
(2023) 08 GAU CK 0026

Gauhati High Court

Case No: Criminal Appeal (J) No. 69 Of 2019

Azizul Hoque @ Batchu

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision: Aug. 11, 2023

Acts Referred:

- Constitution Of India, 1950 - Article 20(3)
- Indian Penal Code, 1860 - Section 34, 120B, 201, 302, 392
- Code Of Criminal Procedure, 1973 - Section 164, 306, 313
- Evidence Act, 1872 - Section 25, 26

Citation: (2023) 08 GAU CK 0026

Hon'ble Judges: Lanusungkum Jamir, J; Mridul Kumar Kalita, J

Bench: Division Bench

Advocate: H. R. A. Choudhury, A. Ahmed, Dr. B. N. Gogoi, S. Jahan

Final Decision: Allowed

Judgement

1. Heard Mr. A. Ahmed, learned counsel for the appellant who is led by Mr. H. R. A. Choudhury, learned Senior Counsel. Also heard Dr. B. N.

Gogoi, Amicus Curiae as well as Ms. S. Jahan, learned Additional Public Prosecutor for the State of Assam.

2. This Jail Appeal has been preferred against the judgment and order dated 20.12.2018 passed by the Court of learned Additional Sessions Judge,

Bilasipara in Sessions Case No. 02/2018, whereby the present appellant, namely, Azizul Hoque @ Batchu was convicted under Section 392/302/201

of IPC and was sentenced to rigorous imprisonment for life and to pay a fine of Rs. 25,000/- in default to undergo rigorous imprisonment for one year

under Section 302 of IPC. He was further sentenced to rigorous imprisonment for 7 years and to pay a fine of Rs. 5,000/- in default to undergo

another 6 months rigorous imprisonment under Section 392 of IPC. He was also sentenced to undergo rigorous imprisonment for 3 months and to pay

a fine of Rs. 2,000/- in default to undergo rigorous imprisonment for 3 months under Section 201 of the IPC. All the sentences were directed to run

concurrently.

3. The facts relevant for adjudication of this appeal, in brief are as follows:

That on 02.10.2017, one Laskar Ali lodged an FIR before officer in-charge of Sapatgram Police Station, inter-alia, alleging that his daughter Ms.

Hasina Begum, who was aged about 28 years had love affair with one Moynal, S/o- Taiab of Village- Karaitari (Chagalchora) who has been named

as accused in the FIR. It is stated in the FIR that, on 29.09.2017, the accused named in the FIR asked the daughter of the first informant, over phone,

to meet him with money and ornaments with a promise to marry her and accordingly, the daughter of the first informant left the house of the first

informant with gold ornaments and Rs.50,000/-. It is further stated in the FIR on 01.10.2017, the dead body of the daughter of the first informant was

found in the jute field of Village Chechapani Part II under Sapatgram Police Station with her hand and legs tied with rope and her mouth was gagged

with cloth. It was alleged that the accused killed the daughter of the first informant with help of other person, dumped her dead body at that place and

took the money with ornaments away.

4. On receipt of the FIR, the officer in-charge of Sapatgram Police Station registered Sapatgram P. S. Case No. 173/2017 under Section 302/34 of

IPC and one Habibur Rahman S. I. of police station was entrusted to conduct the investigation. On completion of investigation, the investigating

officer laid charge-sheet against Azizul Hoque @ Batchu (present appellant) and one Mominul Hoque @ Moinul Hoque under Section

120B/392/302/201/34 of the IPC. Both the accused, namely Azizul Hoque @ Batchu (present appellant) and Mominul Hoque @ Moinul Hoque were

in custody when the trial was initiated.

5. After hearing learned counsel for both sides and perusal of materials on record, learned Additional Sessions Judge, Bilasipara framed charges under

Section 392/302/201/34 IPC against the accused persons, namely Azizul Hoque @ Batchu (present appellant) and Mominul Hoque @ Moinul Hoque

and when the charges were read over and explained two accused persons they pleaded not guilty and claim to be tried.

6. It also transpires from the records of Session of Case No. 02/2018 that, on 12.04.2018, accused Mominul Hoque @ Moinul Hoque was allowed to

go on bail by learned Additional Sessions Judge on certain conditions. However, after obtaining bail accused Mominul Hoque @ Moinul Hoque was

irregular in attending the trial Court and ultimately and he jumped bail and he was declared as an absconder on 30.11.2018 and the trial proceeded only

against the present appellant who was in custody.

7. During the course of trial, the prosecution side examined 21 witnesses. On perusal of the impugned judgment it appears that learned trial Court

convicted the present appellant on the basis of the circumstantial evidences as there was no eye witness to be commission of the alleged offence by

the present appellant. In paragraph 68 of the impugned judgment, the learned Trial Court has set the circumstances which, in its opinion form a

complete chain of events which led to the inference only of guilt against the present accused Azizul Hoque @ Batchu.

8. Let us evaluate the evidence on record of the prosecution witnesses to find out whether the circumstances set forth by the learned trial Court in

paragraph no. 68 of the impugned judgment may be deduced from the evidence on record and whether it leads to only inferences of guilt of the

present appellant or otherwise.

9. (i) PW-1, Md. Laskar Ali who is the first informant of this case as well as father of the deceased girl has stated in his testimony that he knows

accused Moinul from the date of incident and he does not know personally about the other accused (the present appellant). He has stated that the

accused Moinul made a phone call to his daughter with a promise to marry her. Thereafter one Monirul and Badshu (present appellant) made call to

his daughter and told her to come with her ornament and money and other valuables and they will solemnise her marriage with accused Moinul. He

has also stated that after receiving the said phone call his daughter left his home to meet Monirul and Badshu and Moinul to get married to Moinul. At

the time of leaving his house his daughter told him that she was going to brick field to resume her work and after two days of that incident her dead

body was recovered in "Chakadi" in a field. Along with dead body some papers were found which showed that the dead body was of his

daughter Hasina. Local people of "Chakadi field" informed police and police arrived at the spot where the dead body of his daughter was

recovered.

