

(2015) 07 GAU CK 0010

In the Gauhati High Court

Case No : Death Sentence Ref. 1/2014 and Crl. A. (J) Nos. 51, 52, 54 of 2014

State of Assam and Others

APPELLANT

Vs

Selim Uddin and Others

RESPONDENT

Date of Decision : 24-07-2015

Acts Referred:

Arms Act, 1959 — Section 25(1-B)(a), 27(3), 3
Arms Act, 1959 — Section 25(1-B)(a), 27(3), 3
Criminal Procedure Code, 1973 (CrPC) — Section 133, 313, 428, 43
Evidence Act, 1872 — Section 106, 114, 27
Penal Code, 1860 (IPC) — Section 120(B), 120A, 120B, 201, 302

Citation : (2015) 3 GLT 553

Hon'ble Judges : C.R. Sarma, J;Prasanta Kumar Saikia, J

Bench : Division Bench

Advocate : S. Jahan, A.P.P., for the Appellant; T.J. Mahanta, Amicus Curiae,
Advocates for the Respondent

Final Decision : Disposed off

Judgement

C.R. Sarma, J—As the death reference and the appeals aforesaid have arisen out of a single judgment and order, dated 29.04.2014, passed by the learned Sessions Judge, Karimganj, in Sessions Case No. 75/2012, involving same facts and circumstances, for the sake of convenience and as agreed to by the learned Counsel, appearing for the parties, we have heard the said death reference and the appeals together and propose to dispose of the same by this common judgment and order.

2. By the said judgment and order, the learned trial Judge convicted and sentenced the appellants aforesaid in the following manner.

2.1. Mr. Selim Uddin alias Shilu and Mr. Hifjur Rahman alias Hiju have been convicted under Section 302 of the Indian Penal Code (hereinafter called as "IPC") and sentenced each of them with death penalty and also with fine of Rs. 15000/- each.

2.2. Mr. Selim Uddin alias Shilu and Mr. Hifjur Rahman alias Hiju have been convicted under Section 25(1-B)(a) of the Arms Act, 1959 and sentenced to suffer rigorous imprisonment (hereinafter called as "RI") for 3 (three) years and pay fine of Rs. 5,000/- each, in default, suffer RI for 6 (six) months.

2.3. Mr. Selim Uddin alias Shilu, Mr. Sultan Uddin, Mr. Hifjur Rahman alias Hiju, Mr. Raju Ahmed, Mr. Rajani Talukdar and Mr. Hussain Ahmed alias Mojnu have been convicted under Section 365 IPC as abettors and sentenced to suffer RI for 7 (seven) years and pay fine of Rs. 5,000/- each, in default, suffer RI for 6 (six) months each.

2.4. Mr. Hifjur Rahman alias Hiju, Mr. Hussain Ahmed and Mr. Raju Ahmed have been convicted under Section 120(B) IPC as abettors of the offence under Section 386 IPC and sentenced to suffer RI for 10 (ten) years with fine of Rs. 5,000/- each, in default, RI for 1 (one) year.

2.5. Mr. Sultan Uddin, Mr. Selim Uddin alias Shilu and Mr. Rajani Talukdar have been convicted under Section 386 IPC and sentenced to suffer RI for 10 (ten) years and pay fine of Rs. 15,000/-, in default, suffer RI for 1 (one) year each.

2.6. Mr. Rajani Talukdar, Mr. Raju Ahmed and Mr. Sultan Uddin have been convicted under Section 120B as abettors of the offence under Section 302 and sentenced to suffer RI for life and pay fine of Rs. 15,000/-each, in default, RI for 1 (one) year each.

2.7. Mr. Selim Uddin alias Shilu, Mr. Hifjur Rahman alias Hiju and Mr. Raju Ahmed have been convicted under Section 201 IPC and sentenced to suffer RI for 2(two) years and pay fine of Rs. 2,000/-, in default, RI for 2(two) months each.

2.8. Mr. Hussain Ahmed has been convicted under Section 302 IPC and sentence to life imprisonment and pay fine of Rs. 15,000/-, in default, RI for 1 (one) year.

3. We have heard Ms. S. Jahan, learned Additional Public Prosecutor, appearing for the State in the said death reference and the appeals and Mr. T.J. Mahanta, learned Sr. Counsel, appearing as Amicus Curiae in the said Death Reference and the Criminal Appeal No. 51/2014. We have also heard Mr. S.C. Biswas, learned Counsel for the appellant in Criminal Appeal (J) No. 51/2014, Mr. A. Ali, learned Amicus Curiae for the appellants in Criminal Appeal No. 52/2014, Mr. B.N. Gogoi, learned Amicus Curiae, appearing in Criminal Appeal (J) No. 54/2014 and Mr. A. Choudhury, learned Counsel, appearing for the informant.

4. The prosecution case, as may be required for the purpose of disposal of the above-mentioned death reference and the appeals aforesaid, in brief, are as follows:

5. On 19.11.2011 (Saturday), at about 6.30 P.M., Mr. Ahrar Ahmed alias Naj (hereinafter called " the deceased), son of the informant (PW-1), left his house, riding a motor cycle telling his mother that he would return within 1 1/2 hour after visiting the Bhanga Bazar. At about 7.34 P.M., he, over his cell phone,

informed his mother that he was going to Chorgola with a person and that he would return within 1 1/2 hour. However, the deceased did not return home as promised. Worse still, his cell phone was found in switch off mode since the late evening of 19.11.2001. Though, the informant who is the father of the deceased tried to trace his son out, all his attempts had gone haywire.

6. Next morning, at about 6.30 A.M., while he was searching his son, one Mr. Kamrul Islam (PW-6), a hardware shop owner, informed PW-1 that the deceased used to visit Mr. Rajani Talukdar (one of the appellants), a motor mechanic and he may perhaps give some information about his missing son. Being so informed, PW 1 went to said Rajani Talukdar and enquired regarding the whereabouts of his son who remained missing since previous night.

7. Mr. Rajani Talukdar, on being so enquired by the informant, disclosed that the deceased was with him till 8 P.M. in the last evening (i.e. 19.11.2011) but he undertook to search the son of PW1 provided that he was given a motorcycle to carry out such search. As requested by said Rajani Talukdar, a motorcycle was managed and was given to Mr. Rajani Talukdar. Thereafter, Sri Talukdar went out in search of the deceased and little later, he informed PW-1 over phone that his son's motor cycle was found lying near the Reliance Petrol Pump of Chorgola.

8. Being so informed, the informant rushed to such place. However, he could not find the motor cycle in the place, as indicated by Mr. Rajani Talukdar. On his insistence, Sri Talukdar asked him to come over to Chorgola Bazar where Sri Talukdar was at that time. Being so required, he went to Chorgola bazaar and met Sri Talukdar there, who was in nervous condition.

9. Thereafter, the informant, along with Mr. Rajani Talukdar, went towards Karimganj and he showed the motor cycle of his son, lying in a road side ditch, at a distance of 250 mtrs. from the Chorgola Bazar. In the meantime, people gathered there came to know about the son of informant going missing since previous night and they started suspecting Sri Talukdar.

10. At such turn of events, Mr. Rajani Talukdar promised to divulge what he knew about the incident in question. According to Sri Talukdar, Mr. Selim Uddin and Mr. Rahan had made a conspiracy for abducting the deceased and they promised that he would be given Rs. 2 lacs if he could hand over the son of PW 1 to them. Being lured by the said offer, made by Mr. Selim Uddin and Mr. Rahan, he assured them that he would hand over the son of the PW 1 to those persons.

11. In the meantime, as planned by them, Mr. Selim Uddin had given him Rs. 1500/- as advance and a bottle of Corex mixed with sedative drugs for offering the same to the deceased for his consumption. On 19.11.2011, Sri Talukdar had called the victim and both of them then went towards Karimganj in two different motorcycles. On the way, the deceased was lured to consume the bottle of Corex containing sedative drugs and after taking the same, the deceased became unconscious and even fell from his motor cycle.

12. At about 8.30 P.M. the victim was handed over to Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Fuzur alias Munna and Mr. Kamal Hussain who took him away in unconscious condition, in a blue colour Maruti Car to some unknown destination. One Sri Fakaruddin of Kandigram who came to know about such episodes from Sri Talukdar, reported such story to the Police. Police came and took Sri Talukdar into custody. Meanwhile, PW 1 went to Badarpur Police Station and reported such incident both orally and in writing to the In-charge of aforesaid police station.

13. On 20.11.2011, at about 5.45 P.M., the informant received a telephone call, demanding an amount of rupees fifty lakhs towards the release of his son. The informant negotiated with the said caller and during negotiation, he could identify the voice of Mr. Selim Uddin, who, being a person from the same locality, was known to him. Ultimately, the deal was fixed at rupees twelve lakhs and the informant, as directed by the said caller, proceeded to Mendihati, in the State of Meghalaya taking with him the money demanded by the caller.

14. PW 1 deposes that for the safety and well being of his son, he refrained from reporting such incident to the police. When he reached Mehdihati, he got a call from the caller asking him to leave the money at a particular place. Being so required, he went to such place and left the money at the place indicated by the caller. The caller further told him that he would get his son near Malidahar. He came to such place but he did not find his son there. Thereafter, the mobile set of the said caller was also found in switch off mode.

15. Failing to get his son, the PW-1 informed the Police about the demand of ransom and the payment made by him. As stated above, Sri Rajani Talukdar was already arrested by Police and the motorcycle of the deceased was seized from Chorgola area. Subsequently, Police seized the mobile set of the deceased from the house of Mr. Rajani Talukdar. On receipt of clue from Ms. Najima Begum (PW-2), wife of Hifjur Rahman (Appellant) and Ms. Moriom Bibi (PW-3), the dead body of the deceased, which was buried in Dumogrol of Manosangam area, was disinterred, in presence of Magistrate. After conducting inquest on the dead body, the same was sent to the Silchar Medical College Hospital for post mortem examination.

16. During the investigation, Police seized the wearing apparels (one pant) of the deceased from a pond. Police also seized, on being led by Mr. Hifjur Rahman, a service pistol, one live cartridge, one air gun and a knife from the base of a "cham" tree, wherein it was concealed, after disposing the dead body of the deceased.

17. Police arrested Mr. Selim Uddin from Belonia in the State of Tripura and seized an amount of Rs. 97,000/- from his possession. Another amount of Rs. 6,88,500/- was also recovered from Mr. Sultanuddin, brother of Mr. Selim Uddin, after arresting him and searching his house, at Ladrombai, in the State of Meghalaya.

18. During the investigation, on being prayed by the I.O., Sections 120B/302/201 IPC and Sections 25(1-B)(a)/27(3) of Arms Act were added.

Police also seized a blue Maruti car lying in abandoned condition, on the road, near Niralabasti.

19. During the investigation, apart from Mr. Rajani Talukdar, Mr. Selim Uddin, Mr. Sultan Uddin, Police, also arrested Mr. Hussain Ahmed, Mr. Hifjur Rahman, Mr. Kamal Hussain, Mr. Mumin Uddin, Mr. Riaz Uddin, Mr. Nizam Uddin, Mr. Babul Mia alias Ali (PW-23) and Mr. Raju Ahmed.

Police obtained prosecution sanction against Hifjur Rahman, Selim Uddin, Rajani Talukdar, Husain Ahmed and four others for their prosecution under the Arms Act.

20. At the close of the investigation, the Investigating Officer submitted charge-sheet for the offences under Section 120B/365/302/201/384 IPC read with Section 25(1-B)(a)/27(3) of Arms Act against 20 (twenty) persons, out of whom, 2(two) persons were shown as absconders.

21. The case being committed to the Court of Sessions for trial, the learned Sessions Judge, framed charges as follows against 1. Mr. Selim Uddin alias Shilu, 2. Mr. Hifjur Rahman alias Hiju, 3. Mr. Rajani Talukdar, 4. Mr. Kamal Hussain, 5. Mr. Hussain Ahmed alias Mojnu, 6. Mr. Sultan Uddin, 7. Mr. Riaj Uddin alias Shilu, 8. Mr. Munir Uddin, 9. Mr. Nizam Uddin alias Rocky, 10. Mr. Raju Ahmed, 11. Mr. Babul Mia alias Siraj Uddin, 12. Mr. Sahanumin Ahmed and 13. Ms. Monowara Bibi.

