

4 SCOB [2015] HCD 139

High Court Division (Criminal Appellate Jurisdiction)

Death Reference No. 43 of 2010
with
Criminal Appeal No. 1217 of 2011
with
Criminal Appeal No. 6972 of 2011
with
Jail Appeal No. 172,173,174 of 2010

The State

-Versus-

Rafiqul Islam and others

....Condemned-Prisoners.

Rafiqul Islam

....Appellant of Crl. Appeal
No. 1217 of 2011.

Kajol

....Appellant of Crl. Appeal No. 6972 of 2011.

Md. Noor Alam

...Appellant of Jail. Appeal No. 173 of 2010.

Present

Mr. Justice Md Nizamul Huq

And

Mr. Justice Md. Farid Ahmed Shibli

Penal Code, 1860

Section 302

Last seen together theory:

According to the prosecution, in the morning of 05.06.2008 all accused persons with the victim Mamun alive were last seen together at the Gate of Rafique's house no. Ka-109/4, Kureel Bishwaroad and at that time P.W.3 i.e. the Darwan himself saw them coming out together from that house. After they were last seen together, the dead body of the victim was found at an open place of Bholanathpur by the Esapur River on 07.06.2008. In such a situation it is the burden of the accused persons to prove and explain as to how the victim had been taken and done to death there.(Para 119)

Code of Criminal Procedure, 1898

Section 164:

If a confession recorded under section 164 of the Code of Criminal Procedure is true and voluntary, the same alone is sufficient for convicting the confessing accused and retraction of confession is immaterial, once it is found to be true and voluntary.

...(Para 138)

Mr. Md Mansurul Haque Chowdhury with
Mr. A.K.M. Kamruzzaman, Advocates.

.....for the Appellant of
Crl. Appeal No. 1217 of 2011.

Mr. Syed Mahmudul Haque with

Mr. Basharatul Mowla with

Mr. Md. Sanower Hossain, Advocate.

.....For the Appellant of
Crl. Appeal No. 6791/2009.

Mr. Sk. A.K.M. Moniruzzaman Kabir,
D.A.G

Mr Md. Shahidul Islam Khan, A.A.G.and
Mr. Mia Shiraj ul Islam, A.A.G

..... For the State.

Mrs. Hasna Begum, Panel Advocate.

.....In Jail Appeal No. 173
of 2010.

Heard: 20.05.2015, 21.05.2015,
27.05.2015 and Judgment on: 28.05.2015.

Motive:

The prosecution cannot be saddled with an exclusive responsibility of proving motive of each of the assailants. Because it is only the assailant, who can best say his motive for causing the death. But on that ground we cannot lessen the credibility of alleged complicity of the condemned-appellants in killing the victim.(Para 148)

Judgment**Md. Farid Ahmed Shibli, J.**

1. Criminal Appeal Nos. 1217 & 6972 of 2011 with Jail Appeal Nos. 172, 173 & 174 of 2010, at the instance of Condemned Appellants namely Md. Rafiqul Islam @ Rafique, Md. Noor Alam and Md. Kajol (hereinafter named as “Condemned-Appellants” or “accused persons” or “accused Rafique, Noor Alam and Kajol” for the sake of brevity), are directed against the judgment and order of conviction dated 29.06.2010 passed by Mr. A.K.M. Nasiruddin Mahmud, learned Special Session Judge of Court No. 5, Dhaka in Special Sessions Case no. 143 of 2009 arising out of G.R. Case no. 371 of 2008 corresponding to Badda Police Station Case no. 53(6)08. In his judgment, the learned Session Judge found accused Rafique, Noor Alam and Kajol guilty of the charge under sections 302&34 of the Penal Code and sentenced each of them to death thereunder. A reference to the High Court Division under section 374 of the Code of Criminal Procedure has also been made for confirmation of the sentence of death imposed upon the condemned-appellants. All the Criminal Appeals are taken up together with the Death Reference and disposed of by this single judgment.

2. Factual scores pertinent to the disposal of the Appeals and the Death Reference are as follows:-

On 03.06.2008 at around 7 O'clock in the morning the victim Md. Abdul Hye Mamun (hereinafter named as “victim Mamun” or “the victim” or “the deceased”) set out of the residence of his father Abdus Sobhan (P.W.1) for his village home in Noakhali, where his mother Kohinoor Akhter Beauty (P.W.4) and other family members had been living. Immediately after his setting out the victim changed his mind receiving a mobile call from accused Rafique and at around 8 a.m. on that day he went to the residence of accused Rafique situated at 5th Floor of House No. Ka-109/4 of Kureel Bishwaroad under P.S Badda of Dhaka straightaway. The victim was staying there up to the morning of 05.06.2008. Accused Rafique’s father, mother and other members of his family used to reside in that house. Being a Sublettee another accused Noor Alam, who is a distant relation of Rafique, was also residing in some part of that house. In response to the request of accused Noor Alam on 04.06.2008 at the night accused Kajol came and stayed in that house. In the morning of 05.06.2008 Rafique, Noor Alam and Kajol alongwith the victim came out of the house and went to the open place of a government-acquired land situated by the Esapura River at Bholanathpur Boro-bazar area under P.S Rupgonj of Narayangonj. After their arrival at that place of Bholanathpur, accused Rafique, Noor Alam and Kajol in furtherance of their common intention laid down the victim there and killed him dealing several knife blows and causing a cut throat injury applying the knife against his neck. At that time, accused Rafique remained vigilant patrolling and watching the surrounding area. After completing their dreadful mission and ensuring death of the victim, all accused persons left the place throwing the blood stained knife and the Mobile SIM Card of the victim into the Esapura River.

3. On 07.06.2008 at 3.15 p.m. the police of Rupgonj Police Station recovered the dead body as of an unnamed young person and registered a Case bearing no. 20 dated 07.06.2008 with the Police Station of Rupgonj under sections 302/34 of the Penal Code. Officer-in-

Charge of the Rupgonj Police Station endorsed the case to S.I. Md. Ashraful Islam, who held inquest on the body of the deceased visiting the place of occurrence and sent it through Con/351 Md. Sirajul Islam (P.W.16) to the General Hospital of Narayangonj for autopsy. Being a member of the Post Mortem Examination Board, P.W.19 Dr. Prodip Kumar Das examined the body of the deceased and prepared the report dated 08.06.2008 (Ext. 11).

4. P.W.1 Abdus Sobhan, who is the father of the victim, had not been getting the whereabouts of his son i.e. the victim and then lodged the Ejahar (Ext.1) on 25.06.2008 with the Police Station of Badda showing Rafique, Noor Alam and some others as the accused of the case under section 365 of Penal Code. Being endorsed with the responsibility, P.W.27 S.I Md. Hanif started the process of investigation consulting concerned Police officers of Rupgonj, who at that time informed the fact of recovery of an unidentified dead body from the open place of Bholanathpur. Getting such information the Investigating Officer i.e. P.W.27 visited the said place at Bholanathpur along with father, maternal grandfather and other relatives of the victim. They found a photograph of the dead body and its wearing apparels in the Police Station of Rupgonj and identified it as the body of the victim Mamun.

5. On the application of the Investigating Officer (P.W.27) corpse of the deceased was then exhumed from the Majdair Graveyard at Narayangonj in presence of the Executive Magistrate Zinat Rehana (P.W. 17) and other witnesses. At that time relatives of the victim identified the corpse and received the same in presence of the Executive Magistrate and others. The victim's maternal uncle Md. Nurul Haque (P.W.) and others took the corpse away with them and buried the same at a graveyard in the village home of the deceased.

6. P.W.27 S.I. Md. Abu Hanif conducted the investigation visiting the place of occurrence, collecting the incriminating materials including the Post Mortem Report (Ext.11) and recording the statement of witnesses under section 161 of the Code of Criminal Procedure. On 28th & 29th June 2008 accused Rafique, Noor Alam and Kajol made their respective confessional statements under section 164 of the Code of Criminal Procedure. On analysis of the evidence and the materials on record getting a prima-facie case against all the accused persons the I.O. submitted the Charge Sheet having no. 573 dated 31.12.2008 under sections 302/34 of the Penal Code.

7. At the very outset, the learned Special Session Judge framed the charge against 3 accused persons namely Rafique, Noor Alam and Kajol under sections 302/34 of the Penal Code and the same was read over and explained to them, who pleaded not guilty and claimed to be tried as per law.

8. The defence case, as it transpires from the trend of cross-examination of the witnesses and the statements made by the accused persons during their examinations under section 342 of the Code of Criminal Procedure, is that the accused persons had no kind of complicity in the alleged occurrence of causing death of the victim and because of some land disputes of the victim's father with accused Rafique's maternal grandfather and some other disputes with accused Noor Alam's family, the instant case has been planted by the informant party narrating a concocted story of causing death of the victim by the accused persons. According to the defence, the prosecution has cooked up this case falsely on some ill-advice of the deceased's maternal grandfather i.e. 'Nana' named Nurul Haque (P.W.2) and that is why the learned Trial Court ought to disbelieve the prosecution case and record a decision of acquittal for the accused persons in place of their conviction.

9. On hearing both the prosecution and the defence and appraisal of the evidence along with the materials on record, the learned Special Session Judge found all accused persons namely Rafique, Noor Alam and Kajol guilty of the charge levelled against them and recorded the impugned decision of conviction awarding death sentence against each of them.

10. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction, the condemned-prisoners Rafique and Kajol have preferred 2 separate Criminal Appeals and another condemned-prisoner Noor Alam filed a petition of Jail Appeal castigating the judgment and order of conviction passed in Special Sessions Case no. 143 of 2009. Besides, the learned Special Session Judge has also made a Reference to this Court for confirmation of death sentence awarded against the condemned-prisoners i.e. the condemned-appellants.

11. Points to be decided are:- whether the impugned judgment and order of conviction dated 29.06.2010 suffer from any legal or infirmity and whether finding of guilt and the sentence of death awarded against the condemned-appellants are sustainable in law or not.

12. We have heard the submissions advanced by Mr. Mansurul Haque Chowdhury & Mr. Bashratul Mawla, learned Advocates for condemned-appellants Rafique and Kajol respectively and Mrs. Hasna Begum, learned Panel Advocate for condemned-appellant Noor Alam and Mr. Sk. A.K.M. Moniruzzaman Kabir, learned Deputy Attorney-General with Mr. Md. Shahidul Islam Khan, learned Assistant Attorney-General representing the State. We have also carefully scrutinized the evidence of the witnesses along with the materials on record particularly the confessional statements made by the accused persons under section 164 of the Code of Criminal Procedure taking their nitty-gritty into consideration.

13. Let us first try to know the status of the witnesses in this case and their other credentials. P.W.1 Abdus Sobhan is the informant and father of the victim, P.W. 2 Nurul Haque is maternal grandfather or "Nana" of the victim, P.W. 3 Md. Rezaul is a Gate-keeper or "Darwan" of accused Rafique's house having no. Ka-109/4 of Kureel Bishwaroad under P.S Badda of Dhaka, P.W. 4 Kohinur Akhter Beauty is the mother of the victim, P.W. 5 Md. Zafor Iqbal and P.W. 6 Humayun Kabir Bhutto are maternal uncles or "Mamas" of the victim, P.W. 7 Md. Abul Kashem is a cultivator and the victim's "Nana" by village-courtesy, P.W. 8 Abul Khair is a villager residing at North Ambornagar of P.S Sonaimuri of Noakhali, P.W. 9 Md. Amirul Islam @ Alam is the President of Roky Samabay Samity at Kureel Bishwaroad, P.W.10 Md. Sahadat Sheikh is a tailor working at 'Shishir Tailors' at Kureel Bishwaroad, P.W. 11 Md. Shahidullah is an Ex-Chairman of Ambornagor Union Parishad no.5 under P.S. Sonaimuri of Noakhali, P.W.12 Md. Rubel Islam is a student of Class X and a playmate of the accused persons, P.W.13 Rakib Ahmed @ Roky is a witness, who purchased the Sony Ericson Mobile Set from accused Kajol, P.W. 14 Masud Hassan and P.W.15 Md. Majibur Rahman are witnesses of the Inquest Report, P.W. 16 Constable no. 351 Md. Serajul Islam escorted the unidentified dead body to Narayangonj General Hospital for autopsy and he is also a seizure-list witness, P.W. 17 Zeenat Rehena is the Executive Magistrate in whose presence the dead body was exhumed from the Majdair graveyard, P.W.18 Sheikh. Md. Tofael Hossain is a Metropolitan Magistrate, who recorded the confessional statements of the condemned-appellants, P.W. 19 Dr. Prodip Kumar Das held autopsy on the body of the deceased and prepared the Report (ext. 11), P.W. 20 Dr. A. K. M. Shafiquzzaman and P.W. 25 Dr. Jalil Ahmed were members of the Post Mortem Examination Board, P.W.21 Kazi Md. Shahidul Islam and P.W. 22 Kazi Md. Hedayetul Islam are the seizure-list witnesses, P.W.23 Md. Abu Saleh Mallik and P.W.24 Md. Golam Mostafa are

“Khademdar” & “Caretaker” of the Majdair Graveyard respectively. P.W.26 S.I Md. Farid Uddin verified the names and addresses of the accused persons and P.W. 27 S.I. Md. Abu Hanif is the Investigating Officer.

