

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CRIMINAL APPEAL NO.4 of 2013 WITH JAIL APPEAL NO.9(a) of 2021 AND JAIL APPEAL NO.14 OF 2021.

(From the judgment and order dated 20.11.2012 passed by the High Court Division in Death Reference No.93 of 2007 with Criminal Appeal No.6126 of 2007 and Jail Appeal Nos.1178-1180 of 2007).

Noor Mohammad alias Kalu alias :**Appellant**
Kalu Chor alias Kalo Dakat (In CrI. A. No.4 of 2013)
Md. Ershad Ali alias Ershad and :**Appellants**
another (In Jail A. No.9(a) of 2021)
Md. Ashrafal Islam @ Kana Rintu @ :**Appellant**
Mintu (In Jail A. No.14 of 2021)

-Versus-

The State**Respondent**
(In all the appeals)
:
For the appellants : Mr. Md. Khabiruddin Bhuiyan, Advocate-
(In CrI.A. No.4 of 2013) on-Record.
For the appellants : Mr. Sarwar Ahmed, Advocate.
(In Jail A. Nos.9(a) & 14 of 2021)
For the respondent : Mr. Biswajit Debnath, Deputy Attorney
(In CrI. A. No.4 of 2013) General, instructed by Mr. Md. Shamsul
Alam, Advocate-on-Record.
For the respondent : Mr. Biswajit Debnath, Deputy Attorney
(In Jail A. Nos.9(a) & 14 of 2021) General (appeared with the leave of the
Court).

Date of hearing and judgment : The 8th day of December, 2021.

JUDGMENT

Obaidul Hassan, J. This Criminal Appeal No.4 of 2013 with Jail Appeal No.9(a) of 2021 and Jail Appeal Nos.1178-1180 of 2007 is directed against the judgment and order dated 20.11.2012 passed by a Division Bench of the High Court Division in Death Reference No.93 of 2007 along with Criminal Appeal No.6126 of 2007 and Jail Appeal Nos.1178-1180 of 2007 accepting the Death Reference while dismissing all the appeals and thereby upholding the judgment and

order of conviction and sentence dated 15.11.2007 passed by the learned Judge (District and Sessions Judge), Rajshahi (hereinafter referred to as the Tribunal/trial Court) in Druta Bichar Tribunal Case No.18 of 2007 arising out of Salanga (Sirajgonj) Police Case No.07 dated 13.01.2006 corresponding to G.R. No.07 of 2006 (convicting the accused-appellants under sections 8/30 of the Nari O Shishu Nirjatan Daman Ain, 2000 (hereinafter referred to as the Ain, 2003) read with sections 302/201/34 of the Penal Code and sentenced them to death by hanging and to pay a fine of Tk.25,000.00 each.

The prosecution case, in short, is that on 09.01.2006 Abdul Halim the informant with his family came to his father-in-law's house at Ullapara to celebrate Eid festival. After offering Eid prayer he attended his paternal house located at Boromohani Dakshinpara under Salanga Police Station of Sirajgonj District on 11.01.2006. On 12.01.2006 in the evening the informant made a visit to the house of his niece Ismat Jahan Lipi of the same neighbourhood. At that time, his only son Ashiqur Rahman alias Niloy was playing with his mates by the side of his house. At that time, the accused Ershad, was present nearby his house. After staying there for 20 to 25 minutes he along with his wife returned back to their house and saw that his only son had been missing. He enquired about the whereabouts of his son, but in vain. At that time the accused-persons Ershad, Kalam, Yusuf, Rintu made a conspiracy. Said accused persons assured the informant that they would try to search out Niloy, the kidnapped boy

at any rate. The accused Kalu took Tk.700.00 from the father of the victim (seven hundred as cost of fuel for their Honda motor bike). At last, the accused Rintu demanded Tk.70,000.00(seventy thousand) as ransom and told that after getting money he will return back the kidnapped boy Niloy. The accused pretended and applied so many tricks to search out the kidnapped boy just to kill time. They made such pretension talking over mobile phone with the informant. At last on 14.01.2006 the dead body of the victim Niloy was recovered by Police from the septic tank of one of the accused Khaleque. The informant lodged FIR with Salanga Police Station in this regard being Case No.7 dated 13.01.2006.

On receipt of the FIR police took up investigation of the case and after investigation submitted Charge Sheet No.37 dated 14.04.2006 of Salanga Police Station under sections 8/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 read with sections 302/201/34 of the Penal Code against them.

Later, the case was duly sent to the Tribunal for trial. The learned Judge of the Tribunal on taking cognizance of the offence against the accused persons under sections 8/30 of the Ain, 2000 read with sections 302/201/34 of the Penal Code framed charge against them. On being read over and explained the charge to the accused persons, they pleaded not guilty and prayed for a trial. To substantiate the case the prosecution examined as many as 18(eighteen) witnesses, but the defence examined none.