"(i) firstly under Section 120B IPC for committing conspiracy to commit the offences under Sections 365/387 and 302 IPC.

(ii) secondly, under Section 302 read with Section 34 IPC.

(iii) thirdly, under Section 201 read with Section 34 IPC;

(iv) fourthly under Section 27(3) of the Arms Act, 1959

(v) separate charge was also framed under Section 365/34 IPC against Mr. Selim Uddin alias Shilu, Mr. Hifjur Rahman alias Hiju, Mr. Kamal Hussain, Mr. Rajani Talukdar and Mr. Hussain Ahmed;

(vi) charge was also framed under Sections 387/34 IPC against 1. Mr. Selim Uddin alias Shilu, 2. Mr. Hifjur Rahman alias Hiju, 3. Mr. Kamal Hussain, 4. Mr. Sultan Uddin, 5. Mr. Mumin Uddin, 6. Mr. Riaz Uddin alias Shilu, 7. Mr. Nizam Uddin alias Rokkey and 8. Mr. Raju Ahmed.

(vii) separate charge was also framed under Section 125(1-A) of Arms Act, 1959 against Mr. Hifjur Rahman alias Hiju."

The said charges were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.

22. At the close of the trial, the learned Sessions Judge, convicted Mr. Selim Uddin alias Shilu and Mr. Hifjur Rahman alias Hiju under Sections 302 IPC; Mr. Selim Uddin alias Shilu and Hifjur Rahman alias Hiju have been convicted under Section 25(1-B)(a) of the Arms Act; Mr. Selim Uddin alias Shilu, Mr. Sultan Uddin, Mr. Hifjur Rahman alias Hiju, Mr. Raju Ahmed, Mr. Rajani Talukdar and Mr. Hussain Ahmed alias Mojnu under Section 365 IPC as abettors; Mr. Hifjur Rahman alias Hiju, Hussain Ahmed and Raju Ahmed under Section 120(B) IPC as abettors of the offence under Section 386 IPC; Mr. Sultan Uddin, Mr. Selim Uddin alias Shilu and Rajani Talukdar under Section 386 IPC; Mr. Rajani Talukdar, Mr. Raju Ahmed and Mr. Sultan Uddin under Section 120B as abettors of the offence under Section 302; Mr. Selim Uddin alias Shilu, Mr. Hifjur Rahman alias Hiju and Mr. Raju Ahmed under Section 201 IPC and sentenced them, as indicated above and Mr. Hussain Ahmed under Section 302 IPC and sentenced them as indicated, hereinabove.

23. The learned Sessions Judge has referred the death sentence for confirmation and the same has been registered as Death Reference No. 1 of 2014.

24. With regard to the Death Reference No. 1 of 2014, Ms. S. Jahan, learned Additional Public Prosecutor, supporting the conviction under Section 302 IPC and the death sentence, awarded to accused Mr. Selim Uddin alias Shilu and Mr. Hifjur Rahman alias Hiju, has submitted that the victim, who was a college student (21 years), was abducted for ransom and that, even after killing him, the appellants demanded and received Rs. 12 Lakhs from the father (PW-1) of the deceased giving the false impression that the PW's son was alive. It is also submitted that the murder of the unarmed young person in the said manner, without any resistance, has shakened the consciousness of the society and as such the case falls under the category of rarest of rare case, warranting death penalty. It is further submitted that accused Mr. Selim Uddin alias Shilu had previous record of involvement in criminal case and that the accused persons, during the trial of the case, had threatened the father (PW-1) of the deceased and that they had killed PW-1. It is submitted that the involvement of Mr. Selim Uddin and Mr. Hifjur Rahman, in criminal activities, indicates that there is no scope for their reformation or rehabilitation and as such there could no other alternative sentence, except death penalty in respect of Mr. Selim Uddin and Mr. Hifjur Rahman. Therefore, it is submitted, by the learned Additional Public Prosecutor, that, considering the attending aggravating circumstances, the learned trial Judge committed no error by awarding death penalty.

With regard to the convictions and the sentences, awarded to the other appellants, the learned Additional Public Prosecutor has submitted that the learned Sessions Judge has properly appreciated the evidence and rightly convicted and sentenced the said appellants, warranting no interference by this Court.

25. In support of her contention, the learned Additional Public Prosecutor has relied on the following cases:

"1. Machhi Singh and Others Vs. State of Punjab, AIR 1983 SC 957 : (1983) CriLJ 1457 : (1983) 2 Crimes 268 : (1983) 2 SCALE 1 : (1983) 3 SCC 470 : (1983) 3 SCR 413 ;

2. Henry Westmuller Roberts Vs. State of Assam, AIR 1985 SC 823 : (1985) CriLJ 1079 : (1985) 1 Crimes 877 : (1985) 1 SCALE 681 : (1985) 3 SCC 291 : (1985) 3 SCR 533 ;

3. Vikram Singh and Others Vs. State of Punjab, AIR 2010 SC 1007 : (2010) CLT 560 : (2010) 1 JT 568 : (2010) 1 SCALE 633 : (2010) 3 SCC 56 : (2010) 3 SCR 22 : (2010) AIRSCW 5853 : (2010) AIRSCW 5148 ;

4. Vikram Singh @ Vicky and Another Vs. Union of India (UOI) and Others, (2013) 7 AD 338 : (2013) 10 JT 65 : (2013) 3 RCR(Criminal) 718 : (2013) 8 SCALE 449 ;

5. Mohammed Anis Vs. Union of India (UOI) and Others, (1994) 1 SCC 145 Supp : (1993) 1 SCR 263 Supp ;

6. Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra, (2009) 7 JT 248 : (2009) 7 SCALE 341 : (2009) 6 SCC 498 : (2009) 9 SCR 90 : (2009) 6 UJ 2797 ;

7. B. Kumar Vs. Insp. of Police, (2015) 1 CCR 165 : (2014) 4 RCR(Criminal) 1003 ;

8. Mofil Khan Vs. State of Jharkhand, (2014) 4 Crimes 529 : (2014) 4 RCR(Criminal) 683 ."

26. The learned Additional Public Prosecutor has also submitted a written synopsis of her argument.

27. Mr. T.J. Mahanta, learned Amicus Curiae in the death reference and Criminal Appeal (J) No. 51 of 2014, referring the evidence, on-record, has submitted that there is no direct evidence to the occurrence and that the case is based on circumstantial evidence, retracted extra judicial confession and evidence of approver i.e. PW-23. It is submitted that, in view of absence of any direct evidence, it is not safe to uphold and affirm the death sentence, awarded to Mr. Selim Uddin and Mr. Hifjur Rahman only on the basis of circumstantial evidence, retracted extra judicial confession and approver"s (PW-23) evidence. The learned Amicus Curiae has also submitted that all the accused persons belonged to the age group of 21 years to 24 years and that in the absence of any evidence of past conviction, there is sufficient scope for their rehabilitation and reformation.

28. The learned Amicus Curiae has also submitted that, though the accused persons had abducted the deceased, who was a son of a rich man, only for the purpose of releasing money by way of extortion, there is evidence to show that they had to kill the deceased for the purpose of escaping identification, due to creation of a sudden compelling situation, i.e. subsequent uncontrollable condition of the deceased.

29. It is also submitted, on behalf of the appellants, that there is no evidence to show that the deceased was subjected to any form of torture or cruelty, except causing his death by a single bullet injury. In view of the above mitigating circumstances, it is submitted that the killing of the deceased was not a brutal one, shocking the consciousness of the society.

Therefore, it is submitted that the killing of the deceased, under the said circumstances, does not fall under the category of rarest of rare case and as such, the death sentence can't be maintained.

The learned Senior Counsel, appearing as Amicus Curiae, in Criminal Appeal (J) No. 51 of 2014, filed by Mr. Sultan Uddin, has submitted that there is not an iota of evidence to show that Mr. Sultan Uddin had entered into any conspiracy or shared any common intention with others for abducting the deceased for realisation of extortion money and causing his death. Therefore, it is submitted that in the absence of evidence, the conviction and sentenced, recorded against Mr. Sultan Uddin, under Sections 365/386/120B/302 IPC can't be maintained and liable to be set aside.

The learned Amicus Curiae, in support of his contention, has relied on the following decisions:

"1. Wakkar and Another Vs. The State of U.P., (2011) CriLJ 1639 : (2011) 1 Crimes 246 : (2011) 2 JT 502 : (2011) 2 RCR(Criminal) 26 : (2011) 1 RCR(Rent) 911 : (2011) 2 SCALE 198 : (2011) 3 SCC 306 : (2011) 1 SCC(Cri) 846 : (2011) AIRSCW 1215 : (2011) 1 Supreme 609 ;

2. Bishnu Prasad Sinha and Another Vs. State of Assam, AIR 2007 SC 848 : (2007) CriLJ 1145 : (2007) 2 JT 428 : (2007) 2 SCALE 42 : (2007) 11 SCC 467 : (2007) 1 SCR 916 : (2007) AIRSCW 569 ;

3. Sahib Hussain @ Sahib Jan Vs. State of Rajasthan, (2013) 5 AD 138 : (2013) 116 CLT 965 : (2013) CriLJ 2359 : (2013) 3 RCR(Criminal) 159 : (2013) 6 SCALE 219 : (2013) 9 SCC 778 ;

4. Shankar Kisanrao Khade Vs. State of Maharashtra, (2013) 4 ABR 567 : (2013) 6 AD 286 : (2013) CriLJ 2595 : (2013) 6 JT 315 : (2013) 3 RCR(Criminal) 588 : (2013) 6 SCALE 277 : (2013) 5 SCC 546 ;

5. Sanaullah Khan Vs. State of Bihar, (2013) 3 AD 1 : (2013) CriLJ 1527 : (2013) 2 Crimes 13 : (2013) 2 JCC 1029 : (2013) 3 JT 55 : (2013) 3 JT 54 : (2013) 2 RCR(Criminal) 135 : (2013) 2 SCALE 505 : (2013) 3 SCC 52 : (2013) AIRSCW 1159 ."

30. Mr. B.N. Gogoi, learned Amicus Curiae, appearing for the appellants in Criminal Appeal (J) No. 54 of 2014, has submitted that there is no sufficient and convincing substantive evidence against the said appellants and as such their conviction under Section 302 IPC without any substantive evidence and as such, the death penalty can't be maintained.

The learned Amicus Curiae has placed reliance on the following decisions:

"1. Bishnu Prasad Sinha and Another Vs. State of Assam, AIR 2007 SC 848 : (2007) CriLJ 1145 : (2007) 2 JT 428 : (2007) 2 SCALE 42 : (2007) 11 SCC 467 : (2007) 1 SCR 916 : (2007) AIRSCW 569 ;

2. Jamuna Chaudhary and Others Vs. State of Bihar, AIR 1974 SC 1822 : (1974) CriLJ 890 : (1974) 3 SCC 774 : (1974) SCC(Cri) 250 : (1974) 2 SCR 609 ;

3. Ram Kumar Pandey Vs. State of Madhya Pradesh, AIR 1975 SC 1026 : (1975) CriLJ 870 : (1975) 3 SCC 815 : (1975) 3 SCR 519 : (1975) 7 UJ 423 ;

4. Arulvelu and Another Vs. State represented by the Public Prosecutor and Another, (2010) CriLJ 433 : (2009) 2 DMC 677 : (2009) 13 JT 144 : (2009) 13 SCALE 143 : (2009) 10 SCC 206 : (2009) 14 SCR 1081 : (2009) 9 UJ 4289 ;

5. Sawal Das Vs. State of Bihar, AIR 1974 SC 778 : (1974) CriLJ 664 : (1974) 4 SCC 193 : (1974) SCC(Cri) 362 : (1974) 3 SCR 74 ;

6. Anant Bhujangrao Kulkarni Vs. State of Maharashtra, AIR 1993 SC 110 : AIR 1992 SC 110 : (1992) CriLJ 4027 : (1992) 2 Crimes 644 : (1992) 4 JT 228 : (1992) 1 SCALE 1299 : (1993) 2 SCC 267 Supp : (1992) 2 UJ 51 ;

7. Prakash Mahadeo Godse v. State of Maharashtra, reported in 1969 (3) SCC 741;

8. Ujjagar Singh Vs. State of Punjab, (2008) CriLJ 808 : (2008) 1 JT 1 : (2007) 14 SCALE 428 : (2007) 13 SCC 90 ;

9. Sanaullah Khan Vs. State of Bihar, (2013) 3 AD 1 : (2013) CriLJ 1527 : (2013) 2 Crimes 13 : (2013) 2 JCC 1029 : (2013) 3 JT 55 : (2013) 3 JT 54 : (2013) 2 RCR(Criminal) 135 : (2013) 2 SCALE 505 : (2013) 3 SCC 52 : (2013) AIRSCW 1159 ;

10. Sahib Hussain @ Sahib Jan Vs. State of Rajasthan, (2013) 5 AD 138 : (2013) 116 CLT 965 : (2013) CriLJ 2359 : (2013) 3 RCR(Criminal) 159 : (2013) 6 SCALE 219 : (2013) 9 SCC 778 ; and

11. Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra, (2009) 7 JT 248 : (2009) 7 SCALE 341 : (2009) 6 SCC 498 : (2009) 9 SCR 90 : (2009) 6 UJ 2797 . "

31. Mr. A. Ali, learned Amicus Curiae, appearing for the appellants, namely, Mr. Rajani Talukdar, Mr. Raju Ahmed and Mr. Hussain Ahmed, in Criminal Appeal No. 52(J)/2014 has submitted that there is no sufficient evidence against the appellants, substantiating their involvement with the said crime, and as such, their said conviction and sentence can't be maintained.

