

Present:
Mr. Justice Md. Atoar Rahman
And
Mr. Justice Md. Ali Reza

Death Reference No. 26 of 2018

The StatePetitioner

-Versus-

Md. Alamgir Dhali and othersCondemned-Prisoner
With

Criminal Appeal No. 3530 of 2018

Md. Alamgir Dhali Condemned-Prisoner-Appellant

-Versus-

The StateRespondent

With

Jail Appeal No. 77 of 2018

Md. Alamgir DhaliCondemned-Prisoner-Appellant

-Versus-

The StateRespondent

And

Jail Appeal No. 80 of 2018

Md. Masud Ahammad alias Imon

..... Condemned-Prisoner-Appellant

-Versus-

The State

.....Respondent

Mr. Md. Monzurul Alam Sujan, Deputy Attorney General with

Mr. S M Younus Ali Robi,

Mr. Md. Sulaiman Howlader Mintu,

Mr. Rakib Hossain and

Mr. Md. Abu Saleh Apel Mahamud, Assistant Attorney General

.....for the State

Mr. M Masud Rana, Advocatefor the informant
 Mr. Syed Mohammad Yousuf, Advocate
for Condemned-prisoners
 Ms. Nargis Akhter, Advocate
State Defence Lawyer for the two absconding condemned

**Heard on: 07.11.2024, 14.11.2024, 21.11.2024,
 28.11.2024, 05.12.2024, 12.12.2024 and 09.01.2025**

Judgment on: 16.01.2025.

Md. Ali Reza, J.

Under section 374 of the Code of Criminal Procedure (hereinafter referred to the Code) the proceedings of this case has been submitted to this Court by the learned Sessions Judge, Dhaka for confirmation of death sentence passed against condemned prisoner Alamgir Dhali and absconding convicts Mustafizur Rahman and Jahangir Hossain Joy by judgment and order dated 26.02.2018 in Sessions Case Number 1437 of 2016 convicting them under sections 302 and 34 of the Penal Code. The condemned-prisoner Md. Alamgir Dhali also preferred Criminal Appeal Number 3530 of 2018 as well as Jail Appeal Number 77 of 2018 against judgment and order of conviction passed against him sentencing him to death by hanging. Masud Ahmed Emon

also preferred Jail Appeal Number 80 of 2018 against conviction of sentencing him to suffer rigorous imprisonment for life. This reference and appeals are taken up and heard together and disposed of by this common judgment.

The case of the prosecution is that the mother of the victim named Hosne Ara Begum lodged First Information Report (FIR) on 16.10.2015 at 9.30 PM with Keraniganj Police Station alleging that victim Md. Arifin Abedin Khan alias Rajan was a young businessman conducting business of electric and electronic goods and equipments in shop number 189 at Ershad Market first floor of Kaptan Bazar, Dhaka. Mustafizur Rahman and Jahangir Hossain Joy were his two trusted employees in the shop. On 13.10.2015 victim Rajan while was in the shop received a phone call through his mobile phone at around 5.30 PM and left the shop hurriedly. At 6.30 PM wife of victim named Shabnam Abedin Ayni called husband Rajan who informed her that he was out of his shop and it would be late in his returning home but he did not come back ultimately. On 14.10.2015 at 7.00 AM the dead body of an unknown young man with marks of injuries on

face, forehead and throat was found beside Chitakhola Road of Keraniganj. On 14.10.2015 parents of victim Rajan identified the dead body in the morgue of Mitford Hospital. It was suspected that one Atia Khanam as well as KM Arifur Rahman Setu who filed a criminal case against victim's brother Rasel in which victim used to take steps in favour of Rasel might be responsible for such murder. Hence allegations were brought under sections 302/201/34 of the Penal Code.

The investigating officer in course of investigation visited the place of occurrence, prepared sketch map with index and seizure lists, recorded statements of the prosecution witnesses under section 161 of the Code, reviewed inquest and post mortem report as well as the statements of accused Mustafiz, Jahangir, Emon, Alamgir recorded under section 164 of the Code and having found *prima facie* case submitted police report number 84 on 31.03.2016 against Mustafiz, Jahangir, Emon, Alamgir and absconding accused Nazmul and Niamat recommending their trial under sections 302/201/34 of the Penal Code and they were placed on trial before Sessions Judge, Dhaka on 07.11.2016 who framed charge

against them to which they pleaded as not guilty and demanded trial. Charge could not be read over to accused Nazmul and Niamat being absconded. Prosecution examined as many as 22(twenty two) witnesses. During trial accused Jahangir and Mustafizur after obtaining bail in around middle of 2016 from this Court absconded thus they were partially tried in absentia and defended by a State appointed lawyer. On conclusion of examination of prosecution witnesses accused Emon and Alamgir except the absconding accused Mustafiz, Jahangir, Nazmul, Niamat were examined under section 342 of the Code to which they reiterated their claim of being not guilty and declined to adduce any evidence on their behalf. Defense claimed that they have been falsely implicated and the confessional statements are effect of torture.

On consideration of evidence and other materials on record the learned Sessions Judge passed the judgment and order of conviction and sentence as aforesaid and sent the reference to this Court.

Mr. Md. Monzurul Alam Sujan, learned Deputy Attorney General along with Mr. S M Younus Ali Robi, Mr.

Md. Sulaiman Howlader Mintu, Mr. Rakib Hossain and Mr. Md. Abu Saleh Apel Mahamud, Assistant Attorney Generals appearing on behalf of the State and in support of the death reference conveys us through the materials on record as well as the impugned judgment and submits that the prosecution has been able to bring home the charge leveled against the accused by adducing proper and trustworthy evidence and the impugned judgment being reasonably passed shows up its appropriateness for such atrocious and brutal murder of a young man whose death at a wrong place in a wrong time appears to be a big blow to our social order. He draws our attention to the inculpatory nature of the confessional statements given by four accused persons and contends that those confessions are absolutely corroborative with each other and any man of common prudence can get to understand the specific role played by each of the convicts at that terrible time and those confessions can be used as legal evidence not only against the makers but also against other accused persons. He finally submits that the prosecution has evidently succeeded in proving the guilt beyond reasonable doubt thus convicting and

sentencing the condemners by the Court on the basis of confessional statements supported by evidence stand good and proper and the impugned judgment is immune from interference by this Court. In support of his contention he refers to the case of State Vs Haris reported in 71 DLR(AD) 15.

Mr. M Masud Rana, learned Advocate appeared on behalf of the informant and adopted the submission made by the State.

Mr. Syed Mohammad Yusuf, learned Advocate appeared on behalf of the condemned prisoner Alamgir Dhali in Criminal Appeal 3530 of 2018 and Jail Appeal 77 of 2018. Ms. Nargis Akhter, learned Advocate appeared on behalf of condemned prisoner Masud Ahmed Emon being appointed as lawyer by legal aid office in Jail Appeal 80 of 2018 and also as an advocate appointed as state defence lawyer on behalf of absconding convicts Mustafizur Rahman and Md. Jahangir Hossain Joy. The submissions advanced by both Mr. Yusuf and Ms. Akhter are same and supportive to each other. They submit that the impugned judgment is bad in law and the

prosecution failed to prove the case beyond reasonable doubt. They further submit that there is no eye witness of the occurrence leading to the event of murder and the confessional statements are not true and voluntary being not supported by any corroborative substantive evidence and the Court failed to appreciate that the confession of co-accused cannot be used against Nazmul and Niamat without any corroboration and those statements were not made in accordance with the provisions laid down in section 164 read with section 364 of the Code. They draw our attention to the point that abscondence of an accused can be treated corroborative to the evidence of eye witness but not to the confessional statement of another accused and absconsion itself is not conclusive evidence to infer either of guilt or guilty conscience and the finding of the trial Court is perverse and misconceived. They further contend that the car which was allegedly seized from the custody of Jahangir actually belonged to one Rafiqul Islam and the case of the prosecution that victim was murdered in that particular car is absolutely false and since the confessional statements by themselves cannot be

the sole basis for conviction being not supported by any tangible substantive evidence the reference is liable to be rejected and the appeals deserve merit for consideration. In support of such contention they refer to the cases of Bashar Vs State, 60 DLR 347; Humayun Kabir Vs State, 74 DLR(AD) 91 and finally submit that true and complete disclosure of the offence is the soul of true confessional statement which is absent in the present case and the prosecution apparently failed to remove the doubt and suspicion wrapped round the case.

At this stage of argument the defence lawyers were assisted by learned Advocate Mr. Md. Ahsanullah who addressed this Court some important points on fact and law. He refers to the words of wisdom of our Appellate Division passed in the cases of State Vs Babul Mia, 63 DLR(AD) 10; Md. Humayun Kabir Vs the State, 15 SCOB AD 76 along with sections 24, 25, 26, 27, 30, 114(G) of the Evidence Act and sections 164, 364 of the Code and points out the reasons why the confessional statements are not true and voluntary. He proceeds that in most of the cases accused persons

complain to the judges that they were mercilessly beaten and threatened by the police to confess before the magistrates about the crime they are not involved as alleged but accused of and in case of refusal to give such statements police threatened them with untold miseries and cross fire. Referring to section 164(3) of the Code he explains that this text upholds one of the basic principles of natural justice that a person should not be compelled to give statement against him about his crime which considering the facts and circumstances of the present case was not aligned. He also puts forward that according to Article 35 of the Constitution no person accused of any offence shall be compelled to be a witness against himself by inhuman cruel torture or degrading through punishment or torture. He further proposes that our country being signatory to the International Convention of 1984 against prohibited torture or punishment as defined therein these confessional statements are apparent violation of natural justice and human rights of the accused persons. He next contends that the prosecution has diverged their initial stand from the fact and motive as suggested in the FIR and made

out an absolutely absurd case by subsequent embellishment. He then submits that according to the provisions laid down in DNA Act 2014 (Act X of 2014) the material evidence exhibit-III was not tested which was mandatory for proof that exhibit-III was actually used in commission of such atrocious crime. He drives our attention to the post mortem report and submits that the same does not resemble the confessional statement. He finally submits that since the prosecution has failed to prove the case beyond reasonable doubt and Court cannot convict upon suspicion this reference has no substance and the same is liable to be rejected and the appeals may be allowed.

