

Present:

Mr. Justice Zafar Ahmed
And
Mr. Justice Shathika Hossain

Death Reference No. 39 of 2018
with
Criminal Appeal No. 1419 of 2024
with
Criminal Appeal No. 2243 of 2025

The State

-Versus-

Md. Nazmul (absconding) and others
...condemned-convict

Mr. Hafizur Rahman Khan, Advocate,
...State Defence Lawyer for convict Md. Nazmul
(absconding)

Mr. Md. Ahsanullah, with
Mr. Md. Tohrul Islam, and
Mr. H. A. Mahmud Sumon, Advocates
...For the convict-appellants

Mr. Mir Moniruzzaman, AAG
.....For the State.

Heard on: 22.04.2026, 23.04.2026, 30.04.2026,
11.06.2026, 18.06.2026, 25.06.2026, 02.07.2026 and
09.07.2026
Judgment on: 16.07.2026

Zafar Ahmed, J.

1. The instant death reference under Section 374 of the Code of Criminal Procedure, 1898 (in short, the “Cr.P.C.”) arises out of the judgment and order of conviction and sentence dated 01.04.2018 passed in Sessions Case No. 55 of 2016 arising out of

G.R. No. 24 of 2015, Nalitabari Police Station Case No. 10 dated 21.02.2015 by the learned Additional Sessions Judge, Sherpur convicting the accused **Md. Nazmul** (absconding) under Section 302 of the Penal Code, 1860 and sentencing him to death as well as a fine of Tk. 10,000/-. **Nazmul** was also convicted under Section 394 of the Penal Code and was sentenced to life imprisonment and a fine of Tk. 10,000/- in default to suffer rigorous imprisonment for 4 months. By the same judgment, co-accused **Saju Ahammed @ Khokon** and **Md. Momin** were convicted under Section 302 read with Section 34 of the Penal Code and were awarded life imprisonment and a fine of Tk. 10,000/- each, in default to suffer rigorous imprisonment for 4 months more. They were also convicted under Section 394 of the Penal Code and were awarded rigorous imprisonment for 10 years and a fine of Tk. 5,000/- each, in default to suffer rigorous imprisonment for 2 months more; both the sentences of imprisonment to run concurrently.

2. After conclusion of examination of prosecution witnesses, the accused persons absconded. Nazmul is still absconding. Convict **Saju @ Khokon** was arrested on 03.09.2023. He filed Criminal

Appeal No. 1419 of 2024. Convict **Momin** was arrested on 01.02.2024. He filed Criminal Appeal No. 2243 of 2025. The death reference and the criminal appeals are heard together and disposed of by this single judgment.

First information report (FIR) under Sections 326, 302, 201 and 34 of the Penal Code:

3. Md. Sohrab Ali (PW1) is the informant of the case is. He is the father of the deceased-victim Razzak. The FIR story, in short, is that on 20.02.2015 at about 10 am, Razzak (20), Faruk (22) (PW3), Shamim (18) (PW2) and Rakib @ Imon (19) (PW5) went to visit Eco Park situated at Madhutilla, Nalitabari. Between 3 pm and 4 pm, 7/8 unknown persons got involved with the informant's son Razzak and his companions on the issue regarding their purpose of visit. At one stage of the verbal altercation, the unknown persons attacked them and stabbed them with a dagger and knife, causing serious bleeding injuries. The victims raised a hue and cry. The nearby local shepherds (রাখাল) went there. The unknown assailants fled. The shepherds rescued Faruk (PW3), Shamim (PW2) and Imon (PW5), who were found injured. being informed, the police went there. The local people and the police

sent the injured persons to the hospital. But Razzak could not be found. On search, the police and the local people found the dead body of Razzak at the slope of the hill of Lal Pahar, called Gala Chipa under Burunga Kalapani village, No. 1 Poragaon Union, Police Station Nalitabari, Sherpur district at around 9 pm. Thereafter, the inquest into the dead body was held. The FIR was lodged with Nalitabari police station on 21.02.2015 at 8.05 pm.

Charge-sheet under Sections 394, 302 and 411 of the Penal Code:

4. Md. Arif Hossain, a Sub-Inspector of Police (PW16), investigated the case. The post-mortem of the dead body of Razzak was held. The Investigating Officer (I.O.) recorded the statement of witnesses, including that of the injured eyewitnesses Faruk, Shamin and Imon. They also made witness statements before the concerned Magistrate, which were recorded under Section 164 of the Cr.P.C. The I.O. arrested Nazmul (22), Saju @ Khokon (20) and Momin (18). They made judicial confessions which were recorded by the concerned Magistrates under Section 164 of the Cr.P.C. The I.O. recovered some articles as per the disclosure statements of the arrested accused persons and prepared a

separate seizure list. He submitted the charge-sheet dated 31.08.2015 against Nazmul, Saju and Momin.

Charge under Sections 394, 411, 302 and 34 of the Penal Code:

5. Charge was framed against Nazmul, Saju and Momin on 24.03.2016 under Sections 394, 411, 302 and 34 of the Penal Code, to which they pleaded not guilty.

Prosecution witnesses:

6. The prosecution examined 17 witnesses. They were cross-examined by the State defence lawyer. During the trial, the accused persons were granted bail. After the conclusion of the examination of the PWs, the accused persons absconded. They could not be examined under Section 342 of the Cr.P.C. The judgment was pronounced on 01.04.2018 in their absence.