32. In order to examine the correctness of the impugned convictions and sentences, we feel it appropriate to examine the evidence, on-record.

33. The prosecution has examined as many as 23 (twenty three) witnesses, including the official witnesses and accused Babul Ali, as approver (PW-23).

34. PW-1 Md. Tofail Ahmed is the father of the deceased. He lodged the FIR (Ext. No. 1), which moved the machinery of the investigation. He deposed regarding the extra judicial confession, alleged to be made by Mr. Rajani Talukdar, the seizure of motorcycle of the deceased etc., the seizure of the mobile set of the deceased from the house of the Rajani Talukdar and demand and payment of ransom of twelve lakhs.

35. PW-2 Musstt. Nazima Begum, W/o- Hifjur Rahman (Accused) and PW-3 Musstt. Morium Bibi, W/o-Late Moulana Roshid Ahmed, mother of accused Hussain Ahmed, deposed against some of the accused persons, including Mr. Hifjur Rahman, indicating their involvement with the death of the deceased and concealment of the dead body. PW-2 also stated about extra judicial confession, made by her husband Mr. Hifjur Rahman.

36. PW-4 and PW-5 stated that they found the deceased in the company of the appellant Rajani Talukdar on the fateful evening.

37. PW-6, Kamrul Islam stated about the concealment of the dead body of the deceased and recovery of the same.

38. PW-7 stated about the statements made by accused Mr. Selim Uddin, on being asked by the Police.

39. PW-8 stated regarding recovery and seizure of trouser (pant) of the deceased from the pond.

40. PW-9 stated about the statement, made by accused Mr. Kamal Hussain, before him in the Police Station indicating that on being instructed by Mr. Selim Uddin, Mr. Hifjur Rahman had shot dead the deceased for evading identification.

41. PW-10 Jalal Uddin stated regarding discovery of the arms and ammunition and the knife, on being led by Hifjur Rahman.

42. PW-11 Mr. Abdul Rouf stated about the arrest of Selim Uddin and recovery of money from Belonia, Tripura.

43. PW-12 Mr. Pranjit Das deposed regarding seizure of the Maruti 800 Car, from the road near Niralabasti.

44. PW-13 Mr. Badrul Hoque, owner of an Indica car stated regarding seizure of his Indica Car from the custody of his driver Riazuddin.

45. PW-14 Mr. Ratnadip Bhattacharjee, Judicial Magistrate 1st Class, recorded the statement of Musstt. Nazima Begum (PW-2) and Musstt. Morium Bibi (PW-3) and Musstt. Monowara Begum (not examined as (PW)).

46. PW-15 Mr. Nijam Uddin stated regarding discovery of the dead body.

47. PW-16 Circle Officer conducted the inquest of the dead body.
48. PW-17 Dr. Y.N. Singh performed the post mortem of the dead body of the deceased.
49. PW-18 Mr. M.H. Laskar, Police Armurer, examined the seized fire arms and ammunition.
50. PW-19 Mr. N. Das, S.I. of Police, Badarpur Police Station, stated regarding recovery of the dead body and wearing garments of the deceased.
51. PW-20 Mr. Samsul Hoque, S.I. of Police (I.O.) stated about the arrest of Mr. Sultan Uddin and seizure of money from him at Ladrombai, Meghalaya.
52. PW-21 Mr. Khirod Baishya, Officer in-charge of Badarpur Police Station, stated about receipt of the FIR (Ext. No. 1), registration of the P.S. Case No. 181/2011, arrest and interrogation of Mr. Rajani Talukdar, disclosure statement made by Mr. Rajani Talukdar regarding abduction of the deceased, seizure of the motorcycle of the deceased vide Ext. No. 2, seizure of Maruti Car vide Ext. No. 11, submission of written information by PW-1 regarding payment of rupees twelve lakhs, arrest of Mr. Hifjur Rahman, on 04.12.2011, at about 5.10 P.M., admission made by Mr. Hifjur Rahman regarding abduction and killing of the deceased, concealment of the dead body, leading to discovery of the arms, vide seizure list No. 9, seizure of the mobile phone of deceased from the house of Rajani Talukdar, on 06.12.2011 vide Ext. No. 4, recovery of wearing apparel of the deceased vide Ext. No. 8, from the pond, on being led by Mr. Babul Mia (PW-23) and accused Raju Ahmed, prosecution section (Ext. 24) and submission of charge-sheet (Ext. 25) against 20 accused persons.
53. PW-22, Mr. J. Dutta, S.I. of Police, stated about the arrest of Mr. Selim Uddin from Belonia and seizure of Rs. 97,000/- from his possession.
54. PW-23, Mr. Babul Mia alias Ali (accused), deposing as approver, stated regarding concealment of the dead body, the wearing apparels of the deceased and the arms and ammunition.
55. Having heard the learned Counsel for the parties and considering the evidence, on-record, we find that the occurrence, in the present case, involves five stages.
- 55.1. Firstly, there was a conspiracy to abduct the deceased by Mr. Selim uddin, Mr. Hifjur Rahman, Mr. Rehan, Mr. Fuzur alias Munna, Mr. Kamal Hussain and Mr. Rajani Talukdar and accordingly Mr. Rajani Talukdar, on 19.11.2011, in the evening, called the deceased and thereafter at about 8.30 P.M. handed him over, in unconscious state, to Mr. Selim uddin, Mr. Hifjur Rahman, Mr. Rehan, Mr. Fuzur alias Munna, Mr. Kamal Hussain, who took him in a motorcycle. From this stage, Mr. Rajani Talukdar left the company of the deceased and other accused persons.
- 55.2. Secondly, the said persons excluding Mr. Rajani Talukdar kept the deceased in their custody and they killed him by using firearms.

55.3. Thirdly, Mr. Hifjur Rahman, with the help of Mr. Abdul Karim, Mr. Raju Ahmed, Mr. Riju Ahmed, Mr. Oli, Mr. Helal, Mr. Babul Mia alias Ali (PW-23) and Mr. Minu disposed of the dead body by burying the same and they had concealed his wearing clothes and the firearms.

55.4. Fourthly, demand for money towards release of the deceased was made and the informant paid Rs. 12 Lakhs at Ladrombai, in the State of Meghalaya.

55.5. Fifthly, Rs. 97,000/- was recovered from Mr. Selim Uddin after his arrest at Belonia in the State of Tripura and Rs. 6,88,500/- was recovered from his brother, namely, Mr. Selim Uddin, who was arrested from the State of Meghalaya.

56. From the record, it appears that in the present case, there is no direct evidence in the form of eye witness. The entire prosecution case rests on circumstantial evidence, extra judicial confession, made by accused Mr. Rajani Talukdar, before the informant i.e. PW-1 and Mr. Hifjur Rahman before his wife (PW-2) and the evidence of approver (PW-23) Mr. Babul Mia alias Ali, who was also a co-accused.

57. There is no dispute that the dead body of the deceased, who was found, missing from the evening of 19.11.2011, was recovered, on 25.11.2011, at about 11.30 A.M., after digging the burial place at Dumorgol, within Monosangam area. The dead body was found in a decomposed state, indicating that the death was caused much earlier to the date of recovery of the dead body. The Circle Officer, Badarpur (PW-16), conducted the inquest of the dead body. He has exhibited the Inquest Report as Ext. No. 6 and his signature thereon, as Ext. No. 6(2).

58. Dr. Y.N. Singh (PW-17), stated that on 25.11.2011, he received the dead body of the deceased in connection with Badarpur P.S. Case No. 181/2011 and accordingly, he, along with Dr. B.C. Roymedhi, conducted the post mortem examination. He stated that the dead body was in decomposed state, partially saponified and that rigor mortis had passed off. The said Medical Officer found the following injuries, in respect of the dead body.

"Injury:

1. Bullet entry wounds, 1 CM x 1 CM in diameter, with inverted lacerated margin and with abraded collar present over posterior and lower part of left parietal region of scalp and present 1.8 CM above the upper margin or pinna of left ear. Decomposed brain matter coming out through wound. the underlying parietal bone also shows same size entry wound with beveled (sic) margin on inner table of skull. Bloods clots firmly adherent in the wound. The bullet passed through the meninges and brain transversely from left to right and passed out through an wound on the right parietal bone and right parietal region of scalp marked as Exit wound of bullet numbered.

2. With beveling on outer table of right parietal bone with communitied fracture around the exit. the exit wound on scalp measures 1.2 CM X 1 CM and right

parietal scalp 4 CMs above the upper margin of pinna of right ear. The margin lacerated and everted. Brain and meninges protruded through the wound.

3. Dorsum of right hand bruised on mid part, 6 x 5 CM in size. on dissection-extra vacation of blood found. (Suggest defence wound).

Under Scalp

Scalp/hairs can easily be pulled out. Scalp was found decomposed. Injury as described.

Under Skull

Through and through bullet injury present.

Vertebrae was found healthy. Membrane - injured through bullet wound and found decomposed and pale. Brain was found decomposed and liquefied (pale). Spinal cord was not examined. Liver, spleen and kidneys- decomposed. Bladder was found decomposed and empty. Organs of generation, external and internal were found decomposed. Only prostate gland found healthy."

The said Medical Officer opined that instantaneous death was caused due to the injury caused on the head, which was ante mortem in nature. He stated that the injury No. 3 was caused by blunt impact and that the injury Nos. 1 and 2 were the entry and exist wounds of bullet, fired from firm arm and homicidal in nature.

According to the Medical Officer, the approximate time of death was 5 to 6 days. He has exhibited the post mortem report as Ext. No. 16 and his signature thereon as Ext. No. 16(1). He has also exhibited the signature of Dr. B.C. Roymedhi as Ext. No. 16(2), which he knew.

59. From the said medical evidence, which remained uncontroverted, on material point, it is clearly found that the deceased died due to one gunshot injury and no other fatal injury was found on the dead body. Hence, it is clearly found that the death of the deceased was a homicidal one and he died due to the bullet injury, fired on his head, which is a very vital part of a human body. No other injury suggesting any kind of torture or brutality was noticed.

60. As the post mortem examination was done on 25.11.2011 i.e. on the date of recovery of the dead body, considering the time of death, given by the Medical Officer, there is no difficulty in understanding that the death of the deceased was caused on the very night of his abduction i.e. on 19.11.2011. It has also been established that the death of the deceased was caused with a firm arm that too by a single shot, fired on his head. The extra judicial confession made by accused Mr. Hifjur Rahman, which we will discuss later, also suggest that the deceased was killed on the night of his abduction itself i.e. on 19.11.2011.

61. Now, the question is under what circumstances the deceased met with his death and who had killed him?

The father of the deceased, who deposed as PW-1, stated that his said son was

missing from the evening of 19.11.2011 and the last call was received from him at about 7.34 P.M.