(ii) He also went to Sapatgram Police Station where the dead body of his daughter was taken and he identified the daughter of his Hasina Begum. He

has further stated that in his presence one shopkeeper namely, Birendra Kalita of Chakaditold police of Sapatgram that two boys came to his shop on

the night of the incident and purchased some goods from his shop and gave Rs. 2,000/- to the shop keeper Birendra, and Birendra suspected that those

two boys are involved in who looting and murder his daughter Hasina.

(iii) PW-1 has also stated that in his presence police interrogated accused Monirul and Badshu, and both of them confessed that they called her

daughter along with her valuable ornaments and thereafter they killed her. He has further stated that later on, he lodged an FIR in Sapatgram Police

Station, which was exhibited as exhibit-1. His statement was also recorded under Section 164 CrPC and same is exhibited as exhibit-2.

(iv) During the course of examination, PW-1 has stated that his daughter left the house on the date of incident telling him that she was going to brick

field to resume her work. He has also stated that when his daughter left his home, he was not aware as to who was accompanying her. He has

answered in negative to a suggestive question put to him that he did not state before Police and had deposed falsely that his presence shopkeeper

Biren of Chakadi told the Police of Chapatgram Police Station that two boys came to his shop on the night of the incident and purchased some goods

from his shop and gave Rs.2,000/- to the shopkeeper Biren and the shopkeeper Biren suspected involvement of those two boys in the murder and

looting of the daughter of P.W.-1.

10. PW-2 Uttam Das has stated in his deposition that he saw the dead body of a lady being recovered from the jute field of Chechapani (Chakadi) and

the hand, mouth and leg of the dead body was tied with a handkerchief. He put his signature as a seizure witness in Exhibit-5. He has stated that he

does not who had killed the lady.

11. PW-3, Birendra Kalita, has stated in his deposition that he knows accused Mominul Hoque @ Moinul Hoque prior to the incident and he also

knows about the other accused person who was present in the Court. He has also deposed that a dead body of a lady was recovered from

Chechapani (Chakadi) in the jute field and later on, the dead body was recovered by police and he also saw both the persons with police. He also

exhibited one compact disc as Material Exhibit-1 which, when it was played before the trial Court showed accused Mominul Hoque @ Moinul Hoque

and the present appellant and the PW-3 identified both of them in the said medium.

12. PW-4 Md.Rofiqul Hussain has deposed that he knows the informant and his daughter and he also knows both the accused persons he has deposed

that he received one phone call from one of the member of Chechapani Panchayat Mr. Abdul Barek who informed him that one dead body was found

in the jute field at Chechapani Chokadi. After getting information PW-5 informed the police at Sapatgram P.S. and thereafter the police arrived at the

place of incident, where the dead body was recovered. PW-4 has also deposed that he also went to the place where the dead body was recovered

and he saw the hands and legs of the lady was tied and a piece of cloth was put in the mouth of that lady. He has also deposed that the police brought

the dead body of the police and thereafter Moniul and Azizul @ Badshu were apprehended by police and police took both of them to the place where

dead body was recovered. In the field accused persons confessed that they had killed the lady.

During the cross-examination, PW-4 has stated that when both the accused persons were brought to the place of occurrence they were in police

custody. He has also stated that he does not know who killed the said lady.

13. PW-5 Shri Tarapada Das in his deposition has stated that when he went to field to graze cow, he noticed a dead body of a female in the jute field

and he immediately informed Abdul Barek about the same. After some time, police arrived and took away the dead body and large number of people

also gathered to see the dead body. He has also stated that police video recorded the recovery of the dead body.

During the cross-examination PW-5 has stated that police took the alleged persons to the place, from where the dead body was recovered after two

three days of such recovery and on that day he was not present.

14. PW-6 namely, one Bireswar Das has deposed that one day he went to grazing field to graze his cow when he saw the female dead body and he

came to know that said dead body is the daughter of the informant. He has also stated that large number of people gathered at that place when police

along with the accused persons recovered the dead body. He also stated that police video recorded the recovery of dead body.

During the cross-examination, he has stated that on the date when the dead body was noticed and police came, the accused persons were not present

and the police again visited the place of recovery of dead body after two three days along with accused persons.

15. PW-7 Rasurul Hoque has also deposed that after coming to know about recovery of a dead body of a female person, he rushed to the said place

and saw the dead body the face, leg and hands of dead body tied with piece of cloth. Police took away the dead body on that day. Again police

arrived with the accused persons to the place where the dead body was recovered and police video-graphed the whole scene.

During the cross examination, he has stated that the accused persons were not present when the dead body was recovered by the police.

16. PW-8 Md. Sayed Hussain has deposed that after he was called to Sapatgram Police Station by his brother-in-law Sader Ali he visited the said

police station and noticed one female dead body there and he came to know that the niece of Sader Ali was murdered at Chechapani. He put his

signature in exhibit-4 which is inquest report.

17. PW-9 Morzina Bibi is the wife of present appellant. She has deposed that police visited her house and seized one mobile phone and some money

and prepared one seizure list, which is exhibited as Exhibit-6. She has also stated that the seized mobile belonged to her husband.

18. PW-10 Amir Hussain is also a seizure witness who signed on exhibit-6 as a witness. He has also stated that he showed the house of present

appellant to the police.

19. PW-11 Md. Jamal Ali has stated in his testimony that after hearing about recovery of the dead body in the jute field of Chechapani, he came to

Sapatgram Police Station and in Sapatgram Police Station, the present appellant and another accused namely Moinul Hoque confessed that they have

killed the deceased Hasina Begum. He also signed as a seizure witness in the seizure list, which is exhibited as Exhibit-5.