14. Let us now recapitulate the evidence of the Prosecution Witnesses necessary for their proper appreciation P.W.1 Abdus Sobhan deposes that he had a greengrocery shop at Boardbazar under Gazipur district for last 19 years and his eldest son Mamun used to help him in running the shop. According to him on 03.06.2008 at around 8.00 or 9.00 a.m. the victim Mamun set out for the village home at Noakhali taking a Sony Ericson Mobile Set and Tk. 12,000/- in cash with him. Accused Rafique called the victim on his mobile and he accordingly went to the residence of accused Rafique situated at House no. Ka-109/4 of Kureel Bishwaroad. At that time P.W.1 was not getting the victim Mamun on his mobile owing to which he (P.W.1) called his wife (P.W.4), who later informed that her son Mamun would come the village home with accused Rafique and Noor Alam. P.W.1 states that the accused Rafique is his grandson through a daughter of his (P.W.1's) one cousin (*Avmigur iindK ntj v WC, WnD-1 Gi PiPvtZv fBtqi tgqi w tKi bWZ*) and the accused Noor Alam is a nephew through his cousin (*Avmigur bi-Aij g ntj v WC, WnD-1 Gi PiPvtZv fBtqi tqj i w tKi fWZRv*).

15. P.W.1 deposes that since the victim Mamun was not arriving at the village home in Noakhali, he (P.W.1) became anxious and started searching for him and at one stage made a G.D. Entry with the Joydebpur Police Station and his wife's (P.W.4's) maternal uncle Nurul Haque (P.W.2) lodged another case with the Badda Police Station. He further deposes that in the G.D. of Badda police station they suspected some persons namely- Rafique, Noor Alam, Barkaullah and Habibur Rahman and on the basis of the said G.D. the police started investigation and arrested accused Rafique and Noor Alam. P.W.1 states that on interrogation of the police accused Rafique, Noor Alam and Kajol admitted their culpability in the alleged occurrence and the Investigating Officer i.e. the I.O. taking the accused persons with him visited the East Zone Project Area of Bholanathpur under P.S. Rupgonj, where the victim was done to death by accused persons dealing knife blows and they left the body on a sandy ground situated by the Esapura River.

16. P.W.1 deposes that initially the police of Rupgonj P.S. recovered the body as of an unidentified person and after completion of the Post Mortem Examination handed over the same to the Anjuman-e-Mofidul Islam, who buried it at the Majdair Graveyard of Narayangonj observing funeral formalities. He further deposes that on 25.06.2008 the case was lodged with the Police Station and seeing the wearing clothes and a photograph of the body at the Rupgonj Police Station it was identified.

17. According to P.W.1, the victim had Tk. 12,000/- in cash and a mobile phone with him and the police recovered Tk. 6000/- each from Rafique and Noor Alam. P.W.1 testifies that the police recovered the mobile set from a person to whom it was sold out by accused Md. Kajol. He states that the accused persons admitted the alleged occurrence giving their statements under section 164 of the Code of Criminal Procedure. He discloses the fact that accused Rafique's 'Mama' named Jahangir and accused Noor Alam's one relative Sobhan were possessing and enjoying his (P.W.1's) property illegally and on that matter a 'Village Shalish' was also arranged. P.W.1 states that after exhumation of the body, it was identified and taken to the village home and buried there. He has exhibited the Ejahar (Ext.1) and identified all accused persons namely Rafique, Noor Alam and Kajol present in the dock.

18. In cross-examination, P.W. 1 states that his wife and other children lived at his village home and within the area of their homestead the house of accused Rafique's maternal

grandfather has been located. He further states that Rafique's maternal uncle named Jahangir had a dispute with him (P.W.1) regarding a land and on that matter a 'Shalish' i.e. 'Village Arbitration' was held. At one stage of his cross-examination P.W.1 claims that on 03.06.2008 his son set for the village home and the G.D. Entry was made with Joydebpur Police Station on 07.08.2010. He could not remember the G.D. number or date of the G.D. Entry made with Badda Police Station. P.W.1 expresses that he was not at the place of occurrence and hearing the facts of occurrence the Ejahar was lodged by him.

19. P.W.1 has denied the defence suggestion that because of land disputes with the maternal grandfather of accused Rafique the instant case was filed setting forth a got-up story implicating name of accused Rafique. At one stage of his cross, P.W.1 states that in the Ejahar names of Borkatullah and Habibur Rahman were shown but there was no such mention of accused Kajol. He has denied the defence suggestion that name of Kajol was included in the Charge-Sheet collusively. He has also denied the defence suggestion that the confessional statements of accused persons were recorded under duress or inflicting any physical torture to them.

20. According to P.W.2 Nurul Haque, the victim Mamun used to stay with his father Abdus Sobhan (P.W.1) at Boardbazar under Gazipur district and support him (P.W.1) in the Greengrocery Shop and his (P.W.2's) niece Kohinur Akhter Beauty used to reside at the village home in Noakhali with her children. P.W.2 deposes that on 10.06.2008 his niece informed on his mobile that the victim had been sent by his father on 03.06.2008 for the village home Noakhali, but since then he was not coming there and she failed to contact him because of his (the victim's) mobile phone was found switched off. P.W.2 further deposes that getting such information from his niece, he (P.W.2) called accused Rafique on his mobile and the latter told him that the victim had already gone to the village home. On 12.06.2008 P.W.2 again called accused Rafique and Noor Alam and at that time Rafique gave the phone number of some Habibur Rahman and requested to contact him. P.W.2 testifies that pursuant to the said information he called Habib, who expressed that he had no communication with Rafique or Noor Alam for last 2 or 3 years.

21. P.W.2 deposes that on 16.06.2008 he himself made a G.D. Entry having no. 1185 with the Badda Police Station and then went to the house of accused Rafique with a Sub Inspector of the Badda P.S. In reply to his (P.W.2's) query, accused Rafique's mother informed him that the victim Mamun had come to her residence on 03.06.2008 and left in the morning of 05.06.2008. P.W.2 testifies that the police went to the Purbachal Housing Area under Bholanathpur with accused Rafique and Noor Alam, who then disclosed that the victim was killed by them with the help of some Kajol.

22. P.W.2 testifies that seeing the photograph of the body and wearing clothes it was identified and subsequently the same was exhumed from Majdaир Graveyard and handed over to the informant party for its burial at their village home in Noakhali. P.W.2 further testifies that accused Rafique and Noor Alam took away Tk. 12,000/- from the victim and then got the amount equally divided between themselves and the mobile set of the victim was taken away by accused Kajol, who later sold it out to some Roky Ahmed @ Roky. A sum of taka 6,000/-, as deposed by P.W.2, was deposited by accused Rafique using a fake-name of 'Shishir' in a Somabay Samity. P.W.1 states that the knife, with which Mamun was killed by the accused persons, was thrown away in a river and it had been collected by the accused earlier from some Rubel. During his examination, P.W.2 has identified all accused persons namely Rafique, Noor Alam and Kajol present in the dock of the Court.

23. In his cross-examination, P.W.2 discloses that the informant's wife is his (P.W. 2's) niece and his dwelling house and the house of accused Rafique's maternal grandfather are intervened by 2 or 3 other houses and the house of Rafique is about 1 or 1½ k.m. away from him. According to P.W.2, there was no such litigation between accused Rafique's father and the informant. P.W.2 has denied the defence suggestion that at his instance accused Rafique was included in this case and he (Rafique) had no kind of involvement with the alleged killing of the victim. He has denied another defence suggestion that accused Noor Alam and Kajol did not say anything in his presence regarding alleged murder of Mamun and being a relative of the victim he (P.W.2) has been deposing falsely just to favour the informant (P.W.1).

24. Being the Darwan of House no. Ka-109/4 of Kureel Bishwaroad, P.W.3 Md. Rezaul has stated that he had been serving in that house for around 5 years and at 5th Floor of the building, accused Rafique used to reside with his father & mother and in a small part of that house the accused Noor Alam was also residing as a Sublettee. According to P.W.3, the victim came at the house of accused Rafique on 03.06.2008 and he saw him in that house till 05.06.2008. P.W.3 testifies that in the morning of 05.06.2008 accused Noor Alam and Rafique along with the victim came out of that house and at that time they were accompanied by another unknown boy. He further testifies that subsequently he (P.W.) came to know that the victim Mamun had been done to death. During his examination, P.W.3 has identified all the accused persons present in the dock.

25. In cross-examination, P.W.3 discloses that he used to reside in a room at the ground-floor of the building and the room is contiguous to the Gate of the building and he opens the Gate everyday at 7.00 or 7.30 a.m. He states that he was serving as the Darwan of that house for around 5 years. On 04.06.2008 and 05.06.2008, as stated by P.W. 3, the Gate was opened at around 7.00 or 7.30 a.m. He further states that he did not see the alleged occurrence of the death of Mamun. In his cross, P.W. 3 claims that he did not know the name of Mamun, but by appearance Mamun was known to him. He denies the defence suggestion that he did not serve as a Darwan of that house and deposing falsely in favour of the informant.

26. P.W.4 Kohinur Akhter Beauty used to reside with her children at the village home. P.W. 4 deposes that on 03.06.2008 the victim called her on mobile and said that he would stay at the house of Rafique at Kureel Bishwaroad and set for the village home on 04.06.2008. She further disposes that on 03.06.2008 at night she also talked to Mamun and accused Rafique and Noor Alam, who assured her that they would come together on 04.06.2008.

27. According to P.W.4, on 04.06.2008 she found mobile phones of Mamun and Rafique switched off, owing to which she called Rafique's father Borkatullah collecting his mobile number from Rafique's 'Nani' and at that time Barkatullah told her that Mamun, Rafique and Noor Alam would come to the village home by 05.06.2008. P.W.4 states that on 05.06.2008 she again found mobile phones of Mamun and Rafique switched off and then contacted her maternal uncle i.e. 'Mama' Nurul Haque. P.W.4 further states that Nurul Haque's son Nipu phoned Rafique and his father Borkatullah, who on query had given different versions at different times regarding whereabouts of the victim. By that time her (P.W.4's) husband filed a G.D. Entry with the Badda Police Station on 16.06.2008, because of which the police raided the house of Rafique and arrested both Rafique and Nurul Alam therefrom. P.W.4 testifies that Rafique, Nurul Alam and Kajol admitted their complicity in the alleged killing of the

victim by the knife, which was collected from some Rubel and his (the victim's) death was caused giving 7 knife-blows on his chest and removed the skin of his face. She discloses that her family had a dispute with both Rafique's 'Khalu' A. Sobhan and Noor Alam's brother Jashim regarding some land property and for that matter more than once 'Shalish Baithaks' were held at the locality. She identified accused Rafique, Noor Alam and Kajol present in the dock and claimed that they killed her son Mamun.

28. In cross-examination, P.W. 4 states that her family had no dispute with father or mother of accused Rafique, but her family had some conflicts with the maternal grandfather of accused Rafique. She discloses in her cross-examination that once Rafique's maternal uncle Jahangir threatened her family to fracture their legs and limbs. In cross, she testifies that on 04.06.2008 accused Mamun, Rafique and Noor Alam talked to her on mobile phone and informed that they would come together on 04.06.2008 and at one stage she (P.W.4) came to the residence of her maternal uncle Nurul Haque, who made a G.D. Entry with the Badda Police Station accompanying her husband.

29. P.W.4 denies the defence suggestion that because of the dispute with maternal grandfather i.e. 'Nana' of accused Rafique, the case was filed implicating Rafique's name as an accused. In cross, she claims that she gave her statement to the I.O. of the Badda Police Station narrating the alleged occurrence. P.W. 4 has denied the defence suggestion that the accused persons did not kill her son Mamun and the case was lodged just to harass the accused persons.

30. P.W. 5 Md. Zafor Iqbal is maternal uncle of the victim. According to this witness, on 04.06.2008 his (P.W.5's) sister informed him about the fact of missing his nephew i.e. the victim and his Mama Nurul Haque subsequently made a G.D. Entry with the Badda Police Station and prior to that his brother-in-law (i.e. P.W.1) had also made another G.D. Entry with the Joydebpur Police Station. P.W.5 expresses that accused Rafique, Noor Alam and Kajol have confessed their involvement with the alleged killing of Mamun and they caused the death of the victim at Bholanathpur giving knife blows on his person. P.W.5 claims that in his presence the accused persons have admitted their guilt. This witness states that the dead body was initially buried as an unidentified body by the Anjuman-e-Mofidul Islam and it was exhumed subsequently. He further states that his brother-in-law (P.W. 1) had some dispute with Rafique's Mama Jahangir and Noor Alam's brother Jashim on land property. P.W.5 has identified all the accused persons present in the dock.

31. In cross-examination, P.W.5 discloses that he is the Headmaster of a Primary School and his brother-in-law (P.W. 1) had no such direct dispute with accused Rafique. He has denied the defence suggestion that on some ill-advice of his 'Mama' Nurul Haque the instant case was instituted falsely implicating names of Rafique, Noor Alam and Kajol.

32. P.W. 6 Humayun Kabir Bhutto is also a maternal uncle of the victim. He deposes that the victim started for the village home taking a mobile phone and Tk. 12,000/= in cash with him. He testifies that the accused persons killed the victim and got Tk. 12,000/- in cash found with him distributed among themselves and Rafique & Noor Alam received Tk. 6000/- each. He discloses that Rafique deposited an amount of Tk. 5,500/- using a fake name 'Shishir' in the Roky Samobay Samity and the said amount (Mat Ext.II) was subsequently seized preparing a seizure list 'Ext.2' to that effect. According to P.W.6, accused Rafique, Noor Alam and Kajol have admitted their involvement in the alleged killing of the victim.

33. In cross-examination, P.W. 6 states that after the death of his nephew he came to Dhaka and the police recorded his statement. He discloses that after writing the seizure list he signed the same and at that time the Investigating Officer, the informant and some others were present. He has denied the defence suggestion that the police took his signature on a paper written by them and as the informant is his brother-in-law, he is deposing falsely.

34. P.W. 7 Md. Abul Kashem lives at the same homestead of the informant's village home in Noakhali and the victim is his (P.W.7's) 'Nati' i.e. grandson by the village courtesy. He testifies that since the victim had not been going to his village home, his mother and father started searching for him at various places and at one stage the victim's father made a G.D. Entry with the Joydebpur Police Station and Nurul Haque made another G.D. Entry with the Badda Police Station. P.W. 7 states that accused Rafique, Noor Alam and Kajol have confessed their alleged involvement in killing the victim Mamun at Bholanathpur and initially his dead body was buried as of an unknown person. P.W.7 further states that the dead body was subsequently exhumed and it was then sent to the village home for its burial. He claims that accused Rafique and Noor Alam had some land dispute with the victim.

