

Present:

Mr. Justice Afzal Hossain Ahmed
And
Mr. Justice Md. Emdadul Haque Azad

DEATH REFERENCE NO.157 of 2005.

State

-Versus-

Tutul & Fazlur Rahman @ Badal
.....Condemned-prisoners.

Mr. Khandaker Mahbub Hossain with

Mr. Sheikh Mohammad Ali

... for the condemned-prisoner

Fazlur Rahman @ Badal

and

Mr. M.A.Mobin with

Mr. Kazi Bashir Ahmed

... for the condemned-prisoner

Tutul @ Monir Hossain

With

CRIMINAL APPEAL NO. 4488 OF 2005.

Fazlur Rahman alias Badal Appellant

Versus

The State Respondent.

Mr. Khandaker Mahbub Hossain with

Mr. Sheikh Mohammad Ali

..... for the Appellant.

With

CRIMINAL APPEAL NO. 4946 of 2005.

Golzar Hossain... Appellant

Versus

The State ...Respondent

Mr. Kabir Hossain

... for the Appellant

With

CRIMINAL APPEAL NO. 1017 of 2005.

Kabir Ahmed ... Appellant

Versus

The State ... Respondent

Mr. Syed Mahmudul Ahsan with

Mr. Sheikh Shafique Mahmud

... for the Appellant

With

CRIMINAL APPEAL NO. 78 of 2006.

Monir Hossain @ Tutul ... Appellant

Versus

The State ... Respondent

Mr. A.S.M.Abdul Mobin with
 Mr. Kazi Bashir Ahmed
 ... for the Appellant
 With
JAIL APPEAL NO. 1250 of 2005.
 Md. Fazlur Rahman alias Badal ... Appellant
 -Versus-
 The State ... Respondent
 Mrs. Hasna Begum
 ... for the Appellant.

With
JAIL APPEAL NO. 1251 of 2005.
 Monir Hossain @ Tutul ... Appellant
 -Versus-
 The State ... Respondent
 Mrs. Hasna Begum
 ... for the Appellant

Mr. Md. Salim, Deputy Attorney-General with
 Mr.Md. Ensan Uddin Sheikh,
 and
 Mr. Md. Nurul Islam Matubber,
 Assistant Attorney-Generals
For the Appellant-State.

Heard on the 3rd March, 3rd, 5th & 8th, May, 2011.

&

Judgment on the 8th, 9th, 10th, 11th and 12th May, 2011.

AFZAL HOSSAIN AHMED ,J:

This Death Reference has been made under Section 374 of the Code of Criminal Procedure by the Additional Metropolitan Sessions Judge, First Court, Dhaka for confirmation of the sentence of death imposed upon the condemned-prisoners, namely, 1) Tutul son of Mannan Fakir and (2) Fazlur Rahman @ Badal son of Abdul Wahab Bepari in Metro Sessions Case No. 1545 of 2002 arising out of G.R. Case No. 2890 of 1998 corresponding to Demra Police Station Case No. 15(6)98. The above named condemned-prisoner Fazlur Rahman @ Badal and Tutul @ Monir Hossain filed Jail Appeals being Nos. 1250 of 2005 and 1251 of 2005 respectively and also filed separate regular appeals being Criminal Appeal Nos. 4488 of 2005 and 78 of 2006 respectively. Besides, the other convicts Golzar Hossain and Kabir Ahmed @ Tufan have also filed separate regular appeals being Criminal Appeal Nos. 4946 of 2005 and 1017 of 2006 respectively. The Death Reference, Jail Appeals as well as the Criminal Appeals have been heard together and are disposed of by this judgment.

