

16 SCOB [2022] HCD 161**HIGH COURT DIVISION**

Death Reference No.34 of 2015 with Jail
Appeal No.77 of 2015

The State

..... Petitioner

Vs.

Rasu Kha

..... Condemned-Prisoner

Mr. Md. Ashaque Momin, D.A.G with
Mr. Shaheen Ahmed Khan, D.A.G. with
Mrs. Kazi Shahanara Yeasmin, D.A.G.
with

Mr. Mehadi Hasan, A.A.G with
Mrs. Ayesha Flora, A.A.G

..... For the State

Mrs. Nargis Aktar, State Defence Lawyer

..... For the Condemned-Accused

Heard on 02.03.2020, 08.03.2020,
09.03.2020, 10.03.2020 and Judgment
11.03.2020

Present:

Mr. Justice Shahidul Karim

And

Mr. Justice Md. Akhtaruzzaman

Editors' Note:

In the instant case trial Court handed down death penalty to the accused on the basis of his confessional statement. High Court Division, on the other hand, found the confessional statement untrue inasmuch as medico-legal evidence runs counter to the manner of commission of offence described in confessional statement. High Court Division also found that the learned trial judge had based his findings on some hypotheses not established by evidence on record and contrary to the findings of the post mortem report. Therefore, the High Court Division rejected the death reference and acquitted the accused.

Key Words:

Section 302 of Penal Code; strangulation; drowning; confessional statement; prolonged police custody; time, place, manner; impartial arbiter;

Untrue confession is not tenable in law:

From the aforesaid discussions it transpires palpably that the unknown deceased woman was killed by strangulation (শ্বাসরোধ), not by drowning (ছবিয়ে) as was disclosed by accused Rasu Kha in his confessional statement. Thus, it is clear that the deceased victim woman was killed not in the manner as was stated by accused Rasu Kha which has miserably exposed the untrue character of his alleged confession rendering the veracity of the same highly questionable as well as untenable in law. ... (Para 66)

In a criminal case time, place and manner of occurrence are required to be strictly proved beyond reasonable doubt:

It is to be noted that in a criminal case time, place and manner of occurrence are the 3(three) basic pillars upon which the foundation of the case stand on and the same are required to be strictly proved beyond reasonable doubt by the prosecution in a bid to ensure punishment for an offender charged with an offence. If in a given case any one of the above 3(three) pillars is found lacking or proved to be untrue then it will adversely

react upon the entire prosecution story. The same thing has happened in the instant case inasmuch as according to the prosecution story the deceased woman was killed by drowning, whereas as per medico-legal evidence furnished by P.W.11 Dr. Habibur Rahman, the victim was killed by strangulation and thereafter her dead body was abandoned in the water. The inquest-report also does bear out the aforesaid cause of death of the victim woman. Therefore, it is clear like anything that the prosecution has miserably failed to prove the manner of occurrence of the incident. Viewing from this angle there is no hesitation in saying that the confession alleged to have been made by accused Rasu Kha is not true so far as it relates to the manner of occurrence of the incident in concerned. ... (Para 67)

Conjecture or hypothesis however strong it might be, cannot be the substitute for evidence:

In our criminal justice delivery system there is no scope to lean on hypothesis or conjecture instead of proof of the manner of occurrence by sufficient evidence to find out the guilt of an accused charged with an offence. It is the settled principle of law that conjecture or hypothesis however strong it might be, cannot be the substitute for evidence. In such a backdrop, it can be concluded that the learned judge of the court below erred in law in adjudging the culpability of the accused in the killing incident of the deceased woman by the impugned judgment and order which has utterly failed to withstand the legal scrutiny. ... (Para 69)

Under no circumstances, a judge should abandon his high place of impartial arbiter and assume the role of a prosecutor, however altruistic its motive may be:

Having ignored the medico-legal evidence the trial court also presumed that the scar marks and other injuries found on the person of the victim woman are of old nature. But, on the basis of those scar marks including other injuries found on the chest and female organ of the victim woman P.W.11 Dr. Habibur Rahman categorically opined that the victim woman was subjected to rape before her death. In such a scenario, without any tangible materials, there is left no room for the learned Additional Sessions Judge to presume that those injury and bite marks were old in character. It is to be recalled that a judge is considered to be an impartial and neutral arbiter. Under no circumstances, he should abandon his high place of impartial arbiter and assume the role of a prosecutor, however altruistic its motive may be. ... (Para 73)

Confession of the accused was preceded by a prolonged police custody which has seriously affected the involuntary character of the same:

It is undeniable that accused Rasu Kha was first arrested on 06-08-2009 from Gazipur Bazar in connection with another case filed with Faridgonj P.S. Chandpur and thereafter, he was shown arrested in the instant case on 15-10-2009 while he was also under police custody in connection with the earlier one and further that he was again taken on remand in the present case and eventually, he was produced before the relevant Magistrate court on 18-10-2009 by the investigation officer (P.W.6) with a prayer for recording his confession. Materials on record also do bear out the aforesaid factual events of the case. Therefore, it is patent that the confession of the accused was preceded by a prolonged police custody which has seriously affected the involuntary character of the same. ... (Para 75)

It is to be noted further that charge of murder must be proved to the core beyond doubt by consistent and reliable evidence. When there is departure from the manner of

occurrence as alleged by the prosecution found in the evidence during trial, the veracity of the prosecution case becomes doubtful and in such a case conviction and sentence cannot be sustained in the eye of law. ... (Para 78)

JUDGMENT

Shahidul Karim, J.

1. This death reference under section 374 of the Code of Criminal Procedure (for short, the Code) has been submitted by the learned Additional Sessions Judge, Chandpur for confirmation of the death sentence awarded to condemned-accused Rasu Kha. By the impugned judgment and order dated 22-04-2015, the learned Additional Sessions Judge of the court below convicted accused Rasu Kha under Sections 302 and 201 of the Penal Code and sentenced him there under to death along with a fine of Tk.50,000/- and 7 (seven) years rigorous imprisonment along with a fine of Tk.10,000/-, in default, to suffer imprisonment for 1(one) year more respectively in Sessions Case No.156 of 2010, arising out of Chandpur P.S. Case No.19 dated 18-12-2008, corresponding to G.R. No.547 of 2008 and thereafter, submitted the entire proceedings of the case for confirmation of the death sentence imposed upon the accused. Against the aforesaid judgment and order of conviction and sentence, condemned-accused Rasu Kha has also preferred Jail Appeal No.77 of 2015.

2. Since the death reference and the connected Jail Appeal sprouted from the same judgment and order of conviction and sentence, they have been heard together and are being disposed of by this single judgment.

3. The prosecution case arose out of an infernal incident in which an unknown forlorn young woman aged about 18-19 years was done to death by strangulation (শ্বাসরোধ) and thereafter her cadaver was abandoned in the river.