PW-1 stated that, on 20.11.2011 i.e. the next day, he approached Rajani Talukdar, who was a friend of the deceased, and Rajani Talukdar told him that the deceased was with him till 8 P.M., on the previous night. This statement of PW-1 remained unchallenged.

62. Mr. Kamal Uddin, an independent witness, deposing as PW-4 stated that, on the fateful evening i.e. on 19.11.2011 (Saturday), at about 7.15 P.M., while he was returning home from his shop, he found the deceased and Mr. Rajani Talukdar moving, in their respective motorcycles, towards Karimganj. He stated that, on the next day, he came to know that the deceased was missing.

He further stated that, coming to know about the missing of the deceased, he collected the phone number of PW-1 and informed him, telephonically, that he had seen Mr. Rajani Talukdar and the deceased going towards Karimganj. Though this witness was duly cross examined, on behalf of the defence, his said evidence remained undemolished.

63. Mr. Forid Uddin, PW-5, also stated that, on 19.11.2011, in between 7. 45 P.M. to 8 P.M., while reaching Aurangabad, near BRTF Office, he saw both deceased and Mr. Rajani Talukdar waiting on the road and, on being asked by him, the deceased had replied that there was some problems with the bike of Mr. Rajani Talukdar. This witness was also cross-examined by the defence, but his said evidence could not be shaken.

64. From the said indisputable evidence, given by PW-4 and PW-5, it is clearly found that the deceased was found in the company of Mr. Rajani Talukdar in between 7 to 8 P.M. on the previous evening i.e. on the very day of missing.

65. The said evidence, given by PWs-4 and 5, supports the evidence given by PW-1 that Mr. Rajani Talukdar had told him that the deceased was with him till 8 P.M., on the previous night. PW-1 also corroborated the said evidence of PW-4 and PW-5 by stating that they had informed him that they had seen the deceased with Mr. Rajani Talukdar, on the previous evening. Hence, there is sufficient force and corroboration in the evidence of PW-1, PW-4 and PW-5 showing very firmly that the deceased was in the company of Mr. Rajani Talukdar on the fateful evening.

Therefore, in view of the said unimpeachable evidence, it has been established that the deceased was last seen in the company of the Rajani Talukdar, on the evening of his missing at about 7 to 8 P.M. Hence, the last seen theory, propounded by the prosecution has been found fully established.

66. In the case of State of West Bengal Vs. Mir Mohammad Omar and Others etc., AIR 2000 SC 2988 : (2000) CriLJ 4047 : (2000) 9 JT 467 : (2000) 6 SCALE 148 : (2000) 8 SCC 382 : (2000) 2 SCR 712 Supp : (2000) AIRSCW 3230 : (2000) 6 Supreme 172 , the Apex Court dealt with a case of abduction and

murder. In the said case, deceased Mahesh was abducted by the accused persons and subsequently he was found dead. The trial Judge convicted them under Section 364 read with Section 34 IPC but not for murder. The acquittal of the accused persons of the charge of murder was challenged before the High Court. A Division Bench of the Calcutta High Court rejected the State's appeal against the acquittal in the murder and reduced the sentence to a short term. The State as well as the convicted persons filed appeals before the Supreme Court. The appeal filed by the State was against the acquittal in the murder charge, while the convicted persons challenged the conviction recorded against them. The Supreme Court, while allowing the appeal, preferred by the State, and maintaining the conviction under Sections 364/34 IPC, convicted the appellant-accused of the offence under Section 302 read with Section 34 too and imposed on each of them a sentence of imprisonment for life. In the above referred case, Apex Court observed:--

"The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercised a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process the Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case."

The Court also observed:

"when it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody."

67. Referring to the decision held in the case of Shambu Nath Mehra Vs. The State of Ajmer, AIR 1956 SC 404 : (1956) CriLJ 794 : (1956) 1 SCR 199 , the

Apex Court quoted in the State of W.B. v. Mir Mohammad Omar (supra), the following observation made in the case of Sambhu Nath Mehara (supra):

"This lays down the general rule that in criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience."

68. In view of the above proposition of law, as the deceased was last seen in the company of Mr. Rajani Talukdar, it was his burden to explain as to what had happened to the deceased and as to how he met with his death, inasmuch as the dead body of the deceased was disinterred on 25.11.2011, in decomposed state i.e. after he was taken into their custody.

69. From the evidence of PW-1, it is found that Rajani Talukdar had disclosed that a conspiracy was made by Mr. Selim Uddin and Mr. Rehan for abducting the deceased and accordingly, he, on being, persuaded to participate in the said conspiracy with the promise that he would be paid rupees two lakhs, on the fateful day, at about 12 noon, Mr. Rajani Talukdar had met Selim Uddin, Rehan, Fuzur alias Munna and two others in a restaurant, wherein they prepared the plan for abduction and Rs. 1500/- was given to Mr. Rajani Talukdar, as advance, with a bottle of Corex, mixed with some intoxicated tablets.

70. PW-1 also stated that Mr. Rajani Talukdar had further disclosed that he called the deceased for going to Badarpur for purchasing garments and that while proceeding, in their respective motorcycles, he changed his mind and stopped on the pretext of consuming cough syrup (Corex), which was provided to him by Mr. Selim Uddin and that the deceased, after consuming the same, became unconscious, at about 8.30 P.M.

As stated by PW-1, Mr. Rajani Talukdar also stated that he had informed Mr. Selim Uddin alias Shilu and Hifjur Rahman alias Hiju, and within 5 (five) minutes, they, along with Mr. Rehan, Mr. Fuzur alias Munna and Mr. Kamal Hussain, had arrived there in a Maruti Car and carried away the deceased, in unconscious state, in the said Maruti Car.

71. PW-1 further stated that Sri Rajani Talukdar told that Mr. Selim Uddin, after taking the deceased in their custody, had asked him to go home and get ready for proceeding to Ladrombai (in Meghalaya) for receiving the payment and accordingly, he had left for his home in a private vehicle.

72. PW-1 was thoroughly cross-examined by the defence. He denied the suggestion that Mr. Rajani Talukdar did not tell that the accused Selim Uddin, Hifjur, Rehan, Fuzur alias Munna and Kamal Hussain were in the car. Except putting some suggestions, which were denied by PW-1, no major contradictions, belying the said evidence of PW-1, regarding the extra judicial confession could

be proved. Hence, the evidence of PW-1 regarding the said extra judicial confession, which was inculpatory, remained undemolished.

73. From the evidence of PW-1 and PW-21 (I.O.), it is found that the mobile phone of the deceased was found in the house of Mr. Rajani Talukdar. The finding of the mobile phone in possession of Rajani Talukdar, after the occurrence, is a strong incriminating circumstance, indicating the culpability of Mr. Rajani Talukdar. That apart, the evidence of PW-4 and PW-5 that they had seen the deceased in the company of Mr. Rajani Talukdar, indicates Mr. Rajani Talukdar's knowledge about the fate of the deceased. Therefore, there is no difficulty in believing that Mr. Rajani Talukdar had persuaded the deceased to go with him and that he had handed over the deceased to Selim Uddin, Hifjur Rahman, Rehan Uddin, Fuzur alias Munna and Kamal Hussain in unconscious state.

74. From the evidence of PW-12, an independent witness and PW-21 (I.O.), it is also found that a Maruti 800 Car was found in abandoned condition, on the road near Nirolabasti. The finding of the said Maruti Car, in abandoned condition, substantiates the evidence of PW-1 that Mr. Rajani Talukdar had told him that the deceased was taken in a Maruti 800 Car, in unconscious state, by the said accused persons, on being handed over by Rajani Talukdar.

75. As discussed earlier, the present case rests on circumstantial evidence, the extra judicial confession of accused Mr. Rajani Talukdar and Mr. Hifjur Rahman and the direct evidence of the approver (PW-23) i.e. accused Mr. Babul Mia alias Ali, PW-4 and PW-5.

76. In the present case, as indicated earlier, it has been established from the evidence of the PW-1 that accused Rajani Talukdar made extra judicial confession before the PW-1 regarding abduction of the deceased. The said confession was retracted by its maker at a belated stage i.e. at the time of giving statement under Section 313 Cr.P.C. Mr. Hifjur Rahman also made extra judicial confession, by telling his wife (PW-2) that he had killed a boy from Bhanga. In his statement under Section 313 Cr.P.C., Mr. Hifjur Rahman, while admitting his relationship with PW-2, did not specifically deny her evidence that he had made the said statement before his wife. Of course, he stated that the incriminating part of her evidence was false and that at the relevant time, he was at Golaghat i.e. not in the place of occurrence. In view of his failure to specifically deny the said disclosure, his wife's (PW-2) evidence regarding the said confession is found to be trustworthy and believable. As the said accused had taken the plea of alibi, it was his burden to substantiate the said plea by abducting evidence. But, he failed to do so.

Hence, in view of the forceful evidence, given by his wife (PW-2), it can't be held that he was not present in the place of the occurrence at the relevant time. The evidence of PW-23 also indicates his presence in the place of occurrence.

77. As held in the case of Subramaniam (supra), a confession should be retracted at an earliest possible opportunity and not at a belated stage. A belated

retraction loses its effectiveness due to delay.

78. In the case of Sahib Hussain alias Sahib Jan (Supra), the conviction was based on extra judicial confession. Accepting the extra judicial confession, the Supreme Court held "extra judicial confession though a weak type of evidence, can form the basis for conviction if the confession made by the accused is voluntary, true and trustworthy. In other words, if it inspires confidence, it can be acted upon.

79. In view of the said principle of law, we are to examine as to whether the extra judicial confession is reliable and believable to be true. As stated by PW-1, Mr. Rajani Talukdar made the said statement before he was arrested by Police. This indicates that he made the said confession before he had fallen in the custody of Police. There is nothing, on-record, to show that the confession was made either in Police custody or in presence of Police or that he was forced to make any false statement.

80. Further, the evidence of PW-4 and PW-5 lead to find that they had seen the deceased in the company of Rajani Talukdar on the fateful evening i.e. the period which the deceased was missing.

81. As the PW-1's son had gone missing, he was certainly in enormously distressed state of mind, with the only hope of finding out his son alive. There is nothing on-record to show that he had any ill feeling or previous grudge against Mr. Rajani Talukdar requiring him to falsely implicate Mr. Rajani Talukdar with the incident in question. Considering the attending facts and circumstances, it was quite but natural for Mr. Rajani Talukdar to disclose the fact known to him. Therefore, we find sufficient force in the evidence of PW-1 to believe that Mr. Rajani Talukdar had made the extra judicial confession voluntarily and truly and as such, same is found to be trustworthy. Hence, the extra judicial confession, though retracted, at a belated stage, is found to be acceptable.

82. In view of the above, we have found that there is sufficient evidence to show that, Sri Rajani Talukdar, Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Fuzur alias Munna and Mr. Kamal Hussain had entered into a conspiracy to abduct the son of PW-1 i.e. the deceased and accordingly in pursuance to the said conspiracy, Rajani Talukdar made him unconscious, by luring him to take the intoxicated corex and then reported such state of affairs to the other conspirators. Being so informed on 19.11.2011, at about 8.30 P.M., Mr. Selim Uddin, Mr. Hifjur, Mr. Rehan Uddin, Mr. Fuzur alias Munna and Mr. Kamal Hussain came to Mr. Rajani Talukdar and had taken the deceased into their custody, in unconscious condition and took him to some unknown destination in a blue colour Maruti Car.

On 20.11.2011, at about 5.45 P.M. and thereafter, several phone calls, demanding ransom, were received by PW-1, who paid an amount of rupees twelve lakhs with the hope that his son would be released alive, but the dead body of the deceased was recovered, on 25.11.2011, in decomposed state, from

a place called Dumorgol in the Manosangam area, wherein the same was buried.

83. The seizure of the Mobile (Cell) phone of the deceased from the house of Mr. Rajani Talukdar is also incriminating evidence indicating his involvement.

84. In the present case, the accused Mr. Rajani Talukdar and Mr. Hifjur Rahman had made the said confessions before their arrest and they waited to retract the same till the time of their examination under Section 313 Cr.P.C. In fact, Hifjur Rahman did not deny that he had disclosed, before his wife, about the killing of a boy, on the fateful night.

