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HIGH COURT DIVISION

Death Reference No. 103 of 2016 with Criminal Appeal No. 7463 of 2016 with Criminal Appeal No. 7532 of 2016 with Criminal Appeal No. 7897 of 2016 with Jail Appeal No. 290 of 2016 with Jail Appeal No. 291 of 2016 with Jail Appeal No. 292 of 2016 with Jail Appeal No. 293 of 2016 with Jail Appeal No. 294 of 2016 with Jail Appeal No. 295 of 2016

The State and others
-Versus-
Md. Rafiqul Islam and others

Mr S. M. Abul Hossian with Ms Sahida Noor Nahar, Advocates
….For the condemned prisoner and appellant in Criminal Appeal No. 7463 of 2016.

Mr Golam Abbas Chowdhury with Mr Md. Aminul Islam and Mr Md. Muslim Uddin Bhuiyan, Advocates
….For the condemned prisoners and appellants in Criminal Appeal Nos. 7532 of 2016 and 7897 of 2016.

Mr Md. Bashir Ullah, DAG with Mr Mohammad Shafayet Zamil, AAG with
Mr Md. Shamim Khan, AAG
....For the State in Criminal Appeal Nos. 7463 of 2016, 7532 of 2016, 7897 of 2016 and Jail Appeal Nos. 290 of 2016, 291 of 2016, 292 of 2016 and 293 of 2016, 294 of 2016 and 295 of 2016 and Death Reference No. 103 of 2016.

Heard on 21.03.2022,22.03.2022 & 23.03.2022.
Judgment on 29.03.2022.

Present:
Mr. Justice Mohammad Ullah
And
Mr. Justice Md. Atoar Rahman

Editors' Note:
In the instant case the dead body of the victim was recovered with a scarf around his neck. 3/4 days earlier a misunderstanding took place between the victim and a local female member and her husband centering their daughter which subsequently took a grave form. A death threat was openly given to the deceased by the accused persons. The informant suspected that the murder was the result of that dispute. The prosecution relied upon the circumstantial evidence. The trial Court found the accused guilty and accordingly sentenced them. The High Court Division, however, found that the prosecution had failed to prove the time, place and manner of and motive for the occurrence and adduced circumstantial evidence could not point to the guilt of the accused beyond any reasonable doubt. Consequently accused persons secured acquittal.

Key Words:
Section 302/34 of Penal Code; Section 342 of Code of Criminal Procedure; Time, place and manner; sufficiency of circumstantial evidence; motive;

<u>Prosecution to prove time, place and manner:</u>
In the instant case, the rickshaw puller was a vital witness, but he was not produced before the Court by the prosecution. No GD entry was lodged about the alleged threat made by the accused persons. From the evidence of the informant (brother of the

deceased), it appears that he had no knowledge about by whom his brother was taken away from the street and murdered him when the victim allegedly at night following 09.02.2001 was going to his uncle's house at Narindi from Chalar Bazar through a rickshaw. In the following morning, the dead body of the victim was found in Singua Fakir Sahabuddin Girls High School with a scarf around his neck. It is not clear from the evidence as adduced by the prosecution that under what circumstances, wherefrom and when the deceased started for Narindi from Chalar Bazar through a rickshaw and wherefrom he was missing. So, the prosecution failed to prove time, place and manner of occurrence having produced reliable evidence and this case is based on unlinked circumstantial evidence. ...(Para 53)

Section 342 of the Code of Criminal Procedure, 1898:
Incriminating evidence if not drawn to the attention of the accused persons that causes gross miscarriage of justice:
In the instant case, it appears that incriminating evidence or circumstances sought to be proved against the accused persons were not drawn to the attention of the accused persons during examination under section 342 of Cr.PC caused a gross miscarriage of justice. The prosecution examined 11(eleven) witnesses as P.Ws but during the examination of the accused persons under section 342 of Cr.PC, the learned Judge mentioned that the prosecution examined 10(ten) witnesses inasmuch as the incriminating evidence was not drawn to the attention of the accused persons which caused a gross miscarriage of justice. ...(Para 54)

The rule as regards sufficiency of circumstantial evidence:
The rule as regards sufficiency of circumstantial evidence to be the basis of conviction is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis than that of his guilt. If the circumstances are not proved beyond reasonable doubt by reliable and sufficient evidence and if at all proved but the same cumulatively do not lead to the inevitable conclusion or hypothesis of the guilt of the accused alone but to any other reasonable hypothesis compatible with the innocence of the accused then it will be a case of no evidence and the accused should be given benefit of doubt. If there is any missing link in the chain of circumstances, the prosecution case is bound to fail. In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond a reasonable doubt. If the witness examined to prove the circumstances are found to be unreliable or their evidence is found to be unacceptable for any other reason the circumstances cannot be said to have been proved and therefore there will be no occasion to make any inference of guilt against the accused. Circumstantial evidence required a high degree of probability, from which a prudent man must consider the fact that the life and liberty of the accused person depend upon his decision. All facts forming the chain of evidence must point conclusively to the guilt of the accused and must not be capable of being explained on any other reasonable hypothesis. Where all the evidence is circumstantial it is necessary that cumulatively its effect should be to exclude the reasonable hypothesis of the innocence of the accused. ...(Para 55)