On the closure of the evidence of the prosecution witnesses, the convict-appellants were examined under section 342 of the Code of Criminal Procedure, 1898 to which they pleaded not guilty and declined to adduce any evidence on their behalf.

The defence case as it appears from the trend of cross-examination is that the appellants are innocent and have been falsely implicated in this case and the accused-appellants are not involved with the offence as alleged by the prosecution.

During the course of trial, the prosecution produced as many as 18 witnesses including the Medical Officer and the Investigating Officer. The trial Court after considering the evidence and materials on record found the accused persons guilty and convicted them under sections 8/30 of the Nari O Shishu Nirjatan Daman Ain, 2000 read with sections 302/34 of the Penal Code and sentenced them to death.

Thereafter, the Death sentence proceeding was submitted to the High Court Division by way of Reference by the Tribunal and the Reference has been noted as Death Reference No.93 of 2007. Being aggrieved by the judgment and order of the Tribunal, the convicts Noor Mohammad alias Kalu alias Kalu Chor alias Kala Dakat and Md. Ershad Ali alias Ershad preferred Criminal Appeal No.6126 of 2007, convict Md. Ershad Ali alias Ershad also preferred Jail Appeal No.1178 of 2007, convict Md. Ashraful Islam alias Kana Rintu alias Mintu preferred Jail Appeal No.1179 of 2007 and convict Noor

Mohammad alias Kalu alias Kalu Chor alias Kalu Dakat also preferred Jail Appeal No.1180 of 2007 before the High Court Division.

The High Court Division by its judgment and order dated 20.11.2012 accepted the Death Reference and dismissed all the Criminal Appeals and Jail Appeals affirming the judgment and order dated 15.11.2007 passed by the Judge (District and Sessions Judge), Druta Bichar Tribunal, Rajshahi.

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence passed by the High Court Division dated 20.11.2012, the convict-appellants preferred Criminal Appeal with Jail Appeals before this Division.

Mr. Md. Khabiruddin Bhuiyan, the learned Advocate appearing for the appellants along with Mr. Sarwar Ahmed, learned Advocate took us through the FIR, the inquest report, the postmortem report, the charge sheet, testimonies of the witnesses, the judgment and order passed by the Tribunal and the appellate Court (High Court Division), connected materials on record and submits that the High Court Division failed to consider that the judgment and order of conviction is bad in law as well as in facts and, as such, the impugned judgment and order of conviction is liable to be set aside. He further submits that the High Court Division failed to consider that the judgment and order of conviction is based on surmise and conjecture and not on legal evidence and, as such, the same is liable

to be set aside. He also submits that the High Court Division failed to consider that the judgment and order of conviction has been passed by the Tribunal without applying its judicial mind as the case was not proved by the prosecution witnesses beyond reasonable doubt and, as such, the impugned judgment and order of conviction is liable to be set aside. Mr. Khabiruddin Bhuiyan further submits that during trial the prosecution examined as many as 18 prosecution witnesses, but all the witnesses disowned the prosecution case, none of the witnesses witnessed the occurrence and, as such, the impugned judgment and order of conviction and sentence is liable to be set aside. Moreover, he submits that there is no evidence against the appellants except exculpatory confessional statements made by co-accused, which cannot be used against the appellants without corroboration by other evidence and cannot be basis of conviction and it is not an evidence as per section 3 of the Evidence Act, 1872 and, as such, the impugned judgment and order of conviction and sentence is liable to be set aside.

Mr. Biswajit Debnath, the learned Deputy Attorney General, appearing for the respondent-the State, made his submissions supporting the judgment and order passed by the High Court Division and prays for dismissal of the appeals.

Now, to ascertain whether the prosecution has been able to prove the charge against the appellants Md. Ershad Ali @ Ershad, Noor Mohammad @ Kalu @ Kalu Chor @ Kalu Dakat, Md. Ashraful

Islam @ Kana Rintu @ Mintu, Abul Kalam @ Kalam, let us examine and analyze the depositions of the witnesses adduced by the prosecution.