35. In cross-examination, P.W.7 has made an account that he did not see as to who killed the victim and stated that he heard about the alleged occurrence. He denies the defence suggestion that he has deposed at the dictation of the victim's father and mother.

36. P.W. 8 Abul Khayer has been tendered and the defence has declined to cross examine him. P.W. 9 Md. Amirul Islam Alam is the President of the Roky Somabay Samity of Kureel Bishwaroad and states that somebody in the name of 'Shishir' deposited Tk. 5,500/= in the Samity and the police seized the money preparing a seizure-list (Ext.2) to that effect. In cross, this witness testifies that filling-up the prescribe Form 'Shishir' became a member of the Samity. He denies the defence suggestion that he signed a blank paper and did not know what had been written there.

37. P.W.10 Md. Shahadat Sheikh is a Tailor of the shop named 'Shishir Tailors' opposite to the office of the Roky Somabay Samity. He deposes that on 16.08.2008 the police seized Tk. 5,500/= preparing a seizure list (Ext.2) and he signed the same as a witness. In cross, he denies the defence suggestion that the police did not seize any money and he was deposing falsely.

38. P.W.11 is an Ex-Chairman of Ambornagar Union Parishad no.5 under P.S Sonaimuri of Noakhali. According to him, the informant's son had not been going to his village home and subsequently on search it was learnt that he i.e. the victim was done to death. He testifies that accused Rafique, Noor Alam and another boy from Dhaka slaughtered the victim. He discloses that accused Rafique's Mama and his cousin Wali Ullah had a land dispute with the informant. He claims that the body of the victim was buried at the village home in his presence. In cross-examination P.W. 11 states that Rafique's Mama had a land dispute with the informant and on that matter there was litigation in the Court. He denies the defence suggestion that he is deposing falsely.

39. P.W. 12 Md. Rubel Islam is a neighbour and cricket-playmate of accused Rafique, Noor Alam and Kajol and a student of Class X in Sheer-E-Bangla Ideal School. P.W. 12 testifies that sometimes back the accused Rafique collected a knife from him (P.W.12), which belonged to his 'Choto Mama' and used in slaughtering the sacrificing-beasts. P.W. 12 states that subsequently the knife was not returned to him and he came to know that accused Rafique, Noor Alam and Kajol slaughtered the victim with that knife. In cross-examination

P.W. 12 testifies that after taking away the knife he did not see or meet the accused persons again. He discloses the name of his 'Choto Mama' as Moni. He denies the defence suggestion that accused Rafique did not take any knife from him and he was deposing falsely.

40. P.W.13 Rakib Ahmed @ Roky testifies that the Sony Ericson Mobile Set was purchased by him from accused Kajol in consideration of Tk. 5,500/- . He identified accused Kajol present in the dock and also exhibited the Mobile Set as 'Mat. Ext-II'. In cross, he states that there was no such document regarding the purchase of Mobile Set. He denies the defence suggestion that 'Material Exhibit-II' Mobile Set was not purchased by him from accused Kajol.

41. P.W.14 Masud Hasan deposes that on 07.06.2008 he was going through the open place situated by the river at Bholanathpur and at that time seeing some people and police assembled thereat he proceeded and found a dead body wearing a shirt and a Jeans Pant. On the request of the police he (P.W.14) signed the Inquest Report (Ext.3). In cross he claims that around the place of occurrence he had some vegetable producing land and he signed a white paper seeing the dead body there.

42. P.W.15 Md. Majibur Rahman deposes that on his way to village Bholanathpur on 07.06.2008, he found some people and police assembled there and going there found a dead body. He testifies that the police prepared the Report, where he signed as a witness (Ext. 3/2). In cross, P.W.15 discloses that he was going towards the house of his one sister-in-law and at that time seeing a dead body he signed a white paper.

43. P.W. 16 Constable Serajul Islam deposes that on 07.06.2008 Sub Inspector Selim Reza and he saw an unidentified dead body and at that time a liver-colour Check Shirt and a Jeans Pant were found with the body of the deceased and some pieces of those clothes were seized preparing a seizure-list (Ext.4) to that effect. He has identified his signature in the seizure-list as 'Ext. 4/1' and got some cut pieces of the clothes as 'Mat. Ext.III and IV'. In cross P.W.16 claims that in his presence the pieces of clothes were cut away from the Shirt and the Pant of the dead body. He denies the defence suggestion that there was no such 'alamats' with the body of the deceased.

44. On re-call P.W.16 states that he carried the dead body to the General Hospital of Narayangonj vide C.C. No. 1/08 dated 07.06.2008 and signed the Chalan Form (Ext.5). He claims that the inquest of the body was held in his presence. In cross P.W.16 testifies that the inquest was held at the place of occurrence in presence of the witnesses and people of the locality and the body was carried to Narayngonj General Hospital by a Van. He claims that at the time of holding inquest the body was found decomposed. He denies the defence suggestion that he did not see the dead body.

45. P.W. 17 Zeenat Rehana is an Executive Magistrate of Narayangonj. She testifies that in connection with Badda P.S case no. 53 dated 25.06.2008 corresponding to G.R. Case no. 371 of 2008 in presence of S.I Abu Hanif (P.W.27) and other witnesses on that day at 4.30 p.m. the body was exhumed from the Majdair Graveyard in Narayangonj and at that time relatives of the deceased identified the body of the victim. This witness handed over the dead body of the victim to his relatives according to a letter issued by the Deputy Commissioner. In cross-examination, P.W. 17 claims that she herself saw the dead body and handed over the same to the victim's Nana 'Nurul Haque' in presence of S.I. Md. Hanif. She asserted in cross-examination that relatives of the deceased identified the dead body of the victim.

46. P.W. 18 Sk. M. Tofael Hossain deposes that the confessional statement of accused Noor Alam was recorded on 28.06.2008 and the confessional statements of accused Kajol and Rafique were recorded on 29.06.2008. He claims that before recording statement of each accused person 3 hours time was given to think over the matter and all legal requirements were fulfilled. P.W.18 testifies that the accused persons have made their confessional statements voluntarily and contents of their statements were read over to them, who signed admitting them as true.

47. In his cross-examination, P.W.18 expresses that he did not notice any sign of injury on the body of any accused and after recording the confessional statement they were sent back to the Jail Custody. He denies the defence suggestion that at the time of recording the confessional statements relevant provisions under sections 164 and 364 of the Code of Criminal Procedure were not followed and their statements were recorded putting them under duress or intimidation. He also denies the suggestion that the accused persons did not make the statement voluntarily and after recording them he did not certify properly.

48. P.W.19 Dr. Prodip Kumar Das deposes that he held the autopsy on the dead body of an unknown male person and gave his opinion that cause of the death was due to hemorrhage and shock resulting from cut throat wounds and the injuries stated in the Report, which were ante-mortem and homicidal in nature.

49. In his cross-examination, P.W.19 testifies that age of the victim was around 28 years and his relatives identified the dead body. He expresses that at the time of autopsy decomposition of the body started. He denies the defence suggestion that the body of deceased was not identified. P.W. 20 Dr. K.M. Shafiquzzaman and P.W. 25 Dr. Jalil Ahmed are the members of the Medical Board for holding the Post Mortem Examination and they depose that the Report of autopsy was prepared and also signed by them.

50. P.W.21 Kazi Md. Shahidul Islam and P.W. 2 Kazi Md. Hedayetul Islam depose that the Investigating Officer recovered the Mobile Set from Roky and seized it preparing a seizure list (Ext. 12) to that effect and they signed it as the witnesses thereto.

51. P.W. 23 Md. Abu Saleh Mallik is a 'Khademdar' of Majdair Graveyard in Narayangonj. According to this witness, after observing all funeral formalities including the Namaj-e-Janaja, the body was buried at Majdair Graveyard and a few days after burial the police and Magistrate along with some guardians of the deceased came there and in their presence it was exhumed and identified by relatives of the deceased and then it was taken to his village home in Noakhali. The defence has declined to cross-examine this witness. P.W.24 Md. Golam Mostafa is a Caretaker of Majdair Graveyard. He was tendered by the prosecution, but the defence declined to cross-examine him. P.W.26 S.I. Md. Fariduddin has verified names and addresses of all the accused persons and found them correct. The defence declined to cross-examine him.

52. Being the Investigating Officer, P.W.27 S.I. Md. Abu Hanif has visited the place of occurrence and recorded the statements of witnesses. He has prepared the Sketch-Map and Index of the places of occurrences. P.W.27 testifies that on the basis of the Ejahar accused Noor Alam and Rafique were arrested and on interrogation they have disclosed that on 05.06.2008 at 10.30 a.m. the victim Mamun was done to death by them at an open place of Bholanathpur under P.S Rupgonj of Narayangonj dealing repeated knife blows on his person

and left away the body there. He further testifies that accused Rafique and Noor Alam took Tk. 12,000/- and accused Kajol took away the Mobile Set away from the deceased as their dividends of participation in slaughtering the victim. P.W.27 claims that after arrest of all accused persons namely Rafique, Noor Alam and Kajol they have confessed their guilt making their respective statements under section 164 of the Code of Criminal Procedure.

53. According to the evidence of P.W.27, on 07.06.2008 the police of Rupgonj found the body of an unknown young person at an open place of Bholanathpur under P.S. Rupgonj and a Case having no. 20 dated 07.06.2008 was registered on the basis of which the inquest and autopsy were held and it was then buried at Majdair Graveyard in Narayangonj. P.W. 27 states that seeing a photograph of the dead body and its wearing clothes, relatives of the deceased have identified it and subsequently in view of the discloser made by accused Kajol, the Mobile Set of the deceased was recovered from some Rakib Hossain @ Roky preparing a seizure-list to that effect. P.W.27 testifies that on getting the permission from the Executive Magistrate the body of the deceased was exhumed from the Majdair Graveyard of Narayangonj.

54. According to this witness, on 28.06.2008 accused Noor Alam and on 29.06.2008 remaining 2 accused persons namely- Rafique and Kajol made their respective statements before the learned Metropolitan Magistrate under section 164 of the Code of Criminal Procedure. P.W.27 testifies that pursuant to accused Rafique's discloser the Pass Book containing the name of some 'Shishir' was recovered from the Roky Multipurpose Somabay Samity. He further testifies that the victim's father had land disputes with the accused party. P.W.27 claims that during investigation all incriminating materials were collected and finding a prima-facie case against the accused persons, he submitted the Charge Sheet bearing no. 573 dated 31.12.2008 against the accused persons under sections 364,302,307/411/34 of the Penal Code. He has identified all accused persons present in the dock.

55. During his cross-examination, P.W.27 has denied the defence suggestion that in Ejahar the age of the victim was shown as 18 yrs and in the Post Mortem Report it was shown as 28 yrs. He has denied the suggestion that confessional statements of the accused persons were recorded under duress and intimidation and they did not do that voluntarily. He claims that there are two places of the occurrence and he visited both of them but did not find any eye-witness of the alleged occurrence.

56. On the threshold of his submission Mr. Md. Mansurul Haque Chowdhury, learned Advocate appearing for condemned-appellant Rafique contends that the prosecution has failed to produce any eye-witness of the alleged occurrence of killing the victim and that is why it was not legal for the Session Court to rely on the evidence, which was hearsay in nature. The learned Advocate further contends that the confessional statements of the condemned-appellants, as recorded, were neither true nor voluntary, whereas the learned Session Judge has recorded its impugned order of conviction awarding the sentence of death depending on those statements and thereby committed a gross error of law and fact occasioning failure of justice.

57. Mr. Chowdhury has submitted the fact that the alleged occurrence took place on 05.06.2008 and the informant lodged Ejahar (Ext.1) on 25.06.2008 without any explanation for the delay caused thereto. He has further submitted that on exhumation of the body of deceased it was not properly identified by relatives of the victim and the very motive, as

assigned for causing the death of the victim has not been substantiated by any trustworthy witness or document.

58. The learned Counsel has argued that since the prosecution has failed to unearth the root-cause of killing the victim by the condemned-appellants and since the matters relating to land disputes between the maternal grandfather of accused Rafique and the informant-party have not been proved, it would thus hardly be possible for the Court to believe in the alleged involvement of the condemned-appellants with the death of the victim.

59. Mr. Basharatul Mawla, learned Advocate for condemned-appellant Kajol contends that in a case of murder if the prosecution cannot examine any eye-witness and remains dependent on the circumstantial evidence, in that case specific motive of the assailant(s) is to be proved and that should commensurate with the alleged occurrence. Mr. Mawla further contends that in the instant case the prosecution has neither succeeded to prove the motive of accused Kajol nor linked the evidence with the chain of events on the basis of which accused Kajol could be connected with the alleged occurrence.

60. Mr. Mawla submits that accused Kajol did not make the confessional statement voluntarily and the same was recorded under duress and intimidation and that is why the impugned order of conviction against accused Kajol is liable to be set aside and a decision of acquittal needs be recorded for him.

61. Mrs. Hasna Begum, learned Panel Advocate for condemned-appellant Noor Alam contends that the confessional statements of the accused persons are not substantive pieces of evidence and they may be relied upon only when they are found inculpatory, true and voluntarily. Mrs. Hasna Begum further contends that accused Noor Alam did not make the statement voluntarily rather being threatened by the police under duress he had to make such a statement, which was not recorded fulfilling the requirements laid down in sections 164 and 364 of the Code of Criminal Procedure.

62. Mrs. Hasna Begum has further argued in line with the submission made by Mr. Mawla above that in the instant case, which is dependent on the circumstantial evidence, it becomes imperative to see whether the alleged occurrence is being proved by the prosecution so consistently that it excludes every other possible hypothesis except the guilt of the condemned-appellants.