It is the established principle that the circumstances to be related upon by the prosecution must be fully established and the chain of evidence furnished by the circumstances should be so far complete as not to leave any reasonable ground for a

conclusion consistent with the innocence of the accused. The prosecution should have to prove various links in the chain of evidence to connect the accused and must clearly be established. The complete chain must be such as to rule out a reasonable likelihood of the innocence of the accused. The court is required to satisfy its test to prove a case on circumstantial evidence. Firstly, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. Secondly, those circumstances must be of a definite tendency are unerringly pointing toward the guilt of the accused, and thirdly, the circumstances taken cumulatively should follow a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. ...(Para 56)

It is a settled law that suspicion or doubt however strong might be, cannot be the basis of conviction. ...(Para 59)

<u>When to prove motive in a criminal case:</u>
In criminal cases, the prosecution is not required to prove the motive behind the crime but if the prosecution assigned the motive behind the crime, it must prove it.
...(Para 62)

JUDGMENT

Mohammad Ullah, J:

1. This Reference has been made by the learned Additional Sessions Judge, 1st Court, Gazipur (Trial Court) to this Division under section 374 of the Code of Criminal Procedure for confirmation of the death sentence awarded upon condemned prisoners (1) Md. Rafiqul Islam, son of Abdur Razzak, (2) Anar Hossain, son Shamsuddin Sheikh, (3) Selim, son of Nizam Uddin Sheikh, (4) Noyon, son of Bashir Uddin Sheikh, (5) Atikul Islam, son of Abdur Razzak and (6) Alam Sheikh, son of Shamsuddin Sheikh. The Trial Court having found the condemned prisoners guilty of the offence punishable under sections 302 and 34 of the Penal Code convicted them under section 302 of the Penal Code and sentenced them thereunder to death with a fine of taka 10,000/-(ten thousand) each, by the judgment and order dated 09.08.2016 in Session Case No. 181 of 2003. The Trial Court also having found the appellants Anwara Begum (now deceased), Abdul Motaleb and Sheikh Shamsuddin guilty of the offence punishable under sections 302 and 34 of the Penal Code convicted them under section 302 of the Penal Code and sentenced them thereunder to suffer rigorous imprisonment for life with a fine of taka 10,000/-(ten thousand) each, by the above mentioned judgment and order dated 09.08.2016. Against the said judgment and order of conviction and sentence dated 09.08.2016, passed by the learned Additional Sessions Judge, 1st Court, Gazipur in Session Case No. 181 of 2003, the condemned prisoners Selim, Md. Rafiqul Islam, Atikul, Noyon, Alam Sheikh (now deceased), and Anar Hossain preferred Jail Appeal Nos. 290 of 2016, 291 of 2016, 292 of 2016, 293 of 2016, 294 of 2016 And 295 of 2016 respectively. Against the impugned judgment and order of conviction and sentence dated 09.08.2016 the condemned prisoners Rafiqul Islam, Anar Hossain, Noyon, Atikul Islam and Alam Sheikh (now deceased) preferred regular Criminal Appeal No. 7532 of 2016, convict-appellants Most. Anwara Begum (now deceased), Abdul Motaleb and Sheikh Shamsuddin preferred regular Criminal Appeal No. 7897 of 2016, while condemned prisoner Selim preferred regular Criminal Appeal No.7463 of 2016.

2. As the Death Reference No. 103 of 2016 as well as the above-numbered appeals have arisen out of the self-same judgment and order have been taken up together for hearing and being disposed of by this single judgment.