P.W.1, the informant Md. Abdul Halim deposed that the victim Ashiqur Rahman alias Niloy(9) was his son. The occurrence took place on 12.01.2006 at about 6:15 pm to 6:30 pm at dusk in the courtyard of his house. On 09.01.2006 he went to his father-in-law Abdul Majid's house at Ullapara wherein he stayed two days and offered the Eid prayer. He came back to his house along with his family on 11.01.2006 at about 1:00 pm. On 12.01.2006 at about 6:15 pm to 6:30 pm the victim was playing at the courtyard of his house while he saw the accused Ershad to roam around his house. Subsequently, he along with his wife Ismat Jahan Lipi went to the house of his niece on a pleasure trip. After staying there for 20/25 minutes he along with his wife came to his house and searched for the victim, but they did not find him anywhere. Thereafter, they searched for him at different places. He went to the shop of Zahir and on his query Zahir and Kalam told him that they just saw the victim and that he perhaps went to his house, but no where he found the victim. On that day there was an Islami congregation where it was declared that Niloy was not being found. At that time, many villagers including the accused Ershad, Kalam, Ashraful, Rintu and Yusuf came to their house. The accused Ershad told him that his son had been kidnapped. Thereafter, the accused Ershad, Yusuf, Kalam and Rintu

made some consultation in between them and Ershad made a mobile call to the accused Nur Mohammad. 20/25 minutes later Nur Mohammad Kalu and Sujon came to his house by a Honda motorbike. Ershad along with six other accused persons told him that if they were paid money they would find out the victim Niloy within that night. Thereafter, the accused Kalu took Tk.700.00 as price of fuel from the father of the victim. On that day at 12:30 pm Kalu informed him over mobile phone that the victim was found and he will give further mobile call subsequently. 15/20 minutes later the accused Kalu told the informant over mobile phone that taka six lakhs was to be paid as ransom for release of the victim and subsequently the ransom money was fixed at Tk.70,000.00. He along with his brother Hafizur Rahman went with Ershad and Rintu to a place named Metal Bari. But on that night the victim Niloy was not returned to the informant, the father of the victim. Thereafter, all the accused persons in connivance with one another gave false assurance and made mobile calls to the informant from time to time just to kill time. After waiting for some days the informant having not found any progress lodged the FIR. This witness proved the FIR as Exhibit-1 and his signatures thereon as Exhibits-1(1) and 1(2). On 14.01.2006 he came to know that the victim had died. Police arrested Ershad, Rintu and Sujon and recovered the dead body of victim from the septic tank of one Khaleque as per the information given by the accused.

During cross-examination he stated that accused Khaleque and Jalil assisted police to arrest the accused Rintu. The names of Khaleque and Jalil did not appear in the FIR. He knew that police recorded the conversation held between Ershad and Rintu. The accused Kalu was the father-in-law of the accused Ershad. He served in the Air force for 15 years.

P.W.2, Mosammat Ismat Jahan Lipi, the mother of the deceased victim, deposed supporting the deposition of P.W.1. She stated that the accused persons kidnapped her son and demanded taka six lakhs as ransom. Subsequently the accused in collaboration with each other killed the victim. Police arrested Ershad and Rintu and as per their admission the dead body of the victim was recovered from a septic tank.

During the cross-examination she denied the defence suggestions that the accused persons are innocent and they had been involved in the case falsely.

P.W.3, Alhaj Abdul Majid, stated that the accused persons kidnapped the victim and demanded ransom amounting taka six lakhs. Subsequently as per admission of Ershad and Rintu police recovered the dead body of victim from a septic tank.

During cross-examination he stated that he heard from the informant that the accused persons demanded taka six lakhs as ransom. He denied the defence suggestion that he deposed falsely.

P.W.4, Md. Hafizur Rahman stated in his deposition that the accused persons kidnapped the victim for ransom and, thereafter, they killed the victim. Later on, the dead body of the victim was recovered by police from the septic tank of accused Khaleque. He was present at the time of preparation of inquest report on the corpse of victim Niloy. He proved the inquest report and his signature on it, marked as Exhibits-2 and 2(1). He further deposed that police seized a Sony Cassette in his presence, 5/7 pieces of bidi and prepared seizure list. This witness proved the seizure list and his signatures on it, marked as Exhibits-3 and 3(1) and identified the cassette and the pieces of bidi as material Exhibits-I and II. This witness further deposed that police also seized a cut portion of full pant, a portion of cut banian, a cut portion of sweater and prepared another seizure list. This witness proved the seizure list and his signatures on it, marked as Exhibits-4 and 4(1) and identified the alamats as material Exhibits-III, IV and V. This witness further deposed that police also seized a plastic bag and prepared seizure list and he identified the seizure list marked as Exhibits-5 and identified the plastic bag as material Exhibit-VI.

During cross-examination he stated that he heard the cassette when it was being played. He came to know from the informant that the victim was not being found. He further stated that there were marks of fingers at the throat of the victim Niloy and that there were two blackish spots at the both sides of the victim's throat. He denied

the defence suggestion that accused Yusuf and Kalam were not involved in the alleged occurrence and all the accused persons have been entangled with the case falsely.