The prosecution case, in short, is as follows:-

On 2.6.1998 one Kamruzzaman Sarder, as informant, lodged a First Information Report with Demra Police Station against Tutul and Golzar under Sections 364/302/34 of the Penal Code alleging, inter alia, that on 2.6.1998 at about 8-30 P.M. the informant, while staying at the house of his elder sister Shaheda at Jigatola, his nephew Mominul Islam Mamun informed him over telephone that Rony has been abducted by some boys from Uttar Kazla. Upon

receipt of such information the informant rushed there and searched the victim but to no effect. At about 11-00 P.M. some one informed him that the victim had been shifted to Dhaka Medical College Hospital whereupon he rushed to that Hospital where Rustom Ali (P.W.4) and Badsha Mia (P.W.2) told him that on the same day i.e. 2.6.1998 at 7-30 P.M. they, alongwith his nephew victim Rony, were going by Rickshaw towards Jatrabari from Kazlarpar and when they reached near a garage some 5/6 unknown young men stopped their Rickshaw and abducted them with intent to kill them. At one stage, Rustom Ali (P.W.4) managed to escape from the clutches of those accused persons and informed the fact to his locality. The accused persons took Badsha and Rony to a place after crossing a marsh where the accused persons fastening rope on the neck of Rony pulled the rope and also inflicted assaults on his person. Meanwhile, Badsha (P.W.2) managed to escape from the clutches of those accused persons and informed the fact to the Dholpur City Polly area whereupon the local people along with the Police rushed to that place and rescued the victim Rony in an unconscious condition when a rope was found fastened around his neck and he was taken to the Dhaka Medical College Hospital where he died. It is mentioned in the F.I.R. that Rustom Ali (P.W. 4) and Badsha (P.W.2) told the informant that out of enmity accused Tutul and Golzar along with 3/4 other persons killed Rony in the alleged manner and hence the case.

After holding investigation Police submitted charge sheet against 7 accused persons including the appellants. During investigation accused Tutul made a confessional statement recorded under Section 164 of the Code of Criminal Procedure before the Magistrate. Thereafter, charge under Sections 364/302/34 of the Penal Code was framed against all the charge sheeted accused persons including the appellants under Sections 364/302/34 of the Penal Code to which they pleaded not guilty and claimed to be tried.

The prosecution examined as many as 14 witnesses in support of its case and the defence examined 2.

The defence case, as it transpires from the trend of cross-examination of the prosecution witnesses, is that they are quite innocent and they have been falsely implicated in this case out of previous enmity and grudge.

The learned Additional Metropolitan Sessions Judge having heard both the parties and considered the evidence adduced by them and the materials on record convicted the appellants Tutul and Fazlur Rahman @ Badal under Sections 302/34 of the Penal Code and sentenced them to death by hanging and also to pay a fine of Tk.20,000/- each and convicted the other appellants, Golzar Hossain, Kabir Ahmed @ Tufan and another Ahmed Ali @ Tiger (absconding) under sections 302/34 of the Penal Code and sentenced them to imprisonment for life and to pay a fine of Tk. 20,000/- each, in default, to suffer further rigorous imprisonment for two years each. The learned Additilonal Sessions Judge also convicted the appellants Golzar Hossain, Kabir Ahmed @ Tufan and another Ahmed Ali @ Tiger (absconding) under Section 364 of the Penal Code and sentenced them to rigorous imprisonment for 10 years each and to pay a fine of Tk.5,000/- each, in default, to suffer further rigorous imprisonment for six months each and all their sentences shall run concurrently.

The instant Death Reference being No. 157 of 2005 arises out of the aforesaid judgment and order of conviction and sentence and, thereafter, being aggrieved by the aforesaid judgment and order of conviction and sentence the convict- appellants have preferred the Jail Appeals and the regular Appeals as stated above.

Mr. Md. Selim, the learned Deputy Attorney-General, with Mr. Md. Ensanuddin Sheikh and Mr. Md. Nurul Islam Matubbor, the learned Assistant Attorney-Generals, appearing for the State submits that in the instant case the victim, Rony aged about 15 years was kidnapped by the convict-appellants along with other accomplices and then was brutally done to death which has been witnessed by two witnesses P.W.2 and P.W.4. More so, amongst the convict-appellants Tutul @ Monir Hossain made a confessional statement recorded under Section 164 of the Code of Criminal Procedure confessing his guilt as well as of other appellants. Prosecution, with a view to bring home the charge to the convict-appellants, examined as many as 14 witnesses and the learned Additional Metropolitan Sessions Judge having duly considered the evidence adduced by the parties has rightly passed the impugned judgment and order of conviction and sentence and there is nothing to interfere with the same. As such, the Death Reference is liable to be allowed and the Jail Appeals and the regular Appeals be dismissed.