In order to consider the submissions of the contending parties as well as the merit of the case and to arrive at a reasonable conclusion it is now necessary to examine and analyze the material evidence on record.

PW I Hosnera Begum is the informant of this case and mother of victim Rajan. She stated in her examination-in-chief that her son victim Rajan was the owner of the shop named Bikram Power Energy Light and he conducted business of

electrical and electronic goods and equipments. He was an importer of above commodities from foreign country. On 13.10.2015 at 11.30 AM victim Rajan set out from home for his above shop at Kaptan Bazar. He took his launch with his father and they jointly performed their Zohar and Asar prayers in the above market. At about 5.30 PM victim Rajan received a phone call in his mobile phone and then went out of the shop. His wife gave him a phone call at 6.30 PM when victim Rajan replied that he was out of his shop and would be late in coming back home. Thereafter the mobile phone of victim Rajan was found switched off and he did not come back home. On 14.10.2015 at 12.00 noon they came to know about a dead body of a young man in a ditch of Bagair Chitakhola at South Keranigonj. Police recovered above dead body and sent the same to Midfort Hospital Morgue for post mortem examination. They went to the morgue at 4.00 PM and identified the dead body as that of her son victim Rajan. She found that blood was coming out of the nose and mouth of the dead body. There were marks of injuries on face, head and throat of the dead body. After performing post mortem

examination the dead body was handed over to them on 15.10.2015 and they buried him in the Azimpur Graveyard.

She lodged the FIR of this case. The witness proved the FIR and her signature which were marked as exhibits 1 and 1/1 respectively. She further stated that there was a murder case against her third son Rasel in Sutrapur Police Station and she erroneously suspected that the informant of the above case was involved in the murder of victim Rajan because he conducted the case and she erroneously mentioned their names in the FIR as the perpetrators of the crime. Subsequently she came to know that victim Rajan gave huge money on several occasions to his two employees of above shop namely Mustafizur Rahman and Jahangir Hossain Joy for purchasing commodities for the shop but those two accused persons did not purchase the commodities and misappropriated the money. Victim Rajan discovered such cheating and theft by those two accused persons and scolded them. They confessed their guilt and promised to return the misappropriated money. Accused Mustafiz and Joy instead of refunding the money murdered victim Rajan jointly with other

co-accused persons namely Alamgir Dhali, Masud Ahmed Emon, Nazmul and Niamat. Above accused persons have confessed their guilt in their statements made before learned Judicial Magistrate under section 164 of the Code. The witness identified accused Mustafizur Rahman, Jahangir Hossain Joy, Alamgir Dhali and Masud Ahmed Emon in the dock.

In cross examination she stated that she did not see the occurrence of murder of victim Rajan. She denied that she gave huge money to the investigating officer to extract untrue confessional statements from accused Alamgir, Joy and others by way of physical torture and accordingly the investigating officer extracted untrue confessional statements from above accused persons through physical torture. The witness stated that she and her husband with victim Rajan went to India for medical treatment. She denied that during their stay in India the money of victim Rajan was lying with his wife Ayni and not with accused persons and they have been falsely implicated in this case and they did not misappropriate any money of victim Rajan. She and her husband along with other members of the family went to the morgue and saw the dead

body of victim Rajan. She came to know about murder of victim Rajan on 14.10.2015 and lodged the FIR of this case on 16.10.2015. On receipt of a mobile phone call victim Rajan left his shop keeping accused Alamgir and Jahangir Hossain Joy in the shop. At 6.30 PM PW 5 Ayni talked with victim Rajan over mobile phone who informed that he was out of the shop but he did not mention that accused Joy was with him. After 6.30 PM they found the mobile phone of victim Rajan switched off. She had previous enmity with the persons whose names have been mentioned in the body of the FIR. In 2015 she and her husband with victim Rajan went to India for medical treatment and victim Rajan gave blank cheque in favour of the accused persons and accused Mustafiz withdrew money from the bank. Victim Rajan did not lodge any case against accused Joy and Mustafiz for misappropriation of money. She denied the suggestion that she influenced police to obtain untrue confessional statements from the accused persons through physical torture. She did not mention the names of the accused persons in the FIR nor she knew

accused Emon, Alamgir Dhali, Nazmul and Niamat from before.

PW 2 Md. Moslem Uddin is the Vice-President of Shop Owners' Association of Ershad Market. Victim Rajan was a shop owner and businessman. The witness stated in his examination in chief that accused Mustafiz and Jahangir Hossain Joy were two employees of shop number 189 of victim Rajan. On 13.10.2015 at 11.00 AM the Manager of above market told him that victim Rajan was missing. On 14.10.2015 at 11.00 PM they came to know about an unknown dead body in Keranigonj and some men from his Association went there and came back with the information that police has sent the dead body to Mitford Hospital for post mortem examination. At about 3.30 PM he along with parents of victim Rajan and other people went to the morgue of Mitford Hospital and identified the dead body of Rajan. After about 10/12 days of above occurrence he came to know that accused Alamgir, Joy and Mustafiz jointly with other accused persons have murdered victim Rajan. On 10.10.2015 victim Rajan came to his office and told that during his stay in India

accused Joy and Mustafiz could not give him detailed accounts of taka 30-35 lacs of his shop. Since victim Rajan gave pressure on accused Joy and Mustafiz for refunding the money they have murdered Rajan. He further heard that the accused persons have made statements under section 164 of the Code.

In his cross examination the witness stated that he is an elected official of above market committee and owner of six shops of the market. Goods are kept in the godown and samples are displayed in the shop. On the day of occurrence he was in the market until evening and he saw accused Mustafiz and Joy in the shop of victim Rajan. The witness denied that he was giving evidence on the request of the father of victim Rajan and accused Mustafiz and Joy neither misappropriated any money nor were they involved in the murder of victim Rajan.

PW 3 Md. Shah Alam Faruque is the Manager of Kaptan Bazar Ershad Market Owners' Association. The witness stated in his examination in chief that on 15.10.2015 at 5.30 PM he saw accused Joy and victim Rajan hurriedly left the market.

On the next day noon he heard of an unknown dead body found in Keranigonj which was sent to Mitford Hospital for post mortem examination. He then heard of the occurrence of murder of victim Rajan. He heard that accused Mustafiz, Joy, Alamgir, Emon and Nazmul committed murder of victim Rajan.

In his cross examination the witness stated that he was working as the Manager of Shop Owners' Association since 2011 and from that time he knew accused Joy. He denied that accused Joy did not accompany victim Rajan and he was giving false evidence. The Investigating Officer interrogated him after about 15/20 days of the occurrence. He denied that he was arrested by police and obtained bail by bribing the investigating officer. He denied that he was giving false evidence as tutored by the investigating officer.

PW 4 Md. Siraj Bhandari is the father-in-law of victim Rajan. In his examination in chief the witness stated that on 13.10.2015 in the night his daughter Ayni informed him over telephone that his son in law did not return home. On the next day at 12.00 noon he went to the house of victim Rajan

and he along with his daughter and parents of victim Rajan went to Midfort Hospital morgue and identified the dead body of victim Rajan. Accused Mustafiz and Joy two employees of victim Rajan misappropriated taka 35,00,000/- lacs from his shop. Victim Rajan gave them pressure to return the above money and therefore accused Joy and Mustafiz planned to commit murder of victim Rajan jointly with other accused namely Alamgir, Niamat, Nazmul and Emon. Accordingly they murdered victim Rajan and dumped his dead body in a nearby ditch. Above accused persons have confessed to have murdered victim Rajan in their statements under section 164 of the Code.

In his cross examination the witness stated that he did not see the occurrence. Investigating Officer interrogated him on 20.02.2016 in the house of victim Rajan. Accused Mustafiz was an employee of victim Rajan for a long time. The brother of victim Rajan did not go to Mitford Hospital for identification of the dead body of victim Rajan. There was no dispute among the brothers over family business. Victim Rajan married his daughter in 2012. He knew accused Joy as an

employee of victim Rajan. He further stated that accused Alamgir Dhali and Joy were not suspected as the killer of victim Rajan before the police discovered their involvement in the murder. The witness denied that he did not know anything about the occurrence and he was giving false evidence being tutored by police.