P.W.5, Md. Idris Ali was tendered for examination-in-chief.

The defence declined to cross-examine this witness.

P.W.6, Mohammad Ali, deposed that while he was attached to Salanga Police Station as a constable, on 15.01.2006 vide C.C. No.1/2006 he took the corpse of the victim Niloy to Sirajgonj Hospital Morgue. This witness proved the Chalan and his signature thereon. He further deposed that there was a full pant, one banian (গেঞ্জী) and one sweater with the dead body.

The cross-examination of the witness was declined by the defence.

P.W.7, Md. Manik, deposed that he along with Dulal was called to the police station to draw out a dead body at Boromohani. He with the aid of Dulal brought out a sack containing the dead body from a septic tank. After cleaning the dead body the local people ascertained that the dead body was of victim Niloy. The said dead body was taken first to the police station and there from it was taken to the hospital morgue.

The defence side declined to cross-examine the said witness.

P.W.8, Md. Dulal Hossain, was tendered for examination-in-chief while the defence declined to cross-examine the witness.

P.W.9, Md. Alauddin deposed that from the announcement of the case he came to know that the victim was lost. Thereafter, he learned that the accused persons in connivance with one another kidnapped the victim for ransom and subsequently they killed the victim. In his presence the police seized some pieces of burnt bidi and rib and of a cassette. He proved his signature on the seizure list as Exhibit-3(2).

During cross-examination the witness denied defence suggestion that the accused persons were not involved in the instant case.

P.W.10, Md. Serajul Islam, deposed that following the loss of the victim the police recovered the dead body of the victim from the septic tank of Abdul Khaleque.

P.W.11, Md. A. Rashid stated in his deposition that the accused kidnapped the victim Niloy and thereafter his dead body was recovered by the police from a septic tank. The dead body was identified by the informant and his wife.

During cross-examination, he stated that he did not know as to whether the police released the accused Rintoo. He denied the defence suggestion that he deposed falsely.

P.W.12, Dr. Md. Shahjahan Ali stated in his deposition that on 13.01.2006 while he was attached to Sirajgonj General Hospital he held post mortem examination on the dead body of the deceased Ashiqur Rahman Niloy. During post mortem examination he found the following injuries on the body of the deceased:

- I. One oval bruise ($\frac{1}{2}$ "x $\frac{1}{2}$ ") found to right side of throat situated below the angle of mandible and several finger marks found to the left side of throat, lying obliquely downwards.
- II. Several small abrasion found to the right ear labile along the eye brows of right side and to the right forehead.

On dissection: Bruised found in the deeper layer of skin of both sides of throat, the mucosa of the trachea and bronchine were highly congested. Both plugs were highly congested. The liver, spleen, kidney and brain were congested.

After conclusion of the autopsy the doctors opined as under:

“In our opinion the cause of death of the deceased was due to asphyxia as a result of throttling which was ante-mortem and homicidal in nature”.

This witness proved the postmortem report and his signature so endorsed thereon and marked as Exhibits-7 and 7(1) respectively.

During cross-examination the witness denied the defence-suggestion that there was no injury at the throat of the victim or that he did not hold post mortem examination properly on the body of the deceased.

P.W.13, Dr. Md. Sariful Huq Siddique stated in his deposition that as Member of the Postmortem Examination Board he signed the postmortem examination report. This witness proved his signature on the postmortem examination report as Exhibit-7(2).

This witness was not cross-examined by the defence.

P.W.14, Mosammat Asma Khatuni, stated in her deposition that the victim Niloy was her nephew. The accused kidnapped the victim and as per their admission police recovered the dead body of the victim from the septic tank of accused Khaleque. Police held inquest on the dead body of the deceased. He proved her signature so endorsed thereon in the inquest report and marked as exhibits-2(2).

During cross-examination this witness denied the defence suggestion that the accused persons were not involved in the instant case and he deposed falsely.

P.W.15, Saidur Rahman, deposed that hearing the hue and cry he came to the place of occurrence and heard the accused Ershad, Kalam, Rintu and Yusuf saying that the victim had been kidnapped. Thereafter, he came to know that the accused persons kidnapped the victim for ransom. Subsequently, the police recovered the dead body of victim from the septic tank of accused Khaleque.

During cross-examination, he stated that after arrest of the accused Ershad and Kana Rintu police secretly tape recorded their conversation and he himself heard the cassette. Rintu told Ershad that the dead body was dropped in the septic tank of Khaleque. He denied the defence suggestion that he deposed falsely.