4. The prosecution case as projected in the FIR as well as unfurled during trial, in brief, is that P.W.6 S.I. Md. Nazrul Islam, while working at Chandpur Model Police Station, on 18-12-2008, received an information over mobile phone from Md. Zakir Hossain, Member of Ward No.7, Chandpur Police Station that the dead body of an unknown woman aged about 19 years was found floating on the western bank of Dakatia River near the house of one Abdur Rasid Mizi of Sobahanpur village under Bagadi Union Parishad No.8. Having received such news, P.W.6 along with other police personnel rushed to the spot on the strength of a G.D. being No. 756 dated 18-12-2008. After reaching the spot P.W.6 found the dead body of an unknown young woman with her both hands tied from behind to her respective legs with a torn part of yashmak. Except head, the entire body of the deceased woman was found floating in the river. Eventually, the dead body was recovered from the river whereupon P.W.6 held inquest of the same and obtained signature of the witnesses present there and sent it for autopsy through Constable Abdur Rob vide Chalan Exhibit No.3. P.W.6 also seized two parts of a pink coloured scarf and a part of pink coloured veil which were found beside the dead body vide seizure list Exhibit No.2. Thereafter, P.W.6 being informant lodged the formal FIR with Chandpur Police Station which gave rise to Chandpur Police Station Case No. 19 dated 18-12-2008.

5. After lodgment of the case, the task of investigation was entrusted to P.W.13 S.I. Chironjib Das who, during investigation, visited the place of occurrence, prepared sketch map thereof along with index, examined witnesses under section 161 of the Code and circulated the photographs of the deceased woman to different nearby police stations in order

to ascertain her whereabouts and also obtained the post-mortem report. Eventually, having failed to unearth the real perpetrator of the crime as well as the identity of the deceased victim, P.W.13 submitted final report as true (FRT) being No. 427 dated 27-06-2009 under section 302/34 of the Penal Code.

6. While the matter was awaiting for order before the concerned Judicial Magistrate Court, accused Rasu Kha made a confessional statement in connection with Faridgonj Police Station Case No. 15 dated 15-07-2009, corresponding to G.R. No. 122 of 2009, wherein he unravelled the killing incident of the instant case and also made a detailed account of other crimes already committed by him in respect of other women.

7. Having received such information, on the prayer of the concerned police, the learned Magistrate directed to cause further investigation in the instant case, whereupon the task thereof was endowed with P.W.6 S.I. Md. Nazrul Islam who, during investigation, again visited the place of occurrence, examined some witnesses and recorded their statements under section 161 of the Code and also interrogated accused Rasu Kha upon taking him on remand. Since, on preliminary quizzing, accused Rasu Kha admitted to his guilt, P.W.6 made necessary arrangements for recording his confession by a competent Magistrate. Eventually, having found prima-facie incriminating materials P.W.6 submitted charge-sheet against accused Rasu Kha under Sections 302/201 of the Penal Code.

8. At the commencement of the trial, the accused was indicted under the aforesaid Sections of law to which he abjured his guilty and expressed his desire to face trial.

9. In order to prove the charge the prosecution adduced as many as 13 witnesses who were cross-examined by the defence.

10. After closure of the prosecution witnesses, the accused was called upon to enter into his defence under section 342 of the Code while he repeated his innocence and also declined to adduce any evidence.

11. The defence case that could be gathered from the trend of cross-examination of the prosecution witnesses is of complete innocence and false implication. The further case of the defence is that the confession of the accused is not voluntary and true rather it was extracted from him by applying 3rd degree method.

12. Eventually, upon taking hearing from both sides and on an appraisal of the evidence and materials on record, the learned Additional Sessions Judge came to the conclusion that the prosecution has been able to bring home the charge mounted against the accused to the core and accordingly, convicted and sentenced him in the manner as noted at the outset.

13. Feeling aggrieved thereby, the condemned accused has preferred the instant Jail Appeal being No.77 of 2015. As we have already noticed, the learned Additional Sessions Judge has also submitted the entire proceedings of the case for confirmation of the death sentence imposed upon the accused.

14. Mr. Shaheen Ahmed Khan with Mr. Md. Ashaque Momin, learned Deputy Attorneys General along with Mr. Mehadi Hasan, learned Assistant Attorney General appearing on behalf of the State and in support of the death reference at the incept has shouldered the painstaking task of placing the FIR, charge-sheet, charge, deposition of witnesses, inquest as

well as post-mortem report, confessional statement of the accused, impugned judgment and order of conviction and sentence including other materials available in the paper book and then submits emphatically that the prosecution has been able to prove the charge levelled against the accused by some cogent and trustworthy evidence. According to him, the occurrence took place in a remote area of a village and that too during the night time and, as such, it was not possible on the part of the prosecution to adduce any eye witnesses of the occurrence leading to the incident of murder of the deceased victim following which the prosecution had no other option but to rely on the circumstantial evidences. He further contends that accused Rasu Kha admitted his guilt in committing the murder of the deceased victim by drowning which has also got support and corroboration from the inquest as well as post-mortem report. He next submits that the facts narrated by accused Rasu Kha in his confessional statement also received corroboration from the seizure list (Exhibit No.2) as well as from the 2(two) photographs of the deceased woman (Exhibit Nos.6 and 7). The relevant Magistrate who penned down the confession has also proved the authenticity as well as the veracity of the confession by giving evidence in the court as P.W.12 and further that the accused did not raise any objection whatsoever regarding the nature and character of the confession while he was being examined under section 342 of the Code, the learned Deputy Attorney General further added. Finally, he submits that having considered the confessional statement together with the surrounding facts and circumstances of the case the learned Additional Sessions Judge rightly and correctly found the culpability of accused Rasu Kha in the killing incident of the unknown deceased woman and accordingly convicted and sentenced him thereunder by the impugned judgment and order which, being well founded both in law and facts, does not call for any interference by this Court.

15. Per contra, Mrs. Nargis Aktar, learned State Defence Advocate appearing on behalf of condemned-appellant Rasu Kha has strenuously assailed the impugned judgment and order of conviction and sentence contending that the prosecution has miserably failed to bring home the charge brought against the accused by adducing some impregnable, trustworthy and unblemished evidence as there is no eye witnesses of the occurrence leading to the incident of murder of the deceased victim. She has tried to impeach the veracity of the impugned judgment and order on the following counts:

1. that the confessional statement of the condemned-accused was preceded by prolong police custody which has rendered the same involuntary in nature and therefore, no reliance can be placed upon it;
2. that as per inquest and post mortem report, the victim was killed by strangulation (শ্বাসরোধ), whereas in his confession the accused gave out that he killed an unknown girl by drowning which is totally incongruous to the medico-legal evidence suggesting that the confession of the accused is not true so far the cause of death is concerned;
3. that as per doctor's (P.W.11) opinion, the victim girl was killed by strangulation (শ্বাসরোধ) and further that she did not died from drowning;
4. that as per confession, the accused had sexual intercourse with the deceased victim with her consent, whereas according to medico-legal evidence (Exhibit No.10), the victim girl was subjected to rape;
5. that the circumstances of the case do not also bear out the confession of the accused inasmuch as the occurrence came to pass in the middle part of December i.e. in winter season but no such winter garments were recovered either from the place of occurrence or from the body of the deceased victim; and
6. that the investigation of the case was done in a shoddy manner in that the I.O. did not take any positive step to verify the facts narrated by the accused in his confession

and further that even the identity of the deceased victim woman has remained undisclosed.

16. Mrs. Nargis finally submits that the prosecution has hopelessly failed to bridge the accused with the alleged offence in spite of that the learned Additional Sessions Judge most illegally convicted and sentenced him for the alleged killing of the unknown deceased victim by the impugned judgment and order which is liable to be scrapped being devoid of any substance. In support of her submission, the learned State Defence Advocate has relied upon the decisions reported in 36 DLR 185, 54 DLR 80 and 5 MLR (HC) 133.