PW 5 Shobnam Abedin Ayni is the wife of victim Rajan. She stated in her examination in chief that she has a male baby of 3 years of age. On 13.10.2015 morning her husband victim Rajan went to his Ershad Market shop along with his father. Her husband is the owner of shop number 189 of above market and he conducted business of energy light. On above date at 6.30 PM she gave a phone call to the mobile of her husband and he informed that he was outside of the shop and would be late to get back home. Thereafter his mobile phone was found switched off. They all searched to locate the whereabouts of victim Rajan but he was not found. On 14.10.2015 they came to know about an unidentified dead body in South Keranigonj and police sent above dead body to Mitford Hospital for post mortem examination. She along

with the parents of victim Rajan rushed to above Hospital and identified the dead body of victim Rajan. After burial of the dead body her mother in law lodged the FIR of this case with South Keranigonj Police Station. About 15-20 days before the above occurrence victim Rajan told her that accused Mustafiz and Joy have misappropriated taka 30-35 lacs from his shop. Her husband pressured them to return the money and accused Mustafiz and Joy promised to refund the money. Accused Joy, Mustafiz, Alamgir and Emon murdered victim Rajan in a preplanned way so that they were not required to refund the money. Above accused persons have confessed their guilt in the commission of murder of victim Rajan in their statements made before the Judicial Magistrates under section 164 of the Code. Absconding accused Nazmul and Niamat were also involved in the commission of above murder. The witness identified accused Joy and Mustafiz in the dock.

In her cross examination the witness stated that accused Joy and Mustafiz misappropriated taka 30-35 lacs and they admitted the same when her husband interrogated them and they agreed to refund the above money. She heard above facts

from her husband. She does not know what was the total investment of her husband in above business nor does she know anything about his payment of income tax for above business. Accused Joy and Mustafiz had been working in the shop of her husband for 6-7 years. She denied that accused Mustafiz and Joy did not misappropriate any money of her husband nor have they made any confessional statement voluntarily but those were obtained by police through physical torture and she was giving false evidence. Her husband did not file any case against accused Mustafiz and Joy for misappropriation of money. She denied that her husband was involved in purchase and sale of land and he had many enemies and some of his other enemies might have murdered him and they have falsely implicated the accused persons in this case.

PW 6 Hazi Joynal Abedin is the father of victim Rajan and Sectary General of Ershad Market Shop Owners' Association. The witness stated in his examination in chief that on 13.10.2015 morning he and victim Rajan set out from home and victim Rajan went to his electronic shop number

189 of the above market. They together performed Zohar and Asar prayers and also took launch. He returned home at 9.00 PM and came to know that victim Rajan did not come back home. His mobile phone was found switched off. He asked accused Mustafiz over phone about the whereabouts of victim Rajan and in reply he told that before magrab prayer victim Rajan went out of the shop and did not come back. On the next day at 4.00 PM he came to know about the dead body of an unknown young man in South Keranigonj area which was sent to Mitford Hospital for post mortem examination. He along with his wife and wife of victim Rajan went to the morgue of the Hospital and identified the dead body of victim Rajan. On the next day they received above dead body and buried the same and thereafter his wife instituted this case as informant. About 10-15 days before the above occurrence victim Rajan told him that there is missing of commodities of taka 30-35 lacs from his shop which have been misappropriated by accused Mustafiz and Joy. Accused Mustafiz and Joy murdered victim Rajan jointly with accused Alamgir, Emon, Niamat and Nazmul so that they got released

from refunding the above money. The witness identified accused Mustafiz and Joy in the dock.

In his cross examination the witness stated that they did not mention accused Mustafiz and Joy as accused persons in this case at the time of lodging FIR. Accused Mustafiz and Joy were present in the morgue before they reached there. They were also present at the time of receiving the dead body and burial of the same. His another son Rasel is an accused of a murder case and they suspected the informant and witnesses of that murder case as the probable killers of victim Rajan. He denied that in view to save his son Rasel from above murder case they have falsely implicated the accused persons in this case and compromised the matter with the real killers. He further denied that police obtained untrue confessional statements from the accused persons through physical torture. He did neither see the occurrence nor found any eye witness of the occurrence. He denied that accused persons were falsely implicated in this case and he was giving false evidence as was tutored by police.

PW 7 Md. Shamsul Alam Khan is the brother of P.W. 6 Joynal Abedin Khan and uncle of victim Rajan. The witness stated in his examination in chief that on 13.10.2015 PW 1 and PW 6 Joynal Abedin Khan told him that victim Rajan did not come back home. They went for searching victim Rajan but could not find him out. On 14.10.2015 dead body of an unknown young person was found in South Keranigonj which was taken to Mitford Hospital for post mortem examination by police. He along with PWs 1, 5, 6 went to the above morgue and identified the dead body of victim Rajan. The witness stated in her cross examination that accused persons jointly murdered victim Rajan and he identified accused Mustafiz and Joy in the dock.

In his cross examination the witness stated that he was present in the police station at the time of lodging of this case. He did not mention the names of the FIR mentioned accused persons in his evidence. Rasel is another son of his brother Joynal who is in prison in connection of a murder case. He denied the suggestion that they have compromised with the real killers of victim Rajan to save Rasel and falsely implicated

the accused persons in this case and he was giving false evidence on the request of his brother.

PW 8 Ashraful Islam is the owner of shop number 190 of Kaptan Bazar complex building number 1. The witness stated in his examination in chief that victim Rajan was the owner of the shop situated at the eastern side of his shop. He knew victim Rajan and accused Mustafiz and Joy. On 13.10.2015 at 5.30 PM he saw accused Mustafiz went out of above shop and after 5-7 minutes accused Joy and victim Rajan also closed the shop and went away. On the next day afternoon he came to know that victim Rajan has been murdered and his dead body is lying in the morgue of Mitford Hospital. Later on he came to know that accused Mustafiz, Joy, Emon and Alamgir have made separate confessional statements before Judicial Magistrates about commission of murder of victim Rajan.

In his cross examination the witness stated that the number of his shop is 190 and he is doing business in the shop for about five years. He did not know where accused Joy and victim Rajan went. He denied that when victim Rajan left

the shop the same remained open and his employees were in the shop and accused Joy did not accompany victim Rajan in the afternoon on the day of occurrence and he was giving false evidence.

PW 9 Hazi Abul Hasem stated in his examination in chief that on 14.10.2015 at 7.30 AM he saw the dead body of an unknown male person in the water of road side ditch. Above dead body was brought on the road and police prepared an inquest report of above dead body in his presence and he put signature on the same. The witness proved the inquest report and his signature thereon which were exhibits 2 and 2/1 respectively. The cross examination of the witness was declined by the defense.

PW 10 Abul Kalam is another witness to the inquest report of the dead body of victim Rajan. The witness stated in his examination in chief that police in his presence prepared inquest report of the dead body of victim Rajan and he gave signature on the same. The witness proved above inquest report and his signature thereon were exhibits 2 and 2/2

respectively. The cross examination of the witness was declined by the defense.

PW 11 Abul Hasem Sheikh stated in his examination in chief that on the request of police he picked up the dead body of an unknown person from the water of ditch and kept the same by the side of the road. Police prepared inquest report of above dead body. A towel was also found beside the dead body and police seized the same. He gave thumb impression on the seizure list. The witness proved above seizure list and his LTI thereon which were marked as exhibits 3 and 3/1 respectively. The witness lastly stated that he carried the dead body to morgue of Mitford Hospital for post mortem examination.

In his cross examination the witness stated that he could not recollect the date of occurrence. He picked up the dead body from the water and there were about 10-15 persons present in that place. He removed the dead body to Mitford Hospital by a rented rickshaw van.

PW 12 Md. Shahinur Rahman is a Senior Judicial Magistrate of Dhaka who recorded confessional statements of

accused Mustafizur Rahman, Alamgir Dhalia and Masud Ahmed Emon under section 164 of the Code. He stated in his examination in chief that while he was working as Senior Judicial Magistrate at Dhaka accused Mustafizur Rahman was produced before him on 29.10.2015 at 2.30 PM for recording his confessional statement under section 164 of the Code. He allowed the accused statutory period for reflection and on compliance of all relevant rules and laws recorded the voluntarily made statement of accused Mustafizur Rahman under section 164 of the Code. The witness proved the confessional statement and his signatures on the same with twelve signatures of the accused which are exhibits 4, 4/1-4/6 and 4Ka- 4Tha respectively.

The witness further stated that on 02.11.2015 at 12.00 noon Alamgir Dhali was produced before him for recording his confessional statement under section 164 of the Code. He on observing all legal formalities and requirements recorded the voluntary statement of accused Alamgir Dhali in seven pages. The witness proved above confessional statement of accused Alamgir Dhali and his fourteen signatures on the

same with fifteen signatures of the accused which were marked as exhibits 5.5/1-5/14 and 5Ka- 5Dha respectively.

On 11.11.2015 at 11.00 AM accused Masud Ahmed Emon was produced before him for recording his confessional statement under section 164 of the Code. On observing all legal formalities and requirements he recorded the statement of accused Masud Ahmed Emon in 11 pages. The witness proved above confessional statement of accused Masud Ahmed Emon with his thirteen signatures on the same and twelve signatures of the accused which were marked as exhibits 6, 6/1-6/13 and 6Ka- 6Tha respectively.

The witness further stated that all above mentioned three accused persons voluntarily made confessional statements before him and he recorded the same on fulfillment of all legal requirements.

In his cross examination the witness stated that S.I. Aminul Islam produced accused Mustafiz before him. The accused was in the custody of his MLSS Khokon in his chamber until he completed recording of his statement. He examined the body of accused Mustafiz with the help of his

MLSS Khokon. He denied the suggestion that he recorded the confessional statement of accused Mustafiz as was tutored by S.I. Aminul and other police personnels were present beside his chamber and they threatened accused Mustafiz and he did not give accused Mustafiz enough time for reflection and obtained signatures of accused Mustafiz on white papers and then prepared a confessional statement and the accused did not make any confessional statement voluntarily and there were marks of injuries on the body of accused Mustafiz.

