15 SCOB [2021] AD 76

APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain
Chief Justice
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

JAIL APPEAL NO.08 OF 2014.

(From the judgment and order dated 20.02.2012 and 22.02.2012 passed by the High Court Division in Death Reference No.30 of 2006 with Jail Appeal No.301 of 2006.)

Md. Humayun Kabir	...Appellant
Vs.	
The State	...Respondent

For the Appellant:	Mr. A.B.M. Baiyazid, Advocate.
For the Respondent:	Mr. Biswajit Debnath, Deputy Attorney General.

Date of hearing : 09.09.2020, 15.09.2020
Date of judgment : 22.09.2020

Editor's Note
In this case first information report was lodged against the appellant Humayun Kabir and his father Moulana Latifullah under Section 7/30 of Nari-O- Shishu Nirjatan Daman Ain, 2003, but the Investigating Officer, holding investigation, submitted charge sheet against the appellant Humayun Kabir under section 302/201 of the Penal Code and the learned Sessions Judge, Comilla, framed charge accordingly. On transfer Divisional Druto Bichar Tribunal, Chattogram tried the case and convicted the appellant under section 302 of the Penal Code and sentenced him to death. The High Court Division receiving the Death Reference accepted it upon hearing and dismissed the connected Jail Appeal and confirmed the order of conviction and sentence awarded by the Tribunal. Thereafter, the appellant preferred this Jail Appeal in the Appellate Division.
There was no eyewitness in the case and the Appellate Division disbelieving the confessional statement of the accused which is inconsistent with the prosecution case allowed the appeal and set aside the judgment and orders of the Courts below.

Key Words:
Confessional Statement; TI Parade; Motive; Section 27 of Evidence Act; last seen together; Extra Judicial Confession.

Absence of motive demands deeper forensic search of the evidence:

It is true that proof of motive is not necessary to sustain a conviction but when the prosecution puts forward a specific case as to motive for the crime, the evidence regarding the same has to be considered in order to judge the probabilities. Proof of motive satisfies the judicial mind about the likelihood of the authorship of the crime. In its absence, it demands deeper forensic search of the evidence. ... (Para 13)

Section 8 of the Evidence Act, 1872:
Motive is a relevant fact behind a crime:
The proof of motive helps the Court in coming to a correct conclusion when there is no eyewitness of the occurrence. ...It is true that the failure to establish the motive for the crime does not throw over-board the entire prosecution case but it casts a duty on the Court to scrutinize other evidence with greater care since motive moves a man to do a particular act and the same is relevant fact behind a crime. ...(Para 13)

Section 164 of Code of Criminal Procedure, 1898:
IF testimonies of prosecution witnesses and post-mortem report are inconsistent with the contents of the confessional statement it makes the confessional statement unreliable:
To prove the charge brought under Section 302 of the Penal Code primarily on the basis of the confessional statement it is duty of the Court to ascertain as to whether the confession was made voluntarily, and if so as to whether the same was true and trustworthy. Satisfaction of the Court is a *sine qua non* for the admissibility in evidence. True and complete disclosure of the offence is the soul of true confessional statement. In this case, the testimonies of P.Ws.1, 2, 3 and 4 and post-mortem report are inconsistent with the contents of the confessional statement of the appellant which has made the confessional statement unreliable. In view of the evidence quoted above and the contents of the confessional statement, it is difficult for us to hold that the statements made in confession by the appellant are true and those were consistent with the prosecution case. It would be extremely unsafe to base conviction of the appellant on the basis of such confessional statement accepting the same as true. ... (Para 20)

Competency of a child witness to testify:

A child may be allowed to testify, if the court is satisfied that the child is capable of understanding the question put to him and give rational answers to the Court. Before examining a child as a witness the Court should know his intellectual capacity by putting a few simple and ordinary question to him and should also record a brief proceeding of the inquiry. ... (Para 23)

Section 9 of the Evidence Act, 1872:
The idea of holding T.I. parade is to test the veracity of the witness on the question of his capability to identify an unknown person whom he has seen only once:

The idea of holding T.I. parade under Section 9 of the evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court. It is necessary when the witnesses admitted that the accused was not known the witnesses before happening of the incident seen by them. When the accused person is

not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. ... (Para 25)

Section 27 of the Evidence Act, 1872:
Since statement under section 27 of the Evidence Act is alleged to be frequently misused by the police, the courts are required to be vigilant about its application:

Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be allowed to be given in evidence. Since statement under section 27 of the Evidence Act is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act. ... (Para 27)

The evidentiary value of extra-judicial confession depends upon the veracity of the witnesses to whom it is made and the circumstances in which it is made:

It is the duty of the Court to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. The evidentiary value of such statement depends upon the veracity of the witnesses to whom it is made and the circumstances in which it came to be made and actual word used by the accused. Such statement must pass the test of reproduction of exact words, the reason or motive of making such statement. ... (Para 30)

When accused is entitled to benefit of doubt:

Court's decision must rest not upon suspicion but upon legal grounds establish by legal testimony. Mere suspicion, however, strong, cannot take the place of proof. It is well settled principle that where on the evidence two possibilities are open, one which goes in favour of prosecution and the other benefits the accused, the accused is entitled to the benefit of doubt. ... (Para 32)

JUDGMENT

Hasan Foez Siddique, J:

1. This jail appeal is directed against the judgment and order dated 20.02.2012 and 22.02.2012 passed by the High Court Division in Death Reference No.30 of 2006 heard with Jail Appeal No.301 of 2006 upholding the judgment and order of conviction and sentence of death dated 05.04.2006 passed in Druta Bichar Tribunal Case No. 02 of 2006 by the Druta Bichar Tribunal, Chittagong.