During the cross-examination, he has stated that in his presence police recorded the statement of accused Azizul Hoque in his presence and at that

time he was in police custody.

20. PW-12 Sopia Hoque has deposed that after hearing recovery of dead body when he went to Sapatgram Police Station he saw both the persons

there and they were being interrogated by the police at that time. This witness was declared hostile by prosecution and during cross-examination by

prosecution side, PW-12 has denied that he made any statement before police to the effect that

“In my presence and presence of other persons accused confessed that deceased lady had love affairs with one Joynal Ali of accused

village and promise to marry the lady and on 29-09-17 accused Azizul Hoque called the girl over phone telling her that they will solemnize

her marriage with Joynal and asked her to come along with money and gold ornaments. Accordingly deceased girl came to Raniganj from

her house along with cash amount and gold ornaments. Both accused came to Raniganj by cycle and deceased was brought to the Kherbari

in the cycle of Azizul and after dropping the girl at Kherbari to they came to their home and on next day evening they again called the girl

and the girl told them that she was present at Belartari football playground. Accordingly, both the accused went to Belartari football play

ground on their bi cycle and she was brought in the cycle of accused Azizul and brought her to the Chesapani the place of murder at the

jute field and she hand over Rs. 10,000/- and suspecting that she will disclose the same thing they gagged her mouth with their hand and

made her unconscious and after tying her hand, feet and mouth with the clothes that she had brought with her killed her and threw the dead

body in the jute field and taken away Rs. 10,000/- and Rs.2,000/-.

During cross-examination, he has cross-examined by defence, he has stated that till he was at the police station the accused person did not confess

their guilt.

21. PW-13 has deposed that he is the VDP Secretary of Karaitati village and both the accused persons hails from his village. He has stated that after

the incident police came to his house and asked him to show the house of Moinul Hoque and Batchu @ Azizul, which he showed to the police. He has

also stated that police seized one cycle from the house of accused Batchu in his presence.

22. (i) PW-14 Mstt. Momina Bibi has deposed that the informant is her husband and the deceased Hasina Begum was her daughter. She has also

deposed that she knows both the accused Mominul Hoque @ Moinul Hoque and Azizul @ Badshu. She has deposed that one Moynal of Chagalchora

came to see her daughter Hasina Begum to marry her and thereafter, he called her over mobile to meet him and also told her that he will marry her.

(ii) She has also deposed that her daughter asked her for some money and jewelry which she earlier gave her for keeping and when she handed over

the same to her, her daughter told her that she was going to brick field for her work. PW -14 has also deposed that later on, she got to know that

Moynal called her and Mominul Hoque @ Moinul Hoque and Azizur Hoque (Badshu) called her daughter over mobile with her money and ornaments

and the accused person told her that they will act as guardian and would solemnized her marriage with Moynal. Thereafter when her daughter met

them, the accused persons snatched away the ornaments and money from her daughter Hasina and killed her and later on her dead body was

recovered from Chechapani under Sapatgram Police Station.

(ii) During the cross-examination, she has stated that only Moynal of Chagalchora came to see her daughter as bride and accused Mominul @ Moinul

did not visit her house at any point of time. She has also stated that she has not seen the accused person prior to seeing them at the police station.

Certain suggestive questions were put to P.W.-14 by the defence counsel to which P.W.-14 answered in negative.

23. PW-15 is the Dr. Mukul Ch. Barman, who conducted post-mortem examination of the dead body of the Hasina Begum has deposed that on post-

mortem examination he found following injuries on the dead body of the Hasina Begum.

Injuries:-

i. One ligature mark found at the lower part of the neck, below the thyroid cartilage, completely encircling. Surface of the ligature mark

found soft and reddish and on dissection bruising of the deeper tissues found.

ii. Ligature mark also found encircling both fore arms above the wrist joint and both leg above the ankle joint. On dissection bruising of

dipper tissue found.

More detailed description of injury or disease –

i. Ligature mark in the neck is anti-mortem in nature. Signs of asphyxia are evident.

ii. No signs of sexual violence found on her genitals.

iii. Vaginal smears shows no spermatozoa seen in the supplied smear.

P.W.- 15 opined that the death was due to asphyxia and shock as a result of strangulation by ligature sustained by the deceased. He exhibited post-

mortem report as Ext.- 8.

During the cross-examination, P.W.- 15 has stated that he has not specifically mentioned whether ligature was caused by hard material substance or

soft material substance. He has also stated that he found the strangulation mark below the neck of the deceased but he did not mention whether

strangulation mark was tough or soft.

24. P.W.-16 Jobeda Khatun, who is the younger sister of the deceased of the Hasina Begum has deposed that Moynal of village Chagalchora came to

look for her sister Hasina and he took mobile number of her sister. There was a love affair between Moynal of village Chagalchora and her deceased

sister. She has also stated that her sister worked in a Brick factory and she deposited her earnings to her mother and also bought jewellery by working

in the brick factory and she asked her mother to keep the said jewellery. She also stated that one day said Moynal of village Chagalchora called her

deceased sister over mobile and told her that he will marry her and ask her to meet with her money and jewellery. The accused Mominul and Bachhu

of Khoraitari village assured and told her sister Hasina that they will perform her marriage with Moynal of village Chagalchora and they will also act

as her guardian to perform her marriage with Moynal. She has also deposed that when her deceased sister came out from house with her money and

ornaments with Moynal of village Chagalchora, they took her to Khoraitari and at Khoraitari the accused Mominul @ Moinul and Bachhu instead of

solemnizing her marriage with Moynal snatched away her ornaments and money and killed her. She also deposed that the dead body of her sister

Hasina was recovered at village Khoraitari and that place Identity cards of both the accused persons were found.

During the cross-examination, P.W.- 16 has stated that Moynal of village Chagalchora took her sister to marry her from their house and her sister told

her that she was going with Moynal of village Chagalchora to marry him and thereafter she did not return back to home. She has also stated that she

heard about the fact that the accused persons killed her sister after snatching her money and ornaments. She has answered in negative to some

suggestive questions put to her by the defence side.