The witness further stated that accused Alamgir was produced before him by S.I. Aminul and he explained five conditions as mentioned in column 5 of the form of statement to the accused in Bengali. There were no dates beneath the signatures of the accused persons. He had obtained signatures of the accused persons on each and every page. He denied that he did not record the statements of the accused persons in their own language and there were marks of injuries on them. He denied that police tortured accused Alamgir Dhali and his left hand and right leg were broken which fact he did not mention in the statement. He denied that blood was

pouring from the left ear of accused Alamgir Dhali and such injury was caused due to police torture which he did not mention in the statement. He further denied that at the time of recording above statements S.I. Aminul Islam was present and he threatened the accused persons with killing by cross fire and compelled the accused persons to give above confessional statements. He lastly denied that he did not review all legal formalities before recording of above statements of the accused and those were not made voluntarily.

PW 13 Dr. Tazrin Jahan, Lecturar of Forensic Medicine Department of Mitford Medical College Hospital performed post mortem examination of the dead body of victim Rajan. In her examination in chief the witness stated that on 15.10.2015 she was on duty and at 12.00 noon she performed post mortem examination of the dead body of an unknown muslim male person of 35 years of age. She stated the injuries found on the body of the deceased victim and passed opinion that the injuries were antimortem and homicidal in nature. Cause of death was hemorrhage and shock resulting from

above injuries caused by blunt weapon. She proved the post mortem examination report of the dead body of victim Rajan and her signature thereon which were marked as exhibits 7 and 7/1 respectively. The cross examination of the witness was declined by the defense.

PW 14 Jahir is the cleaner of the police station of South Keranigonj who stated that on 02.11.2015 at 9.15 AM S.I. Aminul Islam seized one white coloured mobile phone and two sim cards from the possession of accused Alamgir and he gave his signature on the list. The witness proved above seizure list and his signature thereon which are exhibits 8 and 8/1 respectively.

In cross examination he denied the suggestion that he did not see the recovery of any mobile phone set from the possession of accused Alamgir and he was giving false evidence on the request of police.

PW 15 Mofazzal stated in his examination in chief that on 02.11.2015 at 6.00-6.30 AM police recovered a private car bearing number Dhaka Metro Ga-00-0309 from the garage of one Jahangir (PW 16) and seized the same in his presence and

he signed on the seizure list. The witness proved above seizure list and his signature thereon which were marked as exhibits 9 and 9/1 respectively.

In his cross examination the witness stated that there are about 10-15 houses between his house and the garage of Jahangir. He denied that he was giving false evidence on the request of police.

PW 16 Jahangir Sheikh stated in his examination in chief that there is a garage in his house and police recovered and seized a private car from his garage. Since he is an illiterate person he did not give signature on the seizure list. The cross examination of the witness was declined by the defense.

PW 17 police constable Md. Abdul Haque stated in his examination in chief that an unknown dead body was found in a ditch at Chitakhola near Baghair Itakhola and he took above dead body to Mitford Hospital for post mortem examination by a receipt (challan). The witness proved above receipt (challan) and his signature thereon which were marked as exhibits 10 and 10/1 respectively. On 17.10.2015 S.I. Aminul Islam seized in his presence the wearing apparels of above

dead body as like one full sleeve shirt, one t-shirt, one jean pants and a coffee coloured underwear by a seizure list and he gave signature on the same. The witness proved the seizure list and his signature thereon were marked as exhibits 11 and 11/1 respectively. He further stated that he subsequently came to know that above dead body was of victim Rajan. In his cross examination the witness stated that the seized article is not produced in court. He denied that the dead body he escorted to Mitford Hospital did not belong to victim Rajan.

PW 18 constable Selim Miah accompanied S.I. Aminul Islam at the time of recovery of the dead body of victim. The witness stated in his examination in chief that on 14.10.2015 he was working in South Keranigonj police station and he along with constable Yunus, constable Mizanur Rahman accompanied S.I. Aminul Islam to Chitakhola and recovered the dead body of an unknown muslim male person of 20-25 years. From above place S.I. Aminul Islam also recovered and seized a red coloured towel (gamchha) in his presence. The witness proved above seizure list and his signatures thereon which were marked as exhibits 9 and 9/2 respectively. The

dead body was sent to Mitford Hospital for post mortem examination. On 17.10.2015 S.I. Aminul Islam seized the wearing apparels of the dead body like one full sleeve shirt, one ganzi, one black coloured pants and a coffee coloured short pants in his presence and he gave signature on the same. The witness proved his signature on above seizure list which was marked as exhibit 11/2. The witness further stated that according to marking of accused Alamgir a white coloured private car bearing number Dhaka Metro Ga-00-0309 was recovered and seized by S.I. Aminul Islam which was used in the commission of murder of victim Rajan and he gave signature on above document. The witness proved his signature on above seizure list which was marked as exhibit 9/2. The witness lastly stated that S.I. Aminul Islam also seized mobile phone set from the possession of accused Alamgir and he gave signature on above seizure list. The witness proved the seizure list and his signatures thereon were marked as exhibits 8 and 8/2 respectively.

In cross examination he stated that the wearing apparels of victim Rajan were not seized from the morgue of Mitford

Medical College Hospital. But the same was seized subsequently from the police station. The mobile phone set was seized from the possession of accused Alamgir from the police station as well. He lastly stated that the seized materials as mentioned above were not produced in the court room.

PW 19 Md. Al Amin is the Judicial Magistrate who recorded confessional statement of accused Jahangir Hossain Joy under section 164 of the Code. The witness stated in his examination in chief that on 31.10.2015 he was working as Senior Judicial Magistrate at Dhaka. On above date at 11.00 AM S.I. Aminul Islam produced accused Jahangir Hossain Joy before him for recording his statement under section 164 of the Code. He gave the accused three hours time for reflection and then after observing all legal formalities and fulfilling all legal conditions he started to record the statement of accused Jahangir Hossain Joy made under section 164 of the Code from 2.00 PM. The witness proved above statement of accused Jahangir Hossain Joy with his six signatures and nineteen signatures of accused Joy on above statement which

were marked as exhibits 12, 12/1-12/6 and 12Ka-12Dha respectively.

In his cross examination the witness stated that besides 4 printed forms he used 13 additional pages for recording of above statement of accused Jahangir Hossain Joy. The witness denied that he did not explain question number 5 of the column in Bangla and S.I. Aminul Islam was present in Court at the time of recording of above statement or the same was obtained by threatening accused Jahangir Hossain Joy with murder by cross fire.

PW 20 Md. Monirul Islam, Inspector of Police stated in his examination in chief that on 16.10.2015 he was working as Officer in Charge in South Keranigonj Police Station and on receipt of an FIR from informant Hosneara Begum at 21.30 hours he filled up formal columns in the FIR. The witness proved the FIR and his signatures thereon which were marked as exhibits 13 and 13/1, 13/2 and 1/2 respectively.

In his cross examination the witness stated that there is no name of any accused in the FIR of this case. In the FIR the

time of occurrence has been mentioned as any time between 6.30 PM of 13.10.2015 to 7.30 AM of 14.10.2015.

PW 21 Md. Aminul Islam is the Investigating Officer of this case. In his examination-in-chief he stated that on 16.10.2015 he was working as Sub-Inspector in South Keranigonj Police Station when he was assigned with the investigation of this case. He visited the place of occurrence and prepared a sketch map of the same along with an index thereof and recorded statements of the P.Ws under section 161 the Code. He arrested the accused persons and produced them before the Judicial Magistrates where four of them namely Mustafizur Rahman, Jahgnair Hossain Joy, Alamgir Dhali and Masud Ahmed Emon gave separate confessional statements under section 164 of the Code. He also seized materials of this case pursuant to disclosure made by above accused persons such as mobile phone of accused Alamgir, wearing apparels of the victim, a towel and a white coloured private car used in the commission of murder of victim Rajan. Above private car bearing number Dhaka Metro Ga-00-0309 was recovered from Malabdhi village at the showing of

accused Alamgir and seized the same by dint of a seizure list. The witness proved above seizure list and his signatures thereon which were marked as exhibits 9 and 9/3 respectively. He also seized a white coloured phone set from the possession of accused Alamgir. The witness proved above seizure list and his signatures thereon which were marked as exhibits 8 and 8/3 respectively. On 17.10.2015 on the production of police constable Abdul Haque he seized wearing apparles of the dead body of victim Rajan like one full sleeve shirt, one t-shirt, one jean pants and a coffee coloured short pants. The witness proved above seizure list and his signatures thereon which were marked as exhibits 11 and 11/3 respectively. The witness proved the sketch map and index of the place of occurrence and his signatures on above documents were marked as exhibits 14, 14/1, 15 and 15/1 respectively. In above investigation he found that accused Mustafiz and Joy were employees in the shop of victim Ariful Abedin Khan Rajan and taking advantage of trust of victim Rajan and his temporary absence they misappropriated taka 7-8 lacs from above shop. Subsequently victim Rajan detected such

misappropriation of money by them and put pressure on them to refund the money and they promised to return the same. But secretly they planned to commit murder of victim Rajan and they hired accused Alamgir for commission of murder of victim Rajan for taka one lac. Accused Alamgir hired accused Nazmul, Niamat and Emon for completion of his killing mission. Accused Mustafiz and Joy made an advance payment of taka 50,000.00 to accused Alamgir for above killing. Accused Mustafiz and Joy had obtained bail from the Honourable High Court Division and absconded. The witness identified accused Alamgir and Emon in the dock. Above accused persons have jointly murdered victim Rajan by strangulation with a towel and dumped his dead body in a ditch at Chitakhola road of Keranigonj. Above allegation having *prima facie* proved against accused Mustafizur Rahman, Jahangir Hossain Joy, Alamgir Dhali, Masud Ahmed Emon, Nazmul and Niamat he accordingly submitted charge sheet number 84 on 31.03.2016 against all of them under sections 302/201/34 of the Penal Code 1860.