Defence case:

7. The defence case is not specific. They took an alternative, sometimes contradictory defence pleas.

Juvenility of Momin:

8. At the outset, the learned defence Counsel raised an issue as to the juvenility of Momin, who was awarded a life sentence. In the

confession of Momin recorded on 25.03.2015, his age was recorded as 15 years. In the charge-sheet dated 31.08.2015, Momin's age was mentioned as 18 years. It is stated in Momin's petition of appeal that according to his Birth Registration Certificate (number 20028917075116381), registered and issued on 17.02.2025 (after his arrest) by the Office of the Registrar, Birth and Death Registration, Poragaon Union Parishad, Nalitabari, Sherpur, Momin's date of birth is 01.01.2002. Accordingly, on the date of occurrence, *i.e.*, on 20.02.2015, Momin's age was just above 13 years. It is contended that when the offence was committed, Momin was a child under the Shishu Ain, 2013, and as such, his trial with adults is vitiated. The learned defence Counsel prays for sending the case, so far as it relates to Momin, to the trial Court to determine his age and for retrial under the Shishu Ain. In this regard, we note that the issue as to the juvenility of Momin was never raised before the trial Court although there was ample opportunity to raise the same before the Court below. The issue has been raised for the first time before us.

9. We have examined and verified the Birth Registration Certificate of Momin on the government's official website. The Certificate is issued under the জন্ম ও মৃত্যু নিবন্ধন আইন, ২০০৪ (Birth and Death Registration Act, 2004) and the Birth and Death Registration Rules, 2018 made under the said Act. Section 18 of the Act, 2004 provides, *inter alia*, that the Birth Registration Certificate issued under the Act is to be treated as a public document within the meaning of the Evidence Act, 1872, and the Certificate shall be considered as evidence in the Court. Since the Certificate in question has been produced before us as the Appellate Court for the first time, we have no legal authority to consider the same as evidence unless the certificate is taken as additional evidence in accordance with the provisions of Section 428 of the Cr.P.C. If it turns out after taking evidence that Momin was a child at the time of occurrence, this Court, being the Appellate Court, has the authority under Section 423 of the Cr.P.C. to send his case to the Shishu Adalat constituted under the Shishu Ain for retrial for the reason that the trial Court had no jurisdiction to try Momin with adults.

10. However, such a course of action, *i.e.*, sending the case for retrial, should not be readily followed as a matter of course. In *Asiman Begum*, 51 DLR (AD) (1999) 18, the Apex Court laid down some guidelines to be followed by the Appellate Court where it is found that there was a mis-trial or trial without jurisdiction. The Apex Court observed, (a) where there was no legal evidence to support the conviction and the retrial would be a useless exercise, (b) where prosecution should not be given a chance to fill up its lacuna by bringing new evidence which it did not or could not produce in the first trial, (c) where the accused had suffered a substantial part of the sentence imposed upon him in the mis-trial, a retrial should not be ordered. It was accepted in *Asiman Begum* that there may be other extenuating circumstances which may impel a Court to take a lenient view in favour of the accused. But there is no question that the Court has an undoubted right to direct a retrial where there has not been a trial in accordance with law. *Asiman Begum* was followed and applied in *Goutam Chandra Das*, 55 DLR (AD) (2003) 527. Being fortified with the *ratio* laid down by the Apex Court, we have decided not to take additional evidence to ascertain Momin's age and send his case to the

Shishu Adalat for retrial if Momin is found to be a child. We would consider his case on merit.

Marshalling of evidence:

11. In the instant case, there are sworn testimonies of three eyewitnesses, circumstantial evidence, evidence as to recovery of goods based on disclosure statements of the accused persons, and confessional statements of three accused persons. The proper way to approach a case like the present one is, first, to marshal the evidence against the accused excluding the confession altogether. If it is capable of belief independently of the confession, it is not necessary to call the confession in aid. However, if the Court is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction, in such an event the Court may call in aid the confession and use it to lend assurance to the other evidence and thus fortify itself in believing what without the aid of the confession it would not be prepared to accept. This proposition of law is supported by *Kashmira Singh*, AIR 1952 SC 159, and *Sumon*, 26 BLC (AD) (2021) 114. Accordingly, we would discuss the other evidence first, excluding the confession.

No 'Test Identification Parade' (T.I. parade) and no dock identification by eyewitnesses (PWs 2, 3 and 5):

12. The FIR was lodged against unknown 7/8 accused. No T.I. parade was held during the investigation. PW2 Shamim (eyewitness) in his testimony mentioned the names of three accused persons, although at the outset of his deposition, he stated that three unknown persons had attacked them. PW3 Faruk (eyewitness) mentioned the names of the accused Nazmul and Saju @ Khokon. He did not mention the name of the accused Momin. PW5 Imon (eyewitness) mentioned the names of the accused Nazmul and Momin. He did not mention the name of the accused Saju @ Khokon. PW5 stated in cross-examination that he did not know the accused persons at the time of the occurrence. He came to know about the accused persons after their arrest.
13. None of the eyewitnesses (PWs 2, 3, 5) identified the accused persons during their deposition in Court, although the accused were present in the dock. In other words, there was no dock identification in the case. The learned defence lawyers submitted that since the FIR was lodged against unknown accused, no T.I. parade was held and the eyewitnesses did not identify the accused