25. PW-17 Sobia Bibi has deposed that one year back (from the date of deposing as a witness) she heard hue and cry in the house of informant and

went there and saw Hasina was quarrelling with her mother and asking her to give all her belongings and thereafter with her money and ornaments

and belongings she went outside and after three days of Hasina's leaving from her parents' house P.W- 17 came to know that she was

murdered.

26. PW-18, Chandan Kumar Singh who is the UB Constable (No. 133) of the Assam Police has deposed that on 07.10.2017 as directed by Circle

Inspector, Chapar, he video-recorded the places where accused took police where the offence of murder was committed. This witness exhibited one

certificate issued by him regarding video recording of the place of occurrence as Ext-9.

During cross-examination, this witness has stated that while he was video recording as he was at a little distance he did not hear the audio of the

accused during the video recording.

27. (i) PW-19 Habibar Rahman, S.I. of Police who is the Investigating Officer of this case has deposed that on 01.10.2017 he was posted as Sub-

Inspector of Police at Sapatgram Police Station. On that day, the Officer-in-charge of the Sapatgram Police Station received one telephonic message

from VDP Secretary, Chechapani Part-II that dead body of one female was found near the jute cultivation at Chechapani Part-II. Accordingly, the

Officer-in-charge, Sapatgram Police Station instructed P.W.- 19 to take necessary steps and thereafter P.W.- 19 made a GD Entry No. 07 dated

01.10.2017 and thereafter, he along with Officer-in-charge, Sapatgram Police Station and other Police personnel went to the Chechapani Part-II

where dead body of female was found lying in the jute field. A bag was also found near the dead body. In the said bag, there was a photocopy of

divorce of the deceased lady along with some dresses. From the papers found in the bag, the identity of the deceased was found to be Hasina Begum

and she was the daughter of Lasker Ali of village Kurshakati under Sapatgram Police Station. P.W.- 19 has also stated that as it was dark at that time

they brought the dead body to the Police Station and kept the dead body at the Police Station for one night. On the next day, after conduct of inquest

by the Executive Magistrate over the dead body, it was sent to Dhubri Civil Hospital for post-mortem examination. After the inquest of the dead body,

a piece of cloth which is used to gag the mouth of the deceased, was seized by him. P.W.- 19 has further stated that later on the father of the

deceased lodged an ejahar before Officer-in-Charge of the Sapatgram Police Station on 02.10.2017 alleging that his daughter had love affair with

Maynal, S/o- Tayab and he suspected that Maynal might have killed his daughter.

(ii) P.W.- 19 has further deposed that during investigation he came to know through secret sources that Moinul @ Mominul and Azizul @ Badshu of

village Khoraitari (Chagolchora) committed murder of Hasina. Thereafter, both of them were apprehended and were brought to the Police Station. He

has also stated that during investigation in presence of local people and VDP Personnel, accused Moinul @ Mominul and Azizul @ Badshu confessed

that they had called Hasina telling her that they will arrange her marriage with Maynal, S/o- Tayab and also asked her to come along with money and

when Hasina came with money, both the accused Moinul @ Mominul and Azizul @ Badshu committed murder of Hasina and took away her money

amounting to Rs.10,000/- and they equally divided the amount amongst them and the accused Azizul bought a bicycle with his share of money

amounting to Rs.5,000/-. After purchasing of the bicycle by the accused Azizul, remaining Rs. 1100/- which was seized from his house along with

Hero Bicycle purchased by him. He has also submitted that he also seized the Bicycle in which both the accused person carried the deceased to the

place of occurrence as stated by accused and on being produced by Mohibul, brother of the accused. He has further stated that during police custody,

while interrogating the accused persons, the accused persons took them to the place of occurrence where they have committed murder of Hasina and

accused shown the place of occurrence which is jute field in the Chechapani Part- II village. The whole scene was video graphed with the help

deposed the whole scene was video recorded with the help of UBC No. 133 Chandan Kumar Singh of Sapatgram Police Station who video recoded

the same with his mobile handset. He has also stated that thereafter Maynal, S/o- Tayab, who was named in the ejahar, was produced before the

Court with a prayer to treat him as State witness and his statement was recorded under Section 164 Cr.P.C. P.W.- 19 exhibited ejahar, seizure list,

sketch map and the charge-sheet as well as VCD which was exhibited as M. Ext.-1 and a Mobile Handset along with currency notes exhibited as M.

Ext.-2. Money amounting to Rs.3,500/- is exhibited as M. Ext.- 3 piece of doth which was tied around the mouth of the deceased and other dresses as

M. Ext.-4 and two bicycles as M.Ext.5 and M.Ext.6.

(iii) During cross-examination, P.W.- 19 has stated that he had not submitted exact copy of GD Entry No. 7 dated 01.10.2017 separately before the

Court. He has also stated that he did not collect call detail records (CDR) of the deceased Hasina Begum. He has stated that there is no eye-witness

to show that the accused accompanied the deceased to the place of occurrence. He has also stated during investigation that the accused persons in

presence of Police and in presence of public, they confessed that they committed the murder of Hasina Begum. However, he did not make any prayer

of the confessional statement of the accused persons before the Magistrate. He has also stated that he made prayer for recording statement of the

informant under Section 164 Cr.P.C. on 22.11.2017. He has also stated that he has also recorded the statement of the complainant on 13.11.2017. He

has also stated that the seized items in seizure list which is exhibited as Ext.-6 were seized on being produced by Mominul Hoque @ Moniul, S/o- Md.

Amir Ali of Karaitari.

28. P.W.-20, Sri Soroj Sonowal, who is the Executive Magistrate has stated that on 02.10.2017 he was entrusted by the then SDO(Civil), Bilasipara to

conduct the inquest on the dead body of the deceased- Hasina Begum and during the inquest, he found that the dead body was swollen as the murder

was committed prior to 2-3 days from the date of inquest and date of recovery of the dead body.