P.W.16, Monira Begum, deposed that when he was on duty on January 26, 2006 as 1st Class Magistrate at Sirajgonj District Collectorate, he recorded the confessional statement of accused Md. Ershad under section 164 of the Code of Criminal Procedure, 1898

and he followed the provisions of section 364 of the Code of Criminal Procedure, 1898. She found the confessional statement of the accused was true and voluntary. She proved the confessional statement of the accused Md. Ershad and her signatures so endorsed thereon and marked as Exhibits-8,8(1),8(2), 8(3) and 8(4) respectively. This witness further deposed that on 28.05.2006 observing all the formalities of law she as per section 364 of the Code of Criminal Procedure, 1898 recorded the confessional statement of the accused Nur Mohammad alias Kala Dakat under section 164 of the Code of Criminal Procedure, 1898. She found the confessional statement of the accused was true and voluntary. She proved the confessional statement of the accused Nur Mohammad alias Kala Dakat and her signatures so endorsed thereon and marked as Exhibits-9, 9(1), 9(2), 9(3), 9(4) and 9(5) respectively.

During cross-examination this witness denied the defence-suggestion that the accused Ershad and Nur Mohammad did not make confessional statements voluntarily.

P.W.17, Md. Nabir Hossen, stated that on January 24, 2006 he took up the case for investigation; visited the place of occurrence; perused the sketch map with index as drawn by his previous investigating officer. At the interest of his own investigation he drew 3 sketch maps of the place of occurrence with indexes. This witness proved the sketch map as Exhibits-10 and 11 and his signatures therein as Exhibits-10(1) and 11(1). He further deposed that he seized

a Sony Cassette, 5/7 band pieces of burnt bidi and prepared a seizure list and his signature so endorsed thereon had been marked as Exhibits-3(3). He duly sent the dead body to the morgue for autopsy. He recorded the statement of 16 witnesses. He arrested accused Ershad and produced him to the learned Magistrate for recording his confessional statement.

After investigation he submitted charge sheet No.37 dated April 14, 2006 against the accused persons finding prima facie ingredients of crime.

During cross-examination this witness deposed that the accused Rintu is not totally blind. He further denied the defence-suggestion that all the prosecution witnesses he examined are related to each other and he deposed falsely.

P.W.18, S.I. Md. Nurul Islam stated that on January 12, 2006 he took up the case for investigation; visited the place of occurrence; arrested the accused Ershad on January, 14, 2006 in the evening and arrested other accused as well. As per the information of the accused Ershad he recovered the dead body of the deceased Niloy from the septic tank of the accused Abdul Khaleque. After holding the inquest on the dead body he duly sent the dead body to the morgue for autopsy. He proved his signatures in the inquest report as Exhibit-2(3). He prepared two sketch maps with the index of the place of occurrence. He prepared the seizure list and seized a white plastic bag, a portion of full pant, a portion of banian and a portion of

sweater. This witness proved the seizure list and the signatures therein. He recorded the statement of seven witnesses. He sent the accused Ershad to the learned Magistrate for recording his confessional statement. Due to his transfer to elsewhere he handed over the docket of the case to the Officer in-Charge.

During cross-examination this witness stated that soon after arrest he examined the accused Ershad, who admitted to him that he had kidnapped the victim Niloy and handed over him to the accused Rintu. He further stated that before recovery of the dead body of Niloy he recorded the conversation between the accused Ershad and Rintu. He stated that that accused Nur Mohammad was the father-in-law of the accused Ershad. He denied the defence-suggestion that he did not take out the investigation properly and that the accused persons had been implicated in the case falsely.

In the instant case, two appellants namely Md. Ershad Ali and Noor Mohammad @ Kalu @ Kana Dakat made confessional statement before the Magistrate under section 164 of the Code of Criminal Procedure, 1898.

The confessional statement of Md. Ershad Ali reads as follows:

“আমি গত ১২/১/০৬ তারিখ সকালে আশরাফুল ইসলাম মিন্টুর সংবাদে তার বাড়ি গেলে সে আমাকে ভরমোহনী দক্ষিণ পাড়া মাঠের ভিতর নিয়ে যায় এবং বলে যে, “তুই, আবদুল হালিমের ছেলে নিলয়কে এনে আমাদের কাছে দিবি, তাতে তুই রাজি কিনা। তা না করলে আমার দলবল ও সন্ত্রাসী দ্বারা তোকে খুন করব।” আমি ভয় পেয়ে সন্ধ্যা ৬.৩০ মিনিটের দিকে বাদী আ. হালিমের বাড়ির পাশের রাস্তা হতে বাদী হালিমের ছেলে আশিকুর রহমান নিলয়কে কৌশলে ডেকে নিয়ে বাড়ির আড়ালে নিয়ে গিয়ে আমার