In his cross examination the witness stated that he was assigned with the investigation of this case on 16.10.2015 and arrested accused Mustafizur Rahman on 28.10.2015 at 13.05 hours. He was not taken on police remand. He was arrested from Kaptanbazar and produced in court on 29.10.2015. Accused Jahangir Hossain Joy was arrested on 30.10.2015 at 20.30 hours and he was produced in court on 31.10.2015 at 11.00 AM. He was also not taken on police remand. Accused Alamgir Dhali was arrested on 02.11.2015 at 2.30 AM and on the same day at 12.00 noon he was produced in court for recording his statement under section 164 of the Code. The accused was not taken on police remand. Accused Masud Ahmed Emon was arrested on 10.11.2015 at 4.45 AM and he was produced in court on 11.11.2015 for recording his statement under section 164 of the Code. The accused was not taken on police remand for interrogation. The witness denied that he obtained the confessional statements from above four accused persons by threatening them with murder by cross fire and he was present in the chamber of the Magistrate when they made statements under section 164 of the Code. The

private car was seized from the possession of accused Alamgir. Accused Alamgir used to drive above car on rental basis. He denied that he subjected accused Alamgir to severe physical torture and caused fracture on his left hand and right leg. He denied that accused Mustafiz and Joy did not misappropriate any money from the shop of victim Rajan and he was giving false evidence on the request of the informant. In the FIR the informant suspected three persons named Atiya Khanom Keya, K.M Arifur Rahman and K.M Atiqur Rahman Bappi. He did not arrest or interrogate any of the above mentioned persons. The witness denied that above mentioned three suspects murdered victim Rajan but to save the life of the brother of victim Rajan the informant has compromised with them and falsely implicated the present accused persons in this case and he was influenced by the informant to submit a false investigating report and gave false evidence in this case.

On recall the witness proved the seized wearing apparels of victim Rajan which were marked as material exhibits I series. The witness also proved the white coloured mobile

phone set of accused Alamgir which was marked as material exhibit II. The witness lastly stated that the seized private car as mentioned above has been kept in the compound of South Keranigonj Police Station.

PW 22 Md. Aminur Rahman Miah, S.I. of Police stated in his examination-in-chief that pursuant to GDE Number 629 dated 13.10.2015 he went to Baghair Chitakhola road on 14.10.2015 at 7.30 AM and prepared an inquest report of the dead body of an unknown muslim male person of 35 years of age. The witness proved the inquest report and his signatures thereon which were marked as exhibits 2 and 2/3 respectively. He further stated that at that time he seized one red coloured towel (gamchha) which was lying beside the dead body. The witness proved above seizure list and his signature which were marked as exhibits 3 and 3/1 respectively. The seized towel (gamchha) was marked as material exhibit III. The witness lastly stated that through receipt (challan) he forwarded the dead body by constable Abdul Haque to the morgue for post mortem examination. The witness proved the receipt (challan)

and his signatures thereon which were marked exhibits 10 and 10/2 respectively.

In cross examination he stated that he went to the place of occurrence on 14.10.2015 and other police constables were with him. There were 5-7 persons present in the place of occurrence. He sent the dead body to morgue for post mortem examination hurriedly from the occurrence place. He denied that he did not visit the place of occurrence at all but prepared the inquest report of the dead body of the victim sitting in the police station.

These are all of evidence both oral and documentary adduced by the prosecution to bring home the charge leveled against the accused persons under sections 302/201/34 of the Penal Code for allegedly committing murder of victim Rajan.

It appears that the trial Court convicted and sentenced the accused persons to death and imprisonment for life under sections 302/34 of the Penal Code mainly on the finding that the names of the accused came up through police investigation and the plea of defence on compromise that in view to save Rasel informant made an accommodation with

real killers is unfounded and the motive of murder for misappropriation of large amount of money which has been suggested in this case by the prosecution has been clearly proved in evidence supported by consistent confessional statements made voluntarily by the accused. The Court further found that according to post mortem report the marks of injuries although were caused by blunt weapon and although the inquest does not show injuries caused by blunt weapon but even then such injuries seemingly were caused by blunt weapon in that victim's body would have been struck at and against the body of the car and after his death he was strangled by towel (gamchha) and also found that the subsequent absconsion of accused Mustafiz and Joy denotes the truthfulness of their confessions and finally found that this is a preplanned and cold blooded murder and a tragic case of betrayal and extreme degree of cruelty.

Now the point for determination in this reference and appeals is that whether the murder of victim Rajan by the convicts as alleged by the prosecution has been proved beyond all reasonable doubt and the Sessions Judge following

the principle of law with the fact of the present case is justified in passing the impugned judgment and order of conviction and sentence.

The FIR exhibit-1 lodged on 16.10.2015 by PW 1 the mother of victim Rajan against unknown persons denotes that at 5.30 PM on 13.10.2015 victim Rajan after receiving a phone call went out of his shop leaving accused Mustafiz and Joy in the shop. This is a clear case of prosecution that victim Rajan left the shop alone and did not go off with Mustafiz or Joy. PW 5 the wife of victim called him at around 6.30 PM and victim in reply informed that he was out of the shop and would be late to back home. From then on the mobile of victim was found switched off. They started searching for him in different places when he did not return home on time. At one stage of search she came to learn from people on the next day at noon that a body of a young man was found at 7.00 PM in a ditch by the side of Chitakhola road in South Keraniganj and his body was sent to Mitford Hospital for post mortem examination after holding inquest and informant identified the dead body of victim Rajan in the morgue. Exhibit-1 further

shows that informant's second son Rasel is a convict in a murder case of 2008 whose case is now pending in High Court and victim Rajan looked after the interest of that case for which the complainants of that case named Atia, Atiqur, Arifur used to commit various threats including injury and murder and it was suspected that they acting on the basis of the aforementioned prior grudge or due to any prior dispute some unknown perpetrators in collusion with each other cleverly called him on his mobile phone in a preplanned manner and took him to the place of occurrence and hit him hard on his nose and face and strangled him to death and then dumped his body in the ditch.

The informant PW 1, PW 5, PW 6 are the mother, wife, father of victim Rajan respectively. PW 1 in consistence with exhibit-1 admitted in cross examination that when victim received phone call he went out of the shop leaving Mostifiz and Joy in the shop. She further admitted that Joy was in the shop. PW 5 admitted in cross examination that PW 1 conversing with her filed this case and she did not mention the names of Alamgir, Nazmul, Niamat and Masud (Emon)

while she gave statement on 21.10.2015 under section 161 of the Code. PW 6 also stated in examination-in-chief that he asked Mustafiz where Rajan was and in reply Mustafiz told that Rajan left the shop before magrib. PW 20 recorded exhibit-1 which has also been admitted by PW 1 in her cross examination. PW 21 submitted the police report on 31.03.2016 long after 05(five) months of the occurrence in which he while narrating the statement of FIR mentioned that victim left Mustafiz and Joy while getting out of the shop. Thus from a combined reading of exhibit-1 along with these evidence of close relations and PW 21 it appears that victim Rajan did not go off with Mustafiz and Joy rather he left without them. On the other hand after around 18(eighteen) months of the occurrence PW 3 stated in examination-in-chief that at 5.30 PM he saw accused Joy and victim Rajan hastily getting out of the market and in cross examination he denied the suggestion that Joy had not gone with Rajan on the day of occurrence. PW 8 whose shop is flanked by victim's shop stated in examination-in-chief that approximately at 5.30 PM he saw accused Mustafiz went out of the shop and right after

5/7 minutes accused Joy and victim Rajan went out closing the shop and in cross examination he denied the suggestion that Rajan and Joy left market at 5.30 PM after closing the shop. Thus it transpires that the prosecution failed to make out a definite case on this point and it certainly creates dilemma in mind as to whether Rajan got out of the shop alone or Joy accompanied him or both Mustafiz and Joy stayed in the shop when Rajan departed. A dilemma in criminal justice is a situation where there is a conflict between two or more imperatives and obeying one would mean disobeying another. There remains a room of suspicion in dilemma in this context. Dilemma can lead to perpetuation of injustice with serious unfavourable consequences. PW 21 took the charge of investigation on 16.10.2015 and submitted police report condemning the accused persons through investigation although at the inception of the report while narrating the statement of FIR he mentioned that Mustafiz and Joy did not leave the shop when Rajan departed. Apart from all of the noted evidence of PW 1, 5, 6, 8 and exhibits 4, 5, 6, 12 the investigating officer himself as PW 21 clearly admitted in cross

examination that victim Rajan on last occasion left the shop with sanitary mechanic and this admission openly supports the case as made out in the FIR that Rajan left alone leaving accused Mustafiz and Joy in the shop. Hence it is safe to take the view that victim Rajan went alone leaving Mustafiz and Joy in the shop. Accused Joy was lastly seen with the victim was thus also not embedded in evidence led by prosecution.