3. The prosecution case, in short, is that the informant Md. Asaduzzaman (P.W.1) aged about 28 years, son of Jasim Uddin (P.W.5) of village Gagtia Uttar Para, Police Station-Kapasia, District-Gazipur lodged a First Information Report (FIR) on 10.02.2001 at 1:30 pm with the Officer-in-Charge, Kapashia Police Station, Gazipur alleging, *inter alia,* that his younger brother Sanaullah, aged about 20 years, on 09.02.2001 at about 10:00 pm went to Chalar Bazar after finishing his dinner and therefrom for personal reasons he started for his uncle's house located at Narindi village under Monohordi Police Station. On the following day on 10.02.2001 at about 7:00 am the informant came to know from the public that the dead body of his brother Sanaullah was lying on the floor in Singhua Fakir Sahabuddin Girls High School with a scarf around his neck. Having been informed about the incident, the informant along with his brother Atiqul Islam (P.W.3), uncle Babul Mia (P.W.7), neighbour Hafijuddin, uncle Khabiruddin, another uncle Nasiruddin (P.W.9), one Siddiqur Rahman, and 20/25 others went inside the said classroom and found his brother lying therein wearing a red tracksuit and a scarf around his neck. After touching the body, the informant realised that his brother had passed away. From the nose of the deceased foam was coming out and his whole body was covered in dust and two T-shirts of the deceased were also found torn. Before 3/4 days of the incident a misunderstanding took place between the informant's brother and the local female member convicted Anwara and her husband convicted Motaleb regarding their daughter Mariam which subsequently took a grave form. A death threat was openly given to the deceased by the accused persons. The informant suspected that the accused persons namely Md. Rafiqul Islam, Atiqul, Abdul Motaleb, Anwara (now deceased), Alam Sheikh (now deceased), Anar Hossain, Shamsuddin Sheikh, Bashir Uddin (now deceased), Nizam Uddin Sheikh (now deceased), Selim, Noyon and Kamal (now deceased) strangled his brother to death taking him forcibly from the road to Monohordi. After the incident, the informant inferred from the attitude of the accused persons that they were indeed the murderers.

4. Accordingly, Kapasia Police Station Case No.7 dated 10.02.2001, under sections 302 and 34 of the Penal Code was recorded which subsequently gave rise to G.R. Case No. 37 of 2001.

5. The police during investigation into the case, visited the place of occurrence, prepared a sketch map along with index thereof, examined the witnesses under section 161 of the Code of Criminal Procedure and arrested 7(seven) accused persons, upon completion of the investigation having found a prima-facie case, the Investigating Officer submitted Police Report against twelve suspected persons including the condemned prisoners and convict-appellants recommending their trial under sections 302 and 34 of the Penal Code.

6. After submission of the charge sheet, the case record was transmitted to the court of Sessions Judge, Gazipur wherein Session Case No. 181 of 2003 was recorded. Thereafter the same were transferred to the learned Additional Sessions Judge, 1st Court, Gazipur for trial and disposal who framed charges against all the accused persons including condemned prisoners and the appellants under sections 302 and 34 of the Penal Code and the same were read over and explained to the accused persons, present in Court, to which they pleaded innocence and claimed to be tried.

7. The prosecution to bring home the charges against the accused persons examined in total 11(eleven) witnesses as P.Ws who were cross-examined by the defence. Thereafter, the accused persons, present in the Court, were examined under section 342 of the Code of

Criminal Procedure to which they further claimed innocence and expressed their unwillingness to produce any defence witness.

8. The defence version of the case, as it appears from the trend of the cross-examination of the prosecution witnesses, is that the accused persons are innocent and have falsely been implicated in the case.

9. The learned Additional Sessions Judge, 1st Court, Gazipur after considering the evidence on record having found the condemned prisoners and the appellants guilty under sections 302 and 34 of the Penal Code convicted and sentenced by the impugned judgment and order dated 01.08.2016 and made the reference for confirmation of the death sentence, imposed upon the condemned prisoners as aforesaid.

10. Being aggrieved by and dissatisfied with the impugned judgment and order the convict-appellants have preferred the above jail appeals and regular appeals.

11. Mr. Md. Bashir Ullah learned Deputy Attorney General appears for the State to support the reference as made by the learned Additional Sessions Judge, 1st Court, Gazipur and to oppose the appeals.

12. The learned Deputy Attorney General (DAG) taking us to the FIR, 161, 342 and the evidence on record submits that the condemned prisoners and the appellants in furtherance of their common intention have murdered the victim and as such the impugned judgment and order of conviction and sentence are not liable to be interfered with by this Court and the reference is deserve to be accepted.

13. The learned DAG having placed the evidence on record submits further that the prosecution upon producing reliable, credible and impartial witnesses proved the charge beyond reasonable doubt and, as such, the conviction and sentence as passed by the Trial Court should not be interfered with by this Court.

14. The learned DAG again submits that the circumstantial evidence is more convincing and cogent than the evidence of the eyewitness.

15. He adds that a witness can tell a lie but a circumstance does not.

16. The learned DAG in this regard seeks to rely on the decision in the case of the State Vs. Md. Aynul Haque reported in BCR (2004) 220.