17. In order to appreciate the aforesaid rival submissions put forward by both the parties, we are required to advert to and scrutinize the relevant evidences on record together with the facts and circumstances of the case by juxtaposing the prosecution case with that of the defence version of the story.

18. In his evidence P.W.1 Md. Yunus Mizi, an inhabitant of P.O. village Sobahanpur says that in the morning of 18-12-2008 while he was in his residence, he came to learn that the dead body of an unknown woman was found lying on the bank of Dakatia River at Sobahanpur village. Having heard such news, he along with others went to the spot and found the dead body of an unknown woman aged 18/19 years with her both hands tied from behind to her respective legs and further that some part of the dead body was found on the ground and the rest part was floating in the water. The whereabouts of the woman could not be known instantly. Eventually, police appeared at the spot and took away the dead body for autopsy. After a long interval, he came to learn through newspaper that accused Rasu Kha killed the woman upon bringing her from Dhaka.

19. In reply to cross-examination P.W.1 states that he knew nothing about the death of the victim woman and further that he did not hear the name of accused Rasu Kha from any ocular witness.

20. NP.W.2 Md. Yusuf is another resident of P.O. village. This witness was tendered by the prosecution.

21. In reply to cross-examination P.W.2 simply discloses that he saw the dead body of a woman, but he did not know her whereabouts.

22. In his testimony P.W.3 Md. Harun Patwary, another inhabitant of P.O. village says that in the morning of 18-12-2008 while he was in his homestead, he got news that the dead body of an unknown woman aged about 18/19 years was found lying on the bank of Dakatia River running through their village. On receiving such news, he went to the spot and found the dead body of a woman with her both hands tied to her respective legs from behind with parts of scarf and veil. Nobody could identify the woman immediately. Eventually, police appeared in the scene and held inquest (Exhibit No.1) of the dead body and obtained his signature thereto (Exhibit No.1/1). On 18-12-2008 police seized the aforesaid parts of scarf and yashmak with which the hands and legs of the victim woman were tied up vide seizure list Exhibit No.2 and obtained his signature thereto. Ultimately, police took away the dead body to morgue.

23. In reply to cross-examination P.W.3 divulges that he knew nothing except seeing the dead body on the bank of Dakatia River.

24. P.W.4 Shahid Bepari is also an inhabitant of P.O. village. This witness unveils identical story like P.Ws.1 and 3 so far the factum of seeing the dead body of an unknown woman on the bank of Dakatia River with her both hands fastened to her respective legs from behind is concerned. This witness also proves the inquest-report drew up by the police including the factum of seizure of yashmak and scarf found on the spot.

25. In reply to cross-examination P.W.4 states that he received the death news on a foggy morning and further that he did not know anyone named Abid Mal in their locality. He could not say as to who killed the victim woman since he did not witness the incident. The place of occurrence is about $\frac{1}{2}$ mile away from his (P.W.4) residence. This witness further states that vessels are used to ply the P.O. River.

26. P.W.5 Zafar Ullah Kha is another resident of P.O. village. This witness was also tendered by the prosecution for cross-examination.

27. In reply to cross-examination P.W.5 asserts that he came to learn from public conversation that a dead body was found lying on the western bank of Dakatia River at Sobahanpur village whereupon he visited the spot and found a lot of people there. He was in Chandpur Jail. This witness further states that sand carrying trawlers are used to run through Dakatia River and that he did not know the whereabouts of the victim woman.

28. P.W.6 S.I. Md. Nazrul Islam is the informant as well as final investigation officer of the case. In his testimony this witness gives out that on 18-12-2008 while he was posted at Chandpur Model Police Station, Md. Zakir Hossain, Member of ward No.7 informed him over mobile phone that the dead body of an unknown woman was found lying on the western bank of Dakatia River located on the eastern side of the homestead of one Abdur Rashid Mizi, whereupon he entered the news in a G.D. entry being G.D. No.756 dated 18-12-2008 and thereafter, proceeded to the spot where he found the cadaver of an unknown woman with her both hands tied to her respective legs from behind and further that the upper part of the dead body was found grounded while the remaining portion was seen floating in the water. Eventually, he drew the inquest of the corpse upon pulling it up on the road and obtained signatures of the witnesses thereto and sent it to morgue for post-mortem examination through constable A. Rob vide challan Exhibit No.3 and also seized 2(two) parts of a pink coloured scarf and yashmak vide Exhibit No.2. Eventually, after returning back he filed the FIR (Exhibit No.4) with Chandpur P.S. This witness proves the FIR form and the signature of the then officer-in-charge, Nurul Amin appearing thereon as Exhibit Nos.5 and 1/5 respectively since he was acquainted with the handwritings of the latter. This witness proves the 2(two) photographs of the victim woman which were captured by him as Exhibit Nos.6 and 7 and also identified the seized scarf and veil in the court as Material Exhibit Nos.I and II.

29. In reply to cross-examination P.W.6 unfurls that the occurrence came to pass at any time from 17-12-2008 to 18-12-2008. In the night of occurrence he was not on duty. Having visited the spot, he found the dead body of a woman, aged about 19 years, with her hands and legs tied up. Member Zakir made a phone call to the police station. He (P.W.6) did not find any letter alongside the dead body. At the time of lodgment of the case, he did not know as to who committed the murder.

30. Record reveals that P.W.6 S.I. Nazrul Islam was again examined on 13-06-2013 by the learned judge of the court below as investigation officer of the case figuring him out as

P.W.6. In his subsequent testimony this witness claims that the previous investigation officer of the case submitted final report as true (FRT) being No.427 dated 27-06-2009 under section 302/34 of the Code which was pending before the concerned court for acceptance. In the meantime, accused Rasu Kha was nabbed by the police of Faridgonj P.S. in connection with another case in which he gave confessional statement while he also unveiled his other criminal activities. After obtaining a copy of the said confession, it was found that the relevant accused unraveled the story of the instant case following which the investigation of the instant case was resumed by the court concerned on the payer of the officer-in-charge and thereafter, the task of investigation was handed over to him. During investigation, he (P.W.6) consulted the case docket, visited the place of occurrence and also verified the sketch map along with index thereof but he did not draw the same as it was found correct. Moreover, he examined some witnesses and jotted down their statements, interrogated accused Rasu Kha and another accused after taking them on demand. On quizzing, accused Rasu Kha confessed to his guilt disclosing that the name of the victim woman is Shahida whom he brought to Chandpur from Dhaka Cantonment area and thereafter killed her after committing rape. Following which, he (P.W.6) took necessary measures to get the confessional statement of accused Rasu Kha recorded by a competent Magistrate. Eventually, having found prima-facie incriminating materials, he submitted charge-sheet against Rasu Kha under section 302/201 of the Penal Code.

31. In reply to cross-examination P.W.6 states that the colour of the veil of the victim woman was pink and further that a torn part of the same was used to fasten her up. It was not mentioned in the inquest report that the victim woman was clad in a yashmak. Rather, as per inquest-report, the pink coloured veil was found floating beside the dead body. A photographer of studio took the photographs of the dead body and that witnessing the same accused Rasu Kha admitted that he murdered her. He could not trace out the existence of the alleged victim Shahida by sending inquiry slips to Tangail and Kalihati P.S as disclosed by the accused in his confession. This witness further says that he did not send any inquiry slip to the permanent address of the victim woman as disclosed by accused Rasu Kha in his confession. P.W.6 denied the defence suggestions that accused Rasu Kha did not make any confession out of his own will rather it was extracted from him by torture or that the investigation was done in a shoddy manner.