persons during the trial, the evidence of the eyewitnesses (PWs 2, 3, 5) is inadmissible so far as it relates to implicating the accused persons with the alleged offence. The learned Assistant Attorney General (AAG), on the other hand, submitted that the witnesses are not accustomed to or familiar with the Court procedure. The failure of the investigating officer to hold the T.I. parade and the failure of the Public Prosecutor in conducting the case properly will not *per se* render the evidence adduced by the eyewitnesses inadmissible. The learned AAG further submitted that the entire prosecution case, including the recovery of mobile phones and other articles as well as the confessions of the accused persons and the facts and circumstances of the case have to be considered as a whole. Mere non-identification during the trial (dock identification) cannot be considered in isolation for the reason that the evidence of the eyewitnesses has been corroborated by other evidence on record.

14. Identification of the accused person goes to the root of any criminal trial (*Vishwanatha*, 2024 INSC 482). It is observed in *Sidhartha Vashisht* (Jessica Lal murder case), (2010) 6 SCC 1 at para 256 that the necessity for holding an identification parade

can arise only when the accused are not previously known to the witnesses. An identification test is not a substantive piece of evidence. The substantive evidence is the evidence of identification in Court. T.I. parade is conducted for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in Court. Another purpose of a prior test identification is to test and strengthen the trustworthiness of the evidence of identification in the Court. It is a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused, who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is subject to exceptions, when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. Failure to hold a T.I. parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept

the evidence of identification even without insisting on corroboration.

15. In ***Harbajan Singh***, (1975) 4 SCC 480, the appellant and another were absent at the time of roll call. When they were arrested, their rifles smelt of fresh gunpowder. The empty cartridge case which was found at the scene of the offence bore distinctive markings showing that the bullet which killed the deceased was fired from the rifle of the appellant. Though the T.I. parade was not held, the Supreme Court of India upheld the conviction based on the identification in Court corroborated by other circumstantial evidence.
16. In ***Kanan***, (1979) 3 SCC 319, the witness admitted that he knew the two accused by face. He named the accused while identifying them in Court. This raised an element of doubt that the names of the accused were supplied to the witness from outside.
17. In ***Joseph***, 1997 Cri.L.J. 4289 (Kerala High Court), the accused was not named in the FIR. The accused was identified at the police station. No T.I. parade was conducted. It was held that identification of the accused by the witness at the police station is hit by Section 162 of the Cr.P.C., and no weight can be attached

to the identification alleged to have been made by the witness at the police station.

18. In *Shyamlal Pradhan*, 1996 Cr.L.J. 1019 (Orissa High Court), the prosecuting lawyer did not ask the witness to identify the accused who were present in Court. It was held that the witnesses having not identified the accused in the Court, their statement regarding identification in the T.I. parade cannot be used as legal evidence to rope the accused in the crime.
19. In *Dana Yadav*, (2002) 7 SCC 295, the identification by the witness in Court was not relied upon as the witness did not name the accused before the police, but in Court had identified and named the accused. The identification was not further corroborated by either previous identification or any other evidence, while other witnesses, though they named the accused before the police, failed to identify him in Court.
20. In *Dhanpat Chamara*, AIR 1960 Pat 582, it was held that if the accused was arrested on the spot and was in custody from that time up to the date of trial, no question of identity of the accused arises.

21. In ***Rattan Kha***, 40 DLR (1988) 186, which was a case under Sections 395 and 397 of the Penal Code, the occurrence took place on .07.10.1978. T.I. parade was conducted on 30.11.1978, in which the PWs identified the accused. PWs 1-3 deposed in Court nearly six years after the occurrence and the T.I. parade. PWs did not identify the accused in the dock. It was held that non-identification in the dock was not fatal for the reason that the PWs are not supposed to remember the faces of the accused persons after such a long passage of time, and as such, it was no longer possible for the PWs to recognise the accused at the time of trial.
22. It is now a trite law established through various judicial pronouncements that the evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character unless it is corroborated by previous identification in the T.I. parade or any other evidence. This principle has been applied recently by our Apex Court in ***Md. Humayun Kabir***, 15 SCOB [2021] AD 76.
23. In the case in hand, the date of occurrence is 20.02.2015. The occurrence took place during the daytime between 3 pm and 4

pm. The accused are unknown. No T.I. parade was held. The accused were arrested on 24.03.2015, 02.04.2015 and 10.05.2015 respectively. The eyewitnesses (PWs 2, 3, 5) gave evidence in Court on 22.05.2017 and 03.07.2017 respectively. The age of PWs 2, 3, 5 is between 18 and 22 years. The eyewitnesses neither identified the accused in the dock, nor did the prosecuting lawyer ask them to identify the accused in the dock. No explanation, whatsoever, has been given for the non-identification of the accused in the dock. This is not a case of failure to identify the accused in the dock; rather, it seems to be a case of either intentional or sheer negligent act of the witnesses and/or the prosecuting lawyer to identify the accused in the dock. The conduct of the Public Prosecutor was, no doubt, shoddy and clumsy. The cases of *Harbajan Singh*, *Dhanpat Chamara* and *Rattan Kha (supra)*, in which, considering the facts and circumstances of the cases, an exception to the general principle of identification in the dock for the first time was taken, do not apply to the case in hand. Moreover, mentioning the names of the accused in Court for the first time by the eyewitnesses is doubtful because the names were supplied to them from outside [*Kanan*,

(supra)]. This fact was admitted by PW5. Therefore, the identification of the accused persons connecting them with the alleged offence remains disproved.