Mr. Khandaker Mahbub Hossain, with Mr. Sheikh Mohammad Ali, the learned Advocate appearing for the condemned-prisoner Fazlur Rahman @ Badal submits that this appellant Fazlur Rahman @ Badal is not named in the F.I.R. although P.W. 2 Badsha Mia and P.W.4 Rustom Ali claimed themselves to be the eye witnesses of the occurrence. The said two eye witnesses are, in fact, chance witnesses and that the appellant Fazlur Rahman @ Badal has been falsely implicated in this case as he got inimical relation with the brother-in-law the of confessing appellant Tutul. Mr. Hossain further submits that the veracity of the F.I.R. of the instant case is very much doubtful since there is deviation and departure from the F.I.R. story on vital points and that the prosecution has made attempt to establish a got up case by subsequent embellishment and that the learned trial Judge without properly appreciating those aspects of the matter, came to an arbitrary erroneous decision convicting and sentencing the appellant Fazlur Rahman @ Badal as above and as such the same is not sustainable in law and the Death Reference, so far as it relates to him, is liable to be rejected and the Jail Appeal and as well as the regular Appeal preferred by him are liable to be allowed.

Mr. A. S. M. Abdul Mobin, with Mr. Kazi Bashir Ahmed, the learned Advocate appearing for the condemned-prisoner-appellant, Tutul @ Monir Hossain submits that this appellant is innocent and he has been falsely implicated in this case out of previous enmity. It is mentioned in the F.I.R. that at about 8-30 hours in the night on 2.6.1998 the informant was informed by his nephew Mominul Islam Mamun that some boys of Uttar Kazla kidnapped Rony from the Kazla road but it is apparent from the averment of the F.I.R. that at the time of lodging the F.I.R. at about 11-45 P.M. on that date the informant having heard of the occurrence from P.W.2 Badsha and P.W.4 Rustom Ali gave the names of accused Tutul and Golzar in the F.I.R.. Subsequently, the prosecution made attempt to implicate the appellant Tutul and Golzar through P.W. 1 , appellant Tutul @ Monir Hossain, Fazlur Rahman @ Badal , Kabir Hossain and Ahmed Ali Tiger (absconding) through P.W.2, appellant Tutul and another Tiger (absconding) through P.W.4, and appellant Tutul, Golzar, Tufan, Badal, Tiger(absconding) and some Sohel and Sentu through P.W. 12, the father of the deceased who claims to have heard of the occurrence from P.W.2 on the following day of the occurrence in the morning although at about 10 /11 hours in the night on the date of occurrence his son Mominul Islam Mamun informed him and, at 8-30 P.M., to P.W.1 that some unknown boys kidnapped his son Rony from Uttar Kazla. However , that Mominul Islam Mamun, from whom the informant first came to know about the occurrence, has not been examined in this case . Mr. Mobin further submits that there is complete departure of the essential particulars from the F.I.R. case and the name of the appellant Tutul

has been subsequently embellished in this case and that when the witnesses have deposed differently on essential particulars of the F.I.R. they are liable to be disbelieved which consequently makes the prosecution case doubtful. He further submits that the prosecution obtained a confessional statement recorded under Section 164 of the Code of Criminal Procedure from Tutul when he was a minor boy aged about 15 years and before recording confession he was produced before the Magistrate from Police remand and as such it is unsafe to rely on such a confession of a child. More so, when a confession is recorded just after Police remand the voluntariness thereof is very much affected. As such, the Death Reference, so far as it relates to the condemned-prisoner-appellant Tutul @ Monir Hossain, is liable to be rejected and the Jail Appeal as well as the regular Appeal preferred by him are liable to be allowed. Mr. Mobin, lastly, submits that if, at all, his conviction is upheld the sentence may be commuted to imprisonment for life also in consideration of the fact that he has been in the condemned-cell for about six years.