During the inquest, he found that the injury mark in the vaginal part of the deceased. As per the injury found on the dead body, it is suspected to be a

murder case. After the inquest, the body was referred to Dhubri Civil Hospital for post-mortem to find out exact cause of death. Ext.-4(2) is the

Signature of the P.W.-20 in Ext.-4 inquest report.

During the cross-examination he has stated that he conducted the inquest on the Police Station.

29. (i) P.W.- 21- Moynal Hoque, S/o- Late Tayab Ali, who was named an accused in the FIR which is exhibited as Ext.-1 by the informant- Laskar

Ali, has deposed that he knows the deceased as well as the accused persons, namely, Moinul Hoque @ Mominul and accused Batchu (present

appellant). He met Hasina in a marriage party and became friend and at that time his first wife had already left her and she wanted divorce. She also

was willing to give divorce if he pays her money. However, as he did not had any money, he told this fact to Hasina and told her that he would marry

her. He has also stated that there was a love affair between him and deceased- Hasina and the parents of Hasina also gave consent to his marriage

with Hasina. P.W.-19 had also deposed that he was working under Batchu (the present appellant) and at that time he had informed about his

conversation with Hasina that if she could afford Rs.30,000/- to Rs.35,000/- then he may get divorce from his first wife and would marry her.

(ii) P.W.-21 has further deposed that at the time when he was talking with deceased over phone, the accused Batchu was present and Hasina replied

that she would give him Rs.30,000/- and he accordingly told her to come with her guardian. P.W.-19 further deposed that thereafter after leaving his

mobile phone he went to attended nature calls and at that time Batchu took the Hasina's mobile number from his mobile Handset and called

Hasina and asked her to bring money. P.W.-19 further deposed that after one day her brother-in-law him and told him over phone that Hasina is

missing and reminded him that he is in love with Hasina. On the next day at about 4:00 pm., P.W.-19 got information that dead body of one lady is

recovered at jute field at Kadamtola. He has also stated that at that time he thought that it may be the dead body of some other person. Thereafter,

the Police arrested the accused persons Mominul and Batchu and Police came to his house and at that time he came to know that dead body which

was recovered was of Hasina and was kept in the Police Station. Thereafter, P.W.-21 went to the Police Station where Police recorded his statement

and produced him before the Magistrate where he made his statement. He exhibited his statement under Section 164 as Ext.-14.

(iii) During the cross-examination, P.W.-21 admitted that the first informant had mentioned his name as an accused in the ejahar and he had visiting

terms in the house of Hasina. He has also stated that the accused persons, namely, Mominul and Batchu did not visit Hasina's house with him. He

has also stated that he cannot say exactly when the accused Batchu took her mobile number from his Mobile Handset.

30. During his examination under Section 313 Cr.P.C., the present appellant denied the incriminating testimony of prosecution witnesses against him.

However, while answering to the Question No. 30, he admitted that he confessed before the Police and before witnesses at the place of recovery of

dead body of deceased Hasina that they killed her.

31. Mr. A. Ahmed, learned counsel for the appellant has submitted that in this case, there is no eye-witness and the learned trial Court convicted the

present appellant only on the basis of the circumstantial evidence that too when there are missing links in the chain of circumstances and the

circumstances on which the present appellant was convicted were not fully established during trial. The learned counsel for the appellant also

submitted that there are many lapses on the part of the Investigating Officer and the Investigating Officer has failed to collect credible admissible

evidence against the present appellant during investigation. It is also submitted that though the P.W.-21 (Maynal, S/o-Taiab) was named as an accused

in the FIR, however, he has been shown as a prosecution witness and his statement were recorded under Section 164 Cr.P.C., without taking

recourse to the procedure as prescribed under Section 306 Cr.P.C. by the Investigating Officer.

32. It is submitted by learned counsel for the appellant though the FIR which was lodged on 02.10.2017 had specifically named Moynal, S/o- Taiab as

an accused, however, the present appellant was arrested by the Investigating Officer on 03.10.2017 without any material against him merely on the

basis that the Investigating Officer came to know through secret sources that the present appellant along with the co-accused Moinul @ Monirul has

committed the murder of Hasina. It is submitted by learned counsel for the petitioner that the Investigating Officer has failed to divulge even during

trial as to on what basis the present appellant was implicated and arrested by the Investigating Officer immediately on the next day after lodging of the

FIR.

33. Learned counsel for the appellant has submitted that as the instant case is entirely based on circumstantial evidence, the circumstances on the

basis of which the conclusion of guilt is to be drawn should be fully established. Learned counsel for the petitioner relied upon the ruling of

Hon'ble Supreme Court of India in "Sharad Birdhichand Sarda vs- State of Maharashtra" reported in "(1984) 4 SCC 116" as well as

the ruling of Hon'ble Supreme Court of India in "Nikhil Chandra Mondal Vs- State of West Bengal" (Judgment dated 03rd March, 2023 in

Criminal Appeal No. 2269/2023).

34. Learned counsel for the appellant has also submitted that P.W.-16 has categorically stated in her deposition that her sister (deceased Hasina)

came out from her house with her money and ornaments with Moynal of Chagalchara (P.W.-21) and thus the deceased was last seen by P.W.-16

with P.W.-21 only. Learned counsel for the appellant has submitted that the prosecution side had not declared P.W.-16 as hostile, hence, her

testimony to the effect that it was Moynal with whom her sister left home before she was found dead is binding on prosecution side. To support his

contention, learned counsel for the appellant has cited a ruling of Hon'ble Supreme Court of India in "Rajaram vs- State of Rajasthan",

reported in "(2003) 5 SCC 272" as well as a ruling of Division Bench of this Court in "Sharifa Khatun v. State of Assam, reported in 2020

SCC OnLine Gau 4210" wherein it was observed as follows:-

"20. In the case of Raja Ram v. State of Rajasthan, (2005) 5 SCC 272, the Supreme Court has observed that prosecution witness who did not

support the prosecution case and not declared hostile with the permission of the court, his evidence would be binding on the prosecution. Therefore,

the evidence of PWs 5, 6 and 7, who did not support the prosecution story, would be binding on the prosecution."

