরিয়া রেখে দুজনে মাদারীপুর যাই। কাজ করতে সময় লাগে। বাবুল ও বাবলুকে কাজীরটেক ফেরিঘাট এসে অপেক্ষা করতে বলি। কাজ শেষে এসে ঐ দুজন সহ চারজন হোন্ডায় উঠে টেকের হাট স্টীল ব্রিজের পর কালভাটের সামনে থামতে বলি। বাবলুকে একটি থ্রান জুসে ঘুমের বড়ি মিলিয়ে মোট চারটি জুস আনতে বলি। জুস আনার পরে ঘুমের বড়ি মিশানোটা লিংকনকে খাওয়াই। এরপর বাবলু সিগারেট খায় ও লিংকনের সাথে থাকা গাজা খায়। খাওয়ার পর হোন্ডা চালিয়া আঙ্গুরিয়া ব্রিজ পর্যন্ত এসে লিংকন খেতে চায়। আমি বলি সবাই মিলে আমার বাড়ি চল। লিংকন আমাদের তিনজন সহ হোন্ডা চালায়। তখন পিছনে এসে গোইয়াতলা রোডে ঢুকি। এক কিলোমিটার চালানোর পরে সে গাড়ি থামায় ও বলে আমি চোখে দেখিনা, ঘুম ঘুম আসে তখন আমি চালাই। মাঝখানে লিংকনকে নিয়ে (অপাঠ্য) বসে। গাড়ি চালিয়ে সরদার বাড়ি স্কুল পর্যন্ত আসি। লিংকন ইতিমধ্যে ঘুমিয়ে যায়। গাড়ি রাস্তায় দাড় করানো ছিল। তিনজন পরামর্শ করে লিংকন কে মারার সিদ্ধান্ত নিয়ে ফেলি ও তিনজনই চাপ দিয়ে ধরি। সময় নেওয়ায় লিংকনের শার্ট খুলে গলায় পেচ দিয়ে মেরে ফেলি। পাটক্ষেতের পাশে খেজুর গাছের গোড়ায় রেখে আসি। আশে পাশে তালগাছ ছিল। গাড়ি নিয়ে বাবুলের আত্মীয়ের (মামা বাড়ী) নড়িয়া বাড়িতে যাই। রাতে থেকে পরদিন সকালে মাদারীপুরের গোমস্তাপুর গিয়ে গাড়ি বিক্রির চেষ্টা করি। (অপাঠ্য) সাথে কথা বলি। পুলিশ তৎক্ষণাত আসায় আমি বুঝতে পেরে দৌড়ে পাশে যাই। গাড়ি ফেলে রেখে। সেখান থেকে ডামুড্যা হয়ে ঢাকা চলে যাই। এই আমার জবানবন্দি।

In his cross-examination the witness denied that accused Bablu and Shohag did not give confessional statements voluntarily and he recorded above statement according to the demand of police.

29. P.W.9 Dr. Md. Shah Alam performed Post Mortem Examination of the dead body of victim Linkon. He stated that he examined the dead body of victim Linkon on 28.06.2013 and sent viscera for chemical examination. On receipt of above chemical examination Report on 21.07.2013 he prepared final Post Mortem Examination report on 20.08.2013. The witness proved above Post Mortem Report and his signature on the same which were marked as Exhibit-8 and 8/1 respectively.

30. The relevant part of the Post mortem report of the dead body of victim Linkon is reproduced below:

“ ২= অসম-অবস্থান, আকার ও ধরনঃ

“All toes of both lower Limbs were amputated. All fingers of left hand amuted 1st, 2nd and 5th fingers of right hand were amputated.”

Opinion: Death of victim Linkon was caused due to Haemorrhagic shock which was ante-mortem and homicidal in nature.

31. The result of Chemical Analysis of Parts of liver and kidney of the victim was as follows:

“ফলাফলঃ-

প্লাস্টিকের পাত্রে রক্ষিত ভিসারায় বিষ পাওয়া যায় নাই”।

32. In cross-examination he stated that the fingers of hands and legs of the victim were amputated. In the stomach of the victim no presence of sleeping pill was found.