Corroborative evidence:

24. The learned AAG vehemently argued that there is corroborative evidence against the accused which must be taken into consideration. Let us discuss the corroborative evidence, if any, on record.

PW1 (informant):

25. According to the FIR, PW1 heard the incident at 5 pm on the date of occurrence. PW1 deposed in Court that one of the eyewitnesses (PWs 2, 3, 5) called him over the mobile phone at 4 pm, and thus he received the information about the incident. PWs 2, 3, 5 categorically deposed that the accused took away their mobile phones. Admittedly, the time of occurrence is between 3 pm and 4 pm. Therefore, PW1 cannot be relied upon as to receipt of information regarding the occurrence. Moreover, the FIR does not mention any offence relating to robbery, whereas PW1 in his deposition mentioned the story of robbery.

PW6:

26. PW6 is Rezaul Karim. He is the elder brother of the deceased Razzak. He is not an eyewitness. He deposed that he went to the police station and saw accused Momin in front of the hajat. Momin was wearing the pair of shoes of the deceased Razzak. The pair of shoes was seized. PW6 is the seizure list witness. Again, PW6 did not identify accused Momin in the dock. The evidence of PW6 does not inspire confidence as to the identification of Momin for the reason that the identification of the accused by the witness at the police station is hit by Section 162 of the Evidence Act [*Joseph (supra)*].

Disclosure statements and recovery of goods:

27. It has been observed in *Md. Humayun Kabir*, 15 SCOB (AD) 76 (*supra*) that Section 25 of the Evidence Act mandates that no confession made to a police officer shall be proved as against a person accused of an offence. Similarly, Section 26 of the Evidence Act provides that a confession by the accused person while in custody of the police cannot be proved against him. However, to the aforesaid rule of Sections 25 to 26 of the Evidence Act, there is an exception carved out by Section 27 of

the Evidence Act. Section 27 is a proviso to Sections 25 and 26. Such a statement is generally termed a disclosure statement leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly it can be allowed to be given in evidence. It is further observed that since a statement under section 27 of the Evidence Act is alleged to be frequently misused by the police, the Courts are required to be vigilant about its application. The Court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact to attract the provisions of Section 27 of the Evidence Act. It is further observed in the reported case that sometimes a device is adopted by the Police to stage a scene. It is the duty of the Court to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be a true one.

28. In *Himachal Pradesh Administration V. Om Prakash*, (1972) 1

SCC 249, it was observed by the Supreme Court of India that Section 27 of the Evidence Act which makes the information given by the accused while in custody leading to the discovery of a fact and the fact admissible, is liable to be abused and for that reason great caution has to be exercised in resisting any attempt to circumvent, by manipulation or ingenuity of the Investigating Officer. The protection afforded by Sections 25 and 26 of the Evidence Act, while considering the evidence relating to the recovery, the Court shall have to exercise that caution and care which is necessary to lend assurance that the information furnished and the fact discovered is credible.

29. In the case in hand, the I.O. (PW16) deposed that he seized the pair of shoes of the deceased from the accused Momin on 24.03.2015, vide seizure list – Ga (ext. 4). The pair of shoes were marked as material ext. II by the I.O. However, the victims (PWs 2, 3, 5), the deceased's father (PW1) and brother (PW6) did not identify the pair of shoes in the Court. Therefore, applying the principles laid down in *Md. Humayun Kabir* and *Himachal Pradesh Administration* cases (*supra*), we can conclude that the

attempt of the prosecution to establish that the accused Momin took away the pair of shoes of the deceased on the date and time of occurrence and thus connecting him with the offence miserably fails for want of legal evidence. It is reiterated that Momin and co-accused were not identified in Court.

30. The I.O. recovered a Garo dao from the dwelling home of the accused Saju @ Khokon. PW16 (I.O.) did not say that the recovered Garo dao was used for committing the offence.

31. The I.O. deposed that as per the disclosure statement of the accused Nazmul and Saju @ Khokon, he recovered four mobile phones of the victims, which, according to the prosecution, belonged to the deceased Razzak, and PWs 2, 3, 5. Neither the victims (PWs 2, 3, 5) nor any other witness stated the mobile phone numbers. The victims, PW1 (father of the deceased) and PW6 (brother of the deceased), did not identify four mobile phones which were marked as material ext. I series. The I.O. identified the mobile phones in the Court. Another interesting aspect of the case is that a Walton Primo X mobile phone and a Walton Primo GH2 mobile phone were seized on 14.04.2015 and 02.04.2015 respectively. However, the relevant seizure lists were

not exhibited before the Court. Therefore, the recovery of the alleged mobile phones as per the disclosure statement fails to meet the threshold of admissibility of evidence. Thus, the prosecution case of snatching mobile phones while committing the offence of robbery remains disproved. The I.O. recovered some other articles which do not have significance in the case for connecting the accused persons with the offence.