63. In reply, Mr. Sheikh A.K.M. Moniruzzaman Kabir, learned Deputy Attorney-General has vehemently opposed the submissions advanced by the learned Advocates for the defence above and contended inter alia that the prosecution examined the concerned Metropolitan Magistrate as P.W.18, who recorded the confessional statements of the condemned-appellants under section 164 of the Code of Criminal Procedure and the defence has cross-examined him but failed to elicit any statement from him on the basis of which the Court can disbelieve or discard the confessional statements made by them.

64. The learned Deputy Attorney-General contends that in the Trial Court along with the confession recording Magistrate Sk. Md. Tofael Hossain (P.W. 18) other vital witnesses like P.W.3 Md. Rezaul, the Darwan, P.W.12 Md. Rubel Islam, from whom the knife was taken, and P.W.19 Dr. Prodip Kumar Das were examined, whose evidence was fully corroborative, impeccable and trustworthy. In such a situation, as contended by learned D.A.G, the learned Session Judge had no other alternative but to believe in the charge levelled against the

condemned-appellants under sections 302/34 of the Penal Code and in doing he has not committed any error of law or fact as alleged by the defence.

65. In order to visualize and sift the evidence and attending circumstances in their true perspective and discover the ring of truth relating to the alleged occurrence of death of the victim, it would be convenient and proper for us to consider the whole chain of events in the following 3 (three) phases:

firstly, whether on 03.06.2008 the victim went to the house of accused Rafique at Kureel Bishwaroad receiving a call from the latter and whether accused Rafique had any motive to call the victim or not;

secondly, whether the victim stayed at the house of Rafique at Kureel Bishwaroad till the morning of 05.06.2008 and whether during that period the accused persons took and completed the preparations for killing the victim or not; and

thirdly, whether on 05.06.2008 at around 10.30 a.m. the accused persons took the victim with them to the open place situated by the Esapura River at Bholanathpur and he was killed by them in furtherance of their common intention by dealing knife blows and causing cut throat injury and whether their confessional statements were inculpatory, true and voluntary or not.

66. Before entering into the phase-wise discussion, we may take note of the fact that the victim's father Abdus Sobhan (P.W. 1) had a greengrocery shop at Boardbazar under P.S. Joydebpur of Gazipur, where being the eldest son the victim used to help his father and on that matter there is no dispute between the parties. It is gathered that P.W.1's wife Kohinur Akhter Beauty (P.W. 4) and his other children used to reside at the village home under P.S. Sonaimuri of Noakhali and from time to time she (P.W. 4) maintained communication with her husband (P.W. 1) and the son (i.e. the victim) on mobile phone. It is not challenged by the defence that on 03.06.2008 at around 8 O'clock or 9 O'clock in the morning the victim set out for his village home in Noakhali taking taka 12,000.00 in cash, some mangoes, a Sony Ericson Mobile Phone and other articles with him.

67. According to the prosecution, the victim set out of his residence at Boardbazar for a journey to Noakhali and at that time received a mobile call from accused Rafique, who requested him to go to his residence at House no. Ka-109/4 of Kureel Bishwaroad owing to which changing his mind he (i.e. the victim) went there.

68. Firstly, we are to elucidate the evidence and attending circumstances in order to verify some vital questions like- did the victim receive any call from accused Rafique? And did the latter request the victim to go to his house at Kureel Bishwaroad? Another question is- what was the intention or motive of accused Rafique to take the victim to his house?

69. In the first phase of our discussion, we are to find out answers to those questions and that would, so far we understand, pave our way for determining the issues. The victim's father Abdus Sobhan (P.W.1) deposes in chief that on 03.06.2008 at around 8.00 or 9.00 a.m. the victim set out of his (P.W.1's) residence at Boardbazar for the village home in Noakhali. In cross-examination, P.W.1 has echoed the said testimony saying that on 03.06.2008 his son Mamun started for the village home. P.W.1 discloses his relationship with accused Rafique stating:- “আসামী রফিক চাচাতো ভাইয়ের মেয়ের দিকের নাতি। আসামী নূরল্ল আলম আমার চাচাতো ভাইয়ের ছেলের দিকে i jasj”。 It appears from the said testimony that both Rafique and Noor Alam are distantly

related with the victim and accused Rafique is his (victim's) nephew and accused Noor Alam is his cousin.

70. After getting out of the residence at Boardbazar, by which mobile accused Rafique called the victim and requested him to go to his house:- in this context no clear evidence is available on the record. So, we have to depend on the facts-as to whether the victim in place of proceeding towards his village home changing his mind went to the residence of accused Rafique or not. On that matter the evidence given by Md. Rezaul (P.W. 3) and the confessional statement of accused Rafique are the only available tools which can be used to verify the said fact.

71. P.W.3 was a Darwan of the house at Kureel Bishwaroad. He has deposed that in 5th floor of the building accused Rafique was staying with his father Borkatullah and in some part of the apartment accused Noor Alam used to stay as a sublettee. P.W.3 testifies that some relatives of Rafique from time to time used to visit his house and on 03.06.2008 Mamun also came to that house. P.W.3 has disclosed stating:-

“৩/৬/০৮ তারিখে মামুন রফিকদের বাসায় আসে। ৩/৬/০৮, ৪/৬/০৮, ০৫/০৬/০৮ aʃɪ M ɪcgL, eʃɪm Bmj J
মামুনকে ঐ বাসায় দেখি। ৫/৬/০৮ তারিখ সকালে মামুন, নূরল আলম ও রফিককে বাসা হইতে বাহির হইয়া যাইতে দেখি।
mɪt_ AcɪnɪPZ GKɪU tQj | ॥Qj | cti iɪb th, gɪgɪy grɪv hɪq /”

72. According to this witness on 03.06.2008 the victim came and stayed at the house of Rafique with other accused persons upto 05.06.2008. During his cross-examination P.W.3 says:- “মামুনকে আমি চিনিতাম না চেহারায় মামুনকে Qeaɪj z ejj Sjeajj ejz ॥

73. Above testimony of P.W.3 i.e. the Darwan of the building has clearly unfolded the fact that the victim was known to him by his appearance, but he (P.W.3) did not know detailed antecedents of him. In other words, it can be said that by face and appearance Mamun was known to the Darwan i.e. P.W.3, who on 03.06.2008 recognized him and witnessed his arrival at the house of Rafique. By cross-examining P.W.3 nothing has been elicited from him to discard his evidence on that matter.

74. On the other hand, in his statement under section 164 of the Code of Criminal Procedure accused Rafique has stated the following:

“মামুন আমার চাচাতো মামা। আমার মামা নানাদের সঙ্গে মামুনদের জাগুগো জমি নিয়ে বাগড়া ছিল। আমার মামা জাহাঙ্গীর এসে আমাকে বলে মামুনদের সাথে আমাদের বাগড়া। তুই কেন মামুনের সাথে চলিস। মামুনের ঠ্যাং হাড় ভেঙ্গে দিতে পারিস না। আমার মামা (জাহাঙ্গীর) পরে সৌন্দি আরব চলে গেছে। নূর আলম ও আমার মামা লাগে। নূর আলম বলে ওকে মারতে হলে out side এ নিয়ে যেতে হবে। মামুন আমার সাথে একসাথে বাড়ি যাওয়া আসা করত। আমার। hɪʃɪ ja চলাফেরা করতাম। আমি গত ৩/৬/০৮ ইং তারিখ মোবাইল করে আমার বাড়ি নিয়ে আসি। নূর আলম মামুনকে দেখে বলে আমার মায়ের সাথে ও মামুনদের বাগড়া লেগেছে। শালাকে মার ঠিকই দিব। bɪ-আলম আমাকে বলে যে। lān থেকে পারং
HLVl ॥Qj ॥ceuj Bpθhz Bcɪ ॥S' jɪp Kɪi ॥Rj | ॥ দিয়ে কি হবে? bɪ-আলম বলল সময় হলেই দেখবি কি করি।”

75. Mr. Sk. A.K.M. Moniruzzaman Kabir, learned Deputy Attorney-General has drawn our attention to the tone and tenor of the said part of confessional statement made by accused Rafique and submitted that as a part of his attempt and plan for taking revenge against the victim's family because of some land disputes accused Rafique called the victim on 03.06.2008 to his residence at Kureel Bishwaroad. Learned Deputy Attorney-General has claimed that the statement of accused Rafique was completely true and voluntarily.

76. On perusal of the above statement of accused Rafique, it becomes clear like anything that because of land disputes between the victim's father and Rafique's maternal-uncle's family at a certain point of time on 03.06.2008 accused Rafique had made up his mind to assault Mamun and that plan has subsequently culminated and developed into a devastating blood thirst when accused Noor Alam opened his mind making a reference to the quarrel between his mother and the victim's family. In his confessional statement Rafique has referred to the following utterances of accused Noor Alam:- “*Avgi gitqi mit_I gitgit_i SMor tj #M#Q/ kjj vtK #KB gvi w'e/*” It is noted that even during his examination under section 342 of the Code of Criminal Procedure accused Noor Alam, in reply to question no. 2 made by the Court has stated the following:-

*02/ Arcib tKib #Qyewj teb #K?
Dt nū, ejj e/ gitgj I Avgi dertZr fVb BKeyj Avgi tQitUteib tRvrm#K AgibwL Kfite mbh#Zb Kti | Zniv
ibqv t`tk wePvi nq/ Avgi v b'ih` wePvi cvB bvB/*

77. Taking those disputes and other quarrels into their account accused Rafique and Noor Alam, as it reveals, ultimately decided not to allow the victim to go by, rather to kill him implementing their brutal plan and design. It appears that on 03.06.2008 Rafique called the victim to his house at Kureel Bishwaroad and seeing the victim there accused Noor Alam took his final decision to finish him off and accordingly ordered Rafique to collect a knife, who complied with that order collecting a knife from some Rubel (i.e. P.W.12).

78. It is proved by the evidence of P.W.1 that on 03.06.2008 in the morning the victim set out of the residence at Boardbazar for the village home in Noakhali. As the prosecution cannot produce any ocular evidence to spell out the exact fact regarding at what time and by which mobile Rafique called the victim to his residence at Kureel Bishwaroad, it becomes imperative for us to examine the facts and attending circumstances along with the confessional statement made by accused Rafique in that score. The Darwan of the house i.e. P.W.3 has sharply corroborated the fact that Mamun arrived at the residence of Rafique in the morning of 03.06.2008. Now by juxtaposing the evidence given by the P.Ws. 1 & 3 with the confessional statement of accused Rafique, it transpires that the victim was a relative i.e. 'Mama' of accused Rafique and all along they were friendly to each other and of the same age group and that was why the victim did not hesitate to respond and decided to meet Rafique at his house at Kureel Bishwaroad.

79. Now the question is- what was the motive of accused Rafique to call the victim to his residence? On this question our opinion is that accused Rafique and Noor Alam had some latent vengeance and enmity against the victim and his family for reasons stated by Rafique in the aforesaid part of confessional statement and in the evidence of P.W.1 and that is why accused Rafique needed the victim like a prey to cater to his revengeful motive. So immediately after arrival of the victim at his residence both Rafique and Noor Alam started all out preparations for implementing their plan of killing him and with that the first phase of the occurrence came to an end.

80. We may now turn our approach to the second phase of the occurrence and ascertain:- whether the victim stayed at House no. Ka-109/4, Kureel Bishwaroad and left that house on 05.06.2008 in the morning or not. On those facts except the evidence of P.W.3 and the confessional statement of the accused persons we have no other material on record. But there are some evidence of P.W.1 and P.W.4, who claimed that during the period from 03.06.2008 to 05.06.2008 they from time to time talked on mobile phone to accused Rafique and Noor Alam and sometimes to the father of Rafique.

81. P.W.1 Abdus Sobhan has claimed that his wife P.W.4 Kohinur Akhter Beauty informed him that their son Mamun was staying at the house of Rafique. In this context P.W.4 has deposed the following:-

৩/৬/২০০৮ তারিখ দুপুরে মামুন প্রথমে আমাকে ফোন দেয়। ৩/৬/০৮ তারিখ রাত্রে মামুন, রফিক, নূরল আলম একত্রে আমার সাথে কথা বলে এবং ৪/৬/০৮ তারিখ বাড়িতে আসার কথা জানায়। ৪/৬/০৮ তারিখ মামুন, রফিক, bjm Bmj HL স্বার সাথে আসার কথা বলে এবং পরদিন বাড়িতে আসিবে বলিয়া তাহারা জানায়। ৪/৬/০৮ তারিখ রাত্রে আমি মামুন, রফিকের মোবাইলে ফোন দিয়া তাহা বক্ষ পাই। রাত্রে রফিকের নানীর নিকট হইতে রফিকের পিতা বরকত উল্লার ফোন নম্বর নেই। ফোন করিয়া বরকত উল্লাহকে রফিকের কথা জিজ্ঞাসা করিলে সে বলে রফিক নীচে আছে এবং তাহারা ৫/৬/০৮ তারিখ বাড়ি আসিবে বলিয়া জানায়। ৫/৬/০৮ তারিখ সকালে আবার মামুন ও রফিকের ফোন দিয়া ফোন বক্ষ পাই hl কত উল্লাকে ফোন দিলে সে জানায় যে, রফিক ঘুমাইতেছে। মামুন বাড়ী না আসায় আমি তাহা আমার মামা নূরল হককে SjejCz

82. On analysis of the above testimony of P.W.4 and the evidence given by P.W.3, it becomes abundantly clear that since his arrival at the house of Rafique the victim had been staying there till the morning of 05.06.2008 with other accused persons. P.W.3 (i.e. the Darwan of the house) has stated:- “৫/৬/০৮ তারিখ সকালে মামুন, নূরল আলম ও রফিককে বাসা হইতে বাহির হইয়া যাইতে দেখি” *mit_ AcwiPZ GKU tQj I wQj / cti iwb th, gvgly giv hvq*”.