PW-1's and PW-2's evidence, regarding extra judicial confession remained unshaken. There is nothing, on-record, to show that PW-1 and PW-2 had any reason or grudge to claim falsely that they had confessed before them implicating them with the crime under consideration. Hence, the belated retraction has no value.

85. In view of the above, it can be safely believed that the deceased, prior to his disappearance, was in the company of Mr. Rajani Talukdar. Therefore, considering the evidence of the PW-4 and PW-5, coupled with the recovery of the Cell Phone of the deceased from the house of Mr. Rajani Talukdar and the subsequent attending circumstances leading to the discovery of the dead body and other incriminating evidence i.e. recovery of money, guns, clothes of the deceased, we find sufficient force in the evidence of PW-1 and PW-2 to believe that Mr. Rajani Talukdar and Mr. Hifjur Rahman had made the said extra judicial confession before PW-1 and PW-2.

86. In view of absence of any grudge or ulterior motive, on the part of PW-1, against Mr. Rajani Talukdar and also on the part of PW-2 against her husband, we are inclined to believe that Mr. Rajani Talukdar and Mr. Hifjur Rahman had voluntarily and truly made the extra judicial confession indicating their involvement along with Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Fuzur alias Munna and Mr. Kamal Hussain to effect that they, in pursuance of their conspiracy to abduct the deceased for extortion of money from his father (PW-1), had abducted the deceased and confined him.

87. The said extra judicial confession made by Mr. Rajani Talukdar explains the subsequent circumstance that had fallen on the deceased, who was then in an unconscious state.

88. There is nothing, on record, to find that, during the intervening period i.e. from the time of taking the deceased by the appellants, namely, Mr. Selim Uddin, Mr. Hifjur, Rehan, Mr. Fuzur alias Munna and Mr. Kamal Hussain, till discovery of his dead body, the deceased had gone into the custody of any person or persons other than Mr. Selim Uddin, Mr. Hifjur, Rehan, Mr. Fuzur alias Munna and Mr. Kamal Hussain. Hence, taking into confidence the extra judicial confession, made by Mr. Rajani Talukdar, it can be safely concluded that the deceased died in the custody of Selim Uddin, Hifjur Rahman, Rehan Uddin, Fuzur alias Munna and

Kamal Hussain and that they had made arrangement for concealing the dead body as well as his wearing garments.

89. Musstt. Nazima Begum, wife of appellant Mr. Hifjur Rahman, deposing as PW-2, stated that, on 19.11.2011, her husband Mr. Hifjur Rahman, at about 1 P.M., had received a telephone call from Mr. Selim Uddin, asking him to go to Karimganj, following which, he left home for Karimganj and did not return till the next morning. According to PW-2, though, she also expressed her desire to go with him for visiting her parent's house, he refused to take her with him and on his return, in the next morning, he told her that they had killed one boy from Bhanga area. She further stated that her said husband went out, after taking breakfast, and came back for taking lunch and thereafter, he, again, left home and did not return till the morning of 21.11.2011.

She further stated that her husband, after his return, met his father Abdul Karim, brother Raju Ahmed and accused Babul Mia alias Ali (PW-23) and discussed about shifting of the dead body from a place near the house of Moriom Bibi to Dumorgol.

90. According to PW-2, Mr. Babul Mia alias Ali (PW-23), Mr. Hifjur Rahman, Mr. Karim and Mr. Raju Ahmed went out in the evening by carrying pieces of bamboo, rope and dao. She also stated that her husband did not return home on Tuesday and Wednesday and that, on 24.11.2011, Police from Badarpur Police Station visited her house and that she had told the Police about the said incident. She, stated that she gave statement before the Magistrate and exhibited her statement as Ext. 5 and her signatures, thereon, as Exts. 5(1) and 5(5). She denied the suggestion that she did not state before the Police and the Magistrate that she had heard the discussion, made by the said accused persons. Though this witness was cross-examined, on behalf of the defence, no major contradiction could be elicited to render her said evidence unbelievable.

She being the wife of Mr. Hifjur Rahman (accused), there could be no reason for her to falsely implicate her husband, her brother-in-law and father-in-law with the crime aforesaid. Her said evidence, regarding the disclosure made by her husband and his subsequent conduct i.e. leaving his house frequently from 19.11.2011, keeping away from home, even during the night and the evidence of the approver (PW-23), forcefully indicate his involvement with the said crime.

91. Undisputedly, the deceased was from the Bhanga area. Hence, PW-2's statement that her husband had told her that a boy from Bhanga was killed and that they made arrangement for shifting the dead body to Dumorgol area, wherefrom the dead body of the deceased was recovered, on 25.11.2011, sufficiently indicate the involvement of Mr. Hifjur Rahman with the killing of the deceased, because the deceased was from Bhanga and he remained missing from the evening of 19.11.2011. There is no evidence to show that any other boy from Bhanga was killed on that day. As discussed earlier, the said disclosure, made by Mr. Hifjur Rahman can be accepted as extra judicial confession.

92. Ms. Moriom Bibi (PW-3), mother of Mr. Hussain Ahmed (one of the appellants), stated that Mr. Hifjur Rahman, his brother Raju Ahmed and Mr. Babul Mia alias Ali (PW-23), on the night of the occurrence i.e. on Saturday night, at about 12 O" Clock, forcefully took away her son Mr. Hussain Ahmed from his house by threatening him with a pistol and thereafter, she heard sound of gun fire. She also stated that she went to the house of Mr. Abdul Karim i.e. the father of Hifjur Rahman and reported him that his son, along with others, had killed some person. But, according to PW-3, Mr. Abdul Karim replied that Mr. Hifjur Rahman was not his son. This statement, made by Musstt. Moriom Bibi, stood corroborated by PW-2. She denied the suggestion that she did not hear the sound of gun fire. Despite cross examination, made by defence, except eliciting certain omissions, no major contradiction, discrediting her evidence, on material point, could be brought out.

93. From the said evidence of PWs- 2 and 3 and the extra judicial confession of Mr. Rajani Talukdar, it clearly transpires that Mr. Hifjur Rahman, Mr. Raju Ahmed, Mr. Babul Mia alias Ali (PW-23) and Mr. Abdul Karim were involved with the shifting of the dead body and Mr. Hifjur Rahman also confessed before his wife (PW-2) by telling her that he had killed a person from Bhanga. The recovery of the guns and the knife from the place of concealment, on being led by Mr. Hifjur Rahman, clearly indicates the involvement of Mr. Hifjur Rahman.

94. The evidence of PW-2 that, on Monday i.e. on 21.11.2011, Mr. Hifjur Rahman, Mr. Abdul Karim, Mr. Raju Ahmed and Mr. Babul Mia alias Ali had made discussion for shifting the dead body to Dumorgol from near the house of Ms. Moriom Bibi and that, in the evening, all of them had gone out with pieces of bamboo, rod and dao for shifting the dead body, has been corroborated by co-accused Babul Mia alias Ali (PW-23), who deposed as approver.

95. Lending support to the evidence of PW-2, Mr. Babul Mia alias Ali (PW-23), as approver, stated that, on being forced by Mr. Hifjur Rahman, Mr. Abdul Karim, Mr. Raju Ahmed and Mr. Riju Ahmed, he, along with the said persons, and Mr. Oli, Mr. Helal and Mr. Minu went near the fishery of the brother of Mr. Abdul Karim and found a dead body, wrapped up with bamboo mat and that they had carried the dead body towards Kerorkuna of Haldiala tilla land and buried the same. He further stated that the said items i.e. bamboo, bamboo mat, polythene were thrown towards the Eastern side and all of them had taken bath in the fishery of Mr. Hazi Abdul Rouf. He further stated that Mr. Hifjur Rahman had buried the pati (a mat) and a polythene packet in the pond and left the pieces of bamboo near the water. He also stated that Mr. Hifjur Rahman had concealed two guns and a knife near a tree.

PW-23 further stated that, on being asked, by him, about the identity of the dead body, Mr. Hifjur Rahman and Mr. Abdul Karim had told him that, that was the dead body of Mr. Selim Uddin from Bhanga. He further stated that, subsequently, he came to know that the dead body was of Mr. Naj i.e. the deceased son of Tofail Ahmed (PW-1). He admitted that, during the investigation, he led the

Police to the place of concealment of the polythene packet in the pond and after opening the packet found a pant, used by the deceased. Though this witness was cross-examined, on behalf of the defence, no major contradiction could be elicited to render his evidence unreliable. His said evidence, on material points, more particularly, regarding involvement of the said accused persons remained undemolished.

96. In the case of Mrinal Das (Supra) the Supreme Court discussing the evidentiary value of approver held that though conviction on the basis of approver's evidence is not illegal merely because it proceeds on the uncorroborated testimony of an approver, yet the universal practice is not to convict upon the testimony of accomplices unless it is corroborated in material particulars. Under Section 133 accomplice is a competent witness. However, the first initial and essential question is whether even as an approver the accomplice is a reliable witness.

97. As held in the said case in order to rely on the evidence of approver he should be found to be reliable and there should be sufficient corroboration to his evidence on material point.

98. In the present case though PW 23 is an approver and his evidence is the only direct evidence regarding the concealment of the dead body, wearing clothes of the deceased and the arms of Mr. Hifjur Rahman, the subsequent recovery of the dead body from the place of burial, the recovery of the pant of the deceased from the place of concealment i.e. the pond and the recovery of the arms and ammunition from near a tree, on being led by appellant Mr. Hifjur Rahman, we, find sufficient corroboration in the evidence of the PW 23. That apart, PW-2's evidence, as discussed earlier, lends sufficient support to the evidence given by PW-23. Therefore, the evidence of approver i.e co-accused (PW-23) is found to be reliable and trustworthy.

99. The recovery of the said arms, with a live cartridge, on being led by Mr. Hifjur Rahman and the evidence of PW-23, that Hifjur Rahman, after burial of the dead body, he had hidden the said arms and the medical evidence that the deceased died due to gunshot injury, clearly indicate the possession of the arms by Mr. Hifjur Rahman and also the killing of the deceased by using fire arms.

100. Mr. Khirod Baishya (PW-21), who was one of the Investigating Officers, connected with the arrest of Mr. Hifjur Rahman and recovery of the arms and ammunitions, stated that the arms, which were used for killing the deceased, was concealed by Hifjur Rahman near a tilla land and that, he led the Police to a cham tree, wherefrom one factory made pistol, one live cartridge, one air gun and one knife, wrapped up with a big size polythene packet, were recovered and seized vide Ext. 9. He exhibited the seizure list and his signature thereon as Ext. Nos. 9 and 9(2) respectively.

The said seizure of the arms, at the instance of Mr. Hifjur could not be negated by the defence.

101. In the case of Rajib Phukan (Supra) a Division Bench of this Court has held that in a case under Section 27 of the evidence Act, though it is not material as to whether the statement has been recorded in the form of questions and answers or not, the court must know as to what exactly the accused had stated before the police while he was in such custody so as to enable the court to hold as to what statement of the accused had actually led to the discovery of the fact.

102. In view of the above, it can be safely concluded that the said arms and ammunitions were recovered on being led by Mr. Hifjur Rahman. Hence, the fact that the discovery of the weapons, were made at the instance of Mr. Hifjur Rahman, firmly indicates his involvement with the crime.

The Armurer, who examined the seized arms said that the said pistol was a serviceable one and the cartridge was a live cartridge. This indicates that the said pistol was used in causing the death of the deceased.

103. Mr. Jalal Uddin (PW-10), who was a witness to the seizure of the said arms, stated that he accompanied, when Hifjur Rahman had led the Police to the discovery of the said arms from near a cham tree.

PW-10, who was an independent person, has supported the said evidence, given by PW-21. He has exhibited the seizure list as Ext. 9 and his signature, thereon, as Ext. 9(1). He has also exhibited the big pistol as Material Ext. 4, the small pistol as material Ext. 5, the ammunition as material Ext. 6 and the knife as material Ext. 7. He stated that the said material exhibits were available in the Court, at the time of giving evidence.