2. The prosecution case, in short, was that, at about 10.15 a.m. on 30.06.2004 victim Jaheda Aktara Jyoti, daughter of P.W.1, aged about 8(eight) years, a student of class one of Sakera Government Primary School, left house for going to her school and, thereafter, she

was found missing. Mother, uncle informant Jasimuddin and other relatives of the missing victim started searching for her but did not find her whereabouts. Then Jashimuddin lodged a G.D. being entry No.1336 dated 30.06.2004 with Laksham Police Station. On the next day, when they were searching the victim, one Sakil(P.W.2), Rubel(P.W.3) and Ibrahim(P.W.4) of village Sakera informed them that on 30.06.2004 Sakil and Jyoti were sitting on a culvert situated at the western side of "Pondit Bari" of village Sakera. At that time, appellant Humayun Kabir went there and asked Sakil about the reason of his staying there and compelled him to leave the place. Sakil requested Jyoti to leave the place but appellant Humayon Kabir said that Jyoti is his niece so she should go with him. Getting such information, Jashimuddin rushed to the house of Humayun Kabir and requested his father to handover Jyoti but he scolded Jashimuddin. At 7.30 p.m. on 02.07.2004, Jashimuddin, lodged a first information report against the appellant Humayun Kabir and his father Moulana Latifullah under Section 7/30 of Nari-O- Shishu Nirjatan Daman Ain, 2003.

3. The Investigating Officer, holding investigation, submitted charge sheet against the appellant Humayun Kabir under Section 302/201 of the Penal Code on 29.09.2004. The learned Sessions Judge, Comilla, framed charge against the appellant under Section 302/201 of the Penal Code.

4. The prosecution examined 11(eleven) witnesses in support of its case and defence examined none. The defence case as it appeared from the trend of cross examination of the prosecution witnesses that the appellant has been falsely implicated in the case.

5. After examination of P.W.1, the case was transferred to the Court of Additional Sessions Judge, 1st Court, Comilla where the prosecution examined upto P.W.4. Thereafter, the case was again transferred to the Divisional Druto Bichar Tribunal, Chattogram by an administrative order communicated under memo No.106/2005 dated 31.08.2005 where the case was registered as Druto Bichar Tribunal Case No.02 of 2006. Before the Tribunal, the prosecution examined rest of the P.Ws. Mr. Nasiruddin, learned Advocate was appointed as defence Lawyer by the Court On 22.02.2006.

6. After completion of recording the evidence, examining the appellant under section 342 of the Code of Criminal Procedure and hearing the parties, the Tribunal convicted the appellant under section 302 of the Penal Code and sentenced him to death. Thereafter, the Tribunal sent the case record in the High Court Division for confirmation of sentence of death which was registered as Death Reference No. 30 of 2006. The appellant preferred Jail Appeal No.301 of 2006. The High Court Division heard the Death Reference and Jail Appeal together and upheld the judgment and order of conviction and sentence awarded by the Tribunal. Thus, the appellant has preferred this Jail Appeal in this Division.

7. Mr. A.B.M. Baiyazid, learned Advocate appearing for the appellant, submits that the confessional statement, recorded by P.W.10, was not voluntarily made by the appellant and the contents of the same were not true and the same was not recorded following the provisions of Sections 164 and 364 of the Code of Criminal Procedure, the Courts below committed error of law in relying upon the said confessional statement. He further submits that the P.Ws. 2, 3 and 4 though claimed that they had seen the victim in company of the appellant on 30.06.2004 at about 10.30 a.m. lastly on the culvert situated beside the house of Samsu Master but testimonies of those witnesses are not reliable and they contradicted each other as to the material particulars. He further submits that the Courts below relied upon the testimonies of P.Ws.5 and 11 that the appellant pointed out the dead body of the victim and

the same was recovered on the basis of his confession made before the Police but those testimonies were not admissible in evidence. He, lastly, submits that the prosecution failed to examine some material witnesses, so, the appellant is entitled to get benefit of Section 114(g) of the Evidence Act.

8. Mr. Biswajit Debnath, learned Deputy Attorney General appearing for the State, submits that the appellant made the confessional statement voluntarily and the contents of the same were true. He submits that in his confessional statement, the appellant admitted his guilt and stated that he, taking the victim, went to a jungle situated at the northern bank of the pond of village Ranichor and killed her in that Jungle. He next submits that the appellant and victim were last seen together on a culvert situated near the house of Shamsu Master. He adds that P.Ws.2, 3 and 4 stated that they had seen the victim in the company of the appellant before her disappearance. He further submits that the appellant made extra-judicial confession before the Investigating Officer about the place of killing and as per his pointing out, P.W.11, in presence of P.W.5, recovered the dead body of the victim, her books and khatas from the place of occurrence. He, lastly, submits that it is not necessary to examine all the chargesheeted witnesses to prove the case. The Court can convict an accused if testimony of a single witness is found to be reliable, the Courts below did not commit any error in convicting the appellant.