83. Above corroborative evidence of P.W.3 and other attending circumstances have made us to believe in the fact that the victim Mamun had not only came to the house of Rafique but also stayed there till the morning of 05.06.2008 with accused Rafique, Noor Alam and another boy i.e. Kajol. On perusal of the evidence, it is observed that during that period accused Rafique and Noor Alam have masterly proceeded with their dreadful preparations keeping the victim in their custody like a prey and distracting his attention thereto. Unfortunately the victim, as it appears, has failed to understand the plan and design taken and their progress of which he (victim) was going to be the target.

84. Accused Rafique has made a clean breast of his complicity in taking preparation of causing the death of the victim stating the following in his confessional statement:-

ibbi- Avj g AvgitK etj thLub t_tK cvim GKUv Qj ibtq Avmle | cti Awg iatej i wbKU t_tK Qjw ibtq Awm | iatej etj GUv gvgvi Qj | tm Dnv w`qv Miæ KvUvKwU Ktj | mZivs QjwU tdir w`tq hvteb | ej আলম ছুরিটি দেখে নীচে থেকে ধার দিয়ে নিয়ে আনে। অতঃপর গত ৪/৬/০৮ BS তারিখ সকাল ১০ টার দিকে আমি মামুন আর নূর আলম ইচাপুরা যাই। ঐখানে ঐ দিন যেয়ে খেজুরের রস খেয়ে ঘুরে ঘুরে সমস্ত জায়গা আমরা দেখি নূর আলমের নেতৃত্বে। পরে আমরা বাসায় চলে আসি। নূর আলম ঐ দিন ফিরে বাসায় আমাকে বলে আজ পারলাম না। আগামী কাল তুই dlh Bcj jilhz Bcj AüfLj | Lরি। নূর আলম পরে বলে তুই না পারলে অন্য একটি ছেলেকে নিয়ে Avq th gvitZ cvite | AZci bi- Avj g KvRj tK tWtK ibtq AvmtZ ej tj আমি কাজলকে ডেকে নিয়ে আসি।

85. On the said matter accused Noor Alam has also made a clean breast of his active involvement and disclosed the following in his confessional statements under section 164 of the Code of Criminal Procedure:

Memorandum bs- 109/4, KvRjewo, wekjiw, evCv, XvKv| gvgly g½j evi Gtm H emo _itK| g½j evi | egevi | ep-úZevi KvRj bvgK GKU tQj tK iwdK ibtq GmtQ | AZtc i KvRj, gvgly | iwdK BQvcjw Dti tk” i l b v nq...AZtc i Awg, gvgly, KvRj | iwdK BQvcjw thtq b`x cvi ntq tfvij vrig bvgK hvqmig tcSQIB | cti AtbK `y tnitU Kj wMq, QbMftQi mt_ ejj y gvtV Avgiv thtq em | iwdK Avgit` i Avi | ej H RvgMq thtq tgji tdj tj tKD Rvbte bv |

86. Accused Kajol in his statement under section 164 of the Code of Criminal Procedure has stated the following:

“MZ 04/06/2008Bs ZwiL iwdK Avgvi KtQ Gtm ejj ZB iK GKUv tQj tK gvitZ wtz cve/ Awg iRAvmv Kij vg iK iKg tQj / iwdK ejj tZvi mgibB iayj wq GKUyQnU/ ...ZLb Awg ejj vg iK AvtQ/ iwdK Pj thq Avevi Avar NnUv cti Avtm Ges ejj I tK gvitZ nte bv GtKevti tgiti tdj tZ nte/ ZLb Awg ejj , 00cvie bv/ AZtcI bi-Avj g Avgvi KtQ Avtm/ tm AvgitK iRAvmv Kti th, ZB cve bv? Awg iRAvmv Kij vg iK? tm ejj iwdK tZtK GKUv tQj tK tgiti tdj vi K_v ejj w? Awg A tkvi Kwi th, Awg KitZ crie bv/ tm ejj AvRtK iwdKtKi ewotZ Zvnvi Avr- bvB/ ZB AvR iwdKtKi ewotZ Avq GKmt_ vKe/ Awg ejj vg `rovI evmv t_tK ejj Awm/ cti iwdKt i evmvq tMj vg Ges_vKj vg, Ngj vg/ mKj 5 Uvi mgq mevB Ngj t_tK DVj vg Ges wekfittoi giv_q GKUv tntutj bv-` KtZ hB Awg, bi-Avj g, gqgj I iwdK/ bv-` Kivi mgq iwdK ejj BQvcjw b`xi cti tfvij v bv_cj Mgt Avgvi GK eUjy bvBvi ewo/ tm bvBvi ewotZB AvtQ Ges Zvi KtQ Awg UvKv cve/ iwdK gvgjtK ejj, I i KvQ t_tK UvKv ,tj v cvBtj Awg tZvi mvt_tki ewo thz cve/”

87. It appears from the statements of accused Rafique, Noor Alam and Kajol that they not only made the plan to kill the victim Mamun rather took all preparation so carefully that it could be executed without fail. The confessional statement of Rafique has received a strong support and corroboration from the testimony of P.W. 12 Md. Rubel Islam, who disclosed the fact that accused Rafique, Kajol and Noor Alam were his playmates and from him (P.W.12) accused Rafique collected the knife that belonged to his “Choto Mama” which was used for slaughtering the sacrificing beasts. Accused Rafique, as stated by P.W.2, did not return the knife and afterwards he (P.W.12) came to know that the accused persons killed Mamun with that knife. During his examination, P.W.12 has identified all accused persons present in the dock. In his cross-examination, P.W.12 has denied the defence suggestion that accused Rafique did not take any knife from him.

88. On appraisal of the evidence given by P.W.12 and the confessional statements of the accused persons, it transpires that during the period from 03.06.2008 to 05.06.2008 the accused persons not only kept the victim at the house of Rafique moreover they carried out all preparations including collection of the knife and recruitment of another assailant namely Kajol for murdering the victim in line with their plan.

89. Mr. Sheikh A.K.M Moniruzzaman Kabir, learned Deputy Attorney-General has drawn our attention to the degree of culpability and craftsmanship adopted by the accused persons in orchestrating the plan to finish the victim off the earth. It is noted that after collecting the knife accused Rafique and Noor Alam a day before the date of occurrence i.e. on 04.06.2008 took Mamun with them to that area by the Esapura River at Bholanathpur village and on that date after spending the whole day there, they returned because of lack of their confidence to overpower the victim and that was why decided to take another assailant namely Kajol with them to make sure the execution of their plan. It is thus evident that with those activities the accused persons completed their arrangements and preparation for killing the victim and thereby concluded the second phase of the alleged occurrence.

90. Now we are to proceed and examine the last episode i.e. the third phase of the occurrence and see as to whether the victim Mamun was taken to and allegedly done to death by the accused persons intentionally at the open place of Bholanathpur on 05.06.2008 at around 10.30 a.m in furtherhence of their common intention or not.

91. Regarding the alleged occurrence of causing death of the victim, the prosecution has not produced any eye-witness or ocular evidence. So, as usual we have to sift the materials on record and the evidence led in that score to try out the truth of the alleged death of the victim. In this regard, the prosecution has to connect the accused persons with the chain of events so

coherently that it must exclude every other possible hypothesis except the one indicating the guilt of the accused persons.

92. P.W.3 i.e. the Darwan or of House no. Ka-109/4 of Kureel Bishwaroad has deposed in clear terms that on 05.06.2008 in the morning he (P.W.3) saw Mamun with accused Rafique and Noor Alam and an unknown boy (i.e. Kajol) coming out of that house. On that day (i.e. on 05.06.2008) the victim's mother Kohinur Akhter Beauty (P.W.4) could not contact Mamun or Rafique and at that time their mobile phones remained switched off.

93. It is noted that before apprehension of the accused persons on 25.06.2008 in connection with Badda P.S. case no. 53 dated 25.06.2008 under section 365 of the Penal Code the victim's father had no idea about the cause of disappearance of his son. On 25.06.2008 and 26.06.2008 the police arrested all accused persons, who admitted their involvement in killing the victim at Bholanathpur on 05.06.2008. On the basis of such disclosure the Investigating Officer S.I. Md. Abu Hanif (P.W. 27) went to the place of occurrence and tried to recover "alamats" of the occurrence.

94. Being flanked with relatives of the victim, P.W.27 went to the Police Station of Rupgonj and came to know about recovery of the dead body of an unknown young boy on 07.06.2008 from an open place of Bholanathpur and in this respect a case bearing no. 20 dated 07.06.2008 was lodged with the Rupgonj Police Station. P.W.27 also got the information that the body had been buried at the Majdaire Graveyard and a photograph of the dead body and its wearing clothes had been laying with the Rupgonj Police Station. According to the I.O. i.e. the P.W.27, seeing the photo and wearing clothes of the deceased his relatives identified the body. P.W.27 claims that on getting permission from the Executive Magistrate P.W.17 Zenat Rehana the body was exhumed, identified and finally handed over to the deceased's relatives for its burial at their village home.

95. During his cross-examination P.W.27 has asserted that in presence of the witnesses the corpse had been disinterred and after identification it was handed over to the deceased's 'Nana' namely Nurul Haque (P.W.2). Above evidence of P.W.27 has received clear corroboration from the testimony of P.W.2 who stated:- "Avgiv Qre I Kico tPici t`Lqv jvk mbv³ Kwi / Av`vj tZ `i Lut-`i gva-tg gvR`vBi Kei -`b n`Z gvgjbi jvk Dxvi Kiv nq/ jvk Avgiv t`tk `b tq `vdb Kwi / The evidence of P.W.2 has been also corroborated by P.W.17 Zenat Rehana, who in her cross-examination has expressed that:- "jvk DtEij tbi mgq Gm,AvB nwbd, gtZi AvZ-`Rb / Ab`vb`iv DcW-Z nQtj b/ jvk Avgiv t`LqvQ/ jvk n`fsl Kwi qmQ/..... gtZi AvZ-`Rb iv jvk mbv³ Kwi qitQ/ wKwUtgj bvbv bjzj n`KU jvk n`fsl Kwi qmQ/"

96. It is patent that the body of the deceased was correctly identified by his kith and kin including P.W.1&2s in presence of the official witnesses like the Investigating Officer P.W.27 and the Magistrate P.W.17. We do not get any explanation from the defence as to why they did not challenge the fact of identification of the corpse at best by putting a suggestion to the witnesses in that score. In the sequel of which, the evidence led by the prosecution on the facts of identification and handing over the body of the victim have remained unassailed.

97. P.W.14 Masud Hasan deposes that on 07.06.2008 in his presence the police held autopsy on the body of the deceased and at that time it was found with a Check Shirt and a Jeans Pant. In cross-examination, P.W.14 claims that he signed a white paper seeing the corpse of the deceased. According to P.W.16 Constable Md. Serajul Islam, on 07.06.2008 a

Police Officer of Rupgonj namely S.I. Selim Reza found the unknown dead body having a liver colour Check Shirt and a black Jeans Pant. During deposition P.W.16 has identified one piece of the Check Shirt and another piece of Jeans Pant collected from the corpse and got them marked as "Material Ext. III and IV".

98. According to the evidence given by P.W.23 "Khademdar" of the Majdair Graveyard, on 08.06.2008 getting a body of deceased from the Anjuman-e-Mofidul Islam, it was buried after performing funerals including Namaz-e-Zanaja and after a few days the Police, the Magistrate and the deceased's 'Nana' and others came at the Graveyard, in whose presence the corpse was exhumed and identified. At that time, as claimed by P.W.23, relatives of the deceased has disclosed name of the deceased as Mamun and took the corpse away with them for Noakhali. Surprisingly, the defence has not shown any interest or celerity to challenge the above testimony of P.W.23 putting him on fire of cross-examination for the cause best known to it.

99. Applying the rules of prudence upon the anvil of the evidence given by the witnesses above and other materials on records, we find the strong reason to believe in the fact that the dead body recovered by the police of Rupgonj P.S. on 07.06.2008 from the open place of Bholanathpur situated by the Esapura River belonged to the victim Mamun and subsequently it was identified by P.Ws. 1, 2 and other relatives of the victim in presence of the witnesses like P.Ws. 14-17, 23 and 27. During cross-examination of those witnesses nothing has been elicited from them on the basis of which the Trial Court may disbelieve the prosecution story of identification of the corpse and its exhumation from the Graveyard.

100. In this context, Mr. Md. Mansurul Haque Chowdhury, the learned Advocate representing the condemned-prisoner Rafique and Mr. Basharatul Mowla, learned Advocate representing the condemned-prisoner Kajol have argued on the same string that the prosecution's failure to examine the Sub Inspector Selim Reza of Rupgonj Police Station and produce the photograph of the dead body has cast a doubt on the matter of identification of the corpse and in such a situation, it would not be wise for this Court to endorse a decision of conviction like the death sentence as awarded by the learned Session Judge.

101. In reply, Mr. Sk. A.K.M. Moniruzzaman Kabir, the learned Deputy Attorney-General has vehemently opposed and contended that such omissions and failure on the part of the prosecution are not so serious or substantive and they may at best be taken as omissions of minor nature. Learned D.A.G has further contended that the fact of identification of the wearing clothes and the corpse after its exhumation by relatives of the deceased has already been proved beyond all reasonable doubt, so on the plea of some minor omissions no prudent Court can let off accused persons, who in clear terms confessed their guilt making statements under section 164 of Code of Criminal Procedure.