32. P.W.7 Abid Mal is another resident of P.O. village. This witness also divulges in his evidence that on 18-12-2008 he was in his residence while he got information that a dead body was found lying in Dakatia River. Having received such news, at around 10/10.30 am he went to the spot and found the dead body of an unknown woman, aged 18/19 years, with her both hands fastened to her respective legs from behind. Police appeared in the scene, prepared inquest-report, seized wearing apparels of the deceased woman and eventually went away along with the dead body. He (P.W.7) heard that accused Rasu Kha killed the unknown victim.

33. In reply to cross-examination P.W.7 says that he did not know accused Rasu Kha and further that he did not witness the incident of killing. This witness also states that he could not tell whether any letter or mobile was found or not along with the dead body.

34. P.W.8 Billal Mal was tendered by the prosecution.

35. In his cross-examination P.W.8 simply says that at around 10.45 am in the morning he went to the bank of the river wherein he found the cadaver of a woman. P.W.8 denied the defence suggestion that he has been working as a police source.

36. P.W.9 Md. Zakir Hossain Hiru is a teacher by profession. In his testimony this witness unfurls that in the morning of 18-12-2008 he came to learn that the dead body of a woman was found on the bank of Dakatia River at Sobahanpur village. Being secretary of the community police, he then went to the spot and found the cadaver of an unknown woman including police personnel as well as a huge number of people. After preparation of inquest report, police took away the dead body to morgue. He (P.W.9) could not say as to who killed the woman.

37. In reply to cross-examination P.W.9 states that the spot is 1(one) kilometer away from his residence. He has been serving as a madrasa teacher. He did not know as to who is the killer.

38. P.W.10 Siraj Mridha was also tendered by the prosecution for cross-examination. This witness in fact disclosed nothing new in his cross-examination except the factum of knowing the incident as well as the matter of taking away the dead body by the police.

39. P.W.11 Dr. Habibur Rahman is the relevant doctor who on 18-12-2008 carried out post-mortem examination of the dead body of an unknown woman and found the following injuries on dissection:

One continuous diffuse swelling in the neck, abrasion over both wrist joint, subcutaneous tissue of neck, trachea and esophagus congested; blood clot in muscle spaces of neck and both lungs highly congested. Injuries of variable size were found in vagina with clotted blood. All blood clots resist on washing.

40. According to him, death of the deceased woman was caused due to asphyxia resulting from strangulation which was ante-mortem and homicidal in nature and further that the injuries found in the genitalia consistent with rape before the murder of the victim.

41. This witness proves the post-mortem report including his signature appearing thereon as Exhibit Nos.10 and 1/10.

42. In reply to cross-examination P.W.11 discloses that he did not find any mark of injury in the ankle of the dead body. On physical appearance he mentioned the age of the deceased as about 19 years, but no x-ray was done. The woman was killed by strangulation and her lungs were found congested. The victim woman did not die from drowning. Rather, the victim was killed by strangulation and thereafter, her dead body was abandoned in the water. Presence of water could have been traced in the lung, if she was killed by drowning. Several injuries of variable size were found in the vagina of the deceased victim and further that the blood found was not the outcome of menstruation. There was alamaat that the deceased woman was subjected to rape. P.W.11 denied the defence suggestion that the post-mortem report is faulty.

43. P.W.12 Abdur Rahman is the concerned Magistrate who penned down the confession of accused Rasu Kha. In his testimony this witness claims that on 18-10-2009 he recorded the confession of accused Rasu Kha after complying with all legal formalities. He gave the

accused sufficient time for reflection and made him understand the questionnaires as set-forth in column 5 and 6 of the confession recording form. After being fully aware of the consequences, the accused made confessional statement out of his free will and further that no marks of injuries were found on the person of the accused, whereupon he (P.W.12) gave note to that effect under column 8. This witness further states that after recording the confession, he read it over to the accused who put his signature thereto admitting the same to be correct. P.W.12 proves the confession including his signature appearing thereon as Exhibit Nos.1/8 to 6/8.

44. In reply to cross-examination P.W.12 says that accused Rasu Kha was arrested on 06-08-2009 from Gazipur Bazar. This witness denied the defence suggestion that accused Rasu Kha did not make any confession to him.

45. P.W.13 Chiranjib Das is the first investigation officer of the case. In his testimony this witness unfurls that on 18-12-2008, upon receiving the task of investigation, he visited the place of occurrence and prepared sketch map along with index thereof, examined witnesses and recorded their statements under section 161 of the Code, sent the photographs of the deceased victim along with inquiry slip to the nearest police stations in a bid to find out her whereabouts and also consulted the post-mortem report after obtaining the same. Having failed to find out the whereabouts of the deceased victim as well as that of her actual assailant including the underlying reason of the incident, he submitted final report as true (FRT) being No.427 dated 27-06-2009 under section 302/34 of the Penal Code. This witness proves the sketch map including his signature appearing thereon as Exhibit Nos.9 and 1/9.

46. In reply to cross examination P.W.13 states that he did not know the accused and further that he could not unveil the name of the assailant.

47. These are all the evidences that had been adduced by the prosecution to prove the charge levelled against the accused.

48. Now, the only point for consideration in this case is, whether the impugned judgment and order of conviction and sentence is sustainable in law or not.

49. From a careful scanning of the evidence and materials on record it is patent that in the morning of 18-12-2008 the dead body of an unknown woman, aged about 18-19 years, was found floating on the bank of Dakatia River at Sobahanpur village under Chandpur Model Police Station whereupon, on information, P.W.6 S.I. Md. Nazrul Islam rushed to the spot along with other police personnel and held inquest of the dead body which was marked as Exhibit No.1. Let us now have a peep at Exhibit No.1 in order to ascertain what injury or injuries were found on the cadaver of the deceased victim at the initial stage of the case and what the apparent cause of death was.

50. The relevant portion of Exhibit-1 runs as follows:

আমি এস, আই মোঃ নজরুল ইসলাম সংগীয় কং ৪৯৮ আঃ রব সহ সূত্রে বর্ণিত ডায়রী মোতাবেক অদ্য ইং ১৮-১২-২০০৮ তাং ১১/৪৫ মিঃ সময় ৮ নং বাগাদী ইউনিয়নস্ব ৭ নং ছোবাহানপুর গ্রামে আঃ রশিদ মিজির বাড়ীর পূর্ব দিকে অনুমান ৫০০ গজ দূরে ডাকাতিয়া নদীর পশ্চিম পার্শ্বে খুতনী পানির উপরে মাটিতে, শরীরের বাকী অংশ পানির ভীতর ভাসমান ডান হাত ডান পায়ের সাথে বাম হাত বাম পায়ের গিরার সাথে মিস্তি গোলাপী রং এর বোরকা ছেড়া কাপড় দ্বারা বাধা অবস্থায় উপর করা অবস্থায় স্থানীয় চেয়ারম্যান মোহাম্মদ আলী