33. P.W.10 K.M. Abul Kashem is the officer-in-charge of Palong Police Station and recording officer of this case. He stated that on receipt of the ejahar from P.W.1 Mozammel Kha he filed this case. The witness proved the ejahar form and his signature of the same which were marked as Exhibit-9 and 9/1 respectively.

34. P.W.11 Md. Sultan Mahbud, sub-inspector of Police is the investigating officer of this case. He also performed inquest of the dead body of victim Linkon. He stated that on receipt of the case record he visited two places of occurrence, prepared sketch maps of the same along with indexes thereof. The witness proved above Sketch Maps the and Indexes and his signatures of those documents which were marked as Exhibits 10, 10/1, 11, 11/1, 12, 12/1, 13 and 13/1 respectively. He further stated that he arrested accused Atabur Rahman Bablu and at his showing recovered the dead body of victim Linkon, performed inquest of the same and prepared an Inquest Report. He proved his signature on the inquest report which was marked as Exhibit-4/2. He further stated that accused Shohag and Bablu agreed to give confessional statements voluntarily and he produced them before the Judicial Magistrate who recorded their confessional statements. He seized some parts of the pant, shirt and belt of victim Lincon and mud of the place of occurrence by dint of two separate seizure lists. He proved his signatures on above documents which were marked as Exhibits-3/3 and 2/4 respectively. He could not find out the address of one accused. In his above investigation allegation having proved against accused Shohag and Bablu he submitted charge sheet against them. In cross-examination he stated that he could not recollect the date of arrest of accused Shohag. He took accused Shohag on remand for 5 days on 30.06.2013 and produced him before Judicial Magistrate on 03.07.2013 for recording his confessional statement. He denied that he obtained confessional statement of accused Shohag putting him in fear of death by crossfire. Victim Linkon had no mobile phone. He did not find that accused Shohag had any mobile phone. He found that before two months of the occurrence victim Linkon went to Dhaka due to deterioration of relation with his parents. In the charge sheet he designated accused shohag as a thief. But he did not find any case of theft against accused Shohag. During investigation he did not find any person namely, Arif, Rasel or Ajahar.

35. The inquest report prepared by this witness is reproduced below:

“বয়স অনুমান ১৮ বৎসর হইবে। উচ্চতা অনুমান ৫ ৬ হইবে। মৃত্যুর দেহ অর্ধগলিত ও বিকৃত অবস্থায় পাওয়া গেল। তাহার চোখ বাহির হওয়া ও জিহবা বাহির হওয়া। শরীর অত্যন্ত ফোলা অবস্থায় পাওয়া গেল। তাহার দুই হাতের আংগুল ও দুই পায়ের আংগুলের অগ্রভাগ কর্তন বলিয়া প্রতীয়মান হইল। গলায় অস্বাভাবিক ফুলা। তাহার পরিহিত জিন্সের

প্যান্ট শরীরের মধ্যে বসিয়া যাওয়া অবস্থায় পাওয়া গেল। পচন ও ফোলায় কারণে তাহার শরীরের অন্যান্য চিহ্নগুলি নির্ণয় করা সম্ভব হইল না। তাহার সাড়া শরীরের চামড়া পোড়া ও লালচের মত প্রতীয়মান হইল।”

36. Above is all about the evidence oral and documentary adduced by the prosecution to prove the charge brought against accused Bablu and Sohag.

37. At the very outset it is to be mentioned that P.W.1 Mozemmel Kha while giving evidence in court has made a departure from the statement he made in the ejahar as to the abduction of victim Linkon by the accused persons. He merely stated that the accused persons took away victim Linkon along with his motor bike from his home at 3.00 p.m. on 25.06.2013. But P.W.11 Sultan stated in his cross examination that he found during investigation that about two month before the date of occurrence victim Linkon left his house and went to Dhaka due to deterioration of relation with his parents.