Learned counsel for the appellant has submitted that if the testimony of P.W.-16 to the effect that her sister left her home with Moynal after which

she was found dead is believed, it raises suspicion against Moynal (P.W.-21) of his involvement in the alleged offence and under such circumstances

the present appellant is entitled to get benefit of doubt.

35. Learned counsel for the appellant also submits that the fact that P.W.-1 has also specifically named Moynal in the FIR lodged by him coupled with

the fact that on 06.11.2017 the application for bail of Moynal (P.W.-21) was also rejected by learned Sessions Judge and under such circumstances

when there is nothing on record to show that as to why without taking recourse to Section 306 of the Code of Criminal Procedure, 1973, the P.W.-21

was exonerated and his statement under Section 164 Cr.P.C. was recorded P.W.-1 himself becomes a suspect. Learned counsel for the appellant has

cited a ruling of Hon'ble Supreme Court of India in "Pradeep Kumar Vs- State of Chhattisgarh (Judgment dated 16.03.2023 in Criminal

Appeal No. 1304/2018) wherein Hon'ble Supreme Court of India has observed that "when the witness himself was a suspect, his testimony

cannot to be said to be unimpeachable and or free from blemish. Learned counsel for the appellant has submitted that in the instant case also P.W.-

21 himself was a suspect, hence, his testimony against the present appellant may not be the basis of coming to the finding of the guilt of the present

appellant.

36. Learned counsel for the appellant has also submitted that the appellant is stated to have made confessional statement before Police as well as

extra judicial confession before P.W.-1, P.W.-4 and P.W.-11 at the place of recovery of the deceased, however, the appellant was in custody of

police when he was brought to the place where the dead body of the deceased was recovered, hence, even if he made any confessional statement

there, it is hit by Section 25 and 26 of the Indian Evidence Act and same is inadmissible and may not be proved against the present appellant.

37. Learned counsel for the appellant has also submitted that the prosecution side has failed to show as to how any of the seized article establishes

any link between the present appellant and the alleged offence.

38. Learned counsel for the appellant has also submitted that the compact disc (CD) which was exhibited by P.W.-18 wherein the video recording of

accused taking the Police personnel to the place of murder is of no use for the prosecution side as any confessional statement either directly or

through videography would be hit by Section 25 of the Indian Evidence Act as well as under Article 20(3) of the Constitution of India and in support of

the said contention, learned counsel for the appellant has relied on the ruling of Hon'ble Supreme Court of India in "Munikrishna @ Krishna

"vs- State by Ulsoor P.S." (Judgment dated 30.09.2022 in Criminal Appeal Nos. 1597-1600 of 2022).

39. Dr. B. N. Gogoi, learned Amicus Curiae has also submitted that without following the mandate of Section 306 of the Code of Criminal Procedure,

1973, the testimony of P.W.-21 becomes unsafe for reliance. In support of his submission, he cites ruling of Hon'ble Bombay High Court in

"Nanak Vs- State of Maharashtra", reported in "2017 Legal Eagle (BOM) 1151". Learned Amicus Curiae has also submitted that in the

instant case, one of the circumstance relied upon by learned trial court is that the present appellant called the deceased from the mobile phone of

P.W.-21, however, no credible evidence is there to establish the fact. It is submitted that the Investigating Officer could have verified this fact by

collecting the call detail report (CDR) of the mobile phone of the deceased as well as of P.W.-21, however, same has not been done by the

Investigating Officer and thus the fact that the present appellant have called the deceased could not be established beyond doubt. Learned Amicus

Curiae also submitted that in his testimony the P.W.-15 i.e. the doctor who conducted the post-mortem examination of the deceased has failed to

opine as to whether the ligature mark found on the neck of the deceased was caused by hard material substance or soft material substance raising

doubt about the cause of the death of the deceased Hasina Begum.

40. On the other hand, Ms. S. Jahan, learned Additional Public Prosecutor submits that the prosecution case is based on circumstantial evidence and

the evidence led by the prosecution side has been able to form a complete chain from which only the conclusion of guilt of the present petitioner may

be arrived at. She has submitted that the testimony of P.W.-1, P.W.-14, P.W.-16 as well as P.W.-21 clearly shows that the present appellant along

with co-accused Moinul @ Mominul @ Monirul had called the victim over mobile phone and assured her that they will perform her marriage with

Moinul (P.W.-21) and act as guardian in the said marriage, however, instead of solemnizing of her marriage, the present appellant along with the co-

accused killed Hasina and snatched away her ornaments and money. She has also submitted that learned trial court has committed no wrong in relying

on the testimony of P.W.-21 who was initially named as an accused in the FIR. She submits that at the best the P.W.-21 may be regarded as an

accomplice and evidence of an accomplice is admissible in law. To support her contention, she has relied upon two rulings of Hon'ble Supreme

Court of India, namely, "Laxmipat Choraria and Ors. Vs- State of Maharashtra" reported in "AIR 1968 SC 938" as well as in

"Chandran Vs- State of Kerala" reported in (2011) 5 SCC 161 wherein Hon'ble Supreme Court has held that "consensus of opinion in

India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and instead gave

evidence in the case".