104. The said evidence given by PW-21 and PW-10 could not be shaken during their cross-examination. There is sufficient corroboration in the evidence of PW-21 and PW-10 regarding recovery of the said arms, on being led by Mr. Hifjur Rahman.

105. The above discussed undemolished evidence of PW Nos. -10 and 21, coupled with the evidence of PW-23, sufficiently indicate that the accused Mr. Hifjur Rahman had led the Police to the discovery of the said arms and ammunitions.

106. From the evidence of PW-23, it transpires that the said arms and the knife were with Mr. Hifjur Rahman, at the time of shifting and burring the dead body and that he had concealed the same. Therefore, it is found that Hifjur had carried the said arms and ammunition.

Now, the question is, for what purpose, he had carried the said arms and ammunition.

107. As revealed from the above discussed medical evidence, the deceased died due to one bullet injury, shot on the head.

108. PW-3 stated that, on the fateful evening, she heard the sound of gun fire. This lends support in favour of the evidence of PW-2 that her husband Hifjur

Rahman had told her that a boy from Bhanga was killed. As revealed from the evidence, on-record, the boy from Bhanga was none other than the deceased, who was handed over by Mr. Rajani Talukdar to Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Fuzur alias Munna and Mr. Kamal Hussain, on 19.11.2011, at about 8.30 P.M. PW-23 also stated that Mr. Hifjur Rahman had carried the arms, which he had concealed after disposing the dead body.

109. In view of the above stated evidence, given by PW 23 and the said circumstantial evidence, we find sufficient materials to hold that appellants Mr. Hifjur Rahman, Mr. Abdul Karim, Mr. Raju Ahmed, along with PW-23 and Mr. Riju Ahmed, Mr. Oli, Mr. Helal and Mr. Minu had shifted the dead body from the place of crime and buried the same, concealed the wearing clothes of the deceased and the arms and ammunition, carried by Mr. Hifjur Rahman for causing disappearance of evidence of the crime.

110. Considering the entire facts and circumstances of the case and the said recovery of weapons, coupled with the evidence, given by PW-23, regarding concealment of the arms, by Mr. Hifjur, it can be believed that Mr. Hifjur Rahman had illegally possessed the said arms.

111. As surfaced from the above discussed evidence, after the deceased was taken by Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Fuzur alias Muna and Mr. Kamal Hussain from Mr. Rajani Talukdar, in unconscious state, his dead body, with one bullet injury, was recovered on 25.11.2011 from its place of burial, wherein Mr. Hifjur Rahman, Mr. Kamal Hussain, Mr. Raju Ahmed, PW-23 and others had buried the same.

112. From the above evidence, it has been established that Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Fuzur alias Munna and Mr. Kamal Hussain had kept the deceased in their custody from the evening of 19.11.2011. There is nothing to find that, during the intervening period from the time of taking into custody of the deceased and finding of his dead body, there was intervention by any other person. From PW-23's evidence, it is found that Mr. Hifjur Rahman, who also took the deceased in their custody along with Mr. Selim Uddin and others, when the deceased was alive, had participated in concealment of the dead body and the arms.

113. In view of the above, applying the last seen theory, it can be safely concluded that the deceased died while in the custody of Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Kamal Hussain, Mr. Fuzur alias Munna. Therefore, it was their burden to explain as to what had happened to the deceased, after they had taken him into their custody. Because, in the attending circumstances, they were the best persons to say about the fate of the deceased. Their simple denial, in the teeth of the said circumstances, will not help them to escape the liability. But, they failed to put forward any explanation. In view of their failure to put forward any explanation, the above discussed evidence, given by PW-2, PW-3, PW-23 and the extra judicial confession, which is found to be

reliable and voluntary, forcefully show their involvement with the crime.

114. The answer to the question as to who had killed the deceased, would be, in the absence of any other explanation regarding the cause of death, that the said persons, including Mr. Hifjur Rahman, who had taken the deceased into their custody had killed the deceased.

115. From the evidence of PW-21, it is found that Mr. Hifjur Rahman had told that the deceased, after being taken into their custody, became unmanageable after regaining his sense and as such, on being directed by Mr. Selim Uddin, Mr. Hifjur Rahman had killed him by using the fire arm. PW-9 Mr. Mokbul Haque, an independent witness, also stated that, in the Police Station, he heard accused Mr. Kamal Hussain disclosing that Naj i.e. the deceased could identify them and as such Mr. Selim Uddin gave his pistol to Mr. Hifjur Rahman, by which Hifjur had killed the deceased.

We are aware that the statement, made by an accused before the Police or in the custody of Police, except leading to discovery of fact, is not admissible as evidence. But the said statements alleged to be made by the said accused persons throws some light regarding the cause of causing the death of the deceased. This implies that the deceased was killed to avoid identification and such other complication following the abduction.

116. In view of the above discussion, we find sufficient evidence to believe that the deceased was killed by the said persons by using firearms and that the dead body and the firearms were concealed in the said manner.

The PW-2's and PW-3's evidence, coupled with the medical evidence, implies that the deceased was killed on the very night of abduction, i.e. prior to demanding ransom. The killing of the deceased, who was taken in unconscious state, immediately after such taking, in the absence of any other evidence, inspire confidence to believe that the said abductors i.e. Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Kamal Hussain and Mr. Fuzur alias Munna had killed the deceased, in order to avoid identification and other complications, which would have arisen after the victim's regaining the sense.

117. PW-1 i.e. the father of the deceased, stated that, on the next evening, he received demand call and while negotiating with the caller, he could hear and recognize the voice of Mr. Selim Uddin, who was heard giving instruction to the said caller. According to PW-1, Mr. Selim Uddin, being a person from the same locality, was well known to him, for which he could recognize his voice. Such evidence of PW-1 remained undemolished. Mr. Selim Uddin, being a well known person of the same locality, PW-1's evidence, regarding his recognising the voice of Mr. Selim Uddin can't be disbelieved. Hence, it transpires that Mr. Selim Uddin was also one of the abductors of the deceased and he was involved in making demand for ransom. That apart, sufficient corroboration is found in the extra judicial confession, made by Mr. Rajani Talukdar regarding Mr. Selim Uddin's involvement with the abduction of the deceased. The said evidence of PW-1

regarding the extra judicial confession of Mr. Rajani Talukdar and recognition of voice of Mr. Selim Uddin remained far from being demolished.

118. PW-2, wife of Mr. Hifjur Rahman, also stated that, on the fateful day, at about 1 P.M. i.e. prior to the occurrence, Mr. Selim Uddin had called her said husband and on being so called, he had left home at about 4 P.M. and did not return till the next morning.

Her husband's refusal to take her with him and his failure to return home till next morning, coupled with the extra judicial confession made by him regarding killing of person and the evidence of PW-23, speaks volume about the involvement of Mr. Hifjur Rahman and Mr. Selim Uddin and others in the killing of the deceased.

119. PW-20, Mr. Samsul Hoque, S.I. of Police, who was one of the Investigating Officers, stated that he came to know from S.I. Nabendu Das (PW-19) that Mr. Selim Uddin was arrested at Belonia, Tripura and that he had told that his brother Mr. Sultan Uddin, who used to reside at Ladrombai in the State of Meghalaya was given Rs. 7,00,000/-. On receipt of the said information and on being directed by the O.C. Mr. Khirod Baishya (PW-21) of Badarpur Police Station, he went to Ladrombai, Meghalaya and, after searching the house of Mr. Sultan Uddin, recovered an amount of Rs. 6,88,500/- vide seizure list (Ext. No. 7. He has exhibited his signatures as Ext. 7(4) to 7(7).

120. From the evidence of PW-1, it has already been found that he proceeded to Mandihati (in Meghalaya) and had left the money near a drain, as demanded by the miscreants.

The arrest of Mr. Sultan Uddin, at Ladrombai (in Meghalaya) along with such a huge amount, indicates that such money was a part of the ransom, paid by PW-1. Though Mr. Sultan Uddin claimed that the said amount was his own money, he could neither explain the source of the money, nor justify as to why he kept in his house such a huge amount, in cash. Fact remains that the said money was found after the abduction of the deceased and payment of money by the PW-1. The recovery of the said amount from the brother of Mr. Selim Uddin, (who is involved with the abduction of the deceased), and that too after payment of money by PW-1, as per demand of the abductors, sufficiently lead to the conclusion that the same was a part of the amount, paid by PW-1.

121. He also tracing the tower location of Cell Phone No. 9612969568 of Mr. Selim Uddin on 04.12.2011 i.e. the date on which Mr. Hifjur Rahman was arrested, Mr. Selim Uddin was also arrested at Belonia (in the State of Tripura) by S.I. Mr. J. Dutta (PW-22) and that an amount of Rs. 97,000/- was recovered from his possession.

122. S.I. Mr. J. Dutta, deposing as PW-22, stated that, on being directed by the superior authority, he proceeded to Belonia, along with Mr. Abdul Rouf (PW-11), Mr. Matabuddin (local person) and three other armed Police personals for Belonia

and arrested Mr. Selim Uddin. He also stated that an amount of Rs. 97,000/- was found in his possession, which was seized vide Ext. 10, in presence of the witnesses. He stated that a mobile set having dual Sim including Sim No. 9612969568 was seized from Mr. Selim Uddin. He has exhibited such seizure list as Ext. 10 under which the money and the mobile set were seized and his signature thereon was exhibited as Ext. 10(2). He has also exhibited the mobile set as Material Ext. 9. He further stated that, on being so arrested, Mr. Selim Uddin was taken to Karimganj Police Station and thereafter, he was handed over to O.C., Badarpur Police Station.

123. Supporting the evidence of PW-22, Mr. Abdul Rouf (PW-11), an independent witness, stated that he and Mr. Matabuddin accompanied the Police party from Karimganj Police Station and reached Belonia. He stated that Mr. Selim Uddin was arrested by Police from a construction site and that money, along with a bundle, containing Rs. 47,000/- was found in possession of Mr. Selim Uddin. He has exhibited the seizure list as Ext. 10 and his signature, thereon, as Ext. 10(1). This witness, supporting the evidence of PW-22, stated that Mr. Selim Uddin had telephonically informed Mr. Hifjur to hand over the gun. From the seizure list, i.e. Ext. 10, it appears that two bundles, one containing Rs. 50,000/- and the other bundle containing Rs. 47,000/- were seized and thus, in total Rs. 97,000/- was recovered. The seizure of the said amount and the cell phone remained undemolished.

124. From the above discussed evidence, it is found that, immediately after the arrest of Mr. Selim Uddin, he had asked Mr. Hifjur Rahman, who was also arrested at Karimganj, to hand over the gun, Mr. Hifjur Rahman had led the Police to the recovery of the guns. Hence, sufficient corroboration is found to believe that Mr. Selim Uddin had full knowledge about the guns, which was concealed by Mr. Hifjur Rahman and recovered at his instance.

125. Mr. Selim Uddin, in his examination, made under Section 313 Cr.P.C., while denying any connection with the money, recovered from his brother Mr. Sultan Uddin, admitted that an amount of Rs. 97,000/- was recovered from him by Police. He claimed that the same was his money, connected with his business. But, he failed to explain as to for what purpose and in connection with what type of business he was required to keep such a huge amount, in cash, that too at Belonia, which was a place situated outside his state.

126. Accused Mr. Sultan Uddin, a brother of Mr. Selim Uddin, admitting the seizure of Rs. 6,88,500/- from him, claimed that the said amount belonged to him. But, he also failed to explain the source of the said amount and the purpose of keeping the same, as cash at hand. The recovery of the said amounts, from the two brothers, one of whom was involved with the abduction of the deceased, immediately after the incident, the abduction of the son of PW-1, and payment of Rs. 12 Lakhs by PW-1, at Mendihati in Meghalaya, as directed by the abductors, sufficiently indicate their nexus with the abduction of the deceased and receipt of the ransom. The above circumstances inspire confidence to believe that the

amounts, recovered from Mr. Selim Uddin and Mr. Sultan Uddin were the parts of the ransom, received from PW-1.

127. From the above discussed evidence, it is found that the following circumstantial evidences have surfaced:--

"(i) The deceased left his house with his motorcycle on 19.11.2011, at about 6.30 P.M.

(ii) The last call was received from the deceased by his mother at about 7.34 P.M.