17. The learned DAG also submits that the Trial Court drew the attention of the accused persons to the main incriminating pieces of evidence against them and mere omission on the part of the Trial Court to specifically draw the attention of the accused persons to the incriminating evidence does not always cause prejudice to them.

18. The learned DAG in this regard seeks to rely on the decision in the case of Mezanur Rahman and others Vs. The State reported in 16BLD(AD)(1996)293. With this submission, he prays for acceptance of the Death Reference and dismissal of the Appeals.

19. On the other hand, Mr Golam Abbas Chowdhury, learned Advocate appearing for the condemned prisoners and appellants in Criminal Appeal Nos. 7532 of 2016 and 7897 of 2016

submits that it is a case of subsequent embellishment. It is a case of no evidence and no link among the circumstantial evidence has been proved by the prosecution. A vital witness, rickshaw puller, had not come to the Court for which the circumstantial evidence could not be linked to the crime and murder of the deceased Sanaullah.

20. Mr Md. Aminul Islam, learned Advocate appearing for the condemned prisoners as well as the appellants in Criminal Appeal Nos. 7532 of 2016 and 7897 of 2016 submits that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime but in the instant case, the prosecution failed to prove the connection between the accused and the crime and hence based on such circumstantial evidence the conviction and sentence is a serious miscarriage of justice.

21. The learned Advocate in support of his above submission places reliance on the case of Balwinder Singh Vs. State of Punjab, reported in AIR 1996 (Supreme Court) 607.

22. In this regard, he also relied upon the decisions in the cases of State Vs. Arman Ali and others, reported in 42 DLR (AD) (1990) 50 and the case of Sree Robindra Nath Roy @ Rabindra and another Vs. The State, reported in 17 MLR (AD) 253.

23. The learned Advocate having relied upon the principle made in the aforesaid reported cases submits further that in a case of circumstantial evidence, the circumstances must be conclusive in nature and if two inferences are possible from the circumstantial evidence, one pointing to the guilt of the accused and the other also plausible that the commission of the crime was the act of someone else, the circumstantial evidence would not warrant for conviction of the accused.

24. The learned Advocate having placed a decision of Indian Jurisdiction, reported in AIR (2020) (Supreme Court) 180, submits that when the evidence adduced against the accused persons does not form a complete chain connecting them with the crime the accused persons are entitled to get benefit of the doubt.

25. He next submits that it is a well-settled principle that suspicion however strong cannot be a substitute for proof of a murder charge.

26. The learned Advocate in this regard relied on a decision in the case of Swapan Vs. The state reported in 1MLR 205.

27. The learned Advocate lastly submits that the examinations of the condemned prisoners under section 342 of the Code having been done perfunctorily has seriously prejudiced them as incriminating evidence or circumstances sought to be proved against them was not put to their notice during examination under section 342 causing gross miscarriage of justice.

28. In support of his above submission, the learned Advocate places reliance on the case of the State Vs. Monu Miah and others reported in 54 DLR(AD) (2002)60.

29. Mr Moslim Uddin Bhuiyan, learned Advocate for the condemned prisoners as well as the appellants in Criminal Appeal No. 7532 of 2016 and 7897 of 2016 submits that P.Ws. 3, 4, 7 and 9 in their statements, recorded under section 161 of the Code of Criminal Procedure, did not mention about the threat and searching of the victim on 09.02.2001 in the evening by

the accused persons and their evidence before the Court are beyond their previous statements made to the Investigation Officer which ought to have been taken into consideration by the Trial Court but in the instant case, the Trial Court without considering such discrepancy convicted the condemned prisoners and appellants which should be interfered with by this Court.

30. In support of his above submission, the learned Advocate places reliance on the case of the State Vs. Abdul Aziz and another reported in 23DLR (1971) 91 wherein it has been held that-

"When the defence fails to use the previous statement of a witness for contradicting him under section 161 of the Code of Criminal Procedure the Judge can himself put questions under section 165 of the Evidence Act in order to bring the discrepancies on record.

31. Mr S.M. Abul Hossain learned Advocate appearing for the condemned prisoner Selim submits that the FIR, Statements, recorded under section 161 of the Code, charge sheet and evidence of the prosecution have not been corroborated with each other and, as such, based on such unlinked circumstantial evidence the conviction and sentence are not well-founded and liable to be set aside.

32. The learned Advocate submits further that vital witnesses namely Farida, Abul Hossain, Abdus Samad Sardar, Siddiqur Rahman, Habibur Rahman, Ashraf Ali, Khokon Mia, Jahangir Alam, Kiron Mia, Golam Mostafa, Afaz Uddin, Manik Mia, Nobi Mia, Akbar Ali Majhi and Habibullah were not examined by the prosecution.