Recovery of the dead body of Razzak:

32. The place of occurrence has been described in the FIR as the “slope of the hill of Lal Pahar”. According to the inquest report (ext. 5), the dead body of Razzak was found at 9.10 pm from a place called “Kalapani Lal Pahar”, which is 150 yards away from the border pillars. PWs 2, 3, 5 (eyewitnesses) deposed that Razzak died at the place of occurrence. According to the sketch map (ext. 9), the place of occurrence and the place of recovery of the dead body are not the same; rather, they are different places. PW13 was the Chairman of the concerned Union Parishad. He deposed that on receipt of information that three injured young men had come down from the hill, he sent them with C.N.G. for treatment. They said that another person was lying dead.

Thereafter, PW13, police, members of the B.G.B., village police, along with hundreds of people, went to the hill, searched for the dead body and found the same at the slope of the hill.

33. The above-mentioned evidence on record as to the recovery of the dead body gives rise to some unanswered questions. The time of occurrence is between 3 pm and 4 pm. According to PWs 2, 3 and 5, Razzak died at the place of occurrence. Hearing their hue and cry, the local people rescued them. There is no evidence that Razzak, while still alive, went down the hill in an injured condition or that the stabbing incident occurred at the slope or near the slope of the hill or that Razzak's dead body was dragged to the slope of the hill. Rather, oral testimony of the eyewitnesses establishes that Razzak died at the place of occurrence, and the local people rescued the injured witnesses from there. The dead body was recovered at 9.10 pm. The question is, why the local people, who rescued the eyewitnesses, did not take the dead body with them? There is no answer to the question, but it casts a serious doubt about the veracity of the prosecution case in connecting the accused with the offence.

Defence suggestions:

34. On behalf of the accused, the State defence lawyer gave contradictory and self-destructive suggestions to the prosecution witnesses. For example, PW 2 replied to the defence suggestion that it is not true that they had tussle only with the accused persons; it is not true that the accused did not stab or that Razzak died from stabbing by the witnesses (PW3); it is not true that I do not know who killed [Razzak] or nobody beat me or Razzak (PW5). The I.O. (PW16) replied to the defence suggestion that it is not true that the accused persons did not commit the offence or that there was a tussle between them.
35. There is no doubt that some of the defence suggestions imply that the accused persons were present at the place of occurrence and that they had a tussle with the deceased and the eyewitnesses. The question is whether an inference can be drawn from the defence suggestions in favour of the prosecution and against the defence?
36. It is observed in *Md Khaliluddin*, 1986 6 BLD (AD) 1 that the defence may take whatever pleas he likes, including inconsistent pleas, such as a plea of alibi, and at the same time he may take the plea of private defence. The simple reason for allowing such

contradictory pleas is that the accused is not required by law to prove his innocence, but it is entirely for the prosecution to prove his guilt, failing which the accused shall be acquitted.

37. In *Nowabul Alam*, 1995 15 BLD (AD) 54, the majority view of the Apex Court (2:1) was that the prosecution case is never proved by suggestions made by the defence to the prosecution witnesses. It was further observed in respect of the defence suggestion that the Court cannot accept what is favourable to the prosecution and ignore the true purpose of the suggestion. This is not a fair appreciation of evidence.

38. In *Pulin Mahajan*, 8 ADC (2011) 982, it was held that it is an established rule of administration of criminal justice that the accused is taken innocent when the Court takes up the case for trial even if he makes any confessional statement admitting his involvement in the incident. The accused is not required to make out his defence case by giving suggestions to the prosecution witnesses or in his statement under Section 342 of the Cr.P.C. If it is detected from the lips of the witnesses in course of cross-examination something unfavourable to the prosecution case, the

accused may take it in his defence in course of argument and may get the benefit of doubt.

39. The case in hand neither falls within the purview of Section 105 of the Evidence Act (burden of proving that the case of the accused comes within exceptions) nor under Section 106 of the said Act (burden of proving fact especially within knowledge). Therefore, the prosecution has to prove its own case beyond the reasonable doubt. The contradictory and self-destructive defence suggestions do not favour the prosecution, which must stand on its own feet, but evidence on record so far has established that the said footing is very weak.

40. The learned AAG argued that all three accused made inculpatory judicial confessions which, if considered, would prove the guilt of the accused.

Confession of Momin:

41. Momin was arrested on 24.03.2015. He made the confessional statement on 25.03.2015. The Judicial Magistrate (PW17) recorded the confession. Momin did not mention the names of the victims. He stated in the confession that he had a knife, Nazmul had a knife, and Saju @ Khokon had a dao. They chased four

persons. Nazmul stabbed one of them frequently. They took away the mobile phones of the victims. He [Momin] found a pair of shoes from the bag of one of the victims and wore those. A plain reading of the confessional statement gives the impression that in respect of the alleged offence of robbery the confession was inculpatory in nature, but in respect of the offence of murder the same was exculpatory. However, there are two issues – firstly, the learned Magistrate did not make any note or memorandum at the foot of the record of the confessional statement as per the requirement of Section 164(3) of the Cr.P.C.; and, secondly, the age of Momin was recorded in the confession as 15 years.