(iii) The deceased and Mr. Rajani Talukdar, who was a friend of the deceased, were seen together by PW-4 and PW-5, along with their motorcycles, on the roadside, in between 7.15 P.M. to 8 P.M. on 19.11.2011.

(iv) The deceased did not return home alive, but his dead body with one bullet injury was disinterred on 25.11.2011.

(v) Next morning i.e. 20.11.2011, at about 6.30 A.M., P.W.-1 approached Rajani Talukdar and he informed that the deceased was with him till 8 P.M. on the previous night.

The said fact is substantiated by PWs-4 and 5. [Sl. No. (iii) above].

(vi) On 20.11.2011, Rajani Talukdar, accompanied by PW-1 searched the deceased and the motorcycle of the deceased was found lying, in a road side ditch, at a distance of 250 mtrs. from Chorgola Bazar.

(vii) Rajani Talukdar, in presence of PW-1, made extra judicial confession and stated that as per a conspiracy, made by Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin and two others and on being assured payment of rupees two lakhs by Mr. Selim Uddin, he had persuaded the deceased to go with him and after consumption of intoxicated Corex, offered by him, the deceased became unconscious and he was handed over to Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Fuzur alias Munna and Mr. Kamal Hussain, at about 8.30 P.M., who had carried him in a blue colour Maruti Car.

(viii) A blue colour Maruti Car was recovered in abandoned condition, on 22.11.2011, from the road near Nirolabasti.

(ix) On 20.11.2011, at about 5.45 PM, PW-1 received a telephone call demanding payment of rupees fifty lakhs towards release of his son.

(x) While negotiating with the said caller, who used to repeatedly make demands for money, PW-1 could recognize the voice of Mr. Selim Uddin, who was found prompting the said caller.

(xi) The deal was fixed at rupees twelve lakhs.

(xii) An amount of rupees twelve lakhs, on being directed by the miscreants, was kept near a drain at Mendihati, in the State of Meghalaya.

(xiii) The miscreants, after deposit of the money by PW-1, informed him that he would get his son (deceased) at Malidahar, but he could not find his son.

(xiv) Accordingly, Police was informed about the abduction and payment of ransom.

(xv) On 25.11.2011, the dead body of the deceased was recovered from Dumorgol within Monosangam area, on being led by Musstt. Monowara Begum, W/o-Babul Mia alias Ali (PW-23).

(xvi) Mr. Babul Mia alias Ali (PW-23) husband of Monowara Begum, as approver, stated that he was threatened and forced by Mr. Hifjur Rahman, Mr. Abdul Karim, Mr. Raju and Mr. Riju to join them in shifting the dead body and that his wife Ms. Monowara Begum had requested them not to take him, but, on being forced by Mr. Hifjur Rahman and others, he, along with the said persons, had buried the dead body, followed by concealment of the trouser of the deceased and the arms and ammunitions carried by Mr. Hifjur Rahman.

(xvii) Post mortem examination revealed one bullet injury, on the head of the deceased, which was stated to be the cause of death.

(xviii) The I.O. Mr. N. Das (PW-19) also stated that the place of burial was identified by Ms. Monowara Begum and that the dead body was disentered. There is no dispute regarding recovery of the dead body from the said place.

(xix) PW-3 Ms. Moriom Bibi, mother of the accused Mr. Hussain Ahmed, stated that accused Mr. Hifjur Rahman went to her house with a Pistol, on the same night at about 12 O" clock and forcefully took her said son with him; that she heard sound of gunfire and thereafter, found Mr. Hifjur Rahman and two others standing near a car and that Mr. Hifjur Rahman had threatened her not to make any noise.

(xx) All the accused persons, except Mr. Rajani Talukdar, were found missing from their respective residences, immediately after the incident.

(xxi) Accused Mr. Selim Uddin was arrested from Belonia along with an amount of rupees ninety seven thousand and a mobile phone having dual SIM connection with SIM No. 9612969568 was recovered. He could not justify possession of the said amount.

(xxii) Accused Mr. Hifjur Rahman, on being arrested, led to the discovery of two guns i.e. one pistol and one air gun, one live cartridge and a knife, which were kept by him near a cham tree after disposing the dead body.

(xxiii) The trouser, used by the deceased, was recovered from the pond at the instance of Babul Mia alias Ali, (PW-23).

(xxiv) Babul Mia alias Ali (PW-23), as approver, stated that Mr. Hifjur Rahman had concealed the said trouser and the weapons after burying the dead body. He also stated about the burial of the dead body by himself, Mr. Hifjur Rahman, Mr.

Abdul Karim, Mr. Raju Ahmed, Mr. Riju Ahmed, Mr. Oli, Mr. Helal and Mr. Minu.

(xxv) The mobile phone of the deceased was recovered from the house of Rajani Talukdar.

(xxvi) Mrs. Nazima Begum (PW-2), wife of Mr. Hifjur Rahman, stated that her husband, who had left home on 19.11.2011, on being called by Mr. Selim Uddin, did not return home on the said night and on the next morning, he had told her that a boy from Bhanga was killed by them.

(xxvii) The said boy from Bhanga was none other than the deceased, whose dead body was recovered from the place of burial."

128. The principles regarding acceptance of circumstantial evidence as basis for conviction has been laid down by the Hon"ble Supreme Court in a catena of decisions.

129. The Supreme Court, in the case of Sharad Bidrhichad Sarda (supra), which has been referred to in subsequent decisions, has laid down that the following conditions precedent must be fully established, before conviction could be based on circumstantial evidence. The conditions are :

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(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 tenancy;

(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."

130. Taking similar view, the Supreme Court, in the case of Padala Veera Reddy (supra), observed that the circumstances, if taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none other else and excluding any hypothesis of his innocence i.e. inconsistent with his innocence.

131. From the above discussed evidence and circumstantial evidence, surfaced there from, it is clearly found that a conspiracy was hatched up by Mr. Selim Uddin alias Silu, Mr. Hifjur Rahman alias Hiju, Mr. Rajani Talukdar, Mr. Fuzur alias Munna and Mr. Kamal Hussain for abducting the deceased and in pursuance to

the said conspiracy, Mr. Rajani Talukdar, on being assured payment of an amount of Rs. 2 lakh, agreed to handover the deceased to Sri Selim Uddin alias Silu and others. Accordingly, on the fateful evening, Mr. Rajani Talukdar had called the deceased, on the pretext of going to Badarpur and thereafter, making the deceased unconscious by offering him intoxicated corex to drink, handed over him to Mr. Selim Uddin alias Silu, Mr. Hifzur Rahman alias Hiju, Mr. Rehan, Sri Fuzur alias Munna and Mr. Kamal Hussain, who took him in a blue colour Maruti car. Subsequently, the dead body of the deceased was recovered and it was found that the deceased died due to one gunshot injury.

132. The evidence of PW 3, i.e. the mother of the accused Sri Kamal Hussain, which remained unshaken, discloses that her son was forcefully taken by Mr. Hifzur Rahman alias Hizu, on gun point on the fateful night and that, she heard sound of gun fire. Her evidence also indicates that she was threatened by Sri Hifzur Rahman alias Hizu not to make any noise.

133. PW 2, wife of Shri Hifzur Rahman alias Hiju, who could not be discredited, stated about the conduct of her husband w.e.f. the date of occurrence i.e. the pre-murder and post murder stage, more particularly, the extra judicial confession relating to murder of a boy from Bhanga.

The undisturbed evidence of PW 1 has established that he was made to pay an amount of Rs. 12 Lakhs and that he could hear the voice of Mr. Selim Uddin alias Shilu, who was found instructing the said caller.

134. The subsequent recovery of Rs. 6,88,000/- from the possession of Mr. Sultan Uddin, who used to stay at Lydrumbai, Meghalaya and another amount of Rs. 97,000/- from Mr. Selim Uddin alias Shilu, after the incident and also the recovery of the dead body of the deceased from the place of burial, the wearing apparels of the deceased at the instance of PW 23, who also participated in concealing the dead body and the recovery of the guns from the place of concealment, on being led by the appellant, Sri Hifzur Rahman alias Hiju, coupled with the unshaken evidence of the approver Mr. Babul Ali alias Mia PW 23), and the extra judicial statement made by Mr. Rajani Talukdar and Mr. Hifjur Rahman form a complete chain of events clearly indicating that Mr. Rajani Talukdar, Mr. Selim Uddin, Mr. Hifjur Rahman, Mr. Rehan Uddin, Mr. Fuzur alias Muna and Mr. Kamal Hussain had made a conspiracy to abduct the deceased for realisation of ransom/extortion money from the father (PW-1) of the deceased and in pursuance of the said conspiracy, Mr. Rajani Talukdar had handed over the deceased to the said persons, who killed the deceased on the same night by firing one gunshot. The injury found in the dead body does not indicate that the deceased was tortured or treated with any other brutality. As indicated by the medical evidence, his death was instantly caused due to a gunshot injury fired on his head.

135. However, there is nothing, on-record, to find that Mr. Rajani Talukdar had entered into any conspiracy or shared any common intention or object with the

other abductors for eliminating the deceased, after the abduction. In fact, as revealed from the evidence, on-record, Mr. Rajani's role ended from the stage of handing over the deceased in unconscious state and he had no knowledge or idea that the deceased would be killed. Therefore, it appears that the decision to kill the deceased was taken, after the latter was taken into confinement.

136. Now, the question is as to what made the abductors to kill the deceased. Though the prosecution has made attempt to project a story that the father of the deceased, who belonged to a particular political party and the accused Mr. Selim Uddin alias Shilu, who belonged to another political party, had political rivalry, there is nothing, on record, to show that all the accused persons had any other intention or grudge to cause the death of the deceased, after abducting him. That apart, if Mr. Selim Uddin alias Silu had any such grudge, he would have eliminated his rival i.e. PW 1, instead of killing the son of PW 1, who was a college student and of the same age group of the accused persons. Hence, it can be safely concluded that greed of money was the cause of abduction. There is nothing, on-record, to find that all of them had any intention or object to kill the deceased after abducting him.

137. The above discussed circumstantial evidence, coupled with the evidence of PW-1, PW-2, PW-3, PW-4, PW-5, PW-10, PW-21, PW-23 and the extra judicial confession of Mr. Rajani Talukdar and Mr. Hifjur Rahman, form a complete chain of events, consistent only with the hypothesis of the guilt of the accused persons.

138. In the case of Suresh Chandra Bahri (Supra), the Supreme Court held that mere agreement for commission of an offence itself constitute an offence u/s. 120A and 120B and no overt act is necessary to be done by every member of the conspiracy. Once the conspiracy is proved all members would be liable for the act done by one or more of them.

139. In the case at hand, as revealed from the extra judicial confession of Mr. Rajani Talukdar and the attending circumstantial evidence, it is proved that Mr. Selim Uddin, Mr. Hifjur Rahman and Mr. Rajani Talukdar initially made a conspiracy for abducting the deceased for realizing money from the father of the deceased and in pursuance to the same, Mr. Rajani Talukdar had induced the deceased to go with him and he handed over the deceased to 1. Mr. Selim Uddin, 2. Mr. Hifjur Rahman, 3. Mr. Rehan Uddin, 4. Mr. Fujur alias Munna and 5. Mr. Kamal Hussain, who took the deceased in a Maruti Car.

Applying the said principle, held in the case of Suresh Chandra Bahri (Supra), we find no difficulty in concluding that the conspiracy to abduct the deceased for realising extortion money has been proved. Hence, it can be safely held that appellants (1) Mr. Selim Uddin alias Shilu, (2) Mr. Hifjur Rahman alias Hiju and (3) Mr. Rajani Talukdar are guilty of the offence u/s. 120B IPC read with Sections 365 and 386 IPC.

Hence, we find that the learned Sessions Judge committed no error by convicting and sentencing Mr. Rajani Talukdar, Mr. Selim Uddin alias Shilu, Mr. Hifjur

Rahman alias Hiju under Section 365 IPC, Mr. Hifjur Rahman under Section 120B IPC as abettors of the offence under Section 386 IPC and Mr. Selim Uddin alias Shilu and Mr. Rajani Talukdar under Section 386 IPC. Accordingly, we affirm and uphold their said convictions and sentences.