102. We have given our anxious consideration to the submission advanced by the learned Advocates above and the evidence available on the record and found it difficult to disbelieve the fact of identification of the body of the victim and its subsequent exhumation from the Majdair Graveyard. It is true that the prosecution could further fortify its claim of identification of the body by exhibiting the photograph of the dead body and examining the concerned Police Officer of Rupgonj P.S. as a witness. But such minor omissions, so far we understand, by themselves can in no way mop up the very credibility of identification of the corpse and its exhumation from the Majdair Graveyard. The evidence of the witnesses namely P.Ws. 1, 2, 14, 15, 16, 17, 23 and 24 and the medical evidence given by P.W.19, 20

& 25 are found so corroborative and consistently interwoven that they do not inspire us to disbelieve the prosecution story of identification of the body of the victim. So, we are inclined to put our reliance upon the fact that the dead body recovered by the Police of Rupgonj on 07.06.2008 belonged to the victim and it was rightly identified by the relatives of the deceased.

103. We are to now consider the questions as to:- who and how did take the victim Mamun to the open place of Bholanathpur situated by the Esapur River under P.S Rupgonj and kill him there? Facts of last seen together by the Darwan (P.W.3) of the house at Kureel Bishwaroad and recovery of the body of the victim from the open place at Bholanathpur would definitely guide us to arrive at an unerring decision on the above matter. It is noted that the only eye-witness P.W.3 had last seen the accused persons with the victim alive in the morning of 05.06.2008 and at that time they were coming out of accused Rafique's residence at the 5th floor of building at house no. Ka-109/4 of Kureel Bishwaroad. After their departure from that house, how and when the accused persons with the victim reached at the open place of Bholanathpur- in this context, there is no eye-witness or direct evidence and that is why the learned Court below has to draw its inference relying on the attending circumstances and other paraphernalia including the materials like the confessional statements of the accused persons.

104. Let us now reproduce in verbatim the relevant part of the confessional statements made by 3 condemned-appellants. In his statement under section 164 of Code of Criminal Procedure accused Rafique stated: “পরের দিন সকাল ৬.৩০ *mgibtUi* দিকে আমার বাবা মামুনকে গাড়ীতে উঠায়ে দিয়ে আসতে ব্য। অতঃপর আবু পত্রিকা দিতে চলে যায়। পরে আমরা একত্রে নাস্তা করি। নূর আলম বলে আমাকে মামুনকে বলবি আমি এক বন্ধুর কাছে টাকা পাই, চল ইছাপুরা যাই। অতঃপর আমরা সবাই ইছাপুরা নদীপার হয়ে রূপগঞ্জ থানার ভোলানাথপুর যাই। পরে মামুন এক দিকে দাঢ়িয়ে মোবাইলে কথা বলছিল। নূর আলম আমাকে বলে তুই এই দিকে দাঢ়িয়ে দেখ কেউ আসে নাকি। অতঃপর প্রথম নূর আলম মামুনের চোখ পিছন থেকে ধরে মাটিতে শুয়াইয়া ফেলে এবং কাজলকে ছুরি চালাইতে বলে। কাজল ১টি পার (আঘাত) পেটে ছুরি দিয়ে করে। এ টি বেশি না লাগার কারণে *cb eti* Bলম কাজলের কাছ থেকে *QijUv ibtq tbq Ges gvgfbi eti Ki Dci etm Qij gvgfbi Mj vq tcvUbz_z_itK/ cti gvgfbi gvi v hvq/*”

105. Accused Noor Alam expressed the following under section 164 of Code of Criminal Procedure: *0AZtci Awg, gvgfbi, KvRj I iwdK BQvcjy thq b`x cvi ntq tfvij vvg bvgK hvqmVq tcS0vB/ cti AtbK `jy tntU Kj MvQ, Qb MtQi mt_ eyj y gvtV Avgiv thq em/ iwdK Avgit`i AviI etj H RvqmVq thq tgiti tdj tj_ tKD Rvbte bv/ tmLvtb thq etm Avgiv tek mgq Mf KtiQ/ Zvici iwdK AvgitK Bkviv t`q gvgfbiK ati tdj vi Rb/ ZLb Awg gvgfbiK wCQbtgvov (B nvZ wCQtb) w`tq awi/ AZtci KvRj PvKzitq gvgfbi tctU AvavZ Kti/ cti Awg gvgfbiK tQto wB Ges KvRtj i t_tK Awg PvKzitq gvgfbi tctU 3Uv AvNvZ KvI/ AZtci KvRj Avgi t_tK PvKzitq tbq/ cti Awg gvgfbiK tkvqBqv tdi/ AZtci KvRj gvgfbi Mj vq tcvB gvitj Mj v tKtU hvq Ges gvgfbi wB_i ntq ct0/*

106. In his statement under section 164 of the Code of Criminal Procedure, accused Kajol disclosed:

00mKvij 5 Uvi mgq mevB Ngt_tK DVj vg Ges wek#ivtoi gvi vq GKwU tnvtUlj bv`i KitZ hvB Awg, bi- Avgi, gvgfbi I iwdK/ bv`i Kivi mgq iwdK etj 00BQvcjy b`xi cti tfvij v bv_cjy M0tq Avgvi GK exjy bvbvi emo/ tm bvbvi emo tZB AvgiQ Ges Zvi KvifQ Awg UvKv cvetj/ iwdK gvgfbiK etj, I i KvQ t_tK UvKv ,tj v cvBtj Awg tZvi mt_ t`tki emo thtZ cvie/ ZLb gvgfbi etj, 00Pj Zvntj GKMtZ hvB, UvKv DVvBqv t`tki emo Ptj hve/ Awg ejj vg 00Awg emvq Ptj hvB/ wKs' gvgfbi etj AvctbI Avgvi mth/ Avtmb/ AZtci wek#iW tZtK 10 bsh/ etm Dtv Tlqj t7Z bvg Ges I fvi etR w`tq iv`i Gcvti Gtm tQvU gwr tZ Kti BQvcjy hvB/..... tmLvtb dvKv RvqmV, gvtS gvtS Qb MtQi tSvC tj vKRb bvB, wKbvti Kj vMtQi evMvB/ H Lvtb iwdK Avgit`i emvq/ AZtci mKvij 9 Uvi w`tK bi-Avgi KvifQ Avtmb es etj gvgfbiK wKs' Awg

*tgti tdivi Rb" GtbiQ/ bi-Avj g ejj ZB iayAvgitK GKU help Kivie/ Gi gta" iwdK Gtm ejj
 li (Avgi) Mltq kwb bB, I aitj QJU hte/ cti bt Ajg ejj Avg aie ZB (KvRj) GKU clo
 (QjKvnZ) wne/ AZtci Avg Atk ctk ZvKvB/ bi-Avj g gvgjbi 1 nvZ w tq tPvL I Ab" nvZ w tq gy
 tPtc ati Ges PrKvi w tq ejj clo t clo t/ AZtci Avg clo w B/ clo (QjKvnZ) tetei eKtj t0
 j vM, cti gvgly Qj ati tdtj/ Avg Uvb w tq Qj Qyktj gvgjbi nvZ tKtU hq/ cti bi-Avj g ejj Avgi
 KvQ t/ cti bi-Avj g Wvb nvZ w tq gvgjbi Mj v tcwPq ati evg nvZ w tq Qj tcUfUi wfZi XkVq/ ZLb
 gvgly bor Pov Ki tZ vK sbovPov Kiv chSfb-Avj g gvgjbi Mj v tcwPq i vL/ cti gvgjbi borPov eU
 ntj Zviv gvgjbiK qBqv bi-Avj g gvgjbi ejKi Dci DtV etm Ges Mj vi wfZi tcwPq gti/ ZLb gvgly
 ej wQj gvgjbiK AvgitK gwim bv Avgi tgvevBj UvKv cqmv bqv tb/ bi-Avj g AvgitK ejj Dcti i w tK PvBqv
 vK/*

107. It appears that all confessing accused persons have replied to the questions put to them by the recording Magistrate understanding their meanings and significance and the Magistrate (P.W.18) has recorded their answers and statements in accordance with the provisions laid down in sections 164/364 of the Code of Criminal Procedure. The confessional statement of accused Noor Alam was recovered on 28.06.2008 and accused Rafique and Kajol on 29.06.2008. After recording their statements, as deposed by P.W.18, the contents were read over and explained to them, who signed admitting them as correct. P.W. 18 has certified all those confessional statements in the following manner:-

*"AvgitK fvebv wPSi Kivi Rb" 3(wB) NvU mgq t lqv ntqfQ/ Avgi t "Qq "Avt, -ZuZPte
 Rebe x clvb Kti tQ ejj qv gtb nq/ Avgi tKv ctki fq, ctk vfb, fwZi tcwPq Rebe x clvb Kti b
 bB Ges mZ" e3e" clvb Kwi qfQ ejj qv gtb nq/"*

108. It transpires that the learned Magistrate has complied with all legal requirements in recording the confessional statements of accused persons and finally made a memorandum at the foot of them. Learned Magistrate (P.W.18) in his examination in chief has stated:- *00Avgi t "Qq Rebe x ctki mZ nI qv Avg Zvvi -Ktikw3gj-K Rebe x ti KWKvi / Rebe x ti KWRtj Avg
 I Avgi Qrov KtP Ab" tKn wQj bv/*

109. In cross-examination, P.W.18 has stated that he did not find any sign of torture on the body of accused Noor Alam. He has denied the defence suggestion that the confessional statement was recorded under duress or intimidation.

110. On analysis of the evidence given by P.W.18 and other attending circumstances, it becomes evident that the confessional statements of the condemned-appellants namely-Rafique, Noor Alam, and Kajol were inculpatory and voluntary. In their respective statements under section 164 of Code of Criminal Procedure the statement makers have chronologically narrated all the events connecting themselves thereto and stated as to how they started from the house of accused Rafique and moved to the 2nd place of occurrence i.e. Bholanathpur under P.S. Rupgonj with the victim Mamun and the manner of killing him.

111. Being requested by the learned Deputy Attorney-General, we have gone through the reply given by accused persons during their examination under section 342 of the Code of Criminal Procedure. Accused Noor Alam, as it appears, has made a statement before the Trial Court disclosing the reason as to why he made up his mind to finish off the victim. In his statement accused Noor Alam said the following:

*"gvgly I Avgi dzvtZv fvB BKejj Avgi tQJU tevb tRvrtK AgibumK fvte bhlzb Kti/ Zvvi bqv t tk
 wPvi nq/ Avgi bvh" wPvi cvB bB/ Avg XvKvq iwdKt i evmvq wK/ NUbi 5/6 gm cti gvglyK
 iwdKt i evmvq cvB/ gvgly wK Rb" Avgi tQ wRAvmv Kwi t j iwdK ejj th, gvgly Zvvi mwnZ GKt t tk*

hiBte/ GB K_v iwbqv Avgg wbtp hiB/ bxtP Mqv Avgvi cwiPZ i&ej bvtg GK t0tj i mtZ K_v ej / ZLb Znvvi KtQ GKU Pkzbv tm AvgtK GKU Pkz`q/ Pkzbqv Awmqi KtRtj i mstM K_v ej Ges ZnntK RvbvB th, GKU t0tj tK gwtZ nBte/ tm ZnntZ ivRx nq/ KtRj tK ZLb mt_ Kvi qv evmvq wbqv Awm”/

112. It is true that in course of making the statement under section 164 of Code of Criminal Procedure, accused Noor Alam did not disclose the above reason of his anger or enmity against the victim. During the cross-examination of the prosecution witnesses, the defence has tried to make out a case of land dispute. In any view of the matter, it seems to us that because of inhuman torture, as alleged, on his sister Jutsna a sense of retaliation developed in the mind of Noor Alam, who finally participated in the plan and completed the preparation with his cohorts namely Rafique and Kajol to kill the victim. When the Trial Court, as noted from the examination under section 342 of Code of Criminal Procedure, has drawn the attention of accused Noor Alam to his statement made under section 164 of the Code of Criminal Procedure putting a question to him, at that time Noor Alam responded stating the following in clear terms:- “*Avg -Ktiw3gj-K Rebe`x c0vb Kwi qmQ/*

113. Condemned-appellant Rafique gave his confessional statement under section 164 of Code of Criminal Procedure on 29.06.2008. During his examination under section 342 of Code of Criminal Procedure learned Judge of the Trial Court also drew his attention to the confessional statement. For argument’s sake, if we believe in the defence claim that the condemned-appellant Rafique did not make any confessional statement, the question arises is- then why in the Trial Court filing an application dated 29.06.2010 Rafique tried to retract his confessional statement, which is noted from the Trial Court’s order no. 41 dated 07.06.2010. The confessional statement of Rafique was recorded on 29.06.2008 and the effort for retraction was made on 07.06.2010 that is after around 2 yrs.

114. Mr. Kabir, learned Deputy Attorney-General has contended that such a belated petition for retraction of the confessional statement and taking of some fancy pretences at different times in different manners merely to let off the accused from the liability of a heinous offence like murder cannot legally be considered or accepted. We find strong force in the contention of the learned D.A.G. It is observed that the statement made by accused Rafique was inculpatory, true and voluntary and after conclusion of all prosecution evidence, when he realized that it would be difficult for him to side track his culpability for the alleged murder of Mamun, he then started manouvring different tactics changing his stands-sometimes speaking that he did not at all make any confessional statement and sometimes undertook some efforts for retraction of the same. We do not find any coherence or reliability in those pleas as taken accused Rafique and that was why the learned Session Judge was justified to accept the confessional statement Rafique as true and voluntary discarding all of them.

115. Another accused Kajol made his confessional statement on 29.06.2008 and stated-“*cji iwdK gvgjbi tgvevBj u AvgtK t`q Ges wmg tdtj w`Z ej / Avg wmg tdtj t`B/ iwdK AvgtK tgvevBj wew Kti uKv w`Z ej Ges cij tki Svtgj v tm wglute/*” In his examination under section 342 of Code of Criminal Procedure, accused Kajol has disclosed-“*H weKtj B Avg tgvevBj u Avgvi Aci GK eUyj Ktj wew Kti t`B/*

116. It appears from the above statement of Kajol made under sections 164 & 342 of Code of Criminal Procedure that getting the victim’s mobile set from accused Rafique, it was sold out by accused Kajol to his friend Roky. Those statements of Kajol have received a sharp corroboration from the evidence of Roky, who has deposed as P.W.13. We do not find

any missing-link in the above chain of events as taken place immediately after the alleged killing of Mamun. So, it can safely be held that the statements of Kajol were not only true but also inculpatory in nature.