9. In this case there is no eye witness of killing the victim at the place of occurrence. The entire case of the prosecution revolves around the confessional statement of the appellant; motive; last seen together and discovery of the deadbody and some incriminating materials. In the case of Dogdu V. State of Maharastra reported in AIR 1977 SC 1759 it was observed that when in case involving capital punishment, prosecution demands conviction primarily on the basis of confession, the Court must apply the double tests: (I) Whether the confession is perfectly voluntary, and (II) if so, whether it is perfectly true.

10. The first submission of the learned Advocate for the appellant is in respect of the reliability and admissibility of the confessional statement. A confession is a statement made by an accused which must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence.

11. Let us examine and evaluate the confessional statement of the appellant first. For the purpose of finding out the incriminating fact or facts or truth of the charge framed it is necessary to examine the confession and compare the same with the rest of the prosecution evidence and probabilities of the case. From the confessional statement it appears that the appellant was arrested at about 5.30 a.m. on 04.07.2004 from his father-in-law's house at Jatrapur. He was taken to Laksham thana at 10.15 a.m. on 04.07.2004. At about 2.00 p.m. on 05.07.2004, he was sent to the Magistrate for recording of confessional statement. It appears from the paragraph No.6 of the confessional statement, which is the question and answer para, that when it was asked, "স্বীকারোক্তি কি কারো ভয়ে, চাপে বা লোভে পড়ে দিচ্ছেন?" He replied "না, নিজের ইচ্ছায় করছি, আমার বাপের দিকে চেয়ে।" It is evident that father of the appellant was arrested by the Police before the arrest of the appellant in connection with the occurrence. The words "আমার বাপের দিকে চেয়ে।" raise a question whether there was any promise or assurance behind making such confession. Those words used by the appellant before making confession are significant.

12. In his confessional statement, the appellant made following statements:

"আমি জ্যোতির বাবার কাছে টাকা পেতাম ১৬০০/- আমি তার কাছে ঐ টাকার জন্য গেলে জ্যোতির বাবা আমাকে খুব মারধর করে, এবং লোহার পাত দিয়ে পায়ে বারি মারে। আমি সায়েদাবাদ গিয়ে ডাক্তারের কাছে চিকিৎসা

করাই। এর ৩/৪ মাস পরে আমি অনুনয় করে তার কাছে আবার টাকা চাই তখন সে আমাকে ঘাড় ধাক্কা দিয়ে স্কীমের ধান ক্ষেতে ফেলে দেয়, এরপর আমি জ্যোতির মার কাছে টাকা চাইলে সে বলে জ্যোতির বাবা তাকে ও টাকা দেয় না সে কি করবে, জ্যোতির বাবা ঢাকায় আরেক বিয়ে করেছে। তখন আমি রাগ করে জ্যোতিকে স্কুল থেকে রানীচর গ্রামে পুস্করীনির উত্তর পাড়ে নিয়ে যাই এবং মুখ চেপে ধরে জ্যোতিকে মেরে ফেলি। জ্যোতির বই খাতা কাঁদার মধ্যে ফেলে আমি বাড়ী চলে যাই। বাড়ি এসে আমি আতাউর চেয়ারম্যানের (মতিন মওলানার) বাড়িতে দাওয়াত খেতে যাই। দাওয়াত খেয়ে দোকানে এসে শুনি এর আগের রাতে আমার পিতাকে পুলিশ গ্রেফতার করে নিয়ে আসছে। আমি পরের দিন সন্ধায় মোটর সাইকেলে গিয়ে লাকসাম থানায় পুলিশের কাছে আত্মসমর্পন করি।"