The motive of the offence of murder suggested by the prosecution is one of the important and crucial aspects in the present case. PW 1 the informant of this case did not mention the names of the accused persons in the FIR as suspected for the murder and their names came up as accused through police investigation. PW 1, PW 3, PW 4, PW 5, PW 6, PW 7 unambiguously stated that Mustafiz and Joy were two trusted employees of the shop of victim Rajan. PW 5 stated that before 15-20 days of the occurrence victim told her that Mustafiz and Joy misappropriated taka 30-35 lacs from his shop and when he exerted pressure on them to refund the money they agreed right away but designed a plan with other accused persons to murder Rajan to skip such indebtedness.

PW 1 and PW 6 the parents of victim corroborated PW 5. PW 6 is the secretary of the market complex. PW 2 the vice president of the market complex stated that on 10.10.2015 victim Rajan told him that Mustafiz and Joy were unable to give account of taka 30-35 lacs during his stay in India. Police report shows that in fact Mustafiz and Joy kept looking for ways and means for evading refund of the embezzled money and therefore Mustafiz assigned the responsibility to his former acquaintance named Alamgir who mobilized Emon, Nazmul, Niamat as his associates. But we find no independent substantive evidence on the allegation of such misappropriation of huge amount of taka 30-35 lacs. There is no allegation of misappropriation of any money by accused Mustafiz and Joy in the FIR. PW 2, PW 3, PW 6, PW 8 being the elected authorities and shop owners of the market complex did neither lead any exclusive material evidence showing any independent amount of action against such big embezzlement nor explained away as to why such irrational impunity was offered to them. Mere allegation without corroborative substantive evidence does not prove that

Mustafiz and Joy misappropriated such amount as alleged. PW 1 admitted in cross examination that there was no case filed by Rajan against Joy for such defalcation. PW 2 admitted in cross examination that he had not received any allegation against Joy since the time he served. PW 3 admitted in cross examination that there was neither any case nor any document filed against such allegation. PW 3 also supported PW 2 and PW 5 and further admitted that Mustafiz and Joy did not execute any letter of undertaking acknowledging refund of money. PW 6 admitted in cross examination that he had no proof of misappropriation with himself against Mustafiz and Joy. Thus the motive as suggested by the prosecution does not refer to the reason of committing murder and in the instant case motive claiming to be the implicit cause instigating the accused persons to commit such murder is unfounded. Prosecution could not bring home the case on motive to satisfaction.

Accused Mustafiz, Joy, Alamgir and Emon made confessional statements on 29.10.2015, 31.10.2015, 02.11.2015 and 11.11.2015 respectively. PW 12 Md. Shahinur Rahman

recorded the confessions of Mustafiz, Alamgir and Emon and PW 19 Md. Al Amin recorded that of Joy.

The confession of accused Mustafiz figures out that he and Joy were trusted employees under victim Rajan who used to give them money to bring all the commodities of the shop but they would not but show vouchers without bringing goods and divide the money between themselves. Thus they misappropriated about taka 7-8 lac. Suddenly victim found out their stealth and reprimanded them and instructed to fulfill the goods. Then victim again gave them taka 3,50,000/- to bring other goods but they instead of bringing goods misappropriated the money and lied to the owner. They shared 3,00,000/- lac taka equally and upon intrigue left the remaining 50,000/- for killing the owner to get rid of the anger of the owner. Then they conspired with Alamgir of village Maldia and gave the money to him. On the day of occurrence on 13.10.2015 Alamgir accompanied by a driver came besides Kaptan Bazar with his own car and called him. Then after 3 minutes Rajan and Joy came there. Then Alamgir asked Rajan and Joy to show the land for purchase. They got

in the car. He and Joy sat on the back seat keeping Rajan in their middle and Alamgir and driver on the front and started for Keraniganj when Rajan received a phone call. They reached the new road of Keraniganj where Alamgir took other two persons in the car. He and Joy then went to the front seat and rest two persons and Alamgir sat behind keeping victim in the middle. At 8.00 PM they reached Itakhola and a place was shown to Rajan. They wasted some time there for more darkness. Then they got in the car maintaining the same sitting position and started for Chitakhola Road and while the car was in motion Alamgir wrapped a towel around the neck of Rajan and the other two punched Rajan. When Rajan still did not die and started fretting Alamgir again wrapped the towel around his neck and the others including the driver blew punch to Rajan. Alamgir then asked everyone to see if Rajan was dead. The persons consorting Alamgir touched Rajan's nose and told that he had died. Then the car was taken to the right side of the road and everybody including Alamgir pushed the dead body which fell into the nearby ditch. Then he and Joy got out from the front side of the car and went home. The

next day they went to the shop and sent taka 20,000/- to Alamgir by Bkash through GP number bearing last two digits as 38. Then after having knowledge they went to Mitford Hospital and identified the dead body of Rajan.

This confessional statement of Mustafiz imports the meaning that Alamgir used his own car and Mustafiz was in the front seat of the car and victim Rajan was in the middle of the back seat and he met his death due to strangulation and punch in which the maker and Joy were not involved except Alamgir, driver Emon, Nazmul and Niamat who combinedly finished the task. Mustafiz did not take any part in strangulation or punching. Rajan at first met the gangsters at Kaptan Bazar.

The confession of accused Joy exposes that he and Mustafiz had been working in victim Rajan's shop for around 4(four) years. Mustafiz embezzled 7-8 lac taka from last six months wherefrom he got a share close to three and a half lac taka. After the theft was tracked out Rajan put pressure to refund the misappropriated money to which Mustafiz agreed right away. Before one week of the last eid Mustafiz told that

he would not pay off the money and he would kill Rajan. The next day Mustafiz informed him that he was known to an assassin named Alamgir who had a white coloured car and Mustafiz called Alamgir to Gulistan before 2-3 days of the eid and acquainted him with Alamgir. Mustafiz settled with Alamgir that they would kill Rajan by running the car over him but ultimately they failed. Before 10-12 days of the occurrence Mustafiz withdrew three and a half lac taka from bank from which Mustafiz gave him one and a half and kept equal amount with him. Mustafiz also kept the rest 50,000/- taka from which Mustafiz gave 10,000/- to him for sending to the Bkash account of Alamgir. The last two digits of GP number was 38 and accordingly he sent the same. On 12.10.2015 Mustafiz and Alamgir expressed their intent that the other day Rajan would be killed inside the car of Alamgir. On 13.10.2015 Rajan agreed to visit the land at the request of Mustafiz. On that day Alamgir accompanied by his driver named Emon went to the Ananda bus counter adjacent to Gulistan Mosque by his car where Mustafiz met them before 15 minutes of magrib prayer. He and Rajan reached there at

the time of magrib prayer. Thereafter the car set out at around 6.00 PM. Emon was driving and Alamgir was right beside him. He and Mustafiz sat in the back seat keeping Rajan in the middle of them. The two associates of Alamgir got in the car from South Keraniganj. One got into the front seat and the other into the back seat. Then at around 7.15 PM they visited the land. At about 7.45 PM they got in the car. Emon was driving then. Alamgir and Mustafiz were on the front seat. At the back Rajan sat in the right corner and he sat next left to Rajan and the two associates of Alamgir were next left to him. They again got off the car to see other land at about 8.20 PM. Then again Emon sat on the driving seat. He and Mustafiz sat on the front seat. One of the associates of Alamgir sat on the right corner of the back seat and then Rajan, Alamgir and other associate respectively to his left. By driving a little forward Emon stopped the car. Then at first Alamgir punched in the face of Rajan and he and his two accomplices held Rajan's mouth with their hands. Then Alamgir took a towel from behind the car and wrapped the same 'round Rajan's neck and Alamgir and his two accomplices started pulling the

towel vigorously. Emon then punched Rajan and insisted Alamgir and his two accomplices to pull the towel firmly. He and Mustafiz sat on the front seat and they did not deal any blow to Rajan. Emon and Alamgir along with his two accomplices murdered Rajan. Rajan died within 10-15 minutes. Emon and Alamgir then told that the dead body should be disposed of quickly and accordingly Emon and Alamgir along with his two accomplices pushed and threw Rajan's body by the side of the road. Then Mustafiz told him to pay taka 20,000/- to Alamgir which he followed. Then he and Mustafiz went home. Mustafiz paid the rest 20,000/- taka to alamgir after one day of the occurrence. Next day he and Mustafiz went to the shop and came to learn that Rajan's body was found in Midford Hospital.

This confessional statement of Joy discloses that Alamgir owned a car which was used in the commission of murder and he was in the front seat of the car and victim Rajan was in the middle of the back seat of the car and he died because of strangulation and punch generated by Alamgir, Nazmul, Niamat and Emon. Joy was not at all involved in

committing the strangulation or punching. Victim Rajan at first met the gangsters at the Ananda bus counter flanked by Gulistan Mosque.