38. In the ejahar it has been stated that the motive behind the forcible abduction and murder of victim Linkon was to grab his motor bike. The accused-persons attempted to sale above motor bike in Madaripur but they failed due to resistance by local people and police. P.W.2 Rashida and P.W.3 Ali Hossain have in their evidence also mentioned about the motor bike of victim Linkon. In their confessional statements under section 164 of the Code of Criminal Procedure accused Shohag and Bablu have also mentioned about the motor bike of victim Linkon. But above motor bike was not produced in court nor any seizure list showing that above motor bike was recovered from the possession of the accused-persons was produced at trial. There is no evidence on record to show that the accused-persons were in possession of above Motorbike or they attempted to sale that Motorbike after demise of victim Linkon. The learned Advocate for condemned prisoner Sohag brought to our notice an unexhibited seizure list mentioned at page No.152 of the Paper book. Above document shows that a motorbike was found in an abandoned condition in front of Mostafapur Bus Counter of Madaripur and the same was seized pursuant to GDE No. 1222 dated 26.06.2013.

39. P.W.2 Rashida Begum mother of the victim stated in her evidence that one Rasel informed her that the match light of victim Linkon was in possession of accused Bablu. But above Rasel did not give evidence in this case as a P.W. nor above match light was seized and produced at trial. In his cross-examination P.W.11 S.I. Sultan Mahmud stated that during investigation he did not find any person namely Arif, Rasel or Ajahar.

40. It is not disputed that the dead body of victim Linkon was recovered on 28.06.2013 at 11.30 A.M. from the agricultural land of P.W.7 Mojibur Rahman Sarder. It has been alleged by P.W.11 S.I. Sultan Mahmud that above dead body was recovered at the showing of accused Bablu. P.W.4 Mamun, P.W.5 Siraj, P.W.6 Jasim, P.W.7 Mojibor and P.W.3 Md. Ali gave evidence on this point. P.W.3 Ali Hossain is the brother of the informant, P.W.4 Mamun is the cousin of victim Linkon and P.W.5 Siraj Baga is a village police of the ward adjacent to the place where the dead body of victim Linkon was found. Above three witnesses, namely P.W.3 Md. Ali, P.W.4 Mamun and P.W.5 Siraj have supported the evidence of P.W.11 S.I. Sultan Mahmud that at the showing of accused Bablu the dead body of victim Linkon was recovered. Undisputedly the dead body of victim Linkon was found in an open agricultural land which belonged to P.W.7 Mojibur. As such mere pointing of the location of the dead body by an accused alone cannot be taken as a legal prove that he committed the offence of murder unless above showing is supported by other legal evidence proving the complicity of the accused with the act of murder of victim Linkon.

41. In this case there is no eye witness who saw the commission of murder of victim Linkon. The prosecution has relied upon the confessional statements (Exhibit No.5 and 6) made by accused Shohag and Bablu before P.W.8 Aminul, a Judicial Magistrate to prove the guilt of both accused persons.

42. It is true that an order of conviction and sentence can be recorded on the basis of a confessional statement of an accused made under section 164 of the Code of Criminal procedure to a Magistrate if the same is made voluntarily and proved to be true. P.W.8 Md. Aminul Islam the Judicial Magistrate who recorded above two confessional statements stated that accused Bablu and Shohag gave above confessional statements voluntarily and he recorded their statements observing all legal requirements.

43. While recording a confessional statement a Judicial Magistrate is not required to investigate as to the truthfulness or correctness of the statement being made before him by the accused. It is the duty of the Judicial Magistrate to ensure that the confessional statement is made voluntarily free from any form of coercion or undue influence. Determination of truthfulness or correctness of confessional statement of an accused is the duty of the learned judge of the trial court. The trial Court shall perform above duty by examining the confessional statement in the light of facts and circumstances of the case and by comparing the same with other legal evidence on record. When more than one accused person of a case give separate confessional statements the trial Court shall also examine if above statements are mutually supportive or those suffer from material contradictions.

44. As mentioned above in their two confessional statements accused Shohag and Bablu have mentioned repeatedly about the motor bike of victim Linkon as has been done by P.W.1 Mozammel Kha, P.W.2 Rashida Begum and P.W.3 Mohammad Ali Hossain Khan but above motor bike was not produced before the trial Court. As mentioned above the motor bike of victim Linkon was found in an abandoned condition in front of a Bus counter at Madaripur. There is no evidence on record to show that the accused persons were ever in possession of above Motor bike.