41. Learned Additional Public Prosecutor submits that the evidence of P.W.-1 regarding victim leaving her house on being called by the appellant and

the co-accused and later on being killed by the them is corroborated by his statement recorded under Section 164 of the Cr.P.C. which was exhibited

as Ext. 2 wherein he has also stated that at the time of leaving the house his daughter told his wife Momina Bibi (P.W.-14) and his daughter Jabeda

Khatun (P.W.-16) that she was going to meet Badshu (present appellant) and Mominul at their behest to marry Mominul. It is also submitted by

learned Additional Public Prosecutor that in his statement under Section 164 Cr.P.C., P.W.-1 has also stated that on the next day when the dead body

of deceased was found, some nearby Kalita People said that they saw the present appellant and the co-accused carrying the daughter of P.W.-1 in a

bicycle. Learned Additional Public Prosecutor submits that this statement made by P.W.-1 under Section 164 Cr.P.C. corroborates his deposition

made during trial as P.W.-1. Learned Additional Public Prosecutor has submitted that similarly, P.W.-21 in his statement recorded under Section 164

Cr.P.C. has stated that later on he came to know that Moinul and Badchu used to listen to the conversation of P.W.-21 and Hasina Begum and they

took her mobile phone number from his phone when he went somewhere leaving his mobile phone. This statement of P.W.-21, made under section

164 Cr.P.C., according to learned Additional Public Prosecutor corroborates his testimony which he gave as P.W.-21 during trial. Learned Additional

Public Prosecutor submits that as the testimony of P.W.-1 and P.W.-21 has been corroborated by the statement which they made under Section 164

Cr.P.C., hence, learned trial court has committed no error in relying on the said testimonies in coming to the conclusion of guilt of the present

appellant.

42. We have considered the submissions made by leaned counsel for both sides and have gone through the evidence available on record meticulously.

43. It appears that in paragraph No. 68 of the impugned judgment, learned trial court has enumerated the circumstances, which, according to the

learned trial court, form a complete chain from which inference only of guilt of the present appellant may be drawn. For the sake of convenience, said

circumstances are quoted herein below:-

“ (i) Conversation of deceased Hasina Begum with PW-21 prior to her leaving her house with cash and ornament and PW-21 asking

deceased to make arrangement of money if she can so that he can divorce his first wife and to marry her;

(ii) Over hearing of the conversation of deceased with PW-21 by accused persons;

(iii) Accused persons making call to deceased victim to meet them with cash and ornaments so that they can held her marriage with PW-21;

(iv) leaving of victim from her house (iv) with cash amount and ornaments to meet accused persons and Moynal (PW-21) to marry PW-21

Moynal as called by accused Azizul Hoque and Mominul Hoque (now absconded)

(v) Deceased victim leave her house with money and ornaments to meet accused persons as asked by them which she disclosed to her mother

and sister.

(vi) On third day of leaving of Hasina, recovery of her dead body at accused's village;

(vii) Missing of cash amount and ornaments that deceased carried with her at the time of leaving of her house;

(viii) Accused visited PW-3's shop, bought goods, cycle on the date of incident of murder of the deceased;

(ix) Recovery and seizure of cash amount and cycle from the accused without any explanation of accused how money comes to their hand

and admitted seizure of the same by the PW-19 (IO);

(x) Police brought the accused persons where dead body of the Hasina was recovered;

(xi) Accused persons made extra judicial confession before PW-1, PW-4 and PW-11 at the place of recovery of dead body and narrated

them incident of robbery and murder before them at the place of recovery of dead body of deceased Hasina.

(xii) Deceased Hasina Begum died due to asphyxia and shock as a result of strangulation by ligature sustained by the deceased.

44. There is no dispute regarding the fact of the death of Hasina Begum. Moreover, considering the condition under which her dead body was found

lying in the Jute field with her hands and legs tied and mouth gagged with cloth as well as considering the post-mortem examination report of the

deceased, exhibited as Ext.-8 by P.W.-15, wherein the doctor who conducted the post-mortem examination has opined that the death of Hasina

Begum was due asphyxia and shock as a result of strangulation by ligature sustained by the deceased, we find no difficulty in arriving at the

conclusion that the death of deceased Hasina Begum was homicidal nature. Now, the question before this Court, in this appeal, is as to whether the

present appellant had murdered Hasina Begum and as to whether the impugned Judgment passed by learned trial Court is liable to be upheld or to be

set aside.

45. As there is no eye-witness to the incident of killing of deceased Hasina Begum and as the prosecution case is entirely based on circumstantial

evidence, following observation made by Hon^{ble} Supreme Court of India in *Birdhichand Sarda vs- State of Maharashtra* (supra)

becomes very relevant in the instant case:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be

fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not

only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji*

Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCCz(Cri) 1033 : 1973 Cri LJ 1783] where the observations were made: [SCC

para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental

distance between “may be” and “must be” is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be

explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of

the accused and must show that in all human probability the act must have been done by the accused.

46. Thus, it may be seen that Hon'ble Apex Court has held that the circumstances from which the conclusion of guilt is to be drawn should be

fully established. It is also held that the said circumstances "must or should" and not "may be" established. It is also a settled principle of law

that however strong a suspicion may be, it cannot take place of proof beyond reasonable doubt in a criminal trial. In light of said principle, let us

examine as to whether the circumstances enumerated by the learned trial Court in paragraph No. 68 of the impugned judgment are fully established

and are of conclusive nature and tendency and exclude every possible hypothesis except the guilt of the present appellant.

47. As regards that fact as to whether the present appellant had called the deceased, over mobile phone, to meet him and the co-accused Mominul

with cash and ornaments so that they may get her married to Moynal (P.W.-21), it appears that in their oral evidence, during trial, P.W.-1, P.W.-14

and P.W.-16 have stated that the present appellant which co-accused Mominul called the deceased over mobile phone to meet them with her money

and ornament so that they may arrange her marriage with Moynal (P.W.-21). However, while deposing as P.W.-1, P.W.-14 and P.W.-16 during trial,

none of them disclosed the source from where they came to know about the telephonic conversation between the deceased and the present appellant.