The confession of accused Alamgir embodies that before eid he borrowed taka 20,000/- from Mustafiz to fix his car. He met Mustafiz at Nawabpur road where he was also introduced with Joy. Mustafiz and Joy disclosed to him that they fell in problem and asked him for help. They disclosed that a man who created such problem must be killed. He did not respond and left the place. After 2-3 days he was again called on by them who repeated the same intention to which he agreed by using his car bearing number Gha-11-0309 and received taka 5,000/- out of taka 50,000/- to 60,000/- as was fixed. Then after 2-3 days of the eid Joy sent taka 10,000/- to his Bkash number 01715246238. Then they asked him to take the car to Gulistan on 13.10.2015 and accordingly he went there with Emon after 5.00 PM and called Mustafiz who reached there. After sometimes Joy and victim Rajan came and they reached new road crossing at Keraniganj from where they picked Nazmul and Niamat. At around 7.00 PM they all got

off the car to see the land and got into the car again. Mustafiz and Niamat sat on the front seat with Emon on driving seat. He sat on the left side of the back seat and then Nazmul and Joy on his right and Rajan sat on the right corner of the seat. They again got off the car after crossing a little distance from a market close to Baghoir to see the land. After that they again got in the car and sat on their respective seats maintaining the same arrangement. As soon as they started the car and reached a desolate place Nazmul and Niamat started flogging Rajan and while beating Niamat moved from front seat to back seat and Joy from back to front. At one point of beating when Rajan started screaming Niamat wrapped a towel around Rajan's neck and everybody including Nazmul and Niamat pulled the towel from both sides. At one stage it was seen that Rajan was dead. Then they stopped the car at the right side of the road and the rear door of the right side of the car was opened and after that everyone took Rajan out of the car and pushed him to the side slope and the body rolled down and fell into the ditch of the water. On way back Joy paid him 20,000/- taka. Mustafiz and Joy left at Hasnabad. Rest of them

went on the Postogola Bridge and dropped the broken mobile, moneybag, white comb of Rajan into the water. He gave taka 6,000/- out of 20,000/- to Emon who got off there. Then he and Nazmul and Niamat went their respective homes and at that time he paid taka 5,000/- to Niamat and 1,000/- to Nazmul. He and Mustafiz together decided to engage Niamat, Emon, Nazmul for completion of this murder and he took the responsibility of the money.

This confessional statement of Alamgir indicates that Alamgir himself was the owner of the car which was used in killing mission and victim Rajan was at the right side of the back seat of the car at the time of occurrence. Alamgir was at the left side of the back seat of the car. Nazmul and Niamat took leading part in killing Rajan by strangulation and flogging and all of them took the dead body of the victim out of the car and pushed down into the ditch by the side of the road. Victim Rajan at first met the accused persons at Gulistan.

The confession of accused Emon brings forth that on 10.10.2015 he accompanied by alamgir, Nazmul, Rajan, Mustafiz, Niamat went out with the car of Alamgir to see the

land but in vain. On 13.10.2015 at 5.00 PM Alamgir and Nazmul went to his shop. Alamgir himself drove his car. They expressed that they would bring Rajan that day to show the land. Then Alamgir and Nazmul got in the car and he was in driving seat and they went under Gulistan fly-over. Then Alamgir called and Mustafiz at first came and a few minutes later Rajan and Joy reached there. They then reached the new road crossing through Postogola bridge and stopped there and from that place Niamat got in the car. Then they went to a brick field near new prison cell and got off for visiting another land. They all got in the car again at around 7.00 PM and again stopped to see another land. He was in the car. Afterwards they all again got in the car and he stopped the car at a desolate place beside Chitkhola road and the doors of the car were kept closed. Immediate after stopping the car Alamgir at first and then Mustafiz, Joy, Nazmul, Niamat started beating Rajan. At one stage Alamgir wrapped the towel around Rajan's neck and pulled the same and then Nazmul, Joy, alamgir, Niamat, Mustafiz pulled the towel hard from both sides. Rajan had died then. He sat on the driver's seat when Rajan died.

Then they moved towards a little further and parked the car at the right side of the road and opened the right sided back door. Alamgir, Mustafiz, Joy, Niamat, Nazmul together took the dead body of Rajan out of the car and threw the body down which went down under water because there was slope and water hole beside the road. Then on way back Joy gave taka 20,000/- to Alamgir. Mustafiz and Joy left the car at Ekuria. He received taka 5,000/- from Alamgir and got off the car at Postogola bridge and Alamgir, Nazmul, Niamat went towards Dhaka.

This confessional statement of Emon discloses that Alamgir owned the car and Alamgir initiated the murder and Nazmul, Joy, Niamat, Mustafiz, Alamgir together took their part in the murder of Rajan by beating and strangulation hard and after the murder they pushed down the dead body into the ditch by the side of the road. Victim Rajan at first met the accused persons under Gulistan fly-over.

This is a case of unseen murder and in that context law is settled that prosecution has got to show that the case is proved beyond all reasonable doubt from each and every

corner. The trial Court convicted and sentenced the accused persons relying mainly upon their confessional statements despite having found some minor discrepancies and invited some remarkable words which were not embodied in such confessions and in doing so Court patched the post mortem report up with the statements of confessions.

It turns out from the record that the dead body of victim Rajan was found on 14.10.2015. FIR was lodged on 16.10.2015. GR Case Number 369 of 2015 was registered on 17.10.2015. Order number 2 of the case dated 29.10.2015 shows that on that day accused Mustafiz gave confessional statement exhibit-4. Column 2 of exhibit-4 shows that he was arrested on 29.10.2015 at 12.05 PM. The investigating officer PW 21 on the other hand stated in cross examination that he arrested accused Mustafiz on 28.10.2015 at 13.05 hours. Such statement of PW 21 on date of arrest of accused Mustafiz is completely bereft of the record of the Court and exhibit-4. From reading of the entire police report dated 31.03.2016 it is never found that PW 20 or PW 21 ever made any attempt to approach accused Mustafiz or any other accused persons in

between 14.10.2015 to 29.10.2015 for an occupational investigation. The main goal of the police investigation is to gather evidence in view to confirm the occurrence of a crime and assist the State in prosecuting the accused. It is the responsibility and authority of a police officer to arrest the accused if he after experiencing a proper investigation gathers reason to suspect that the person committed a cognizable offence. The primary object of investigation is to collect material and find out evidence as to commission of an offence. But in the instant case no such least endeavour was taken by the investigating officer to name the investigation proper and legal. Police report only shows that investigating officer collected a call list of the mobile of accused Mustafiz for a review from which he came to learn that Mustafiz was in the area of Keraniganj police station on 13.10.2015 at 19.56 hours but no such call list is tendered in evidence. It is in no way perceivable how the accused were suspected without a proper investigation.

There are some important aspects discernible in the confessional statements to be pursued and taken into account.

To begin with it is not unnoticed that accused Mustafiz was at first taken to the private chamber of the magistrate PW 12 at 2.30 PM on 29.10.2015 for recording confessional statement under section 164 of the Code. Column 1 of this confessional statement exhibit-4 shows that the recording of statement started at 5.00 PM after affording the accused sufficient time and column 10 shows that the accused was forwarded to the central jail at 5.00 PM. Recording of confession of an accused under section 164 of the Code is a solemn act and the magistrate must record it in the prescribed format and only when so recorded does it become relevant and admissible in evidence. Exhibit-4 shows that recording took no point of time and thus it infallibly loses its presumption under section 80 of the Evidence Act and question of truthfulness and voluntariness of this confession under section 164 of the Code does not evolve. This exhibit-4 is like slip sliding away and according to section 24 of the Evidence Act no reliance can be placed on such statement.

The next is Mustafiz says that Rajan met them at Kaptan Bazar and Joy says at Ananda bus counter near Gulistan

Mosque. Alamgir says that Rajan met them at Gulistan and Emon says at under Gulistan fly-over. This discrepancy creates inevitable doubt because a person cannot meet the same people in different places at the same time for same occasion. This occasion of meeting is so realistic that there remains no room for error and it is not possible to say anything contrary to reality in the event of expressing truthfulness.

Arrangement in sitting in the car at the time of occurrence is another aspect. Mustafiz says that Alamgir, Nazmul, Rajan, Niamat were at the back seat of the car and Rajan was in the middle. Joy says that Niamat, Alamgir, Rajan, Nazmul were at the back seat and Rajan was in the middle. Alamgir says that Alamgir, Nazmul, Joy, Rajan were on the back seat and Rajan sat just to the right side and Alamgir sat just to the left and then Nazmul and Joy were in the middle and in course of event of murder Niamat came from front to back and Joy from back to front. It is absolutely unusual and impossible as to how the assassins gave different statements in respect of the position of Rajan where they invested all their

mental and physical attention and efforts to get the job to completion. If Alamgir's statement is true then the statements of Mustafiz and Joy become false and vice versa.

The next one is victim Rajan was hit and strangled by whom. Mustafiz says that Alamgir wrapped the towel around Rajan's neck and Niamat, Nazmul, Emon punched him. Nobody says where Rajan was hit except Joy. Joy says that Alamgir punched in the face of Rajan and he along with Nazmul and Niamat held his face tight and they strangled Rajan with the towel and Emon also dealt blow on Rajan. Alamgir says Nazmul and Niamat mainly started beating and strangled Rajan to death. Emon says that Alamgir, Mustafiz, Joy, Nazmul, Niamat started beating and strangled Rajan to death. So it appears that each of them made different statements each time and each made special efforts to save oneself and therefore part of their statements is inculpatory and part becomes exculpatory. It is exculpatory so far when they avoided their personal hand in the killing. In the instant case since there is no eye witness and the exculpatory element of each of the accused persons is not inherently incredible law

does not offer permission to accept the inculpatory element and reject the exculpatory element.