Mr. Syed Mahmudul Ahsan, with Mr. Sheikh Shafique Mahmud, the learned Advocate appearing for the convict appellant, Kabir Ahmed @ Tufan submits that the appellant Kabir Ahmed @ Tufan was not concerned with the alleged murder and that he has been falsely implicated in this case at the instance of his rivals and that the holding of the alleged T.I. Parade identifying the appellant Kabir Ahmed @Tufan by P.W.1 and P.W. 2 was not done in accordance with law and that was done in violation of the P.R.B Regulation No. 288. Mr. Ahsan further submits that there is also no sufficient reliable evidence to show that this appellant had ever any complicity in the alleged murder and as such his appeals are liable to be allowed and the impugned judgment and order of conviction and sentence, so far as it relates to this appellant, is liable to be set aside.

Mr. Kabir Hossain, the learned Advocate appearing for the convict-appellant Golzar Hossain submits that this appellant has been falsely implicated in this case out of enmity with the father of the deceased over a restaurant. The learned Advocate further submits that the informant was, at first, informed of the occurrence at about 8-30 P.M. on 2.6.1998 by his nephew Mominul Islam Mamun that some unknown boys kidnapped the victim Rony. P.W. 12 father of the deceased has also said by corroborating the informant P.W. 1 that his son Mominul Islam Mamun also informed him at 10/11 P.M. on 2.6.1998 that some boys of the Uttar Kazla kidnapped his son Rony but inspite of the fact the name of this appellant has been falsely inserted in the F.I.R. to suit their purpose. More so, the aforesaid Mominul Islam Mamun from whom the informant, at first, came to know of the occurrence has not been examined in this case. The learned Advocate, lastly, submits that there is no sufficient reliable evidence against this appellant to implicate him in this case and as such his appeal is liable to be allowed and the impugned judgment and order of conviction and sentence, so far as it relates to him, be set aside.

Now, let us see whether the impugned judgment and order of conviction and sentence is sustainable in law.

Heard the learned Advocates on both the sides and perused the impugned judgment and order of conviction and sentence, the Memo of Appeals, Jail Appeals, evidence adduced by the parties and the materials on record.

It is alleged in the F.I.R. that on 2.6.1998 at about 8-30 P.M. one Mominul Islam Mamun, a nephew of the informant, informed him over telephone that his brother Rony has been kidnapped by some boys from Uttar Kazla. At about 11 P.M. on that date some one informed the informant that the victim had been shifted to Dhaka Medical College Hospital whereupon he

rushed to that Hospital where Rustom Ali (P.W. 4) and Badsha Mia (P.W.2) told him that on the same day at about 7-30 P.M. they, along with the victim Rony, were going by Rickshaw towards Jatrabari from Kazlarpar and when they reached near a garage some 5/6 unknown young men stopped their Rickshaw and abducted them with intent to kill them. At one stage, Rustom Ali managed to escape from the clutches of those accused persons and informed the fact to his locality. The accused persons took Badsha and Rony to a place after crossing a marsh where the accused persons fastening a rope on the neck of Rony pulled the rope and also inflicted assaults on his person. Meanwhile, Badsha (P.W.2) managed to escape from the clutches and informed the fact to the Dhalpur City Polly area whereupon the local people along with the Police rushed to that place and rescued the victim Rony in an unconscious condition and he was taken to the Dhaka Medical College Hospital where he died. It is also mentioned in the F.I.R. that Rustom Ali (P.W.4) and Badsha Mia (P.W.2) told the informant that out of enmity accused Tutul and Golzar along with 3/4 other persons killed Rony in the alleged manner. The prosecution, with a view to establish the charge levelled against the accused persons on trial including the appellants examined as many as 14 witnesses of whom P.W. 2 Badsha Mia and P.W. 4 Rustom Ali are claimed to be the eye witnesses.