45. Both accused-persons have further stated in their respective confessional statement that sleeping tablets were mixed with juice and victim Linkon was made to consume the same. But P.W.9 Dr. Md. Shah Alam who performed Post Mortem examination of the dead body of the victim has stated in his evidence that no presence of any sleeping pill was found in the stomach of victim Linkon.

46. As to the manner of murder of victim Linkon accused Bablu has stated in his confessional statements that he caught hold of the leg of victim Linkon and accused Shohag and Babul ensured the death of the victim by pressing his neck with his shirt. But accused Shohag stated in his confessional statement that he and other two co-accused namely Babul and Bablu murdered the victim by pressing his neck with his shirt. Accused Shohag did not mention that accused Bablu caught hold of the leg of victim Linkon.

47. It turns out from above confessional statements (Exhibit No.5 and 6) of accused Bablu and Shohag that the death of victim Linkon was caused by strangulation. But two important documents of the prosecution the Inquest Report (Exhibit-4) which was prepared by P.W.11 S.I. Md. Sultan Mahmud and the Post Mortem Report (Exhibit-8) which was prepared by P.W.9 Dr. Md. Shah Alam do not support that the death of victim Linkon was caused by strangulation.

48. In the Inquest Report (Exhibit-4) it was found that the fingers of both the hands and legs of victim Linkon were amputated. There were unusual swelling mark on the neck. The skin of the whole body of the victim appeared to be brunt and of reddish color.

49. The Post Mortem Report (Exhibit-8) corroborates above findings as recorded in the Inquest Report. In the Post Mortem Report (Exhibit-8) it was stated that all toes of both lower limbs were amputated. All fingers of left hand were amputated. 1st, 2nd and 5th finger of right hand were amputated. In the opinion of the Post Mortem examiner death of victim Linkon was caused due to hemorrhagic shock which was ante mortem and homicidal in nature.

50. Hemorrhagic shock may be resulted from absence of oxygen due to excessive loss of blood. In cross-examination P.W.9 Dr. Md. Shah Alam has supported above perception and stated that the death of victim Linkon was caused due to excessive loss of blood.

51. It is crystal clear from above mentioned evidence of P.W.I Dr. Md. Shah Alam, P.W.11 S.I. Md. Sultan Mahmud, the Post Mortem report (Exhibit-8 and the Inquest report (Exhibit No.4) that the death of victim Linkon was caused due to loss of excessive blood for amputation of fingers of both hands and legs and other injuries as mentioned above and not by strangulation as have been stated by accused Bablu and Shohag in their respective confessional statement. Above confessions statements do not make any mention of above injuries let alone providing any explanation as who inflicted those injuries.

52. Analyzing above ocular and documentary evidence on record in the light of the facts and circumstances of the case and the confessional statements made by accused Shohag and Bablu under section 164 of the Code of Criminal Procedure we are of the view that above confessional statements do not find any support from any other legal evidence on record.

53. In above view of the materials on record we are unable to accept the confessional statements made by the accused Bablu and Shohag as true and give the same the status of legal evidence which can be the basis of an order of conviction and sentence. The learned Judge of the Druto Bichar Tribunal committed serious error in accepting above confessional statements as true and valid legal evidence which is not tenable in law.

54. The prosecution has miserably failed to prove the charge leveled against accused Shohag and Bablu under section 302/34 of the Penal Code by legal evidence beyond reasonable doubt. As such, above conviction and sentence passed the learned Judge of the Druto Bichar Tribunal against accused Bablu and Shohag is not tenable in law and the accused persons are entitled to be acquitted.

55. In the result, the Death Reference is rejected and both the Jail Appeal being No.327 of 2016 and 328 of 2016 are allowed.

56. The impugned judgment and order of conviction and sentence dated 07.09.2016 passed by the learned Judge, Druto Bichar Tribunal No.4, Dhaka convicting the accused Shohag Howlader and Md. Atabur Rahman@ Bablu under section 302/34 of the Penal Code and sentencing them there under to death and also pay fine of Tk. 20,000/- is set aside.

57. Accused Md. Shohag Howlader and Md. Atabur Rahman@Bablu are acquitted of the charge mentioned above. Let them set at liberty if not wanted in any other case.

58. Let the lower court's record along with a copy of this judgment be transmitted down at once.