সহপাঠী আশরাফুল ইসলাম মিন্টু ওরফে রিন্টু এবং মো. আবুল কালামের কাছে বুঝিয়ে দেই। তখন তারা আমাকে পাঠিয়ে দেয় এবং বলে যে, তোমার ডিউটি শেষ। এ কথা বলে আশরাফুল বলে যে, বাদীর নিকট থেকে যে টাকা পাব তার অর্ধেক তোমাকে দিব। তখন আমি বাড়ি চলে যাই। ভিকটিম নিলয়কে নিয়ে আসামীরা কি করেছে তা জানি না। কালামকে আমি মোবাইলে বাদীর নিকট তার ছেলের মুক্তিপণ ৬ লক্ষ টাকা দাবী করতে শুনি। তখন আরো ছিল আলহাজ, জলিল মুঙ্গি, খালেক ও কালাম ও আশরাফুল। পরে শুনেছি নিলয়কে খালেকের বাড়ির বাথরুমে পাওয়া গেছে।”

The confessional statement of Noor Mohammad @ Kalu @ Kana

Dakat reads as follows:

“ঘটনার তারিখ বলতে পারবনা। ৫/৬ মাস আগের ঘটনা। আমার মোবাইল নং- ০১৭১৯৫৪৬১১৩ এ রাত ৮ টায় হালিম ফোন করে জানায় তার বাসায় একটা সমস্যা হয়েছে এবং আমাকে তার বাসায় যাওয়ার জন্য অনুরোধ করে। আমি বাড়িতে মেহমান থাকায় আসতে পারবনা জানাই। পরে সে কান্নাকাটি করে অনুরোধ করে যেতে। আমি তার বাড়িতে আসলে সে জানায় যে, তার ছেলে (নাম বলতে পারবনা) হারিয়ে গেছে। হালিম তার হারিয়ে যাওয়া ছেলেকে খুঁজে দিতে অনুরোধ করে। আমি বয়স্ক মানুষ, চোখে কম দেখি খোঁজাখুঁজি করতে পারব না জানালে হালিম পুনরায় কান্নাকাটি করলে আমি সম্মত হই। তখন আমি আমার মোটর সাইকেল বাদীকে আমার সাথে তার ছেলেকে খুঁজতে যেতে বলি। বাদী নিজে না গিয়ে তার নিজস্ব লোক কালামকে আমার সাথে পাঠায় এবং গাড়ির তেল ও মোবাইল কার্ড বাবদ কালামের কাছে টাকা দেয়। কত টাকা দেয় তা বলতে পারবনা। কুয়াশা থাকায় কিছুক্ষণ পরে আমার বাসায় কালামসহ চলে আসি। কালাম জানায়, আমার মোবাইল এর জন্য কার্ড কিনতে সে বাজারে যাবে। বাজারে যায় কালাম এবং আমার বাড়ির ৩.৪০০ গজ দূরে বাজারে যায় এবং ২ ঘন্টা পর ৫০ টাকার একটা কার্ড নিয়ে আসে। আমি কার্ডটি চালু করার পরে বাদী হালিম পুনরায় আমার কাছে ফোন করে জানায় “কালাম, আমার কাছে ছেলেকে ফেরত দেওয়ার জন্য ৫০/৬০ হাজার টাকা চাচ্ছে।” এ কথা শুনে আমি কালামসহ হালিমের বাসায় এসে হালিমের নিকট কালামকে বুঝিয়ে দেই এবং আমি বাড়ি চলে আসি।”

From the deposition of P.W.16, Monira Begum, Magistrate, 1st Class, and on perusal of confessional statements, it appears that the statements were recorded by the learned Magistrate following all the provisions required by law to be followed at the time of recording the

confessional statements. P.W.16 stated that the confessional statements made by Md. Ershad Ali and Noor Mohammad @ Kalu @ Kana Dakat were done voluntarily and those were true. The appellants Md. Ershad Ali and Noor Mohammad @ Kalu @ Kana Dakat made confessional statements incriminating themselves along with Md. Ashraful Islam @Kana Rintu @ Mintu and Abul Kalam @ Kalam. Now, the question arises whether the confessional statements of Md. Ershad Ali and Noor Mohammad @ Kalu @ Kana Dakat can be used against Md. Ashraful Islam @ Kana Rintu @ Mintu and Abul Kalam @ Kalam.

Section 30 of the Evidence Act, 1872 provides that as follows:

“30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other persons as well as against the person who makes such confession.”

The ingredients of this section are that:

- I. More persons than one are to be tried jointly for the same offence.
- II. One of such persons has to make confessional statement affecting himself and others. and
- III. Such confession can be taken into consideration by the Court against others as well as the maker of the confession.