Md. Rustom Ali, appearing as P.W. 4, has stated that he, along with victim Rony and Badsha (P.W. 2), was caught by the three accused persons from the Rickshaw when they were going to Jatrabari and when they were being taken towards the alleged place of occurrence, suddenly, he managed to escape from their clutches and rushed to the mother of the victim, Rony and informed her that some boys took away Rony and Badsha with them from near Kazla Bridge. Momtaz Begum, mother of the victim, appearing as P.W. 6 has stated that on 2.6.1998 at about 7/7-15 P.M. Rustom Ali (P.W.4) came to her house and informed that he, along with Badsha (P.W.2) and victim Rony, were proceeding towards Jatrabari when accused Tutul, Golzar with 3/4 others caught hold of them. Then they were being taken towards road No. 4 of Bibir Bagicha when, on the plea of natural call, he managed to escape from their clutches and she (P.W.6) forthwith informed this fact to her husband's brother (P.W.1) over telephone and asked him to come home quickly. If that be so, the informant (P.W.1) was informed of the fact immediately after the alleged occurrence through P.W. 6 that accused Tutul and Golzar along with 3/4 others were involved in the alleged occurrence. But the informant, appearing as P.W.1, has stated that the names of accused Tutul and Golzar having their complicity in the alleged occurrence were disclosed to him by P.W. 2 Badsha Mia and P.W. 4 Rustom Ali at about 11-45 P.M. on 2.6.1998 at the time of lodging the ejahar with Demra Police Station. In this regard P.W. 12 Saiful Islam, father of the deceased has stated that in the following morning he called Badsha (P.W. 2) and on query about the occurrence he informed that accused Tutul, Golzar, Tufan, Tiger, Badal, Sohel, Sentu and others took them including victim Rony to the alleged place of occurrence where they strangled Rony to death. If, that be so, P.W. 2 Badsha Mia would certainly disclose the names of those accused persons, namely, Tutul, Golzar, Tufan, Tiger, Badal, Soel, Sentu and others to the informant P.W. 1 and these names would surely find place in the F.I.R. but in the F.I.R. only the names of accused Tutul and Golzar are mentioned. Besides the above, we find from the deposition of P.W.2 Badsha Mia that even he himself did not state the names of all the aforesaid 7 accused persons. He simply mentioned the names of accused Ahmed Ali, Badal, Tutul and Kabir Hossain.

The First Information Report is the foundation for the prosecution. When this foundation is removed the whole prosecution case shall fall. If the witnesses depose differently on essential particulars of the F.I.R., they are liable to be disbelieved. Where the prosecution has a definite or positive case, it must

prove the whole of the case. Partial departure affects credibility of the witnesses and complete departure from the F.I.R. case robs them of their credibility.

In the present case it is to be noticed that the prosecution has recorded its version in the F.I.R. that accused Tutul and Golzar alongwith 3/ 4 accomplices kidnapped the victim Rony and strangled him to death in the manner as alleged. The informant P.W. 1 has stated that he at first came to know the names of those accused persons, namely, Tutul and Golzar from the eye witnesses, namely P.W. 2 and 4 on the alleged date of occurrence at about 11-45 P.M. at the time of lodging the ejahar but P.W. 2 Badsha Mia disclosed the names of 4 accused. P.W. 4 Rustom Ali has said some unknown boys kidnapped the victim but P.W. 6 mother of the victim said that Rustom P.W. 4 disclosed the names of the accused Tutul and Golzar to her immediately after the occurrence when P.W. 12 father of the deceased has said that in the following morning P.W.2 Badsha disclosed to him the names of 7 accused persons including the appellants. Thus it appears that the aforesaid vital witnesses have deposed differently on essential particulars which casts a doubt as to the veracity of the prosecution case.

The witnesses for the prosecution are to support the prosecution case appearing in the First Information Report. If being motivated or some other reasons, the witnesses shrink from the main stream of the prosecution story and depose differently on essential particulars, the witnesses are liable to be disbelieved.