13. From the first four sentences of the confessional statement, it appears that the appellant has stated about the motive behind killing of the victim that earlier he met the father of the victim and requested him to pay taka 1600/- as was due but her father, instead of refunding the same, assaulted him severely. He assaulted the appellant by giving blow on his leg with an iron sheet. After receiving injury, the appellant took treatment from a doctor of Sayedabad. 3 /4 months later, he again met the P.W.1 and requested him to pay his money but he, giving a slap on the shoulder, pushed him in a paddy field. Thereafter, the appellant met the mother of the victim and demanded the said money. She replied that the victim's father had married another lady in Dhaka and does not send any money for her; she had nothing to do with the matter. It is true that proof of motive is not necessary to sustain a conviction but when the prosecution puts forward a specific case as to motive for the crime, the evidence regarding the same has to be considered in order to judge the probabilities. Proof of motive satisfies the judicial mind about the likelihood of the authorship of the crime. In its absence, it demands deeper forensic search of the evidence. The aforesaid portions of the statement are contrary to the evidence of P.W.1, that is, the father of the victim, who in his examination-in-chief has said, "আসামীকে আগে চিনতাম না। ধৃত হওয়ার পর চিনতে পারি।" In his cross examination, P.W. 1 specifically said, "ঘটনার আগে আসামীকে আমি দু একবার দেখে থাকতে পারি। তবে পরিচিত নয়।" In view of the categorical assertion of P.W.1, father of victim Jyoti, that the appellant was not previously known to him it is difficult to accept that the above quoted four sentences of confessional statement, that is, regarding the dues and demand of taka 1600; story of assault and pushing him in the paddy field giving blow are true. Mother of the victim was not examined so it is difficult to ascertain as to whether last of those four sentences, that is, the appellant met her and demanded those money from her was true or not. But in view of aforesaid assertion of P.W.1, that the appellant was unfamiliar to him, the statement as to the claim of demanding the dues from the victim's mother by the appellant lost its intrinsic acceptability. The proof of motive helps the Court in coming to a correct conclusion when there is no eye witness of the occurrence. Since P.W.1 claimed that the appellant was not previously known to him and, after his arrest, he came to know him for the first time, the motive of killing as stated by the appellant in confessional statement was not true. We do not find any other motive of killing the victim by the appellant in the testimonies of the prosecution witnesses. It is true that the failure to establish the motive for the crime does not throw over-board the entire prosecution case but it casts a duty on the Court to scrutinize other evidence with greater care since motive moves a man to do a particular act and the same is relevant fact behind a crime. Section 8 of the Evidence Act states motive, preparation and previous or subsequent conduct as relevant. The conduct of the accused before or after the crime is relevant. After the occurrence, the appellant did not abscond. Similarly, motive prompts a man to form an intention to do an act and the same is a moving power. There is hardly any action without a motive.

14. Next sentence of confessional statement of the appellant is তখন আমি রাগ করে জ্যোতিকে স্কুল থেকে রানীচর গ্রামে পুস্করীনির উত্তর পাড়ে নিয়ে যাই এবং মুখ চেপে ধরে জ্যোতিকে মেরে ফেলি। (underlined by us)

15. From the evidence of P.Ws.2, 3 and 4, it appears that on 30.06.2004, victim Jyoti did not at all reach her school. P.W.2 said that he went to the culvert first and found victim Jyoti sitting on the culvert. He asked Jyoti whether she went to her school or not who replied, "সে স্কুলে ঢোকার আগেই ঘন্টা পড়ে গেছে, সেজন্য ফিরে এসেছে।". P.W.3 in his testimony said, "যুথিকে স্কুলে না যাওয়ার কারণ জিজ্ঞেস করায় সে বলেছে ঘন্টা পড়ে যাওয়ায় স্কুলে যায়নি।" Sometimes thereafter, appellant Kabir went there. So the story of taking away the victim from the school as made by the appellant is contrary to the evidence of P.Ws.2 and 3.

16. In his confessional statements, the appellant stated, "তখন আমি রাগ করে জ্যোতিকে স্কুল থেকে রানীচর গ্রামে পুস্করীনির উত্তর পাড়ে নিয়ে যাই এবং মুখ চেপে ধরে জ্যোতিকে মেরে ফেলি।". The word "তখন" is significant here. Its previous sentence is, "এরপর আমি জ্যোতির মার কাছে টাকা চাইলে সে বলে জ্যোতির বাবা তাকে ও টাকা দেয় না সে কি করবে, জ্যোতির বাবা ঢাকায় আরেক বিয়ে করেছে। " Next sentence was started with the word, "তখন", that is, "then" or "thereafter" or "after that" he, capturing Jyoti from her school, had killed her at northern bank of a pond of village Ranirchar. We have already found that the father of victim said that the appellant was not previously known to him. So the story of demanding taka 1600/- from P.W.1; story of assault and, thereafter, the meeting with the mother of victim and demand of money from her and "তখন", captured the victim from her school and killed her cannot be considered as true story. There is nothing in the evidence and it is not the prosecution case that on that day appellant met the mother of the victim and (তখন) took away the victim from school.

17. From the Postmortem Report of the dead body of the victim (exhibit-4/2) it appears that the Doctor has observed, "It is to be noted that the body was highly decomposed at the time of post mortem examination and no soft tissue injury even if present could be detected, but antemortem of 3rd and 4th ribs of right side was found which is indicator that heavy blunt trauma to the chest were inflicted prior to her death". In his examination in chief P.W.8 Dr. Abdul Hye has said that antemortem fracture of 3rd and 4th ribs at the lower third of right side was present. That is, Doctor found that 3rd and 4th ribs of right side of the chest of victim Jyoti were fractured due to heavy blunt trauma which was caused prior to her death. In the Postmortem report, it was further stated in the column "অস্থিভঙ্গ" that "Antemortem of 3rd and 4th ribs at the lower third of right side present". In the Inquest Report (exhibit-2/1) it was stated "লাশ সনাক্ত না হওয়ার জন্য সে কোন কেমিক্যাল মৃত লাশের উপর প্রয়োগ করে এবং লাশ পচাইয়া ফেলে।" From the Police report, though not evidence, the Investigating Officer stated, – "জ্যোতির লাশ ৫ দিনের মধ্যে গলিয়া যাওয়ার ব্যাপারে জিজ্ঞাসা করিলে আসামী হুমায়ুন কবির সঠিক কোন জবাব দিতে পারেন নাই।" In view of the fractures of ribs No.3 and 4 and finding of the Doctor that those were caused due to heavy blunt trauma on the chest clearly indicated that victim was not killed by pressing her mouth. That is, statement of the appellant that he had killed the victim by pressing her mouth was inconsistent with post mortem report. Where the medical evidence on the side of prosecution and statement of the accused is more or less equally balanced, the benefit of doubt must go to the accused.