They have not stated that they were told about such conversation by the deceased herself or by the present appellant. Though, P.W.-1 in his

statement made under Section 164 Cr.P.C., on 22.11.2017 (i.e. about 51 days after lodging of the FIR) had stated that while leaving the house, the

deceased had told his wife Momina bibi and his younger daughter Jabeda Khatun that she was going to meet Badchu (present appellant) and

Mominur, at their behest to marry Moynal, however, P.W.-1 has not stated so while deposing as a witness during trial, neither P.W.-14 and P.W.-16

have stated in their depositions that they were told by the deceased that she was called by the present appellant and the co-accused Mominul to meet them.

48. It is no more res integra that a statement made under Section 164 Cr.P.C. is not a substantive piece of evidence, however, it may be used for the

purpose of corroborating substantive evidence. What is to be corroborated is the testimony given by a witness during trial in the dock. However, when

a person, while deposing as a witness, during trial, does not state a fact, his statement given during investigation stage, under Section 164 Cr.P.C.,

which was not subjected to cross-examination when it was given, may not fill up the lacuna in the substantive evidence of such witness recorded

during trial.

49. In the instant case as P.W.-1, P.W.-14 and P.W.-16 have not disclosed the source of their knowledge about the telephonic conversation between

the deceased and the present appellant, their testimony regarding such a telephonic conversation in our considered opinion is not safe for reliance.

50. As regards P.W.-21, as he himself was a suspect in this case and as P.W.-16 has also stated that her sister left her home with P.W.-21, his

testimony is to be considered with circumspection. Though, P.W.-21 has stated that when he left his mobile phone and went to attend nature calls

the present appellant took Hasina's (deceased) mobile number from his phone and called her and asked her to bring money. However, the

question arises when P.W.-21 left his mobile phone to attend nature calls, how he came to know that the present appellant had taken the mobile

number of the deceased and called her. Moreover, P.W.-21 has himself stated during his cross-examination that he cannot exactly say as to when

accused Badchu (present appellant) took Hasina's mobile number from his mobile handset. P.W.-21 has not categorically stated that he saw the

present appellant calling the deceased over mobile phone or that he overheard the conversation of the deceased with the present appellant. Moreover,

the Investigating Officer while deposing as P.W.-19 has also stated, in his cross-examination, that he did not collect the call detail record (CDR) of the

mobile phone of Hasina (deceased) which could have been an important piece of evidence from the prosecution side. However, in view of discussions

made herein above, we are of the view that the fact that the present appellant had called the deceased over mobile phone to meet him and the other

co-accused, along with money and ornaments could not be fully established.

51. As regards confessional statement of the present appellant is concerned, the confession made by the present appellant in the Sapatgram Police

Station before the Investigating Officer and video recording of same, in our considered opinion is inadmissible as evidence in view of the provisions of

Section 25 and 26 of the Indian Evidence Act as well as under Article 20(3) of the Constitution of India. As regards extra judicial confession made by

the present appellant, P.W.-1, P.W.-4 and P.W.-11, on which learned trial Court has relied on, is concerned, it appears that the said confession was

made by the present appellant when he was brought by the Police to the place where the dead body was found. As at that time, he was in custody of

Police, any confession made by the appellant in such custody is hit by Section 26 of the Indian Evidence Act and is inadmissible. We are, therefore, of

considered opinion that reliance by the learned trial Court on the extra judicial confession made by the present appellant, while he was in Police

custody is erroneous.

52. As regards Ext. 6 and Ext. 7 regarding seizure of money and bicycle is concerned, there is no evidence on record to connect the said seized

articles with the offence involved in this case. Though, from the testimony of P.W.-1, it appears that he had stated before Police that shopkeeper

Biren told Police that two boys came to his shop and purchased some goods from his shop by giving Rs.2,000/- and he suspected that those two boys

were involved in looting and murder of the deceased, however, nothing of this sort has been stated by Biren while he deposed as P.W.-3 during the

trial. There is nothing on record to show that the money which is shown to have been seized in Ext. 6 and Ext. 7 is the money of the deceased as

findings such a small amount (Rs.1,100/- from the house of present appellant) in the house of even a poor person may not be a ground to presume that

the said money is ill-gotten or proceed of any crime. Moreover, from the evidence of the prosecution witnesses, it appears that the deceased had left

the house along with ornaments also, however, there is no recovery of ornaments of the deceased in this case. Similarly, though the P.W.-19

(Investigating Officer) has stated that some villagers had seen the present appellant carrying the daughter of P.W.-1 on the bicycle which was seized,

however, none of the prosecution witnesses has deposed that the present appellant was seen carrying the deceased on a bicycle. Similarly, though

P.W.-19 is the Investigating Officer himself, he also failed to categorically state as to who were those villagers who saw the appellant carrying the

deceased in a bicycle, neither any clarification has been given by the Investigating Officer as to why those villagers were not enlisted as prosecution

witnesses in this case. As such, we of the considered opinion that circumstances enumerated at serial No. viii and ix in paragraph No. 68 of the

impugned judgment has not been fully established by the prosecution side in this case.

53. Thus, in view of above discussions made in foregoing paragraphs, we are of the considered opinion that the circumstances enumerated at Serial

No. iii, iv, v, viii, ix, xi in paragraph No. 68 of the impugned judgment, from which the conclusion of guilt of the present appellant has been drawn by

the learned trial Court, are not fully established. The evidence on record and the remaining circumstances which are fully established during trial does

not, in our considered opinion, form a chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with the

innocence of the present appellant. Under such circumstances, the present appellant, in our considered opinion, is entitled to get benefit of doubt which

we hereby give to him.

54. In view of above discussion, the present appeal is allowed. The impugned judgment passed by learned Additional Sessions Judge, Bilasipara in

Sessions Case No. 2/2018 is hereby set aside. The appellant, namely, Azizul Hoque @ Batchu shall be released from jail forthwith unless he is

required to be detained in connection with some other case.