পাঠান ও দফাদার ছৈয়দ আহম্মেদ দ্বয়ের দেখানো মতে পাইয়া সুরতহাল রিপোর্টের বাম পার্শ্বে উল্লেখিত স্বাক্ষীদের মোকাবেলায় সুরতহাল রিপোর্ট তৈয়ার করিতে আরম্ভ করিলাম। থানার লাশ বহনকারী মোঃ হারুন অর রশিদ পিং মৃত মারফত আলী সাং নিউট্রিক রোড মোল্লা বাড়ী ও স্থানীয় দফাদার ছৈয়দ আহম্মেদ ৮ নং বাগাদী ইউনিয়নদের সহায়তায় নদীর পাড়ে ছোবহানপুর গ্রামের কাচা রাস্তার উপর উত্তর শিয়রী অবস্থায় পাংটর উপর সোয়াইয়া দেখিতে পাই যে মৃত্যুর বয়স অনুমান ১৯ বৎসর মাথার চুল কালো লম্বা অনুমান ১(এক) হাত মুখমন্ডল গোলাকার লম্বা অনুমান ৫' : ১' পাঁচ ফুট ১ ইঞ্চি চোখ বোজা ঠোঁট খোলা সামান্য পড়নে লাল সুতী ছাপা কাপড় গায়ে লাল ব্লাউজ লাল রং এর পেডিকোর্ট হাত দুই খানীর কজী সোজা বাধনের দাগ দেখা গেল। স্থানীয় উপস্থিত মহিলা নুরজাহান বেগম (৩২) ও রাশিদা বেগম (৪০) দ্বয়ের সহায়তায় ওলট পালট করে দেখার সময় মৃত্যুর জনিদ্ধার ফোলা দেখা গেল তলপেট সামান্য ফাপা। ইহা ছাড়া শরীরে অন্য কোথাও কোন আঘাত বা চিহ্ন পাওয়া গেল না।

(Emphasis put).

51. Regarding cause of death it has further been stated in Exhibit-1 that:

প্রাথমিকভাবে অনুসন্ধান কালে মনে হইতেছে যে কোন দৃষ্টকারী উক্ত অজ্ঞাতনামা মেয়েটিকে অন্যত্র হইতে ফুসলাইয়া নিয়া আসিয়া তাহার পড়নের বোকরার কাপড় দ্বারা হাত পা বেধে শ্বাস রোধ করে হত্যা করিয়াছে বলিয়া মনে হইতেছে। তদুপরী ও মৃত্যুর মৃত্যু সঠিক কারণ নির্ণয় করা প্রয়োজন এবং সে মৃত্যুর পূর্বে ধর্ষিতা কিনা তাহা নির্ণয় করা প্রয়োজন।

(Underlining is ours).

52. From the aforesaid discussions it appears manifestly that the dead body of an unknown young woman was found with her both hands tied to her respective legs from behind with a torn piece of veil and that the apparent cause of death of the victim woman was strangulation (শ্বাসরোধ).

53. It is on record that the cadaver of the unknown deceased was sent to Chandpur Sadar Hospital through Constable No.498 Abdur Rob for autopsy vide challan Exhibit No.3. Materials on record further go to show that P.W.11 Dr. Md. Habibur Rahman, while posted as emergency medical officer at Chandpur Sadar Hospital, on 18-12-2008, held autopsy of the corpse of the unknown deceased victim and found the following injuries:-

- “1) one continuous diffused swelling in neck;
- 2) one abrasion present in both forearm near wrist joint; and
- 3) One bite mark present in each breast.

Moreover, the tongue of the victim woman was found protruded as well as bitten by teeth and further that external injuries of variable size were also found in her vagina.

54. On extensive dissection throughout the whole body including head, neck, thorax, abdomen, one continuous diffuse swelling was found present in the neck, abrasion was found over both wrist joints, subcutaneous tissue of neck, trachea & esophagus were found congested, blood clot was found in muscle spaces of neck. Both lungs were found highly congested, injuries of variable size were found in vagina with blood clots. All blood clots resist on washing.

55. According to him, death was caused due to asphyxia resulting from strangulation which was ante-mortem & homicidal in nature. On the basis of the injuries found in the genitalia P.W.11 further opined that those were consistent with rape before murder of the deceased woman.

56. P.W.11 proves the post-mortem report and his signature appearing thereon as Exhibit Nos.10 and 1/10 respectively.

57. We do not find any earthly reason to disbelieve or to hold a different view with that of P.W.11 so far the cause of death of the deceased victim is concerned. The defence also did not raise any objection regarding the aforesaid matters while cross examining the relevant witnesses i.e. P.W.6 and P.W.11 including others. Rather, in reply to cross-examination P.W.11 asserts that:

শ্বাসরোধ করে মেয়েটিকে হত্যা করা হয়েছে। Lungs congested ছিল। মেয়েটি পানিতে ডুবে মারা যায় নাই। মেয়েটিকে শ্বাসরোধ করে হত্যা করে পানিতে ফেলেছে। Injuries of variable size present in vagina, ঐ রক্ত period এর রক্ত ছিল না।

58. In such a backdrop, we have no other option but to hold that the unknown deceased woman was killed by strangulation (শ্বাসরোধ) and before that she was subjected to violation.

59. Now, the paramount question that calls for our determination is who is or are responsible for the gruesome murder of the unknown deceased woman.

60. It is indisputable that in the instant case there is no eye witness of the occurrence leading to the incident of ravishment of the unknown deceased woman followed by her murder by strangulation (শ্বাসরোধ). Even, the prosecution has also failed to bring to the fore any incriminating circumstances which can hook-up accused Rasu Kha in the killing incident of the unknown woman, except his confessional statement (Exhibit No.8).

61. The mainstay, as it appears, in embroiling accused Rasu Kha in the killing incident of the unknown deceased woman is his confessional statement. It is by now well settled that an accused can be found guilty and convicted solely banking on his confession, if the same is found to be true, voluntary and inculpatory in nature. Let us now scrutinize the confession of accused Rasu Kha (Exhibit No.8) with a searching eye to see for ourselves whether the same has satisfied the aforesaid criterion or not.