18. In his confessional statement, the appellant has further stated "জ্যোতির বই খাতা কাঁদার মধ্যে ফেলে আমি বাড়ি চলে যাই।" From the seizure list (exhibit-5) it appears that books and khatas were recovered under the water as well as beneath the ground. In the seizure list it was stated – "উক্ত আলামত আসামী হুমায়ুন কবিরের দেখানো মতে পানি মাটিতে পুতানো অবস্হা হইতে উদ্ধার করা হয়।" None of the witnesses said that there was any marks of mud on those books and khatas.

19. It further appears from the confessional statement that the appellant, thereafter, has said, "জ্যোতির বই খাতা কাঁদার মধ্যে ফেলে আমি বাড়ি চলে যাই। বাড়ী এসে আমি আতাউর চেয়ারম্যানের (মতিন

মওলানার) বাড়ীতে দাওয়াত খেতে যাই। দাওয়াত খেয়ে দোকানে এসে শুনি এর আগের রাতে আমার পিতাকে পুলিশ গ্রেফতার করে নিয়ে আসছে। আমি পরের দিন সন্ধায় মোটর সাইকেলে গিয়ে লাকসাম থানায় পুলিশের কাছে আত্মসমর্পন করি।" | This portion of confession is also contradictory to the statement recorded in the confessional statement itself. We have already found that in the confessional statement it was stated that the appellant was arrested at 5.30 a.m. on 04.07.2004, that is, four days after the occurrence but from above quoted sentence of the confessional statement it appears that the appellant has stated that on the date of occurrence, that is, on 30.06.2004 after commission of offence, he returned to his house and, on the same day, he went to the house of Ataur (মতিন মওলানা) to have his lunch. Thereafter, he went to a shop where he came to know that his father was arrested and taken to the police station. Thereafter, on the next day, (that is, on 01.07.2004) he, by motorcycle, went to local Police Station and surrendered. That is, according to the contents of the confessional statement, the appellant surrendered on 01.07.2004. P.W.5 Habibulla in his cross examination has said, "পুলিশ এই মামলার পর কবিরের পিতাকে ধরিলে তখন কবিরের ভাই পুলিশের কাছে কবিরকে ধরাইয়া দিয়াছে।" P.W.1, in his examination in chief, has said, "মোকদ্দমার পর কবিরের বাবা ও পরের দিন কবিরকে এরেষ্ট করে।" That is, according to him the police arrested the appellant on 03.07.2004. That is, date of surrender of the appellant as stated in confessional statement and date of arrest as claimed by the police and witnesses are different.

20. To prove the charge brought under Section 302 of the Penal Code primarily on the basis of the confessional statement it is duty of the Court to ascertain as to whether the confession was made voluntarily, and if so as to whether the same was true and trustworthy. Satisfaction of the Court is a ***sine qua non*** for the admissibility in evidence. True and complete disclosure of the offence is the soul of true confessional statement. In this case, the testimonies of P.Ws.1,2,3 and 4 and post-mortem report are inconsistent with the contents of the confessional statement of the appellant which has made the confessional statement unreliable. In view of the evidence quoted above and the contents of the confessional statement, it is difficult for us to hold that the statements made in confession by the appellant are true and those were consistent with the prosecution case. It would be extremely unsafe to base conviction of the appellant on the basis of such confessional statement accepting the same as true.

21. It is the prosecution case that in between 10.30 a.m. to 11.00 a.m. on 30.06.2004 , P.Ws. 2, 3 and 4 lastly saw the victim in the company of the accused on a culvert situated near the house of Shamsu Master of village Shakera. That was the place of taking away the victim towards the killing spot of village Ranir chor. We do not find evidence regarding the distance between the said culvert of village Shakera and killing spot of village Ranirchar which was very relevant to adjudicate case. It has been stated in the F.I.R. that after consultation with the P.Ws. 2 and 4, that is, Sakil and Md. Ibrahim, the informant came to know that the victim did not attend the class on that fateful day and she was sitting on a culvert situated near "Pandit bari" along with 5/6 other students and at that time, the appellant went there. The prosecution has failed to examine informant Jashimuddin to prove the contents on the F.I.R. From the F.I.R., it appears that the informant stated that after making G.D. entry No.1336 dated 30.06.2004, he met Sakil and Ibrahim but P.W.1, father of the victim, who was in Dhaka at the relevant time, in his examination in chief has stated, "কিন্তু প্রতিদিন যে সময় স্কুল থেকে বাড়ি ফিরে আসে সেদিন ঐ স্কুলে থেকে ফিরে না আসায় আমার বাবা, মা, ছোট ভাই জসিম উদ্দিন ও আমার স্ত্রী আত্মীয় স্বজনের বাড়ী সহ বিভিন্ন দিকে খোজ খবর নেয়। কিন্তু অনুসন্ধান না পেয়ে ভাই জসিম উদ্দিন থানায় গিয়ে ১৩৩৬ তাং ৩০-৬-২০০৪ জি,ডি, করেন। তার পরে ও অনুসন্ধান করা হয়। পরের দিন অনুসন্ধান কালে সাকেরা গ্রামের সাকিল, রুবেল ও ইব্রাহীমকে জিজ্ঞাসাবাদ জানায় যে বিগত ৩০-৬-০৪ তারিখে সাকিল সাকেরা গ্রামের পন্ডিত বাড়ির