33. The learned Advocate submits that if those vital witnesses were examined by the prosecution they would not have supported the prosecution case.

34. The learned Advocate again submits that there is no legal evidence available on record to support the conviction and sentence as awarded against condemned prisoners and he prays for rejection of the Death Reference as well as acquittal of the condemned prisoners.

35. The learned Advocate finally submits that there is no legal evidence available on record to justify the death sentence as awarded to condemned prisoner Selim.

36. With the above submissions, all the learned Advocates for the condemned prisoners and the appellants pray for allowing the appeals as well as rejection of the death reference and pray for acquittal of the condemned prisoners and the appellants.

37. It appears from the record that the condemned prisoner Alam Sheikh was one of the appellants in Criminal Appeal No. 7532 of 2016 who died on 05.10.2021 and convict Most. Anwara Begum one of the appellants in Criminal Appeal No. 7897 of 2016 also died on 16.09.2019. In such facts and circumstances, the Death Reference and Criminal Appeal Nos. 7532 of 2016 and 7897 of 2016 would be abated so far it relates to the condemned prisoner Alam Sheikh and appellant Most. Anwara Begum.

38. To appreciate the arguments set forth by the learned Advocates of the contending parties we are to see the evidence adduced by the prosecution in justifying the death sentences as well as in awarding the life sentences.

39. For coming to a proper decision about the sustainability of the impugned judgment and order of conviction and sentence we need to assess and examine the evidence on record keeping in view of the charge framed. Accordingly, the relevant evidence on record are briefly discussed below.

40. It has already been mentioned that the prosecution produced and examined as many as 11(eleven) witnesses in order to prove the charge. Of them P.W. 1 Md. Asaduzzaman is the brother of the victim Sanaullah and the informant of the case; P.W. 2 Tara Miah at the relevant time was a member of the Managing Committee of the school; P.W. 3 Md. Atiqul Islam is the elder brother of the deceased Sanaullah and a brother of the informant, P.W. 4 Golam Mostafa is a neighbour; P.W.5 Md. Jashim Uddin is the father of the deceased Sanaullah; P.W. 6 Habibur Rahman is cousin of the deceased and at the time of the incident he was a student of class II. P.W. 7 Md. Babul Miah is the uncle of the deceased and also a seizure-list witness; P.W. 8 Dr Md. Haider Ali Khan who held the post-mortem of the body of the deceased; P.W. 9 Nasir Uddin alias Khokon is the uncle of the informant; P.W.10 Md. Mojibor Rahman Sub Inspector of Police who investigated the case and P.W. 11 Ismail Hossain is the maternal uncle of the deceased.

41. The P.W. 1 Md. Asaduzzaman, brother of the deceased and son of the P.W. 5 Md. Jashim Uddin deposed that accused Anwara and her husband Motaleb along with other accused persons made a complain to the father of the informant (P.W. 5) about the alleged outraged of modesty of their daughter Mariam by the deceased Sanaullah and at that time they threatened that they will pass judgment by themselves. He again deposed that accused Motaleb on 09.02.2001 went to his father's house and threatened them saying that might is right (জোর যার মুল্লুক তার). After that accused Motaleb left their home and in the morning of the following day, the dead body of Sanaullah was found in a schoolroom. But from the evidence of P.W. 5, father of the P.W. 1 (informant) we do not find such threat allegedly given by the accused Anwara and Motaleb, even P.W. 5 did not say that the accused Anwara and Motaleb at any point of time went to their house and threatened them with a dire consequence about the alleged outraged of modesty of Mariam, daughter of the accused Anwara and Motaleb.

42. P.W. 2 Tara Mia being a member of the Managing Committee of the school testified that the accused Anwara had made a compliant against the deceased Sanaullah to the Head Master of the School and after investigation they found that the allegation was false. He stated in his examination in cross that-

ডকে উপস্থিত আসামীদের চিনি। ডকে দাড়ানো আসামীরা সানাউল্লাকে হত্যা করেছে এই কথা আমি শুনি নাই।

So, this P.W. 2 had no knowledge about the assailants of the deceased Sanaullah.

43. P.W. 3 Md. Atiqul Islam, elder brother of the deceased Sanaullah and also a brother of the informant, though stated that on 09.02.2001 at 8.00 pm accused Selim, Motaleb, Rafiqul and Alam were searching for the whereabouts of the victim Sanaullah, but this P.W. 3, when made statement to the Investigation Officer, recorded under section 161 of the Code of Criminal Procedure, did not say as such, so inference can be drawn that the said accused persons did not search for the whereabouts of the deceased Sanaullah.