Besides, the informant, appearing as P.W. 1, has said that on the alleged date of occurrence, at about 8-30 P.M., his nephew Mominul Islam Mamun informed him that the victim Rony has been kidnapped by some boys from the road of Kazla. P.W. 12, the father of the deceased has also stated that his son Mominul Islam Mamun informed him about 10/11 P.M. on the date of occurrence that some boys of Uttar Kazla kidnapped the victim Rony. According to the version of the informant, P.W.1, since he came to know of the alleged occurrence at the earliest opportunity from his nephew Mominul Islam Mamun, he was a vital witness in this case but, for the reasons best known to the prosecution, he has not been examined which gives rise to concoction as to the veracity of the prosecution case with regard to complicity of the appellants with the alleged murder and, as such, it may be presumed that had Mominul Islam Mamun been examined in this case he would not have supported the prosecution case, so far as it relates to involvement of the appellants with the alleged murder. Thus, the appellants are entitled to get the benefit of Section 114 (g) of the Evidence Act, 1872.

In the instant case, we take note of the complete departure of the prosecution case from its first recorded version with great doubt. Partial departure from the First Information Report makes the prosecution shaky and the same may be looked upon with great suspicion. It will not be safe to rely on the evidence of witnesses who are found to be unworthy of credence relating to one part of the prosecution story in its material particulars. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of the case. Therefore, partial departure affects credibility of the witnesses very much. And complete departure from the F.I.R. case robs the witnesses of their credibility making their testimony to be entirely discarded and they should be spotted as liars. Thus, in view of the above, the credibility of the P.Ws. 2 and 4, who are claimed to be the eye witnesses of the occurrence upon whose testimony the whole prosecution case is based, looks askance at and we do not consider it safe to rely upon their testimony. This view of ours finds support from the decision in the case of Gupal Rajgor and others Vs. The State reported in 9 B.L.D. (1989) 358.

Admittedly, the victim Rony was kidnapped from the Kazla road on 2.6.98 at about 7-30 P.M. by some ones, accused Tutul, Golzar and other appellants might be amongst them and, thereafter, he was strangled to death by fastening rope around the neck and that the victim was rescued by Police and others from the alleged place of occurrence in an unconscious condition and when he was taken to the Dhaka Medical College Hospital the Doctor declared him dead.

P.W.10 Dr. Md. Fazlul Karim held Post Mortem Examination on the dead body of the victim Rony and opined that the death was due to asphexia as a result of strangulation by a ligature mark on the neck which was ante mortem and homicidal in nature. Thus, it is apparent that the victim Rony was done to death in the manner as alleged by the prosecution but the fact remains to be determined who is responsible for causing the murder of the victim Rony.

P.W. 2 Md. Badsha Mia has stated that after being kidnapped when Rony, Rustom and he were being taken to Bibir Bagicha Rony slipped down when accused Badal dealt a blow by a chapati on the back of Rony but no such injury caused by a chapati was found on the back of the deceased, as appears from the Post Mortem Report, which casts a doubt as to the veracity of such statement of P.W. 2.