In the instant case, the appellants Md. Ershad Ali and Noor Mohammad @ Kalu @ Kana Dakat made inculpatory confessional

statements which narrated the crime committed by all of them. They made the inculpatory confessional statements incriminating themselves along with other co-accused and the defence failed to prove any personal enmity or grudge of Md. Ershad Ali and Noor Mohammad @ Kalu @ Kana Dakat with the non-confessing appellants Md. Ashraful Islam @Kana Rintu @Mintu and Abul Kalam @ Kalam. Moreover, P.Ws.1,2,3,4,9,10,11,14 and 15 gave evidence to the effect that all the accused in connivance with each other kidnapped the victim Niloy and as per the admission of Ershad and Rintu police recovered the dead body of victim from a septic tank. In their confessional statements, both of them narrated the role played by themselves and other accused persons in the occurrence and there is no inconsistency in their statements which leads us to believe the confessional statements of Md. Ershad Ali and Noor Mohammad @ Kalu @ Kana Dakat involving the co-accused Md. Ashraful Islam @Kana Rintu @ Mintu and Abul Kalam @ Kalam in the said occurrence are true.

It is evident from the record that accused Md. Ershad took away the victim Niloy and handed him over to the accused Ashraful Islam @ Rintu and Kalam soon after the occurrence, the accused Md. Ershad, Yusuf, Ashraful Islam @ Kana Rintu @ Mintu and Kalam came to the place of occurrence. The accused Md. Ershad told the informant that the victim Niloy had been kidnapped and the accused Noor Mohammad @ Kalu Dakat would be able to search him out and

thereafter on being made a phone call by Md. Ershad the accused Noor Mohammad @ Kala Dakat came to the place of occurrence. Kala Dakat, Kalam and Sujon went away on the pretext of searching victim. The accused persons demanded taka six lakhs as ransom and subsequently, the ransom was fixed at Tk.70,000.00. The police arrested Ershad and Rintu and as per their admission the dead body of the victim was recovered from a septic tank. The chain of missing of the victim Niloy till the recovery of his dead body are so interwoven to each other that dispel the innocence of the accused persons in the alleged occurrence.

Besides, in the present case there are as many as three sketch maps with index drawn by P.W.17. The sketch map No.1 (Exhibit-12) is the outer courtyard of the house of the informant where the victim Niloy was playing and wherefrom he had been kidnapped. The sketch map No.3 (Exhibit-10) is the round whole 8 cubits in diameter, round about 10 cubits and about $1\frac{1}{2}$ " cubits in depth situated in the bamboo garden where the accused persons killed the victim Niloy by throttling in a pre-planned way. In the said places 5/7 pieces of burnt bidi were found and that there scratches of nails were found. The scratches of nails on the soil were perhaps caused by the victim while he was being killed by the accused person. The sketch map No.2 (Exhibit-15) is the septic tank of Abdul Khalque from where the dead body of the victim was recovered while being packed in a plastic bag.

Thus, it is crystal clear that the accused persons kidnapped the victim from the place of occurrence as shown in the sketch map (Exhibit-12) and was taken to the place of occurrence-hole in the bamboo garden as mentioned in the sketch map (Exhibit-10) where the accused persons in a pre-planned way killing the victim packed his body in a plastic bag and dropped it in the place of occurrence i.e., the septic tank of Abdul Khaleque as described in the sketch map (Exhibit-15).

The inquest report, the postmortem report and the depositions of the witnesses clearly reveal that the victim was murdered by strangulation.

It is true that there is no eye witness in the instant case, but the inculpatory, true, and voluntary confessional statements of two accused, and the circumstances are so well connected to indicate that those circumstances render no other hypothesis other than the involvement of the appellants in kidnapping and murder thereof.

In performing our duties, this court is charged with the task of not only assessing the facts against the law, but also considering the impacts of judgments that are pronounced and any assessment made on the overall justice system.

In the case of *Shukur Ali (Md) and another Vs. The State* reported in **74 DLR(AD) 11**, it has been held by this Division that *“With modern criminal justice mechanism, the right against self-incrimination is one that stands as a cornerstone. As such, confessions by a co-accused are generally inadmissible against the accused in a concerned*

case. However, in our duties of administering justice, we are sometimes faced with a case that forces us to consider aspects of larger policy at play.

The balance between crime control and due process models of justice is such a consideration that requires reassessment with changing times and upon the fact of each case. The case before us is one of such a heinous crime, where measures of control are made far more necessary, to ensure that justice can be brought to the victim in question. As such, while due process is still of utmost importance; crime control considerations must be made as well.” (Emphasis added)

As such, the considerations of the use of a co-accused’s confession, where supported by corroborating evidence, in the face of an overwhelming presence of circumstantial evidence, must be made. Corroborative evidence presented by the prosecution shows that there is sufficient reason to suggest that the co-accused’s accounts of the events are likely to be true. It is therefore, that this court is of the opinion that in order to pursue a model of crime control in this regard, this court is willing to admit, in such rare instances, the confession of a co-accused as incriminating evidence against the other accused. Albeit, such evidence is still circumstantial.