44. P.W. 4 Md. Golam Mostafa stated about searching for the deceased Sanaullah by accused Rafiqul and his companion accused Alam Sheikh, Anar Hossain and he told that fact

of searching to the uncle of deceased Md. Babul Mia, P.W. 7 but P.W. 7 did not say so in his evidence.

45. P.W. 6 Habibur Rahman on the date of occurrence was a student of class II. From his evidence, it appears that he had no knowledge about the assailants of the deceased Sanaullah.

46. P.W. 7 Md. Babul Mia, uncle of the deceased, stated the fact of threat, given by some of the accused persons, saying that "might is right". This P.W. 7 stated in his cross-examination that he was present at Salish held about the alleged outraged of modesty of daughter of accused Motaleb and Anwara, but from the evidence of the P.W. 2, a member of the Managing Committee and other evidence on record we do not find that he was at all present at so-called Salish allegedly held regarding misunderstanding about Mariam daughter of accused Anwara and Motaleb.
In his cross-examination, he again said that –
আসামীরা সানাউল্লাহকে মারিয়াছে উহা আন্দাজ করিয়া বলিয়াছি। সানাউল্লাহকে আসামীরা ডাকিয়া নিয়া গিয়াছে, কিংবা সানাউল্লাহকে আসামীরা খুন করিয়াছে ইহা আমাকে কেউ বলে নাই।
So, from the evidence of this P.W. 7, it appears that in fact, he had no knowledge about the killing of the deceased Sanaullah.

47. P.W. 8 Dr Md. Ali Haider held post-mortem of the body of the deceased Sanaullah; who found the following injuries on the dead body.

"(1) One circular Bruise around the neck having five cm breadth.
(2) One Abrasion back of the neck on the left side (3 X 1) cm.
(3) Swelling over the centre of the forehead (2 X 1) cm."

Finally, P.W. 8 made his opinion about the death of Sanaullah that "Death was due to asphyxia resulting from strangulation which was Ante-mortem and Homicidal in nature".

48. P.W. 9 Nasir Uddin alias Khokon, uncle of the informant, though in his examination-in-chief stated that he along with accused Motaleb went to Chalar Bazar on Friday evening and accused Atiqul, Rafiqul, Motaleb, Noyon, Kamal, Alam along with 7/8 persons were searching about the whereabouts of deceased Sanaullah.

49. However, we have meticulously examined the evidence of P.W. 9 and have seen his statement made to the Investigation Officer during the investigation of the case, recorded under section 161 of the Code of Criminal Procedure, wherefrom it transpires that he did not say as such about searching the whereabouts of the victim Sanaullah by the accused persons.

50. P.W. 10 Md. Mojibor Rahman, Sub-Inspector of Police was the Investigating Officer of the case who arrested 7(seven) accused persons and on his prayer, the accused persons were taken into remand but they did not say anything about the killing of deceased Sanaullah nor make any statement under section 164 of the Code of Criminal Procedure, even the accused persons did not make any extra-judicial confessional statement about the occurrence. He visited the place of occurrence and prepared a sketch map and index. He prepared an inquest report and sent the dead body for post-mortem report.

51. After investigation, he submitted charge sheet against all the accused persons having been found prima facie case against them punishable under sections 302/34 of the Penal Code. He produced and proved the sketch map Exhibit-5, his signature therein Exhibit-5/1, the index Exhibit-6, his signature therein marked Exhibit-6/1, the seizure list Exhibit-7, his signature therein Exhibit-7/1, another seizure list dated 13.02.2001 Exhibit-8 and his

signature therein Exhibit-8/1. He also produced an application filed by accused Anwara Begum to the Headmaster of the school which was marked as Exhibit-9.
In his cross-examination, this P.W. 10 stated that-

> "Deceased রাত্র ১০ টায় চালার বাজার যায়। সেখান থেকে মনোহরদী চাচার বাড়ীর দিকে রওনা হয়। deceased এর বাড়ী হইতে চালার বাজার কতদুরে জানা নাই। তদন্ত কালে রিক্সা ওয়ালাকে পাই নাই।..... .....
> আসামীদের গ্রেফতার করিয়াছিলাম এবং Remand এর আবেদন করি। আসামী আতিকুল ও মোতালেবকে Remand এ নেই। কিন্তু তাহারা মামলার ঘটনার বিষয়ে কিছুই স্বীকার করে নাই। পরে আরও ২ জনকে Remand এ নেই। তাহারাও অপরাধের কথা স্বীকার করে নাই। আসামীদের নিকট হইতে কিছু তথ্য পাওয়া গিয়াছে। মর্মে উল্লেখ আছে। বাদী পক্ষের কারও কাছ থেকে কোন আলামত পাই নাই। পুলিশের কনষ্টেবল এর নিকট হইতে লাশের গায়ের আলামত পাওয়া যায়। আমি ২১ জনের জবানবন্দী ফৌঃ কাঃবিধির ১৬১ ধারামতে রেকর্ড করি। উক্ত সাক্ষীদের মধ্যে কেহ Deceased সানাউল্লাহকে হত্যা করিতে দেখিয়াছে মর্মে কোন সাক্ষী নাই। deceased সানাউল্লাহকে কে রিক্সা থেকে নামাইয়া হত্যার ঘটনাস্হল স্কুলে নিযা. যাইতে দেখার কোন সাক্ষীও আমি পাই নাই।