117. During examination under section 342 of Code of Criminal Procedure when the attention of Kajol was drawn to his statement made under section 164 of Code of Criminal Procedure, he replied that his statement was recorded under duress and intimidation. Although Kajol has made such an allegation at his examination under section 342 of Cr.P.C, but no evidence was led by the defence in that score before the Trial Court. On the other hand, the Recording Magistrate P.W.18 has made a point-blank denial to the defence suggestion that Kajol made his statement under any duress or fear of torture.

118. Although other accused Rafique and Noor Alam made some abortive attempts to retract their earlier statements, but accused Kajol did not do anything in that regard. Even by cross-examining the Recording Magistrate (P.W.18) no such contradictory statement has been elicited which might emaciate the credibility of statement made by accused Kajol. In view of the above, it becomes transparent that the confessional statements made by all the accused persons namely Rafique, Noor Alam and Kajol were wholly true, voluntary and inculpatory in nature.

119. According to the prosecution, in the morning of 05.06.2008 all accused persons with the victim Mamun alive were last seen together at the Gate of Rafique's house no. Ka-109/4, Kureel Bishwaroad and at that time P.W.3 i.e. the Darwan himself saw them coming out together from that house. After their last seen together, the dead body of the victim was found at an open place of Bholanathpur by the Esapur River on 07.06.2008. In such a situation it is the burden of the accused persons to prove and explain as to how the victim had been taken and done to death there.

120. In their confessional statements, accused Rafique, Noor Alam and Kajol have disclosed some of the deceptive ploy adopted by them to distract the victim's attention from their plan and target. In the morning of 05.06.2008 before starting their journey for Esapur under the village Bholanathpur the accused persons gave an understanding to the victim, as stated in their confessional statements, that they were going to a house of Rafique's friend at Esapur under the village Bholanathpur to recover some loan money, with which they would then go to their village home and the victim on good faith believed that and agreed to accompany them. We think, had the victim been able to understand actual motive or target of the accused persons, he would then try to avoid them and save his life.

121. According to the statement made by accused Kajol, they first went to Khelkhet from Bishwaroad boarding a bus and changing the transport went to Esapura by a small taxi. It is revealed from the record that the open place of occurrence under village Bholanathpur of P.S. Rupgonj has been situated by the Esapur River and so that reason the said place is also known as "Esapura" or "Esapur".

122. Condemned-appellants Noor Alam and Kajol have confessed the fact that dealing some knife blows and causing a cut throat injury on the person of the victim he was done to death. At that time accused Rafique, as disclosed in the confessional statement, in compliance with the order of Noor Alam remained busy by watching the surrounding area of the place of occurrence to see whether anybody was coming up or not. In the above ways, all accused persons namely- Rafique, Noor Alam and Kajol participated in causing death of the victim.

123. Above descriptions regarding the knife blows and the cut throat injury allegedly caused on the person of the victim have received substantive corroboration from the medical evidence given by P.W.19 Dr. Prodip Kumar Das and the inquest report (Ext.3) prepared by the Police in presence of P.Ws. 14 & 15. It is noted that the inquest and autopsy reports clearly speak about some incised wounds of the inner side of the victim's finger which indicates a link with the following part of the confessional statement made by Kajol: "bi Ajy g gygjbi 1 nVZ w`tq tPvL | Ab" nVZ w`tq gy tPtC ati Ges MPkVki w`tq etj cvo t` cvo t` | AZtci Awg cvo w`B | cvo (OjKvnZ) tet`ei eKtj tQ j vM, cti gygy Ojy ati tdtj | Awg Uvb w`tq Ojy Olytj gygjbi nVZ tKtU hvq'"

124. Such statement of accused Kajol has made it abundantly clear that when a knife bolw was given at the belly of the victim, it missed the target because of buckle of the victim's waistbelt and when the victim tried to catchhold of the knife to save him on the following moment accused Kajol snatched the knife away from the victim.

125. Following part of the confessional statement of accused Rafique has also lent corroboration to the above statement of Kajol:- অতঃপর প্রথম নূর আলম মায়নের চোখ পিছন থেকে ধরে মাটিতে শুয়াইয়া ফেলে এবং কাজলকে ছুরি চালাইতে বলে। কাজল ১টি পার (আঘাত) পেটে ছুরি দিয়ে করে। ঐ টি বেশি না লাগার কারণে নূর আলম কাজলের কাছ থেকে ছুরি পেটে দিয়ে করে।

126. If the portions of the confessional statements made by accused Kajol and Rafique, as stated hereinabove, are taken together with description of wounds found at the finger of the victim, it would then be patent that the first blow of knife was given by accused Kajol, but that failed to hurt, owing to which accused Noor Alam took the knife and caused some other stab injuries on person of the victim and at one stage he caused a cut throat injury applying the knife against the victim's neck.

127. P.W.19 Dr. Prodin Kumar Das has proved the autopsy report and got the same marked as "Ext.11". He found the following injuries and made his opinion in the Autopsy Report:-

00even K j Tbt-

- 1/ e^W³i Ae^{-t}- ej evb, k^bb^cMuj Z, BZ^w t - Highly decomposed meggats of found whole body.

2/ hLg-Ae-ib, AvKvi I aibt- 1) Body is decomposed (highly) and maggots present all over the body, 2) Incised wound in front of neck below the level of the thyroid cartilage, extending from anterior border of the right sternocleidomastoid muscle to the anterior border of the left sternocleidomastoid muscles, measuring 5" X 3" cutting skin subcutaneous tissue, neck muscles, trachea, esophagus up to the anterior surface of the cervical vertebrae 3) Penetrating wound measuring 1" X 1 1/2 " depth left thoracic cavity, situated left 4th. 4) One incised wound in the left between right thumb and index finger measuring 1 1/2 " X 1/2 " X 1/4 " and left between left index and middle finger 1" X 1/2 " X 1/4 ".

3) effjt-

2/ ~~dndn~~ Avei Yt- Decomposed and injured on left side.

5/ evg ~~d~~^ddnt- Injured & decomposed.

128. On dissection body is found decomposed and ante-mortem congestion found in and around the above mentioned injuries. Mention viscera are found injured and mentioned viscera are found decomposed.

129. Opinion: In our opinion cause of death was due to hemorrhage and shock resulting from cut throat wound and above mentioned injuries which were ante-mortem and homicidal in nature.”

130. Above mentioned medical evidence containing description of injuries and confessional statements disclosing the manner of knife-blows are found reciprocally corroborative and complementary to each other.

131. Mr. Md Mansurul Haque Chowdhury, learned Advocate for accused Rafique has pointed out some discrepancies noted in the autopsy report and the confessional statements regarding the stab injuries found on the body. In the confessional statement of Noor Alam and Kajol, it has been mentioned that the knife blows were given on the belly or stomach (*tclj*) of the victim, whereas in the autopsy report no such injury on the belly was noted by the Doctor (P.W.19). Mr. Chowdhury, learned Advocate for accused Rafique contends that depending on some inconsistent and contradictory description of injuries found on the body of the victim the Court cannot consider the confessional statements as true or trustworthy documents.

132. In reply, Mr. Sk. A.K.M. Moniruzzaman Kabir, learned Deputy Attorney-General opposes stating that there is no discrepancy in the description of the cut throat injury found on the neck, so on the plea of a minor discrepancy regarding other stab injuries found on the body of the victim, it would not be proper to discard or disbelieve the entire prosecution case and the alleged complicity of the accused persons in commission of the offence. Learned D.A.G. has referred to the decision in the case of State of Rajasthan-Vs- Smt. Kalki and another reported in (1981)2 SCC 752 and argued that normal discrepancies are not material discrepancies and on that plea the Court cannot legally discard the prosecution case.

133. In the above referred case, it has been observed:-

“The discrepancies are with regard to as to which accused pressed the deceased and at which part of the body to the ground and sat on which part of the body; with regard to whether the respondent, Kalki, gave the axe blow to the deceased while the latter was standing or lying on the ground, and whether the blow was given from the side of the head or from the side of the legs. In the deposition of witnesses there are always normal discrepancies however honest and truthful that may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and the like. Material discrepancies are those which are not normal and not expected of a normal person.”

134. In the instant case, the description of injuries shown in serial nos. 3(2)(5) of the autopsy report (Ext.11) provides us that the deceased's left lung and its membrin were found injured. So it can be held that the victim received stab injuries on his left chest. In the confessional statement, accused persons disclosed the fact of a knife blow on the belly of the deceased, but the said blow, as stated by accused Kajol, failed because of the buckle of

deceased's waistbelt. Regarding the place of injuries as noted in the autopsy report and mentioned in the confessional statements, as pointed out by Mr. Chowdhury, the discrepancies are not so material as to shake the overall credibility of the occurrence and complicity of the accused persons in causing the death of the victim.

135. In respect of the last phase of occurrence that is the events of taking the victim to Bholanathpur and killing him there, the learned Session Judge relied upon the confessional statements of accused Rafique, Noor Alam and Kajol made under section 164 of Code of Criminal Procedure On plain reading of those statements, they appear to be inculpatory and voluntary. In the case of State-Vs-Minbu @ Gul Hasan reported in 16 DLR(SC)598, as referred to by learned D.A.G, their lordship's held as follows:

"As against the maker himself, his confession, judicial or extra-judicial, whether retracted or not, can in law validity form the sole basis of his conviction. So, we are also of the opinion that a confession, if proved true and voluntary, can be the sole basis for conviction of the maker of the confession."

136. In the case of the State-Vs-Punardhar @Kudu and Shefali reported in 31 DLR (HCD) 312, it has been held that the accused first made a confession statement under section 164 of the code of Criminal Procedure that he committed the murder, although subsequently he retracted his confessional statement before the Court and the confession being found voluntary and without any threat, coercion or inducement, conviction of the accused based on his confession, though subsequently retracted by him, is valid in law.

137. The core principle as enunciated in the case of Hazrat Ali and another-Vs-The State reported in 1990 BLD(HCD) 38 is that once a confession has been found to be true and voluntary, conviction can be based solely on the confession, even if it is retracted.

138. In the case of Bakul Chandra Sarker-Vs-The State, reported in 45 DLR(HCD) 260, it was held that if a confession recorded under section 164 of the Code of Criminal Procedure is true and voluntary, the same alone is sufficient for convicting the confessing accused and retraction of confession is immaterial, once it is found to be true and voluntary.

139. Regard being had to the decisions referred to above and attending facts and circumstances to the case, we are inclined to hold that the confessional statements made by accused Rafique, Noor Alam and Kajol were recorded not under any duress or any fear from any quarter and the learned Session Judge was well-justified to accept them as true and voluntary and recorded his decision of conviction against them under sections 302/34 of the Penal Code.

140. Mr. Md. Mansurul Haque Chowdhury, learned Advocate for accused Rafique has argued that the alleged occurrence took place in the morning of 05.06.2008 and the Ejahar (Ext.1) was lodged on 25.06.2008 without any explanation for the delay caused. In such a situation, as contended by Mr. Chowdhury, it was not proper for the Trial Court to convict the accused persons relying on the facts disclosed in the Ejahar and the evidence led to that effect.

141. In reply Mr. Kabir, learned D.A.G. retorts and takes us with him through the recital of the Eiahar dated 25.06.2008 (Ext.1), where P.W.1 Abdus Sobhan has stated the following:-

the Ejana dated 25.06.2008 (Ext.1), where P.W.1 Abdus Sobhan has stated the following:-
‘‘EevoritZ bv hvl qvq gvgbytK tlvrVlN R Kwi tZ _wK | ZvnitK tlvrVlN R Kwi qv bv cvBqv Avzq ‘‘Rb mn
Rat’eciv vbg GKwI wRwv Kwi | evCv vbg Avavi qvav kli i biqj nK GKwI qvajv ‘‘vtqi Kfib| evCv

_vbvi RvWtZ Avgiv iwdK, bijj Ajg g, ei KZ Dj in, nweey ingvbtK mft' n Kwi | RvWi vfiEtZ cij k Z t'si
hiq Ges iwdK I bijj Ajg g ftK tMbz vi Kti mnKix cij k mgvi Avgit itK mnvqZv Kti | _vbvq RAvmlvft
iwdK, bijj Ajg g I KvRj NUbvi K_y -Kvi Kti | Avmlvft i evCv _vbvq vtq Avtm Ges cti tKtU©
vbvq Avtm| cti Avg 25/06/2008 Zwi tL _vbvq gvgj v `vtqi Kwi | Ø

142. On examination of the above recital of the Ejahar (Ext.1) and the evidence given by P.W.1, it transpires that the victim's father (P.W.1) initially took time to contact accused Rafique's family and know the whereabouts of his son and at one stage receiving incongruous responses from Rafique's family, he became suspisious about them and finally lodged the Ejahar on 25.06.2008. In view of the above, can we be doubtful about the credibility of the alleged involvement of the accused persons?

143. After missing his eldest son i.e. the victim being a father P.W.1 and his other relatives were supposed to be anxious and shocked. So immediately after finding the mobile phones of Mamun and Rafique switched off on 05.06.2008, the informant supposed to be not so vigilant, which is expected from a normal person in lodging the Ejahar. Taking those things into consideration along with the explanation, so far, we get from the Ejahar (Ext.1) and the evidence of P.Ws. 1, 2 & 4, we are of the opinion that the delay caused in lodgment of the Ejahar by P.W.1 can in no way dissipate overall credibility of the prosecution case and there was sufficient and reasonable causes for such delay.