62. The relevant portion of the confession of accused Rasu Kha (Exhibit No.8) reads as under:

.....এর সূত্র ধরে আমি গত বৎসরের ডিসেম্বর মাসে ছোবহানপুর গ্রামে ডাকাতিয়া নদীতে চুবাইয়া আমি সাহিদাকে মারি। সাহিদার সাথে আমার পরিচয় হয় ঢাকা এয়ার পোর্ট এলাকার রেলওয়ে স্টেশনে। সাহিদা একজন ভাসমান দেহ ব্যবসায়ী ছিল। সে ক্যান্টমেন্ট এলাকায় নৌ বাহিনীর সদর দপ্তর এর গেটের অপর পাশে জঙ্গলে ও স্টেশন এলাকায় ঘুরে ফিরে দেহ ব্যবসা করত। সাহিদার সাথে আমি অর্থের বিনিময়ে তার দেহ ভোগ করি। এভাবে ১০/১২ দিন অতিবাহিত হতেই আমি তাকে বিয়ের প্রস্তাব দেই। আমি সাহিদাকে আমার দেশের বাড়িতে নিয়ে আসার প্রস্তাব দিলে সে খুশি হয়ে রাজী হয়। আমি চিন্তা করতে থাকি সাহিদাকে চাঁদপুরের কোথায় আনা যায়। তখন মনে পড়ল আবিদ মালের বাড়ির নিকটস্থ ডাকাতিয়া নদীর পাড় তখন উজু জায়গাটি মনে মনে নির্ধারন করি। এই জায়গা পছন্দ করার কারন হচ্ছে আবিদ মালের ৩/৪ টি গরু আছে। উজু গরু গুলি চুরি করার ফন্দিতে আমি পূর্বেই আবিদ মালের বাড়িতে এক দিন এসে তার মেয়ের নিকট থেকে পুরো নাম ঠিকানা সংগ্রহ করে নিয়ে ছিলাম। আবিদ মালের ছেলে বিল্লাহ সাং ছোবহানপুর থানা ও জেলা চাঁদপুর লিখে একপক্ষ করে অন্য পক্ষে সাহিদার নাম লেখে আর্থিক লেনদেন বিষয়ক একটি বানোয়াট স্ট্যাম্প তৈরী করি। এই স্ট্যাম্পটি অন্য একজন লোককে দিয়ে লিখেছি। স্ট্যাম্প সাহিদার ঠিকানা লিখেছে। সাহিদা পিতা চান মিয়া সাং ফরমজ থানা- দৌলতপুর, জেলা-খুলনা। ঘটনার আগের দিন ১৭-১২-২০০৯ ইং তারিখ পূর্ব সিদ্ধান্ত অনুযায়ী সাহিদাকে এয়ার পোর্ট স্টেশনে থাকতে বলি। আমি এয়ারপোর্টে এসে সাহিদাকে নিয়ে ট্রেন যোগে কমলাপুর রেলস্টেশনে আসি। রেললাইন পথ ধরে আমি পায়ে হেটে সায়েদাবাদ আসি। সায়েদাবাদ এসে খাওয়া দাওয়া করি। সাহিদাকে নিয়ে সুপার গাড়িতে করে অনু ৩/৪ ঘটিকার সময় ঢাকা হতে চাঁদপুরের উদ্দেশ্যে রওয়ানা করি। রাত্র অনুমান ৯ঃ০০ ঘটিকার সময় আমরা চাঁদপুর এসে

পৌঁছাই। চাঁদপুর বাসষ্ট্যাণ্ডে নেমে রিক্সা যোগে ইচলী চলে যাই। সেখান থেকে খেয়া পার হয়ে আবার রিক্সা যোগে বাগদী চৌরাস্তায় যাই। সেখানে মসজিদের সন্নিহকটে রিক্সা থেকে নেমে পাশের মুদি দোকানে যাই। দোকান থেকে ০১টি রুটি ৪টি কলা এবং ১ বোতল পানি কিনে বায়ে বাঘড়া বাজারের একটু সামনে রাস্তা দিয়ে একটু সামনে হেটে ডাকাতিয়া নদীর কাছাকাছি যাই। নদীর পাড় ধরে হেটে আবিদ আলীর বাড়ির সোজা গিয়ে কিছু খড় বিছানো জায়গায় আমি এবং সাহিদা বসি। সেখানে সাহিদার সাথে দৈহিক মেলামেশা করি। আমি ফুর্তি আমোদ করার পর বলি যে, সাহিদা আমাদের বাড়ি নদীর ঐ পাড়। যে বাড়িটি দেখা যায় এটা আমাদের। এখানে এত রাত্রে কোন নৌকা বা নৌযান পাওয়া যাবে না তোমাকে মাথায় করে নদী পার হতে হবে। তুমি কান্নাকাটি করব না কিংবা কোন কারণে চিৎকার দিবা না। তখন সাহিদা রাজী হয়। আমি সাহিদার বোরকা এবং ওড়না দিয়ে ডান হাত ডান পায়ের সাথে এবং বাম হাত বাম পায়ের সাথে বেধে পাজকোলে করে কোমড় সমান পানিতে নিয়ে সাহিদাকে পানিতে চুবিয়ে মেরে ফেলি। সাহিদার মাথা ধরে পানিতে চাপ দিয়ে ঠুয়া দিয়ে ধরে পানিতে চুবিয়ে মারি। লাশ পানিতে রেখে দেই। পরিকল্পনা অনুসারে মৃত্যু সাহিদার দেহে পূর্বে হাত সূজিত স্ট্যাম্পখানা রেখে দেই যেন আবিদ মাল ও তার ছেলেকে সন্দেহ করে। এ পরিকল্পনা করেছি যেন সাহিদা হত্যা মামলায় আবিদ মাল ও তার ছেলে বিল্লাল জড়িয়ে পড়ে। আবিদ মালের বিরুদ্ধে এই হত্যা মামলায় জড়িত করতে পারলে আবিদ মালের গরু গুলি চুরি করে নিয়ে নিতে পারব। সাহিদাকে পানিতে চুবিয়ে হত্যা করে বাগদী বাজার হয়ে বাঘড়া বাজারে চা দোকানে চা খাই। তখন রাত্র অনুমান ৩.৪৫-৪ টা হবে। সেখান থেকে ফরিদগঞ্জ মুখী গাড়ীতে ফাস্ট টীপে করে আমি ঢাকায় রওয়ানা হই। উক্ত হত্যা সংঘটনের পর কোন ভয় ভীতি লাগেনি

(Emphasis added).

63. From the aforesaid narration it is apparent that accused Rasu Kha gave a detailed account as to how he got acquainted with one Shahida (alleged victim) and brought her to the place of occurrence by giving false assurance of marriage, had sexual inter-course with her consent and eventually, with a view to implicate one Abid Mal and his son Billal in the incident, killed her by dipping into the water of Dakatia River upon fastening her both hands to respective legs from behind.

64. P.W.12 Md. Abdur Rahman is the relevant Magistrate who jotted down the confessional statement of accused Rasu Kha. According to him, accused Rasu Kha made confessional statement out of his own will without raising any question about the nature of the same. But the story given by accused Rasu Kha in his confessional statement does not get any support or corroboration either from the inquest report or from the medico-legal evidence furnished by P.W.11 so far the cause of death of the deceased woman is concerned. According to the confession of accused Rasu Kha, he killed alleged victim Shahida by dipping her into the water of Dakatia River after fastening her both hands and legs together from behind. If it had happened as such in that event water should and must have been detected in the abdomen as well as lungs of the deceased woman which could easily be visible on outward looking. But, mysteriously, it had not happened so as because nothing was mentioned as such either in the inquest-report (Exhibit No.1) or in the post-mortem report (Exhibit No.10) of the deceased woman. Rather, in both of the said reports it was mentioned that the victim girl was killed by strangulation (শ্বাসরোধ).

65. It would not be out of place to note that the words শ্বাসরোধ করে মারা and পানিতে চুবিয়ে মারা are completely 2(two) different manner of causing death of a person and that both of the two cannot go hand in hand. It is on record that during post-mortem examination the tongue of the deceased victim was found protruded. Moreover, continuous diffused swelling mark was also found in the neck of the deceased victim and her trachea, esophagus and both lungs were also found highly congested and no water was found either in her lung or abdomen. In this context, we may profitably refer to the evidence of P.W.11 who categorically stated that:

“.....শ্বাসরোধ করে মেয়েটিকে হত্যা করা হয়েছে। lungs congested ছিল। মেয়েটি পানিতে ডুবে মারা যায় নাই। মেয়েটিকে শ্বাসরোধ করে হত্যা করে পানিতে ফেলেছে। পানিতে ডুবে মারা গেলে lung এ পানি থাকতে পারে।
(Underlining is ours).