The principle of the right against self incrimination is also accompanied by the principle that upon silence on part of those incriminated, adverse inferences may be drawn at any stage of the trial and pre-trial procedures.

When the co-accused, Noor Mohammad @ Kala @ Kalu Dakat and Md. Ershad Ali made their confessions incriminating the accused Md. Ashraful Islam @ Kana Rintu @ Mintu and Abul Kalam @ Kalam, they had the opportunity to present their accounts of the events in question. Their refusal to adduce defence witness and to give any statement, allows this Court to draw an adverse inference against them.

We hold that confessional statement of a co-accused can be used against others non-confessing accused if there is corroboration of that statement by other direct or circumstantial evidence. Thus, the accused namely Md. Ashraful Islam @ Kana Rintu @ Mintu and Abul Kalam @ Kalam equally liable like Noor Mohammad @ Kala @ Kalu Dakat and Md. Ershad Ali for killing the deceased after kidnapping him for ransom.

We are also of the view that the confession of Md. Ershad Ali and Noor Mohammad @ Kalu @ Kana Dakat and the inculpatory facts furnished by the circumstances appearing from the evidence as discussed above are incompatible with the innocence of the appellants Md. Ashraful Islam @ Kana Rintu @ Mintu and Abul Kalam @ Kalam.

In the light of the discussions we may conclude that the prosecution has been able to prove the charge against all the appellants beyond reasonable doubt and the Tribunal has rightly convicted and sentenced the appellants to death and the confirmation

there of by the High Court Division is justified. We find no cogent reason to interfere with the judgment and order passed by the High Court Division.

Mr. Md. Khabiruddin Bhuiyan and Mr. Sarwar Ahmed, learned Advocates appearing for the appellants lastly drew our attention regarding the age of the appellants and submits that the appellant Noor Mohammad @ Kalu @ Kalu Chor @ Kalu Dakat is an octogenarian man and other appellants have been languishing in the condemned cell for more than fifteen years and considering their age and length of confinement in the condemned cell the sentence of death may be reduced.

In this regard it is pertinent to mention that the observation of their Lordships U.U. Lalit and two other honorable Judges of the Supreme Court of India made in the case of *Arvind Singh Vs. The State of Maharashtra, (2020) SCC 489, Para-38* that:

- “(i) The extreme penalty of death need not be inflicted except in gravest case of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
- (iii) Life imprisonment is the Rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only, the option to impose sentence of imprisonment for life cannot be conscientiously exercised

having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

Agreeing with the above decision (except the observation as mentioned in para-iii) we are of the view that since the appellants are in the condemned cell for more than 15(fifteen) years suffering the pangs of death. They deserve consideration of commutation of sentence.

It was held in the case of *Nazrul Islam (Md) vs. State* reported in 66 DLR(AD) 199 that, *"Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death."*

In view of the decisions cited above as well as the circumstances of this case, we are of the view that justice would be sufficiently met, if the sentence of death of the appellants be commuted to one of imprisonment for life.

Accordingly, **all the appeals are dismissed with modification of sentence.** The sentence of death of the appellants, namely, Noor Mohammad alias Kalu alias Kalu Chor alias Kalu Dakat, son of Montaz Ali Momtaz Ali, of Village-Kutipara, Salanga, Police Station-Salanga, District-Sirajgonj (in Criminal Appeal No.4 of 2013); Md. Ershad Ali @ Ershad, son of Md. Yousuf Ali Mondal and Abul Kalam @ Kalam, son of late Kuddus Ali, both of Village-Bormohoni Dhakhinpara, Police Station-Salanga, District-Sirajgonj (in Jail Appeal No.9(a) of 2021); and Md. Md. Ashraful Islam @Kana Rintu@Mintu, son of Md. Sohorab Ali Mondal, of Village-Bormohoni Dhakhinpara, Police Station-Salanga, District-Sirajgonj (in Jail Appeal No.14 of 2021) is commuted to imprisonment for life and also to pay a fine of Tk.20,000.00(twenty thousand) each, in default, to suffer rigorous imprisonment for 6(six) months more. However, they will get the benefit of section 35A of the Code of Criminal Procedure in calculation of their sentence and other remission as admissible under the Jail Code.

The concerned jail authority is directed to move the appellants to the regular jail from the condemned cell forthwith.

J.

J.

J.

J.