It is stated in the F.I.R. that Rustom Ali (P.W.4) and Badsha (P.W.2), the companions of the victim Rony at the time of the alleged occurrence, told the informant that under the leadership of accused Tutul, accused Golzar and some 3/4 unknown persons committed the alleged occurrence and they would be able to identify those unknown accused persons on seeing them again but in the instant case the Test Identification Parade was held where only Kabir Ahmed @ Tufan was placed and identified although P.Ws. 1, 2, 4, 6 and 12 have put forward different stories as to recognition of the accused persons including the appellants. It transpired from the statement of P.W. 12, father of the deceased that P.W. 2 Badsha Mia could recognize as many as 7 accused persons including the appellants. In this connection we have gone through the Lower Court Records and perused the order No. 30 dated 28.7.1998 and Order No. 33 dated 6.8.98 which speak that the Test Identification Parade was held on 6.8.98 at about 2 P.M. in the Sadar Hajat of Chief Metropolitan Magistrate Court, Dhaka where none of the accused of this case except Kabir Ahmed @ Tufan was placed and he was identified by the informant P.W. 1 and Badsha Mia P.W. 2. It appears from the above orders of the learned Magistrate that before holding the Test Identification Parade of accused Kabir Ahmed @ Tufan he was produced in Court when P.Ws. 1 and 2 were present in the Court which shows that this accused Kabir Ahmed @ Tufan, before he being placed before the Test Identification Parade in Sadar Court Hajat, was shown to the P.Ws. 1 and 2 who identified him thereat. In this context Regulation No. 282 of the P.R.B. needs be mentioned which requires that the Test Identification Parade shall be held inside the Jail. Thus, holding of the Test Identification Parade in identifying the appellant Kabir Ahmed @ Tufan in the Sadar Court Hajat of Chief Metropolitan Magistrate, Dhaka is a violation of the aforesaid P.R.B. Regulation No. 282. Besides, showing the appellant Kabir Ahmed @ Tufan to the P.Ws 1 and 2 before holding the Test Identification Parade is also a clear violation of the aforesaid P.R.B. Regulation No. 282. As such, the Test Identification Parade in identifying the appellant Kabir Ahmed @ Tufan has lost its credibility and the same can not be relied upon.

Mr.A.S.M. Abdul Mobin, the learned Advocate for the condemned-prisoner- appellant Monir Hossain @ Tutul submits that in this case the prosecution procured a confessional statement, recorded under Section 164 of the Code of Criminal Procedure, from this appellant on 28.6.1998 when he was a minor aged only 15 years and, as such, it would be unsafe to rely upon such a confessional statement of a child.

P.W. 3 Narayan Chandra Das, Additional Deputy Commissioner (General), Bhola while being a Metropolitan Magistrate, Dhaka recorded the confessional statement of accused Tutul under Section 164 of the Code of Criminal Procedure on 28.6.1998 and exhibited the same, marked as Ext. 4. Perused the said confessional statement made by the accused Tutul, marked as Ext. 4, wherein he claimed himself to be aged 15 years. P.W. 3, the recording Magistrate has also admitted during cross-examination that at the time of making the aforesaid confession the accused Tutul was aged 15 years.

Thus, we apparently find that appellant Tutul made the aforesaid confessional statement, marked as Ext. 4, when he was a minor aged 15 years and this fact can not be ignored.

In view of the above it is evident that the appellant Tutul was aged 15 years of age at the time when he made the aforesaid confessional statement recorded under Section 164 of the Code of Criminal Procedure and as such it would be entirely unsafe to rely upon the confessional statement of a child, as defined in the Children Act, 1974, without corroboration of the fact that he made the confession voluntarily and knowing the consequence of waiving his right to remain silent. There being no such corroboration in this case, we find that it is unsafe to rely on that confession.

Furthermore, we are of the view that, although our law does not provide for presence of any parent, guardian or custodian at the time of recording confessional statement, the children of our country are no different from the children of any other country and they ought to get the protection of law so that they do not make false confession or confessions under threat or coercion. We feel, therefore, that prudence demands that when children are taken to record their confessional statements, they must be accompanied by a parent, guardian, custodian or legal representative. Our Constitution in Article 35(4) gives the citizen the right to remain silent and not to incriminate himself. A mature person can assess pros and cons in waiving that right when making any confessional statement, but the immature child can not be expected to fully appreciate the outcome of his action in waiving the right to silence. At that age he would be deemed not to have the mental capacity in law to sign any contract, agreement or other document. The Children Act, 1974, provides for special consideration for children who come face to face with the law. They are dealt with differently due to their immaturity and vulnerability. By the same token, children who are produced for questioning by the Police or for recording their statement by a Magistrate under section 164 of the Code of Criminal Procedure, either as a witness or as an accused, must be dealt with differently from adults. They must be accompanied by a parent, guardian, custodian or legal representative which is completely absent in the instant case and, as such, it would be entirely unsafe to rely upon the confessional statement of appellant Tutul, he being a child as defined in the Children Act, 1974, at the time when the same was recorded. This view of ours finds support from the decision in the case of **Jaibar Ali Fakir Vs. The State reported in 28 BLD(HCD)(2008)627**.