পশ্চিমে অবস্থিত কালভার্টে সে ও জ্যোতি বসা ছিল।" From the above quoted testimony of P.W.1 it appears that on the next day, that is, on 01.07.2004 his father, mother, informant Jashimuddin and wife started searching the victim and Sakil, Rubel and Ibrahim disclosed the story that they had seen the victim in the company of the appellant on the culvert situated at the western side of "Pondit Bari" of village Sakera to them. P.W.2 Sakil, P.W.3 Rubel and P.W.4 Ibrahim, in their testimonies, did not state that, on next day, that is, on 01.07.2004 they had disclosed any such story to any of the aforesaid persons before lodging F.I.R. Moreover, the prosecution did not examine the father, mother, younger brother (the informant) and wife of P.W.1 to substantiate the aforesaid claim. That is, F.I.R. story of discloser of the fact, regarding the presence of appellant and victim on the culvert near "Pandit bari" to the informant party before the lodging F.I.R., by the P.Ws.2, 3 and 4 has not been proved.

22. P.W.2, a child of 12(twelve) years, in his examination-in-chief has stated that he found the victim Jyoti on the culvert and, sometimes thereafter, appellant Humayun Kabir went there but in his cross examination he has said "আমি কবির নামক লোকটিকে আগে চিনতাম না ও তার নাম জানতাম না একথা ঠিক। আমি কালভার্ট থেকে চলে যাবার সময় সেখানে ২ জন লোক ছিল।" P.W.3, who is not F.I.R. named witness in his examination in chief, stated that at about 10.30 a.m. on 30.04.2004, he was sitting on the culvert situated at the western side of the house of Shamsu Master and found Sakil, Jyoti and 2 /3 others. P.W. 2 Sakil did not say about the presence of P.W.3 there. P.W. 3, thereafter, has said one Humayun Kabir went there and set on the culvert. In his cross examination he said, "আমাদের বাড়ী থেকে যুথিদের বাড়ী এখান থেকে গেট যতদুর। (এ কোর্টরুম থেকে স্বাক্ষীর দেখানো গেটের দুরত্ব ২০০/২২০ গজ)". Thereafter, he said "আমি জ্যোতির বাবা মাকে চিনি না। আমি ১১.৩০ মিনিটে বাড়ীতে ফিরেছি। আমি চলে যাবার সময় কালভার্টে ৪ জন লোক ছিল। তারা সেখানে গল্পগুজব করছিল একথা ঠিক। (গল্পগুজব কালে বলে আদালতের জিজ্ঞাসায় জবাব দিতে পারে নাই)। (It is to be mentioned here that this witness is also aged about 12 years) ঐ দিন আমি ৪টা পর্যন্ত স্কুলে ক্লাস করি।" Once he said that he had returned home at 11-30 a.m. and, thereafter, said he had participated in his class upto 4 p.m. In his cross examination he further said, "ঐ লোকটাকে আমি আগে চিনতাম বা তার নাম জানতাম না।" The evidence of these witnesses are self contradictory, discrepant and inconsistent with each other on material points which should not be lightly passed over, as they seriously affect the value of their testimonies and those inconsistences go to the root of the matter. From the evidence of P.W.2 and 3 it is apparent that the appellant was not previously known to them. But mysteriously both the witnesses in their examination in chief disclosing the name of the appellant stated that the appellant Humayun Kabir went to the culvert.

23. It is relevant here to state that a child may be allowed to testify, if the court is satisfied that the child is capable of understanding the question put to him and give rational answers to the Court. Before examining a child as a witness the Court should know his intellectual capacity by putting a few simple and ordinary question to him and should also record a brief proceeding of the inquiry. From the above quoted evidence of P.W.3 it appears that his understanding and intellectual capacity is questionable.

24. P.W. 4 Md. Ibrahim, another witness of the claim of "last seen together" of the victim with the appellant, who, in his examination in chief, has said, " ঘটনার তারিখ মনে নেই। ১১/১২ মাস আগে বুধবারে সকাল ১১.০০ টায় আমি বাড়ী থেকে উত্তর দিকে যাবার পর সাকেরা গ্রামে নোয়াব আলী পন্ডিতের বাড়ীর পাশে কালভার্টে ডকে থাকা আসামী কবীর মিয়া ও জলিলের মেয়ে যুথিকে দেখি। তখন কবীর আমাকে দেখে বলে তার ভাগ্নি যুথি ঐদিন স্কুলে যায়নি।" In his cross examination he has said, "যুথির বাবা জলিলকে চিনি। কবিরকে আগে থেকে চিনতাম না ও নাম ও জানতাম না। পরে শুনেছি ছেলেটার নাম কবির।"