144. Mr. Mawla, learned Advocate for the accused Kajol contends that in a case to be proved by the circumstantial evidence, the root-cause and the motive of an offender is very much significant and without establishment of that it would not be safe to record any decision of conviction. Mr. Chowdhury, learned Advocate for accused Rafique has added that the prosecution has not produced even a scrap of paper or any dependable witness to prove the story of land dispute or quarrel between the families of Mamun and Rafique or between the families of Mamun and Noor Alam.

145. In course of his reply Mr. Kabir, learned D.A.G has taken us to the relevant part of evidence given by P.W.1, 4 & 27 and the confessional statements made by Rafique and Noor Alam. On analysis of the evidence and other materials on record, it transpires that accused Rafique's maternal-grandfather and Noor Alam's sister Jutsna had disputes and quarrel with the family of Mamun and that was why Rafique and Noor Alam together hatched up a criminal plan to call the victim as a prey to the house of Rafique and took all preparations to finish him off the earth.

146. It appears from the confessional statement of Rafique that on 04.06.2008 in the morning at 10 O'clock he and Noor Alam took the victim to Esapura of Bholanathpur, but on that date they were not confident of their power and physical ability and that was why they called accused Kajol to join them so that they can conjointly overpower the victim. In this case the motive of accused Kajol was to fortify the power of his cohorts namely Rafique and Noor Alam, who gathered strength getting companion of Kajol and finally executed the plan of annihilating the victim from this world.

147. It has been stated by the defence that no specific motive of each of the accused persons has been substantiated by the prosecution and for that reason it is to be ended in smoke. In the instant case, the prosecution, as noted above, has to the best to its ability proved the motives of all the assailants along with the complete chain of events implicating them thereto beyond all reasonable doubt. For argument sake, if it is found that the

prosecution has failed to disclose or prove any motive of the condemned-appellants, even then it would not be a lawful ground to absolve them of their liability or culpability. In this regard we may profitably refer to what has been stated by their Lordships in the case of Lal Khan –Vs- Muhammad Sadiq and others reported in 20 DLR(SC) (1968)307, where it has been held that:-

“What moves an individual to commit crime being within his exclusive knowledge, there is no onus on the prosecution to lead positive evidence of motive in a given case and a charge established by reliable evidence will not fail, if there be no ostensible motive on the part of the accused to the crime.”

148. In view of the above referred decision and the evidence on record, we are of the opinion that the prosecution cannot be saddled with an exclusive responsibility of proving motive of each of the assailants. Because it is only the assailant, who can best say his motive for causing the death. But on that ground we cannot lessen the credibility of alleged complicity of the condemned-appellants in killing the victim.

149. Mr. Basharatul Mowla, learned Advocate representing condemned-appellant Kajol has pointed out some omissions done by the prosecution by not exhibiting the Sketch-Map and Index of the 2nd Place of Occurrence, which occurred at Bholanathpur under P.S. Rupgonj. It is noted that in the Trial Court during cross-examination by the learned Advocate for Noor Alam and Kajol, the Investigating Officer S.I Md. Abu Hanif (P.W. 27) categorically disclosed the following:-

“NUbr̄-j̄ `BnU/ Awg Dfq̄ -itbB Z̄ ŠlKwi qmQ/ NUbri Pv¶m tKvb mv¶k cVb bvB/Ø

150. It is noted that regarding the 2nd place of occurrence the defence did not make any challenge putting any suggestion in that score to the I.O. (P.W.27). Whereas in his examination in chief P.W.27 stated:- “NUbr̄-tj̄ tcŠlQqi cyivq ifcMÄ _ybvi Gm,AvB Avki vdz̄ (er-x) t̄ Lv̄tbr̄ gtZ gvgj vi NUbri-j̄ cwi`kfb hvB/..... tMøZvi KZ.AvmvgitI mbq NUbri-tj̄ Pvj qv Avm/Ø

151. The learned Deputy Attorney-General has argued that the Investigating Officer at that time visited the 2nd place of occurrence at Bholanathpur and prepared the Sketch-Map and Index, but unfortunately for the laches of learned Public Prosecutor, the said Sketch-Map and its Index were not taken to the Judicial File of the Court and exhibited therein, which are nothing but a mere irregularity. We find substance in the submission of the learned Deputy Attorney-General and opine to hold that for the above reason no Court can mop up the entire credibility of the alleged occurrence, which took place at an open place known as the government acquired land situated by the Esapura River under Bholanathpur of Rupgonj P.S.

152. A significant aspect of this case is that after recovery of the dead body and its identification, the Investigating Officer P.W. 27 has succeeded to recover the Sony Ericson Mobile Set from Rakib Ahmed @ Roky (P.W.13), who expressed that he purchased it from Kajol in consideration of Tk. 5,500=/. P.W.13 has identified the said Mobile as “Material Ext.II” and also the accused Kajol present in the dock.

153. It is noted that the I.O. (P.W.27) has also realized a part of the money taking which the victim supposed to go to his village home in Noakhali and pay to his mother. After receiving his share accused Rafique, as it appears, deposited Tk. 5,500/= in the name of some “Shishir” in the Roky Somaboy Samity and the I.O. recovered the said money in presence of witnesses preparing a seizure-list (Ext.2) to that effect. P.W. 9 Md. Amirul Islam, who is the

President of the Samity, has corroborated the said fact stating that in the name of "Shishir" a person deposited Tk. 5,500/= in the Samity.

154. Mr. Chowdhury learned Advocate representing the condemned-appellant Rafique submits that accused Rafique had no such name like Shishir and the prosecution has planted a story manufacturing some papers showing the name of Shishir. In this regard the learned D.A.G. retorts stating that after commission of an offence, it becomes a usual propensity of all the offenders to hide their appearance and identity, so that they cannot be brought to book and the similar things happen in this case. He has argued that had there been any other persons having actual name as Shishir, the defence could produce him to the Court.

155. We find strong force in the above submission made by learned Deputy Attorney-General. Besides, the defence has not made any challenge giving suggestion to the witnesses that the name "Shishir" was not an anonym of accused Rafique. So we can safely believe in the fact that money recovered from body of the victim by accused Rafique was kept deposited in anonymity with the Samity and that was finally recovered by the I.O. (P.W.27).

156. At the end, Mr. Mawla, learned Advocate for accused Kajol has pointed out the following discrepancies found in the testimony of the prosecution witnesses:-

157. In chief P.W.1 says that he himself made G.D Entry no. 1185 on 16.06.2008, but in cross he states that on 14 or 13 he did not go to Badda Police Station. Again P.W.1 says in cross that he had land disputes with only Rafique's 'Mama' Jahangir, but P.W.4 states that the informant i.e. P.W.1 had several disputes with Rafique's 'Khalu' A. Sobhan Member, his Mama Jahangir and Noor Alam's brother Jashim.

158. P.W.1 in his cross-examination by the Advocate of accused Rafique has stated that his son set out for the village home on 03.06.2008. Whereas at one stage of his examination he (P.W.1) has claimed that the G.D. entry with the Police Station of Joydebpur was made by him on 07.08.2010.

159. Listing the above discrepancies Mr. Mawla has contended that the evidence given by the prosecution is not consistent and there exist some material discrepancies and that is why they cannot be relied upon by any prudent Court. Mr. Kabir, learned Deputy Attorney-General has opposed the above contention stating that all those discrepancies, as listed, are not at all material in the instant case and that is why the learned Session Judge has considered them as minor discrepancies.

160. We have given our careful consideration to the submission above and scrutinized the evidence given by the witnesses keeping in view the discrepancies as pointed out and examined the nitty-gritty of the matters. The occurrence of the victim's death took place on 05.06.2008 and the Trial Court completed the examination of all prosecution witnesses on 30.05.2010. In other words, around 1½ yrs after the alleged occurrence, the prosecution witnesses including the victim's father, mother and others came to depose before the court.

161. It is known to all that human memory is always subjected to lapses and omissions and after such a long time it was not possible for any person to narrate all events with complete accuracy and all mathematical precisions. We know, the evidence of the witnesses should be considered as a whole, not in utter fragmentation taking them out of the context. Mr. Mawla, learned Advocate for accused Kajol has tried to make an approach by taking the

sentences torn out of the context here or there from the evidence, which cannot be appreciated by any rule of prudence. As the discrepancies pointed out by the learned Advocate Mr. Mawla are on some trivial matters and do not touch the core of the case and as the accused persons themselves confessed their culpability and complicity in causing the death of the victim making statements under section 164 of Code of Criminal Procedure, we are, therefore, inclined to hold that the prosecution case cannot be disbelieved on the basis of those minor discrepancies which are found on some trivial matters of the case.

162. Be that as it may be, we have considered the entire chain of events regarding the alleged occurrence in three phases and carefully scrutinized all evidence on record and other materials including the inculpatory confessional statements made by the accused persons and the attending circumstances in their true perspective. It becomes abundantly clear that the condemned-appellants namely Rafique, Noor Alam and Kajol in furtherhence of their common intention in a cruel and barbaric manner killed the victim dealing knife blows and causing a cut throat injury on his person and it was so shocking nature of crime that we find no alternative but to inflict a punishment to them under sections 302/34 of the Penal Code.

163. In the instant case, it appears from the confessional statements of the condemned-appellants and other materials on record that mainly accused Rafique and Noor Alam devised the plan in collaboration with accused Kajol and pursuant to that all preparations for implementation of the plan was completed for killing the victim. In other words it can be held that all the condemned-appellants were animated by the common intention in accordance with the pre-concerted plan and in the morning of 05.06.2008, they jointly set out for the place of occurrence situated by the Esapur River at village Bholanathput and participated in the criminal acts resulting in instantaneous death of the victim Mamun. It is revealed from the evidence on record and circumstances to the case that a meeting of minds and fusion of ideas have taken place amongst accused Rafique, Noor Alam & Kajol and in furtherance of their common intention they caused the death.

164. We know that all murders are culpable homicides but all culpable homicides are not murders. Mere killing of a person or mere causing his death is not murder. In section 300 of the Penal Code, there are 4 (four) cases of death described as murder and when a death is caused by an act done with the intention of causing death, then it would come under the first part of the definition of murder under section 300 of the Penal Code. In the instant case, all accused persons namely Rafique, Noor Alam and Kazol had clean and common intention of causing death of the victim Mamun and they all participated in the offence through their overt acts and that is why, the first part of section 300 of the Penal Code will attract the alleged occurrence of causing the death of the victim.

165. Under the above legal position and attending circumstances, we are inclined to hold that the criminal act done and the offence committed by accused Rafique, Noor Alam and Kajol is the culpable homicide amounting to murder, which is an offence punishable under sections 302/34 of the Penal Code.

166. Before conclusion of his submission Mr. Md. Mansurul Haque Chowdhury, learned Advocate for the accused Rafique has drawn this Court's attention to the fact that according to the Children Act, 2013 any child up to the age of 18 years on the date of occurrence shall be tried by concerned Juvenile Court and in the instant case on the date of occurrence the accused-persons had been below 18 yrs and that is why no punishment of death or life imprisonment can legally be inflicted to them.

167. Mr. Sk. A.K.M. Moniruzzaman Kabir, learned D.A.G. has replied contending inter alia that as the children Act 2013 came into force on June 20, 2013 that is about 2 years after pronouncement of the impugned judgment and order of conviction, the instant case thus supposed to be guided by the Children's Act of 1974, which provides that the age limit of a child should be less than 16 years.

168. On analysis of the record it transpires that the occurrence took place on 05.06.2008, the charge was framed on 06.12.2009 and the trial was concluded by the judgment and order dated 29.06.2010. Being requested by the learned D.A.G. we have gone through the relevant materials particularly the Police Report, confessional statements made by the accused persons and other documents on record and observed that on the date of framing charge all the accused-persons were more than 16 yrs.

169. Learned Deputy Attorney-General has calculated the age of accused Rafique, Noor Alam and Kajol on the basis of the recital of Ejahar and the Police Report and stated that on 06.12.2009 (i.e. the date of charge framing) each of the accused-persons was around 16½ yrs. In this context, learned Deputy Attorney-General has relied upon the decision of the Case of Bimal Das-Vs-the State reported in 46 DLR(1994)460, where their lordships have observed that at the time of framing the charge against an accused with an offence, if he reaches the age of 16 yrs that would forfeit his right to claim a trial by the Juvenile Court.

170. Having regard to the submission made by the learned Advocates above and the decision cited by the learned Deputy Attorney-General, we are of the view that at the time of framing of the charge before the Trial Court each of the accused persons was more than 16 years and in such a position, under the Children's Act of 1974, they were lawfully tried and decided by the Special Session Court No.5 of Dhaka. In doing that the learned Judge of the Trial Court, as it appears, has not committed any error of law or fact.

171. It appears from the record that no condemned-appellant had earlier involvement with any other criminal offence and that was why in the police reports their P.C & P.R. have been shown as 'Nil'. It reveals that the condemned-appellants had no complicity in any other crime during their past life and they were the boys of tender- age. Taking those extenuating facts and circumstances into account, we think, justice will be met if we sentence the condemned-appellants with life imprisonment and fine in place of the death sentence. Consequently the impugned judgment and order passed by the Trial Court are upheld with modification in respect of the sentence awarded against the condemned-appellants.

172. In view of the above, all the criminal appeals are dismissed with modification of sentence awarded by the Special Session Court No.5 of Dhaka. The condemned-appellants namely Md. Rafiqul Islam @ Rafique, Md. Noor Alam and Md. Kajol are found guilty of the charges under section 302/34 of the Penal Code and each of them is sentenced to suffer life imprisonment and to pay a fine of Tk. 5,000/= in default to suffer rigorous imprisonment for 6(six) months more. The reference made by the learned Judge of the Trial Court under section 374 of the Code of Criminal Procedure for confirmation of the death sentence is hereby rejected.

173. The period, the accused-appellant has already spent in the custody, shall be deducted pursuant to section 35A of the Code of Criminal Procedure, 1898.

174. Let a copy of this judgment along with Lower Court's Record be sent down at once.