52. P.W. 11 Ismail Hossain, maternal uncle of the deceased, stated that he found the dead body of victim Sanaullah in a room of Hatibandha Primary School under Gaktia Union with a scarf around his neck. But the other evidence on record shows that the dead body of deceased Sanaullah was found on a floor in Singhua Fakir Sahabuddin Girls High School.
In his cross-examination, he stated that-

> সানাউল্লাহ কিভাবে মারা যায় জানি না । মারা যাওয়ার খবর পাইয়া আমিও গেছি আরো অনেক লোক গেছে।

So, from the evidence of this P.W. 11 it transpires that in fact, he had no knowledge about the cause of death of victim Sanaullah, even in his deposition he mentioned a different place than the real place of occurrence.

53. In the instant case, the rickshaw puller was a vital witness, but he was not produced before the Court by the prosecution. No GD entry was lodged about the alleged threat made by the accused persons. From the evidence of the informant (brother of the deceased), it appears that he had no knowledge about by whom his brother was taken away from the street and murdered him when the victim allegedly at night following 09.02.2001 was going to his uncle's house at Narindi from Chalar Bazar through a rickshaw. In the following morning, the dead body of the victim was found in Singua Fakir Sahabuddin Girls High School with a scarf around his neck. It is not clear from the evidence as adduced by the prosecution that under what circumstances, wherefrom and when the deceased started for Narindi from Chalar Bazar through a rickshaw and wherefrom he was missing. So, the prosecution failed to prove time, place and manner of occurrence having produced reliable evidence and this case is based on unlinked circumstantial evidence.

54. In the instant case, it appears that incriminating evidence or circumstances sought to be proved against the accused persons were not drawn to the attention of the accused persons during examination under section 342 of Cr.PC caused a gross miscarriage of justice. The prosecution examined 11(eleven) witnesses as P.Ws but during the examination of the accused persons under section 342 of Cr.PC, the learned Judge mentioned that the prosecution examined 10(ten) witnesses inasmuch as the incriminating evidence was not drawn to the attention of the accused persons which caused a gross miscarriage of justice. We find support of our aforesaid view, in the case of Mizanul Islam @ Dablu Vs. the State, reported in 41 DLR (AD) 157, wherein it was held that-

> *"Incriminating evidence or circumstances sought to be proved by the prosecution must be put to the accused during examination under section 342 of Cr.PC otherwise it would cause a miscarriage of justice to the great prejudice of the accused."*

Let us address the principle of circumstantial evidence from our jurisdiction as well as Indian decisions.

55. The rule as regards sufficiency of circumstantial evidence to be the basis of conviction is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis than that of his guilt. If the circumstances are not proved beyond reasonable doubt by reliable and sufficient evidence and if at all proved but the same cumulatively do not lead to the inevitable conclusion or hypothesis of the guilt of the accused alone but to any other reasonable hypothesis compatible with the innocence of the accused then it will be a case of no evidence and the accused should be given benefit of doubt. If there is any missing link in the chain of circumstances, the prosecution case is bound to fail. In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond a reasonable doubt. If the witness examined to prove the circumstances are found to be unreliable or their evidence is found to be unacceptable for any other reason the circumstances cannot be said to have been proved and therefore there will be no occasion to make any inference of guilt against the accused. Circumstantial evidence required a high degree of probability, from which a prudent man must consider the fact that the life and liberty of the accused person depend upon his decision. All facts forming the chain of evidence must point conclusively to the guilt of the accused and must not be capable of being explained on any other reasonable hypothesis. Where all the evidence is circumstantial it is necessary that cumulatively its effect should be to exclude the reasonable hypothesis of the innocence of the accused.