66. From the aforesaid discussions it transpires palpably that the unknown deceased woman was killed by strangulation (শ্বাসরোধ), not by drowning (চুবিয়ে) as was disclosed by accused Rasu Kha in his confessional statement. Thus, it is clear that the deceased victim woman was killed not in the manner as was stated by accused Rasu Kha which has miserably exposed the untrue character of his alleged confession rendering the veracity of the same highly questionable as well as untenable in law.

67. It is to be noted that in a criminal case time, place and manner of occurrence are the 3(three) basic pillars upon which the foundation of the case stand on and the same are required to be strictly proved beyond reasonable doubt by the prosecution in a bid to ensure punishment for an offender charged with an offence. If in a given case any one of the above 3(three) pillars is found lacking or proved to be untrue then it will adversely react upon the entire prosecution story. The same thing has happened in the instant case inasmuch as according to the prosecution story the deceased woman was killed by drowning, whereas as per medico-legal evidence furnished by P.W.11 Dr. Habibur Rahman, the victim was killed by strangulation and thereafter her dead body was abandoned in the water. The inquest-report also does bear out the aforesaid cause of death of the victim woman. Therefore, it is clear like anything that the prosecution has miserably failed to prove the manner of occurrence of the incident. Viewing from this angle there is no hesitation in saying that the confession alleged to have been made by accused Rasu Kha is not true so far as it relates to the manner of occurrence of the incident in concerned.

68. The learned Additional Sessions Judge of the Court below has also noticed the aforesaid discrepancies found in the manner of the occurrence of the prosecution story. Nevertheless, he tried to patch up the matter giving reasoning in paragraph 46 of the impugned judgment which reads as under:

রসু খা তার স্বীকারোক্তিতে মেয়েটিকে মাথায় ধরে পানিতে চুবিয়েছে বললেও সে তার গলায় চেপে ধরে নাই তা বলে নাই। ময়না তদন্ত রিপোর্টে ও সুরতহাল রিপোর্টে মেয়েটির গলায় যে দাগ দেখা যায় তাতে মেয়েটিকে শ্বাসরোধ করে হত্যা করা হয়েছে দেখা যায়। মেয়েটিকে শ্বাসরোধ করার সময় বা পানিতে চুবিয়ে মারার সময় তার গলায় চেপে ধরে চুবানো ও অস্বাভাবিক নহে। ফলে ভিকটিম মেয়েটিকে পানিতে চুবায় শ্বাসরোধ করে মারার সময় তার গলায় আসামী রসু খা চাপ দিয়ে ধরেনি তা বিশ্বাস করার কোন সুযোগ নাই। ভিকটিমকে মারার উদ্দেশ্যেই তার হাত পা বেঁধে সতর্কতা অবলম্বনের পর রসু খা তার পক্ষে যোভাবে দ্রুত ও সহজে মারা সম্ভব সেভাবেই মেয়েটির মৃত্যু ঘটিয়েছে মর্মে বিশ্বাস করা গেল।

(Emphasis put).

69. The aforementioned observations of the trial court are totally based on surmises and conjecture which is completely unacceptable. In our criminal justice delivery system there is no scope to lean on hypothesis or conjecture instead of proof of the manner of occurrence by sufficient evidence to find out the guilt of an accused charged with an offence. It is the settled principle of law that conjecture or hypothesis however strong it might be, cannot be the substitute for evidence. In such a backdrop, it can be concluded that the learned judge of the court below erred in law in adjudging the culpability of the accused in the killing incident of the deceased woman by the impugned judgment and order which has utterly failed to withstand the legal scrutiny.

70. The observations made by the learned Additional Sessions Judge touching the factum of fastening of both the hands of the victim woman with her respective legs from behind also appears to be wide of the mark. As per confession of accused Rasu Kha, for crossing the

Dakatia River conveniently, he tied up both the hands and legs of the victim woman with parts of veil and scarf from behind. The above story sounds like an old wives tale inasmuch as the same does not stand to reason at all. In normal course of business it is hard to carry a person on head after fastening his hands and legs from behind. Normally, the hands and legs of sacrificial animals are being tied up together at the time of slaughtering so that they cannot put much resistance. It is very much unusual and unthinkable as well that a living person can be held with his/her hands and legs pinioned together from behind. Even, no such forged stamp paper was found and recovered along with the cadaver of the deceased woman as was delineated by accused Rasu Kha in his confessional statement. These discrepancies have also exposed the vulnerability of the confession alleged to have been made by the accused and thereby making in the prosecution case highly doubtful and shaky as well.

71. Incidentally, we may also note that according to the confession of accused Rasu Kha, before the alleged murdering incident he had sexual intercourse with the deceased woman on consensus basis, whereas as per medico-legal evidence, the victim woman was subjected to ravishment. On this count also the confession of accused Rasu Kha does not align with the medico-legal evidence rendering the same unworthy of credence.

72. From a close perusal of the materials on record it further reveals that the learned Additional Sessions Judge observed in para 41 and 42 of the impugned judgment that the scar marks including other marks of injuries as was found on the private organ and chest of the deceased woman are the act of salaciousness of other customers while they were having sex with her which is the clear manifestation of her being a prostitute and further that the victim woman had sexual intercourse with accused Rasu Kha on consensus basis. For felicity of discussion, we may quote the relevant paragraphs in verbatim which read as under:

(৪১) আসামী রসু খার স্বীকারোক্তি মতেই ভিকটিম (সাহিদা) ভাসমান দেহ ব্যবসায়ী ফলে জীবিকার প্রয়োজনে ভিকটিম বহু বার বহু জনকে দেহদান করেছে অনুমিত হয়। তার সকল দেহদানই স্বেচ্ছা মূলক ছিল বা লোভী দেহ ভোগীরা দেহ ভোগ করে কেহই যাতনা বা নির্যাতন ভিকটিমকে করেনি তদ্রূপ নিশ্চিত হওয়া যায় না। উদ্ধারকৃত ১৮/১৯ বৎসরের ভিকটিম মেয়েটি যৌনদারে বহু আঘাতের চিহ্ন, ময়না তদন্ত রিপোর্টে বৃক্ক কামড়ের দাগ, এই সমস্ত চিহ্ন অজ্ঞাত নামা ১৮/১৯ বৎসরের মেয়েটির দুঃখ ময় সংগ্রামী জীবনে হিংসা, নির্যাতন, লোভীদের শিকারের এক করণ বর্ণনা। যা থেকে মেয়েটি দেহ দানের পেশায় ছিল বা রসু খার ভাষায় দেহ ব্যবসায়ী ছিল রসু খার এই স্বীকারোক্তির সত্যতা পাওয়া যায়।