42. There are differences of opinion as to the consequence of non-compliance with the provision of Section 164(3) of the Cr.P.C. There are judgments in which it has been held that the non-compliance of any of the provisions of Section 164 is curable under Section 533 of the Cr.P.C. For example, in *Hazrat Jamal*, 11 DLR (SC) 1959 84, it was held that failure to keep a memorandum is an irregularity which can be cured under Section 533 provided the error has not injured the accused in his defence on merit. In *Major Md Bazlul Huda*, 62 DLR (AD) (2010) 1, it

was held that if any of the provisions of Section 164 has not been complied with by a Magistrate, the document (confessional statement) may be admitted under Section 533 upon taking evidence that the statement recorded was duly made and the non-compliance has not injured the accused in his defence on the merit. A similar view was expressed in **Kehar Singh**, AIR 1988 SC 1883 and in **Nalini**, (1999) 5 SCC 253, which were referred to and relied in the case of *Major Md Bazlul Huda (supra)*.

43. Again, there are judgments in which compliance of Section 164(3) was held to be a mandatory one and not curable under Section 533 of the Cr.P.C. [**Raisuddin**, 48 DLR (1996) 517, **Bashar**, 15 BLT (2007) 391, **Fazlur Rahman Tonmoy**, 61 DLR (2009) 169]. In **Babul Miah**, 63 DLR (AD) (2011) 10, Section 533 was not referred to, but it was held that compliance with the provisions of Section 164(3) is mandatory. In **Rabindra Kumar Pal**, AIR 2011 SC 1436, which was a sensational case of triple murder of an Australian Christian Missionary and his two minor sons, the Supreme Court of India observed that Section 164 requires strict and faithful compliance of Sub-sections 2 to 4, the failure to observe safeguards not only impairs evidentiary value

of confession but cast a doubt on nature and voluntariness of the confession on which no reliance can be placed.

44. In this case, the Magistrate (PW17), who recorded Momin's confession, did not state in her examination-in-chief that she had complied with all the requirements of Section 164. She simply stated that the accused made the confessional statement voluntarily. The confession was read over to the accused; he signed it, and she signed it also. In cross-examination, the Magistrate deposed that she had recorded the confession in compliance with the requirements of Section 164. She denied the defence suggestion that the memorandum, which was supposed to be written, was not written.

45. Now, we turn to the second issue. Momin's age was recorded in the confession as 15 years. The learned AAG frankly and candidly submits that in view of the provisions of the Shishu Ain, 2013, Momin's confession cannot be treated as a confession and as such the same cannot be admitted as evidence. We accept and endorse the submission. Momin's confession is kept out of consideration.

Confession of Nazmul:

46. Nazmul was arrested on 02.04.2015. He made the confessional statement on 08.04.2015. The Judicial Magistrate (PW4) recorded the confession. In his confession, Nazmul mentioned the names of two victims, namely Shamim (PW2) and Razzak (deceased). He further stated that after arrest he came to know the name of Shamim, whom he apprehended. He further stated that police told him that the mobile phone belonged to Shamim. He stated that he had stabbed Razzak. He also stated that three accused persons, including himself, went to the place of occurrence to commit robbery. He stated that they took away the mobile phones of the victims.

47. A scrutiny of Nazmul's confession reveals two issues. Firstly, Nazmul was in police custody for six days before making the confessional statement. He was tutored by the police, which is evident from the confession itself. Therefore, the truth of the confession is highly questionable. Secondly, he was brought to the private chamber of the Magistrate at 4 pm. After recording the confession, the Magistrate sent him to the Jail at 4.30 pm.

48. Rule 79(4) of the Criminal Rules and Orders (Practice and Procedure of Subordinate Court), 2009 states, “Magistrates shall not, except under the circumstances which render delay impossible, record the confession of an accused person immediately the police brings him into Court and the accused shall be given sufficient time for reflection during which period he shall not be in contact with any police personnel and shall not be permitted to hold conversation with any person”.

49. The question is what amount of time can be considered as ‘reasonable time’ as mentioned in rule 79(4) of the Criminal Rules and Order? In *Haripada Devenath*, 19 DLR (Dhaka) 573, it was held that there is no absolute rule that a confessing accused should be given three hours or any specific time for reflection. The Rule referred to in the confessional form does not have the force of law. Besides, any irregularity in recording a confession is curable under Section 533 of the Cr.P.C. It was held in *Jatindra Kumar Sutradhar*, 20 DLR (Dhaka) 526 that no hard and fast rule can be laid down as to the time given to the accused for reflection before confession. In *Rattan Kha*, 40 DLR 186 (*supra*), it was held that a full three hours taken in both reflection and

recording confession is sufficient compliance with the requirement to give the confessing accused time for reflection. In *Sidharth*, AIR 2005 SC 4352, the Supreme Court of India held that two hours given for reflection was sufficient.

50. Nazmul's confessional statement is quite lengthy. It was handwritten by the Magistrate. The recording of the confession and explaining the requisite formalities to the accused takes a considerable amount of time. Therefore, the full 30 minutes taken in both reflection and recording of the confession, in our opinion, cannot be held as sufficient compliance with Rule 79(4) of the Criminal Rules and Orders, 2009 for the reason that no explanation has been given as to the almost immediate recording of the confession after the police had brought the accused Nazmul into the Magistrate's chamber. This being the position, the confession of Nazmul is discarded not only for giving insufficient time or no time for reflection but also for the reason that the same seems to have been tutored by the police.