25. From close reading of the testimony of this witness, it appears to us that he was going towards north from his house and, on the way, he found the appellant and victim Jyoti on the culvert. While he was crossing the culvert appellant Humayun Kabir, who was not previously acquainted to him, voluntarily told him that his "bhagni" (sister's daughter) did not attend the class on that day. There was no earthly reason of saying so to an unknown man, particularly, when no such question in that regard was asked for by P.W.4. It was totally an unnatural statement and beyond natural human conduct. P.Ws. 2, 3 and 4 in their cross-examinations admitted that appellant Humayon Kabir was not previously known to them and they were not aware of his name even but in the F.I.R. it has been stated that these witnesses disclosed the name of the appellant to the informant and others. Discloser of the name and particulars of an unknown man can not be accepted as correct identification. In the case of Kanan V. State of Kerala reported in AIR 1979 SC 1127 it was observed by the supreme Court of India that where a witness identifies an accused who is not known to him, in the Court for the first time, his evidence is absolutely valuless unless there has been a previous T.I. parade to test his powers of observations. The idea of holding T.I. parade under Section 9 of the evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court. It is necessary when the witnesses admitted that the accused was not known the witnesses before happening of the incident seen by them. When the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in Court at the trial. In view of the discussion made above, we are of the view that the story of last seeing of the victim with the company of the appellant at about 10.30 a.m. to 11.00 a.m. on 30.06.2004 is highly doubtful. Their conduct does not inspire confidence.

26. In the Police report it was stated that, "তাকে নিয়ে যাবার সময় তার সাথে থাকা স্কুলের ছেলে মেয়েরা এবং পন্ডিত বাড়ীর লোকজন দেখে।" The prosecution did not examine those students of the school and any person of " পন্ডিতবাড়ী" though it was claimed that they saw the occurrence of taking away the victim. This was an unfortunate part of the prosecution case.

27. Next point is in respect of oral extra-judicial confession of the appellant before the Investigating Officer and recovery of the dead body of the victim from the place of occurrence. The evidence of the Investigating Officer in this regard is very relevant. As P.W.11, he has said, "আমি আসামীকে গ্রেফতার করিয়া তাহাকে জিজ্ঞাসাবাদ শেষে তাহার জবানবন্দী মতে মৃত জাহেদা আক্তার জ্যোতির লাশ উদ্ধার করিয়া ময়নাতদন্তের জনা মর্গে প্রেরণ করি।" Section 25 of the Evidence Act mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Similarly Section 26 of the Evidence Act provides that confession by the accused person while in custody of police cannot be proved against him. However, to the

aforesaid rule of Sections 25 to 26 of the Evidence Act, there is an exception carved out by Section 27 of the Evidence Act. Section 27 is a proviso to Sections 25 and 26. Such statement is generally termed as disclosure statement leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be allowed to be given in evidence. Since statement under section 27 of the Evidence Act is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 the Evidence Act.

28. In the case of Himachal Pradesh Administration V. Om Prakash reported in (1972) 1 SCC 249 it was observed by the Supreme Court of India that section 27 of the Evidence Act which makes the information given by the accused while in custody leading to the discovery of a fact and the fact admissible, is liable to be abused and for that reason great caution has to be exercised in resisting any attempt to circumvent, by manipulation or ingenuity of the Investigating Officer. The protection afforded by sections 25 and 26 of the Evidence Act, while considering the evidence relating to the recovery the Court shall have to exercise that caution and care which is necessary to lend assurance that the information furnished and the fact discovered is credible.

29. Earlier, we have found that the date and time of arrest or surrender of the appellant to the Police as revealed in the evidence are contradictory and inconsistent. It was duty of the prosecution to disclose the exact date and time of arrest or surrender of the appellant to the Police for the reasons that the police was not authorized to keep the appellant in their custody for a period more than 24 hours without any order of the Court. Evidence as to total period of interrogation of the appellant is not definite and the same is highly debatable. According to the contents confessional statement of the appellant it was from 01.07.2004 to 05.07.2004, according to P.W.1, appellant was arrested on 03.07.2004, that is, he was in custody from 03.07.2004 to 05.07.2004 and according to Investigating Officer the appellant was in his custody since 5.30 am on 04.07.2004 and he was produced before the Magistrate at 2 PM on 05.07.2004, that is, he was in police custody for more than 24 hours. Another significant event appears from paragraph 2 of the confessional statement where it was stated , "I was arrested at (e) ভোর 5.30 p.m. on 04 .07.04 in $\frac{village}{town}$ of (যাত্রাপুর শ্বশুরবাড়ী) . I was taken (f) $city$

লাকসাম থানা -সকাল ১০-১৫ টা p.m on 4.07.04." That is, arresting the appellant from his father-in-law's house he was brought at Laksham Police Station at 10.15 a.m. or p.m. Inquest report shows that the same was prepared at 11-50 a.m. on the basis of the alleged statement made by the appellant before the Police. That is, within 95 minutes of bringing the appellant at