Place of occurrence is one of the most pertinent aspects of a criminal case. In this case P.Ws 2 and 4, who are claimed to be the companions of the victim Rony at the time when the victim was kidnapped by the accused persons along with them, have made different versions about the place from where they were kidnapped. P.W. 2 Badsha Mia has stated that they have been kidnapped from Bibir Bagicha but P.W. 4 has stated from Kazla. Thus, as to the first place of occurrence the different versions of the P.Ws. 2 and 4 as above have called the veracity of the prosecution case in question. Besides, it is very important to note that the sketch-map marked as Ext. 6 through P.W. 8, shows that the place of occurrence marked therein as “Ka” is a road and “Kha” and “Ga” marks are shops, “Uma” mark is a garage and “Cha” mark is a house, but none of the

owners or dwellers of those marks, as the case may be, has been examined in this case. It appears that by the sketch-map the second and real place of occurrence has also been shifted. More so, the owners or dwellers of marks “Kha”, “Ga”, “Gha”, “Uma” and “Cha” of the sketch-map having not been examined as witnesses in this case casts a doubt that had they been examined they would not have supported the prosecution case which entitles the appellants to the benefit of Section 114(g) of the Evidence Act, 1872.

Mr. Selim, the learned Deputy Attorney General appearing for the State, in appreciation of his submission, has cited some decisions in the cases of *Hazrat Ali Vs. The State* reported in **11 B.L.D.(AD)270**, *Abdul Hye Sikder Vs. The State*, reported in **12 B.L.D. (AD) 180**, *Mistha Vs. The State*, reported in **(1963) P.L.D. (Karachi) (DB) 1**, *Ghulam Vs. The Crown* **1950 P.L.D. (Lahore) 90**, *Baktiar Hossain Vs. The State* reported in **47 D.L.R. (HCD) 542** but those decisions do not apply in the present case as the facts and circumstances of those cases are distinguishable from that of the present case.

On careful consideration of the evidence, attending circumstances and materials on record we are constrained to hold that this case has been made pregnant with the legends of surmise and conjecture and in absence of sufficient reliable evidence the dubious evidence as adduced by the prosecution in this case are not safe to warrant conviction of the appellants and, as such, the appellants are entitled to benefit of doubt and the impugned judgment and order of conviction and sentence is liable to be set aside.

In the result, the Death Reference No. 157 of 2005 is rejected and the Jail Appeal Nos. 1250 of 2005 and 1251 of 2005 and Criminal Appeal Nos. 4488 of 2005, 4946 of 2005, 1017 of 2006 and 78 of 2006 are allowed and the impugned judgment and order of conviction and sentence dated 12.10.2005 passed by the learned Additional Metropolitan Sessions Judge, First Court, Dhaka imposing the sentence of death upon the condemned-prisoners, namely, 1) Tutul son of Mannan Fakir and (2) Fazlur Rahman @ Badal son of Abdul Wahab Bepari and imprisonment for life upon the convict – appellants Golzar Hossain and Kabir Ahmed @ Tufan in Metro. Sessions Case No. 1545 of 2002 arising out of G.R. Case No. 2890 of 1998 corresponding to Demra Police Station Case No. 15(6)98 is set aside and they be acquitted of the charges whereunder they were convicted.

The condemned–prisoner-appellants Tutul @ Monir Hossain and Fazlur Rahman @ Badal and convict –appellant Golzar Hossain be set at liberty atonce if not wanted in any other connection.

Convict-appellant Kabir Ahmed @ Tufan be discharged from his bail bond.

Send down the Lower Court Records, along with a copy of this judgment and order, at once.

MD. EMDADUL HAQUE AZAD, J:

I agree.