Confession of Saju @ Khokon:

51. Unlike the confessions of Momin and Nazmul, the confession of Khokon does not suffer from any procedural irregularity. Be that

as it may, before assessing the qualitative value of the confession of Khokon, the observations made in *Md. Humayun Kabir*, 15 SCOB [2021] AD 76 (*supra*) are worth discussion. It is observed in the reported case that to prove the charge under Section 302 of the Penal Code primarily based on the confession, it is the duty of the Court to ascertain whether the confession was made voluntarily, and if so, whether the same was true and trustworthy. Satisfaction of the Court is a *sine qua non* for the admissibility of the confession in evidence. True and complete disclosure of the offence is the soul of a true confessional statement, and the same has to be consistent with the prosecution case. In the reported case, the Apex Court found that the testimonies of PWs 1-4 and the post-mortem report were inconsistent with the contents of the confession of the accused, which made the confession unreliable.

52. Khokon was arrested on 10.05.2015. He made the confessional statement on 11.05.2015. He did not mention the names of the victims in his confession. He stated that on the day of the occurrence, between 3 pm and 4 pm, he, Nazmul and Momin went to the place of the occurrence to commit robbery. He had a Garo dao with him. They found four young men aged between 19

and 20 years at the place of occurrence. The accused persons asked them to give mobile phones and money to them. The unknown persons refused to comply with the demand. Then a scuffle started between them. One of them punched Khokon. He also punched him back. One of the victims hit Nazmul with a stick. Nazmul stabbed another victim on the chest with a knife, and he fell on the ground. Momin and Nazmul took away the mobile phones from the victims during the scuffle. Thereafter, the accused persons ran away. It is further stated in Khokon's confession that he took a Walton mobile phone, which he sold to Monir for Tk. 6500/-. The police recovered the said mobile phone from Monir.

Is Khokon's confession consistent with the prosecution case?

53. It appears from the post-mortem report (ext. 8), which was exhibited by the doctor (PW15) who conducted the post-mortem examination, that the deceased Razzak received the following injuries:

- a. One penetrating injury on the chest, just right side of the sternum, and about 3cm x 1cm with skin, muscle and soft tissue depth;

- b. One penetrating injury on the abdomen just left side of the umbilicus and about 1cm x 1cm x with skin and muscle depth;
- c. Two penetrating wounds on the left side of the back of the chest and each about 2.5cm x 1cm x skin and muscle depth;
- d. One penetrating injury on the anterior aspect of the right leg and just below the right knee about 2.5cm x 1cm x skin depth;
- e. One abrasion on the right leg just below the left knee about 2cm x 2cm x skin depth.

The doctor (PW15) opined that death was due to the haemorrhage and shock caused by the above-mentioned injuries, which were ante-mortem and homicidal in nature.

54. It appears that the injury No. 1 mentioned in the post-mortem report, so far as it relates to inflicting a single stab injury on the deceased's chest by Nazmul, corroborates the confession of Khokon. If the confession is taken to be true, Nazmul stabbed the victim (deceased Razzak) in the chest, who did not have any stick with him, but another victim had a stick with him. According to PW2, Razzak, being scared, tried to hit the accused persons with a stick. Then Nazmul stabbed him with a knife in the chest.

Nazmul also stabbed Razzak in different parts of his body. PW3 did not mention anything about hitting or attempting to hit the accused by the deceased Razzak with a stick. PW5 did not mention the name of the accused Khokon, but he mentioned the names of the other two accused. According to PW5, the deceased Razzak tried to hit one of the accused persons, then Nazmul stabbed him on his chest and on other parts of his body with a knife. PW5 did not say anything about the deceased Razzak carrying a stick. So, there is an apparent inconsistency between the confession and the eyewitnesses' account of the incident.

55. The story of recovery of Walton mobile phone from one Monir is stated in the seizure list-Gha. However, the seizure list-Gha was not exhibited, but the I.O. (PW16) testified in Court that he recovered a mobile phone from Monir. Monir was not examined as a witness. Therefore, the recovery of the Walton mobile from Monir by the police, which was taken by the accused Khokon and then sold to Monir, as stated in Khokon's confession, was not proved.

56. In view of the above-mentioned discussions, it is difficult to hold that Khokon's confession is true for the reason that the same is

inconsistent with the prosecution case. It would be extremely unsafe to uphold the conviction of the accused based on Khokon's confession, accepting the same as true.

Abscondence of accused persons:

57. The learned AAG argued that all the accused persons remained absconding after the conclusion of the examination of the prosecution witnesses. The learned AAG further submitted that the accused Nazmul, who is awarded a death sentence, has remained absconding till date. Co-accused Monin and Khokon have been arrested very recently. The learned AAG submitted that the deceptive conduct of the accused persons to turn into fugitives by jumping bail is a clear indication of their guilty conscience. In support of the argument, he cited some cases.

58. The argument was opposed by the learned State defence lawyer by placing the case of *Alamgir Hossain*, 22 BLC (AD) (2017) 155, wherein it is held that even an innocent man may feel panicky and, to evade arrest and trial, may abscond when suspected of a grave crime like murder. It is further held in the reported case that abscondence by itself is not conclusive

evidence to infer either guilt or guilty conscience. It may only lend weight to other evidence.

59. In this case, the evidence on record does not inspire confidence to maintain the conviction of the accused persons; rather, those suggest the innocence of the accused. Therefore, abscondence of the accused persons by jumping bail cannot be inferred as an indication of a guilty mind.