Laksham thana, dead body of the victim was recovered. We have seen from the F.I.R. that the Police Station is about 8 Kilometer far from the crime village. In his report, the Investigating Officer categorically stated," আসামী স্বীকারোক্তী মতে উপজেলা নির্বাহী অফিসার সহকারে আসামী কবিরকে সংগে নিয়ে রানী চৌ বড় পুকুর পারে গভীর জঙ্গলের ভিতরে পুকুরের উত্তর পাড় হইতে জাহেদা আক্তার যুথীর গলিত লাশ মামলার বাদীর সনাক্ত মতে উদ্ধার করিয়া লাশের সুরতহাল রিপোর্ট প্রস্তুত করিয়া ময়না তদন্তের জন্য মর্গে প্রেরণ করি।" That is, as per identification of the informant (not examined) deadbody was recovered. The appellant did not identify the deadbody or pointed out the deadbody at the place of recovery. After bringing the appellant at thana at about 10.15 a.m. on 04.07.2004, the Investigating Officer started interrogation and, thereafter, he made his alleged statement to the Police and, then, the Police informed the same to Upozilla Nirbahi Officer and, thereafter, they started moving towards the place of recovery together and on the way, they picked up P.W.5 Habibulla member from his village Badarpur and, then reached at village Ranir Chor and recovered the dead body as per informant's identification. Upon calculation of time, consumed for those incidents it appears that those were completed within 95 minutes which was not at all humanly possible and those facts indicated that all those events were not done and completed as stated date, time and manner.

30. Section 27 has frequently been misused by the Police and the Court should be vigilant about the circumvention of its provisions. Sometimes a devise is adopted by the Police to stage a scene and take the accused to the place where the things discovered. Here in this case P.W. 11 simply said, "জিজ্ঞাসাবাদ শেষে তাহার জবানবন্দি মতে" (which was made in the police station) dead body was recovered by the Police. It is the duty of the Court to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. The evidentiary value of such statement depends upon the veracity of the witnesses to whom it is made and the circumstances in which it came to be made and actual word used by the accused . Such statement must pass the test of reproduction of exact words, the reason or motive of making such statement. It is not clear such " জবানবন্দি" was written by the Police or the same was oral "জবানবন্দি" before the Police. There is no evidence that the appellant himself narrated the name of the place of occurrence and pointed out the dead body. If the accused points out, or leads the Police to, a place from where some incriminating article is recovered there would be discovery within the meaning of section 27 and the relevant of the conduct of the accused. According to P.W.11 the appellant gave a "জবানবন্দি" but there is no reliable evidence that he himself pointed out the dead body and other incriminating materials at the place of recovery in the village Ranirchar. At the time of recovery, the U.N.O., Laksham, an important and most responsible chargesheeted witness was allegedly present but the prosecution withheld him without any explanation. From the inquest report, it appears that Jashimuddin (informant) of village- Konoksree, Sanjit Kumar Vhoumik of village Rani Chor, Md. Shafiqur Rahman and Md. Habibullah member village of Badarpur; Md. Abul Quasem village Uttor Bonoy and constable Nurul Alam were cited as witnesses. But the prosecution did not examine Jashimuddin, Shafiqur Rahman, Abul

Kashem and Constable Nurul Alam though it has been stated that in their presence dead body was recovered. Sanjit Kumar was tendered by the prosecution and defence did not cross examine him. Only witness P.W.5 Habibullah member of village Badorpur. Prosecution witnesses failed to reproduce the exacts words used by the appellant in his alleged extra-judicial confession before the police. The appellant while making his confessional statement before the Magistrate did not disclose that he had given any such information to the police though the deadbody was recovered on the same day. The alleged extra-judicial confession made before the Police and recovery of the deadbody and other incrementing materials are surrounded by suspicious circumstances.

31. In the case of K.K. Jadav Vs. State of Gujarat reported in A.I.R.1966 SC 821 it was observed by the Supreme Court of India that mere fact that the dead body was pointed out by the appellant or was discovered as a result of statement made by him would not necessarily lead to the conclusion of the offence of murder. In the case Bakshish Singh Vs. The State of Punjab reported AIR 1971 (SC)2016 it was further observed by the Supreme Court of India that only incriminating evidence against the appellant in his pointing out the place where the dead body of deceased had been thrown. This is not a conclusive circumstance though undoubtly it raises strong suspicion against the appellant. In a criminal case when the Court is called upon to convict a person having committed any offence it has to satisfy that possibility of innocence is ruled out.

32. Court's decision must rest not upon suspicion but upon legal grounds establish by legal testimony. Mere suspicion, however, strong, cannot take the place of proof. It is well settled principle that where on the evidence two possibilities are open, one which goes in favour of prosecution and the other benefits the accused, the accused is entitled to the benefit of doubt.

33. Considering the aforesaid facts and circumstances of the case, we are of the view that the prosecution has not been able to prove its case beyond all shadow of doubt against the appellant, so the appellant is entitled to get benefit of doubt. Accordingly, we find substance in the appeal.

34. Thus, the appeal is allowed.

35. The judgment and orders of the Courts below are hereby set aside. The appellant Humayun Kabir, son of Liakatulla, of village- Newrain, Police Station Laksham, District Comilla is acquitted on the charge. He may be released forthwith if not wanted in any other case.