(৪২) আসামীর স্বীকৃত মতে ভিকটিম একজন ভাসমান দেহ ব্যবসায়ী হওয়ায় এবং রসু খা তার নিয়মিত গ্রাহক ও ভোগী হওয়ায় হয়তো নিজেকে এই অল্প বয়সে বিপদ সংকুল কঠিন পেশা থেকে বাঁচার আশায় রসু খাকে বিশ্বাস করে বিয়ের স্বপ্ন পূরণের জন্য তার সাথে ঢাকা থেকে চাঁদপুর এসে ঘটনাস্থলে ডাকাতিয়া নদীর পাড়ে ঘটনার গভীর রাতে রসু খার চাহিদা নির্দেশ মতে রসু খাকে যন্ত্রস্ত রাখার লক্ষ্যে তার সাথে দৈহিক মেলামেশা করা অস্বাভাবিক নয়। ডাকাতিয়া নদীর পাড়ে ঘটনার রাতে ভিকটিম মেয়েটির সাথে আসামী রসু খা দৈহিক মেলামেশা করার বিশ্বাস করা যায়। ঐ দৈহিক মিলনে মেয়েটির সম্মতি ছিল না বা রসু খা তাকে জোর পূর্বক বা প্রাণের ভয় দেখিয়ে সেখানে দৈহিক মিলনে বাধ্য করেছে তন্মর্মে কোন সাক্ষ্য স্বীকারোক্তি পাওয়া যায় না। ফলে ভিকটিম মেয়েটিকে রসু খা ধর্ষন করেছে তা প্রমানিত হয়নি।

73. The above observations made by the court below run counter to the evidence and materials or record in that as per medico-legal evidence, the deceased victim was subjected to rape which also got support and corroboration from the attending circumstances of the case, particularly the bite marks including other injuries found on the breast and private organ of the victim woman. Moreover, having ignored the medico-legal evidence the trial court also presumed that the scar marks and other injuries found on the person of the victim woman are of old nature. But, on the basis of those scar marks including other injuries found on the chest and female organ of the victim woman P.W.11 Dr. Habibur Rahman categorically opined that the victim woman was subjected to rape before her death. In such a scenario, without any tangible materials, there is left no room for the learned Additional Sessions Judge to presume

that those injury and bite marks were old in character. It is to be recalled that a judge is considered to be an impartial and neutral arbiter. Under no circumstances, he should abandon his high place of impartial arbiter and assume the role of a prosecutor, however altruistic its motive may be.

74. It would not be out of place to notice that the learned Additional Sessions Judge did not at all properly take into stock of the absurdity as well as surrealistic story as depicted by accused Rasu Kha in his confessional statement regarding lashing down of both the hands and legs of the victim woman at the back. It has already been observed that lashing down of both the hands and legs of a living person from behind is very difficult task and unusual as well. Moreover, had the victim woman be alive then, she must have put resistance by raising her voice or otherwise when she found that her both legs and hands are being tied up in a very unusual manner with the help of her torn veil and scarf by the accused which any prudent man would certainly do being swayed by natural instinct. Furthermore, the story of crossing the river as made out by the accused in his confession also sounds like a cock and bull story inasmuch as it is the most easiest and convenient way to cross a river by a person along with another adult one upon taking the latter within the lap of the former rather by lashing down both hands and legs in an unusual manner at the back. Having considered the pros and cons of the case together with the attending facts and circumstances, we are of the view that in a bid to fix the accused with the responsibility of the murder of the deceased woman such type of bizarre story was told by the accused in his confession which is against the course of normal behavioural pattern of human conduct. More so, the medico-legal evidence also does not bear out the facts disclosed by the accused in his confession including the observations made by the trial judge on the above score.

75. It is undeniable that accused Rasu Kha was first arrested on 06-08-2009 from Gazipur Bazar in connection with another case filed with Faridgonj P.S. Chandpur and thereafter, he was shown arrested in the instant case on 15-10-2009 while he was also under police custody in connection with the earlier one and further that he was again taken on remand in the present case and eventually, he was produced before the relevant Magistrate court on 18-10-2009 by the investigation officer (P.W.6) with a prayer for recording his confession. Materials on record also do bear out the aforesaid factual events of the case. Therefore, it is patent that the confession of the accused was preceded by a prolonged police custody which has seriously affected the involuntary character of the same.

76. There is another aspect of the case which we cannot ignore at all. It is true that in the instant case no charge was framed against accused Rasu Kha for committing rape on the person of the deceased victim. Nevertheless, since it had happened in the course of the same transaction we need to put focus on the said issue in order to find out the veracity of the entire incident. As per confession, alleged victim Shahida was a prostitute and accused Rasu Kha had sexual intercourse with her at different times. Eventually, he (accused) coaxed her into coming with him to the spot by giving false assurance of marriage and thereafter, he had sexual intercourse with her on consensus basis and eventually he killed her. But, it is curious to note that during post-mortem examination marks of violence was found on the private organ of the unknown deceased girl as a result P.W.11 opined that the victim girl was subjected to rape. In this connection, we may refer to the post-mortem report (Exhibit No.10) wherein it has clearly been mentioned that external injuries of variable sizes were found in the vagina of the victim woman and there was also bite marks in her each breast. We have already observed that the post-mortem report is found to be true and the defence has failed to belittle the facts stated therein. Moreover, this post-mortem report has been submitted on behalf of the prosecution and therefore, there is no scope to challenge the veracity of the

same on its side. In such a scenario, if the statements made in (Exhibit No.10) can be regarded as true in that event the story depicted by accused Rasu Kha in his confessional statement becomes a nullity inasmuch as literally 'rape' and 'sexual intercourse with consent' are 2(two) different words meaning different situations. More so, as per confession, the victim girl was a prostitute and accused Rasu Kha satisfied his carnal desire with her on consensus basis. If so, in that case also there is no possibility of leaving any injury mark on the private organ of the deceased victim. On this view point also the veracity of the confession of the accused appears to be highly doubtful and unbelievable.

77. The weird story as has been given by accused Rasu Kha in his confessional statement concerning tying up of both hands of the unknown deceased woman to her respective legs from behind also runs counter to the normal behavioural pattern of human being. From the proved facts and circumstances of the case it can be presumed that the unfortunate unknown deceased victim was first subjected to violation and then she was killed by strangulation and eventually, her dead body was thrown into the river after tying up her both hands to respective legs from behind.

78. It is to be noted further that charge of murder must be proved to the core beyond doubt by consistent and reliable evidence. When there is departure from the manner of occurrence as alleged by the prosecution found in the evidence during trial, the veracity of the prosecution case becomes doubtful and in such a case conviction and sentence cannot be sustained in the eye of law.

79. From the evidence and materials on record it further reveals that the investigation officer of the case did not carry out the investigation diligently and efficiently, rather it was done in a floppy manner inasmuch as the I.O. did not make any sincere endeavor to bring to light the whereabouts of the unknown deceased victim woman and further that he also did not make any attempt to verify the facts as alleged to have been disclosed by accused Rasu Kha in his confessional statement. The performance of the investigation officer in collecting incriminating evidences and materials is not at all satisfactory but highly deplorable.

80. In the aforementioned premises, we are of the dispassionate view that the prosecution has hopelessly failed to bring home the charge brought against accused Rasu Kha to the core and that the learned Additional Sessions Judge has most illegally found him guilty under Sections 302 and 201 of the Penal Code and accordingly convicted and sentenced him there under by the impugned judgment and order which is liable to be knocked down being contrary to law and evidence on record.

81. Accordingly, the death reference is rejected.

82. The judgment and order of conviction and sentence dated 22-04-2015 passed in Sessions Case No.156 of 2010 is set aside.

83. Condemned-prisoner Rasu Kha is found not guilty of the charge levelled against him and he is acquitted of the same.

84. The authority concerned is directed to release accused Rasu Kha immediately, if he is not wanted in connection with any other case.

85. The connected Jail Appeal being No.77 of 2015 is allowed.

86. Send down the L.C. Records along with a copy of the judgment to the court concerned forthwith.