Summary of facts and evidence:

60. The FIR was lodged against unknown 7/8 accused for committing the murder of Razzak and causing grievous hurt to PWs 2, 3 and 5. The offence of committing robbery was not mentioned in the FIR. Charge was brought against the accused mainly for committing murder and robbery. Causing grievous hurt was dropped from the charge.

61. No T.I. parade was conducted when the three accused were arrested within 1 to 3 months of the date of occurrence. The trial began precisely after 2 years 3 months of the occurrence. The eyewitnesses (PWs 2, 3, 5) did not identify the accused persons in the dock although they were present in the Court. PWs 2 mentioned the names of all accused. PW3 and PW5 mentioned

the names of two accused persons. PWs 2, 3 and 5 mentioned the roles played by the accused persons in the alleged occurrence. PW5 deposed that the names of the accused persons were supplied to them from outside. The evidence of PWs 2, 3 and 5 does not carry any evidentiary value as to the involvement of the accused in the occurrence without any corroboration.

62. The eyewitnesses testified that the accused took away four mobile phones from them, but they did not mention the mobile phone numbers. The I.O. (PW16) testified that he had recovered four mobile phones. Seizure list-Ka (ext.7) contains a description of two mobile phones. Four mobile phones were produced before the Court as material exhibit-I series, which were identified by the I.O. The eyewitnesses (PWs 2, 3, 5), the father (PW1) and the brother (PW6) of the deceased Razzak did not identify the mobile phones in Court although they were the most reliable persons to identify those.

63. The recovery of Razzak's pair of shoes from the accused Momin, which Razzak was wearing at the time of the occurrence, was not proved.

64. According to the testimony of the eyewitnesses, Razzak died on the spot at the place of occurrence at or about 4 pm. The eyewitnesses (PWs 2, 3, 5) were rescued by the local people (রাখাল) from the place of occurrence. Four local people (রাখাল) were cited as witnesses in the charge-sheet, but they were not examined. The dead body was recovered at 9.10 pm not from the place of occurrence, but from the slope of a hill, which is not the place of occurrence. No explanation has been given in this regard.

65. The confessions made by the accused persons cannot be accepted as true and voluntary. Then how can the conviction be sustained?

The principle of beyond reasonable doubt and probative value of evidence:

66. The learned AAG argued that the deceased was murdered brutally, which is evidenced by the post-mortem report. The learned AAG accepted that the investigation was weak and the role of the Public Prosecutor in conducting the case was also weak. Be that as it may, the learned AAG argued that the evidence on record, including the confessions, when considered as a whole, not in a piecemeal fashion, establishes that the accused Nazmul murdered Razzak and the accused persons

jointly committed the offence of robbery. The learned AAG submitted that for the fault of the investigating officer and the Public Prosecutor, the accused should not go scot-free. The probative value of the evidence on record has to be considered in the attending facts and circumstances of the case.

67. The probative value of a piece of evidence means the weight to be given to it. This is something which has to be judged in accordance with the facts and circumstances of each case (*Ram Bihari Yadav*, AIR 1998 SC 1850). It is observed in *Pulin Mahajan*, 8 ADC (2011) 982 (*supra*) that in a criminal case, the onus of proving all the ingredients of an offence is always upon the prosecution and at no stage does it shift to the defence. This burden is neither neutralised nor shifted. It is further observed in the reported case that ‘reasonable doubt’ means the doubt which a rational thinking person will reasonably, honestly and conscientiously entertain and not the moral courage to decide but shelters itself in a vain and idle scepticism. In *Dharam Das Wadwani*, AIR 1975 SC 241, Krishna Iyer, J. speaking for the Supreme Court of India observed that the cumulative effect of guilt-pointing circumstances in a case is such that the Court can

conclude not that the accused ‘may’ be guilty but that he ‘must’ be guilty. In the instant case, the evidence on record unequivocally establishes that the prosecution has hopelessly failed to bring home the charges brought against the accused. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the defence case, if it has not proved its case beyond reasonable doubt [*Sunil Kundu*, (2013) 4 SCC 422].

68. The trial Court failed to apply the relevant laws in the course of analysing, appreciating and evaluating the evidence on record and thus, arrived at a wrong conclusion in finding guilt of the accused which cannot be sustained.
69. The present case is a glaring example of a weak and irresponsible investigation. The role of the public prosecutor and the State defence lawyer in conducting the trial was weak. It can be debated which one was the weakest. The investigating agency, the public prosecutor, even the father of the deceased victim Razzak did not make any honest and sincere endeavour to unearth the truth and to bring the real culprits to face the rigour of justice.

Along with the deceased Razzak, the truth has also become a victim in this case.

70. In the result, the death reference No. 39 of 2018 is rejected.

Criminal Appeal Nos. 1419 of 2024 and 2243 of 2025 are allowed. The judgment and order of conviction and sentence dated 01.04.2018 passed in Sessions Case No. 55 of 2016 by the learned Additional Sessions Judge, Sherpur is hereby set aside. The accused Md. Nazmul (absconding), Saju Ahammed @ Khokon and Md. Momin are acquitted of the charge. The warrant of arrest of Md. Nazmul (absconding) is recalled and vacated. Saju Ahammed @ Khokon and Md. Momin be set at liberty at once, if not wanted in connection with any other case.

Communicate the judgment and order at once.

Shathika Hossain, J.

I agree.