56. It is the established principle that the circumstances to be related upon by the prosecution must be fully established and the chain of evidence furnished by the circumstances should be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The prosecution should have to prove various links in the chain of evidence to connect the accused and must clearly be established. The complete chain must be such as to rule out a reasonable likelihood of the innocence of the accused. The court is required to satisfy its test to prove a case on circumstantial evidence. Firstly, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. Secondly, those circumstances must be of a definite tendency are unerringly pointing toward the guilt of the accused, and thirdly, the circumstances taken cumulatively should follow a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The Indian Supreme Court held the essential ingredients to prove guilty of an accused person by circumstantial evidence which are: (1) The circumstances from which the conclusion is drawn should be fully proved; (2) the circumstances should be conclusive in nature; (3) all the facts so established should be consistent only with the

hypothesis of guilt and inconsistent only with the hypothesis of guilt and inconsistent with the innocence and (4) the circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused.

57. It appears that a misunderstanding was existing between the parties before the occurrence over the alleged outrage of modesty of Mariam daughter of convict Motaleb and Anwara by deceased Sanaulla.

58. In this connection, the time gap that occurred between the discovery of the dead body of the victim and the lodging of the FIR needs to be noticed. The informant got the information about the death of his brother Sanaullah at about 7.00 am on 10.02.2001 and the FIR was lodged after 8 hours of such information. Thus, it appears that 8 hours of time was available under the disposal of the informant for consultation and deliberation. But the informant did not mention anything in the FIR about the threat allegedly given by the accused persons saying that "might is right" and alleged searching in the evening on 09.02.2001 about the whereabouts of victim Sanaullah by the accused persons.

59. So, prosecution evidence about the threat and search for the victim Sanaullah in the evening on 09.02.2001 appears to be subsequent embellishment and nothing else. In the FIR itself, it is noted that the accused persons are suspected to be the murderer of the brother of the informant. It is a settled law that suspicion or doubt however strong might be, cannot be the basis of conviction.

60. The trial Court has misconceived the principle of dealing with circumstantial evidence. It appears that none of the circumstantial evidence referred by the trial Court in his judgment points conclusively to the guilt of the condemned prisoners as well as the appellants. Therefore, such circumstantial evidence being not compatible with the conviction of the condemned prisoners as well as the appellants cannot form the basis of conviction.

61. A criminal trial is not like a fairy tale as one is free to give flight to one's imagination and fantasy. It concerns itself with the question of whether the accused arranged at trial is guilty of the crime with which he is charged. Crime is evil in real life and the product of the interplay of different human emotions. In arriving at the conclusion of the guilt of the accused, the court has to judge the guilt by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. Although benefits of reasonable doubt should be given to the accused. Of course, the court at the same time rejects evidence that ex-facie is unreliable and too artificial.

62. In criminal cases, the prosecution is not required to prove the motive behind the crime but if the prosecution assigned the motive behind the crime, it must prove it. But in the instant case, though the prosecution assigned a motive behind the cause of death of deceased Sanaullah, it failed to prove such motive beyond a reasonable doubt.

63. About the decisions, as referred to by the learned DAG, we find the same is not applicable in the context of present facts and circumstances of the case in hand and accordingly the same is not discussed. On the other hand, we find a good deal of force in the submissions, as well as the decisions, referred to by the learned Advocates for the condemned prisoners and respective appellants.

64. Thus, having considered the entire evidence on record, facts and circumstances, we are of opinion that order of conviction is not sustainable in law.

65. In the result, the Death Reference No. 103 of 2016 in respect of condemned prisoners (1) Md. Rafiqul Islam, son of Abdur Razzak (2) Anar Hossain, son of Shamsuddin Sheikh (3) Selim, son of Nizam Uddin (4) Noyon, son of Bashir Uddin and (5) Atiqul Islam, son of Abdur Razzak is rejected. The order of conviction and sentence passed by the learned Additional Sessions Judge, 1st Court, Gazipur in Sessions Case No. 181 of 2003 is hereby set aside and the condemned prisoners and the appellants are found not guilty to the charge levelled against them and they are set at liberty forthwith if not wanted in any other case.

66. The Death reference, Jail Appeal No. 294 of 2016 as well as Criminal Appeal No. 7532 of 2016 so far relates to condemned prisoner Alam Sheikh being abated at his death during the pendency of the appeal.

67. The Criminal Appeal No. 7897 of 2016 so far relates to the convict-appellant Anwara Begum being also abated at her death.

68. The Criminal Appeal No. 7532 of 2016 preferred by the convict-appellants Rafiqul Islam, Anar Hossain, Noyon, Atiqul Islam is allowed. Similarly Criminal Appeal No. 7897 of 2016 preferred by convict-appellant Abdul Motaleb and Sheikh Shamsuddin is allowed and Criminal Appeal No. 7463 of 2016 preferred by convict-appellant Selim is also allowed.

69. The Jail Appeal Nos. 290 of 2016, 291-293 of 2016 and 295 of 2016 are hereby allowed.

70. Let the lower Court's records along with a copy of this judgment be sent to the Court concerned forthwith for necessary action.