In the FIR the accused persons were not suspected. The persons who were suspected were exempted from the police report and they were never ever questioned. The implication of these accused persons in the police report started from the fact that PW 21 collected the call list from the mobile phone of Mustafiz and came to know by reviewing thoroughly that he was not at home as he claimed but was at the area of Keraniganj police station at 19.56 hours on 13.10.2015 and on such basis of review he arrested Mustafiz and Joy who disclosed the names of other accused persons. But unfortunately there is no such evidence on call list and review for reaching to a definite conclusion that Mustafiz actually was in Keraniganj and the accused persons were truly involved in the murder. As discussed earlier the case as made out by prosecution on misappropriation of money by Mustafiz and Joy and subsequent pressure upon them by victim Rajan for paying off the money to him is unfounded being not proved in evidence.

The most important aspect in this case is to ascertain the link between exhibits 4, 5, 6, 12 the confessional statements of Mustafiz, Joy, Alamgir, Emon respectively and exhibit-7 the post mortem report. Exhibit-7 shows that on dissection it was found that left temporal, both parietal bone and occipital bone were fractured and haematoma was present. Both eyes contain clotted blood. In cranial cavity epidural and subdural spaces contain liquid and clotted blood. Mentioned injuries are antemortem. The opinion shows that the cause of death was due to haemorrhage and shock resulting from injuries by blunt weapon which were mentioned above and was antemortem and homicidal in nature. Thus it appears that blunt weapon was used in killing the victim. A blunt weapon is a hard and non piercing object that can cause injury upon impact. Blunt weapons are used in cases of assault or homicide causing injuries without penetrating the skin deeply. From a combined reading of exhibits 4, 5, 6, 12 it evidently transpires that when victim Rajan started fretting and screaming the makers wrapped a towel around victim's neck and pulled hard from both sides and he died. So these exhibits clearly show that

there was strangulation. But exhibit-7 does not refer to that there was even any ligature mark around his neck rather on the other hand hyoid bone was referred to be intact. There might be no scope to be hit in parietal bone causing fracture because victim was in the car and the space between his head and the ceiling of the car was so narrow that no sudden forceful jerk by any blunt weapon could be executed. More importantly it is perceptibly impossible to get hurt in the occipital area of the head in the allegedly given situation. The doctor was examined as PW 13 who stated in her examination-in-chief that cause of death was haemorrhage and shock resulting from injuries caused by blunt weapon and her cross examination was declined. Therefore under this probative circumstance no irresistible inference of guilt can be drawn. The evidence of PW 13 is suicidal being against the case of the prosecution. The link between confessional statements and post mortem report is uprooted.

Exhibit-14 is the map which was proved by PW 21. The “A” marked place in the map which is the place of occurrence does not indicate any car or road but a ditch and framing of

charge exposes that the accused persons dealt blows on nose and face but not on head and wrapped towel around victim's neck for strangulation and consequently he died and in view to hide the dead body was thrown into the ditch of water. So no car was mentioned at the time of framing of charge. Exhibit-9 the seizure list contains the car which was recovered from the garage of accused Nazmul of village Kazirbag of police station Sirajdikhan of district Munshiganj as shown by accused Alamgir. The case of the prosecution is that the car belonged to Alamgir. But there is no evidence in its support. A simple endeavor by the prosecution in the BRTA office was enough to determine the ownership of the car. No document including the blue book of the car was seized. PW 16 stated in his examination-in-chief that the seized private car was recovered by the police from their rented garage and he was not cross examined. PW 16 was corroborated by PW 15. Moreover it appears that a report bearing memorandum number 606 dated 31.07.2016 forwarded by PW 21 is kept with the record which shows that on 02.09.2015 one Rafiqul Islam purchased the car from previous owner Ms. Ismat Ara

through notary public which was supported by memorandum number 1328 dated 03.08.2016 issued by BRTA office of Ekuria, Keraniganj. The case of the prosecution would have failed if this document had been tendered in evidence by PW 21 but purposefully it was not marked in evidence. The car which is said to be used in this case did not belong to Alamgir and since the case on car falls through the link as made out by the prosecution is missing which makes the entire case suspicious. None of the makers of the confessional statements say that victim was hit at and against the body of the car as the Court below found.

The Court below relying upon legal evidence rightly disbelieved the charge leveled against the accused persons under section 201 of the Penal Code. Now question inevitably arises if the same is disbelieved the other part condemning the accused persons under section 302 of the Penal Code relying upon the same confessional statements exhibits 4, 12, 5, 6 whether could be believed. This part on the finding under section 201 of the Penal Code is completely dependent upon the rest part convicting the accused persons under section 302

of the Penal Code being solidaristically interrelated. The impugned judgment is thus apparently self-contradictory. Moreover the inside body of the car and the towel material exhibit-III affixing with the hair, sweating element of the body of the victim required to have forensic DNA test to ensure the claim of the prosecution which was not done under DNA Act 2014 [Act No. X of 2014].

Prosecution also made out a case that on 13.10.2015 Mustafiz and Joy proposed victim Rajan that they wanted to show him a land. This was the proposal that led Rajan to the killing zone and there was no other reason for him to go there and face this consequence. This proposal itself demands proof but prosecution did not adduce any evidence of any real estate owner or private land owner to substantiate such claim. PW 5 denied the suggestion that her husband was involved in purchase and sale of land. This appears to be a sudden popped up story concocted upon second thought in view to shift their case from the initial story of FIR.

Prosecution lay emphasis on the point that the absconsion of Mustafiz, Joy, Nazmul and Niamat reflects their

guilty mindset. It appears that Nazmul and Niamat absconded from beginning and did not face the trial. Mustafiz and Joy after making confessional statements on 29.10.2015 and 31.10.2015 respectively obtained bail from the High Court. But due to their absence before the Court of learned Sessions Judge their bail was cancelled on 22.05.2017 and 03.07.2017 respectively. Abscondence of an accused can be treated corroborative to the evidence of eye witness which is absent in this case and absconsion of one accused cannot be treated corroborative to the confessional statement of another accused and absconsion itself is not conclusive evidence to infer either of guilt or guilty conscience.

Confessional statement is considered to be an important piece of evidence and may be the sole basis for convicting its maker if such statement is found to be true and voluntary. From the discussion made above it is evidently discernible that exhibits 4, 12, 5, 6 the confessional statements are not true and voluntary. Accused Joy was lastly seen with the victim was not proved. Prosecution failed to prove the case of misappropriation of money by accused Mustafiz and Joy as

well as the motive as suggested. Exhibit-7 the post mortem report directly and alarmingly contradicts exhibits 4, 12, 5 and 6. The car in which victim Rajan was claimed to be murdered was not owned by accused Alamgir. The place of first meeting by the victim with the convicts on the day of occurrence and the sitting arrangement in the car as confessed by the makers are devoid of truthfulness. There is nothing in the record to show that the investigating officer ever approached accused Mustafiz or any other accused persons in between 14.10.2015 to 29.10.2015 for conducting a proper investigation to reasonable satisfaction. Therefore we find uniformity with the *ratio* laid down by our Appellate Division in the cases of State Vs Babul Mia, 63 DLR(AD) 10; Md. Humayun Kabir Vs the State, 15 SCOB AD 76 referred to by Mr. Ahsanullah.

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

place of proof. The trial Court erred in law and arrived at a wrong conclusion upon fanciful consideration in convicting and sentencing the accused persons.

Considering the aforesaid facts and circumstances of the case we are of the view that the prosecution has failed to prove the charges leveled against the accused persons beyond all shadow of doubt and thus they are entitled to get the benefit of doubt. We do not find any substance in this Death Reference and the same is liable to be rejected and we find merit in Criminal Appeal Number 3530 of 2018 and Jail Appeal Numbers 77 and 80 of 2018.

In the result the Death Reference Number 26 of 2018 is rejected and Criminal Appeal Number 3530 of 2018 preferred by accused Alamgir Dhali is allowed and connecting Jail Appeal Number 77 of 2018 preferred by Alamgi Dhali is disposed of and Jail Appeal Number 80 of 2018 preferred by accused Masud Ahmed alias Emon is allowed. The judgment and order of conviction and sentence dated 26.02.2018 passed by the Sessions Judge, Dhaka in Sessions Case Number 1437 of 2016 arising out of South Keraniganj Police Station Case

Number 26 dated 16.10.2015 corresponding to G.R. Case Number 369 of 2015 under sections 302/34 of the Penal Code is hereby set aside and Mustafizur Rahman, son of Abdul Khaleque alias Khaleque Rari of Village Chanpur of Police Station Dashmina of District Patuakhali; Jahangir Hossain Joy, son of Abdul Aziz alias Sattar Madbar of Village Nawdoba of Police Station Zazira of District Sharitpur; Alamgir Dhali, son of Md. Ibrahim Dhali of Village Malabdia of Police Station Sirajdikhan of District Munsigonj; Masud Ahmed Emon, son of late Abdul Kashem of Village Malkhanagar of Police Station Sirajdikhan of District Munsigonj; Nazmul, son of Md. Jahangir of Village Kazirbag of Police Station Sirajdikhan of District Munsigonj and Niamat, son of Mohammad Ali of Village Malamat of Police Station Sirajdikhan of District Munsigonj are hereby acquitted of the charge leveled against them under section 302 of the Penal Code. The accused persons be set at liberty forthwith if not wanted in any other cases.

Send down the lower Court's record along with the copies of this judgment to the concerned Court and the jail authority at once.

Md. Atoar Rahman, J:

I agree.

Naher, B.O.