140. Though there is sufficient evidence, regarding keeping a part of the extortion money by Mr. Sultan Uddin, there is no evidence to show his involvement with the said activities i.e. conspiracy, abduction, extortion, murder and disappearance of evidence, except to the extent of keeping part of the extortion amount. In the absence of any other evidence, it can be safely believed that he had kept the same knowing it to be extortion money, which is an offence under Section 411 I.P.C. Of course, no charge was framed against him under Section 411 IPC. But he has been charged for the offences under Sections 120B read with Sections 365 and 367 and 387/34 IPC, the gravity of which offences are higher than the offence under Section 411 IPC. Therefore, his conviction under Section 411 IPC will not cause any prejudice to him. In view of the above discussed evidence, we find it fit and proper to base conviction under Section 411 IPC without framing fresh charge under Section 411 IPC. Therefore, we hold him guilty of the offence under Section 411 IPC and modify his conviction under Section 365 and 386 IPC to Section 411 IPC. Accordingly, we convict him under Section 411 IPC and sentence to suffer rigorous imprisonment for 3 (three) years with fine of Rs. 5,000/- (Rupees Five Thousand), in default, suffer imprisonment for 6 (six) months. The period of detention, already undergone, shall be treated as set off under Section 428 Cr.P.C.

141. There is no evidence to show the involvement of appellants (1) Mr. Sultan Uddin, (2) Mr. Raju Ahmed and (3) Mr. Hussain Ahmed alias Mojnu with offences under Sections 365 and 386 read with Section 120B IPC. Hence, their conviction for the said offences can't be maintained and accordingly their said conviction and sentences recorded under Section 365 IPC against Mr. Sultan Uddin, Mr. Raju Ahmed and Mr. Hussain Ahmed alias Mojnu and under Section 120B IPC read with Section 386 IPC against Mr. Hussain Ahmed alias Mojnu, Mr. Raju Ahmed and under Section 386 IPC against Mr. Sultan Uddin, are set aside. Consequently, they are acquitted and be set at liberty from the said offences.

142. From the above discussed evidence, we find no difficulty in understanding that the appellants namely 1. Mr. Selim Uddin alias Shilu, 2. Mr. Hifzur Rahman alias Hiju, along with others, had caused the death of the deceased. The fact that the death of the deceased was caused by firing on his head, which is a vital part of the body, indicates that the death was caused intentionally and thus, they committed the offence under Sections 302/34 IPC.

143. Therefore, in view of the above discussion, we find sufficient convincing evidence, both circumstantial and direct, to hold that the appellants Mr. Selim Uddin alias Shilu and Mr. Hifzur Rahman alias Hiju, have been rightly convicted for the offence under Section 302 IPC, which require no interference. Accordingly, we affirm and uphold the conviction of Mr. Selim Uddin alias Shilu

and Mr. Hifjur alias Hiju under Section 302 IPC.

144. Though Mr. Rajani Talukdar, Mr. Raju Ahmed and Mr. Sultan Uddin have been convicted under Section 120B IPC as abettors of the offence under Section 302 IPC and Mr. Hussain Ahmed has been convicted and sentenced under Section 302 IPC, from the above discussed evidence, we find nothing to conclude that the said appellants had any meeting of mind or conspiracy with the killers including Mr. Selim Uddin and Mr. Hifjur Rahman, for causing the death of the deceased.

There is also no evidence to find that they had either played any role in causing the death of the deceased or had any intention or object or conspiracy to kill the deceased.

145. The evidence, on-record, shows that Mr. Raju Ahmed had joined Mr. Hifjur Rahman, PW-23 and others at the time of shifting the dead body for concealment. There is no evidence indicating that he was party to the abduction, extortion and killing of the deceased. Of course, considering the facts and circumstances of the case, presumption may be drawn regarding their involvement with the death of the deceased. But, presumption, howsoever high, can't be sufficient to base conviction without substantive evidence. Hence, we find no basis for conviction of the said appellants for the offences under Section 120B and 302 IPC. Accordingly, the conviction and sentence recorded under Sections 120B read with Section 302 IPC against Mr. Rajani Talukdar, Mr. Raju Ahmed and Mr. Sultan Uddin and under Section 302 IPC against Mr. Hussain Ahmed are set aside and they are acquitted of the said offences. They be set at liberty forthwith, if not required in connection with any other offence or other case (s).

146. In view of the above stated evidence given by PW 23 and the said circumstantial evidence, we find sufficient material to hold that appellants Mr. Hifjur Rahman, Mr. Raju Ahmed, along with PW-23 and Mr. Riju Ahmed and others had shifted the dead body from the place of crime and buried the same and concealed the wearing clothes of the deceased and the arms and ammunition, carried by Mr. Hifjur Rahman for causing disappearance of evidence of the crime.

147. As Mr. Selim Uddin, who appears to be involved from the initial stage of forming the conspiracy for abduction, claiming of extortion money and also with the killing of the deceased, his role in causing disappearance of the dead body can't be ruled out. Hence, we are inclined to hold that the learned Sessions Judge committed no error by convicting and sentencing Mr. Hifjur Rahman, Mr. Raju Ahmed and Mr. Selim Uddin under Section 201 IPC. Accordingly, we uphold and affirm their said conviction and sentence.

148. The learned trial Judge has convicted and sentenced Mr. Selim Uddin and Mr. Hifjur Rahman under Section 25(1-B)(a) of the Arms Act, 1959. The offence under the said provision relates to acquiring, possessing and carrying any firearm

or ammunition in contravention of Section 3 of the Act. In the present case, as found from the evidence of PW-23 and the evidence regarding leading to discovery, it is found that Mr. Hifjur Rahman alias Hiju had possessed and carried the said arms and ammunition, without any permit or authority. Hence, his possession of said arms and ammunition was in contravention of Section 3 of the Arms Act, 1959. Hence, he has been rightly held guilty of the said offence and convicted and sentenced, as indicated above. There is no evidence to show that Mr. Selim Uddin alias Shilu had possessed or carried the said arms and ammunition. Hence, the conviction and sentence under Section 25(1-B)(a) of Arms Act against Mr. Selim Uddin can't be maintained and the same is liable to be set aside and we do so. Accordingly, we acquit and set at liberty Mr. Selim Uddin alias Shilu from the liability under Section 25(1-B)(a) of Arms Act, 1959.

However, in view of the above discussion, we affirm and uphold the conviction under Section 25(1-B)(a) of the Arms Act against Mr. Hifjur Rahman alias Hiju.

149. Now, the question is whether the death sentence, awarded to Mr. Selim Uddin and Mr. Hifjur Rahman is maintainable. The matter rests on the question as to whether the offence under Section 302 IPC committed by Mr. Selim Uddin and Mr. Hifjur Rahman, falls under the category of rarest of the rare case.

150. The principle and the law regarding imposing death penalty has been laid down by the Apex Court in a catena of decisions.

151. In the case of Machhi Singh (Supra) the Supreme Court, while laying down the guidelines for applying to the facts of each individual case for determining the question of imposition of death sentence has held that life imprisonment is the rule and death sentence is the exception and that before opting for death sentence the circumstances of the crime is to be considered. As held in the said case death penalty is to be imposed in cases where life imprisonment appears to be inadequate and that a balance sheet of mitigating and aggravating circumstances is to be drawn up and a just balance is to be struck between the aggravating and mitigating circumstances giving full weightage to the mitigating circumstances.

152. In the State of Rajasthan Vs. Kheraj Ram, AIR 2004 SC 3432 : (2003) 7 JT 419 : (2003) 6 SCALE 757 : (2003) 8 SCC 224 : (2003) 2 SCR 861 Supp : (2003) 2 UJ 1488 , the Supreme Court stated the law thus:

"34. In Machhi Singh v. State of Punjab it was observed:

The following questions may be asked and answered as a test to determine the "rarest of the rare" case in which death sentence can be inflicted:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the

mitigating circumstances which speak in favour of the offender? (SCC p. 489, para 39)

The following guidelines which emerge from Bachan Singh case will have to be applied to the facts of each individual case where the question of imposition of death sentence arises:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. (SCC p. 489, para 38)

In the rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. (SCC pp. 487-88, paras 32-33)

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis-?-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland. (SCC p. 488, para 34)

(3) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. (SCC p. 488, para 35)

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of

persons of a particular caste, community, or locality, are committed. (SCC p. 488, para 36)

(5) When the victim of murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-?-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community. (SCC pp. 488-89, para 37)

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so. (SCC p. 489, para 40)""

153. In the case of Henry Westmuller Roberts (Supra) which was a case of murder of a minor boy for ransom and proved the guilt of two persons on the circumstantial evidence, the Supreme Court upheld the death sentence holding the same to be a case of rarest of rare category. In the said case the originator was Henry at the idea of kidnapping children of rich people for extracting ransom. He had been attempting to extract money from the unfortunate father of the minor even after murdering the boy and by making the father to believe that the boy was alive and would be returned. There was no mitigating circumstances.

154. In the case of Vikram Singh (Supra), a student aged about 16 years was kidnapped for ransom and murdered. Here the death of the minor was caused by using scientific method and injecting fatal doses of chemicals i.e. Chloroform and fort win injections, after tying the hand and legs of the victim and putting a tape on his mouth. It was observed that on the basis of the materials on record it appears that the body was kidnapped for his elimination finally in either case (whether ransom has been paid or not). Considering the facts and circumstances the case it was found to be a rarest of rare case and death penalty except in respect of a lady namely "Sonia" was upheld.

155. In both the cases of Henry and Vikram Singh the victims were minor boys and the kidnappers' intention was to kill the minors, even if the ransom was paid or not. The manners of killing in both the cases were brutal. There was no mitigating circumstances and scope for rehabilitation of the culprits.

156. In the present case the victim was a major and he belonged to the age group of the abductors (21 to 24 years) and he was killed by a single shot without subjecting the victim to any form of torture. The younger age of the abductors and the circumstances leading to the death of the deceased can be treated as mitigating circumstances.

157. The case of Vikram Singh alias Viky (supra) was referred to a larger Bench for determination of the validity of Sec. 364(A) IPC.

158. In the case of Santosh Kumar Satish Bhusan (Supra) the accused person,

making a plan for kidnapping for ransom (10 lakh) invited their friend (victim) for a party and decided to kill him if difficulties arose. Accordingly during the party they tied the hands of the victim with rope and his mouth with a napkin and dragged to the toilet, assaulted with hacksaw blade and sickle, separated the head and kept the head in a poly bag. Then the accused called up the family of the victim demanding payment of ransom of Rs. 10 lakhs if they wanted to see Kartikiraj (victim) alive again. In the trial one of the accused was imposed death penalty and others were inflicted life imprisonment.

On appeal, the Supreme Court, referring to a catena of decisions including the cases of "Bachan Singh" and "Machhi Singh" observed that in imposing death penalty the age of the offenders, their antecedent and possibility of reformation and rehabilitation are also to be taken into consideration and that the punishment cannot be determined on the grounds of proportionality alone. In the said case, as there was nothing to show that the appellant could not reform and be rehabilitated, the Supreme Court converted the death sentence to life imprisonment.

159. In the said case, the Supreme Court also observed that Bachhan Singh while enunciating the rarest of rare doctrine, did not deal with the role and responsibility of sentencing court and the appellate Court separately.

160. In the said case the following observation made in Bachhan Singh case was referred:

"206 Dr. Chitale has suggested these mitigating factors:

Mitigating Circumstances - In exercise of its discretion in the above cases, the Court shall take into account the following circumstances:--

1. That the offence was committed under the influence of extreme mental or emotional disturbances.
2. The age of the accused, if the accused is young and old he shall not be sentenced to death.
3. Probability that the accused would not committed criminal acts of violence as would constitute continuing threat to the society.
4. Probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy conditions 3 and 4 above.
5. That under the facts and circumstance of the case, the accused believes that he was morally justified in committing the offence.
6. That the accused acted under the duress or domination of another person.
7. That the conditions of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

207- We will do no more than to say that these are undoubtedly relevant circumstance and must be given correct weight in determination of sentence."

161. In the case of Mofil Khan (Supra) (decided on Oct. 9, 2014) a three Judge Bench of the Supreme Court referring to all the relevant decision on the question of death penalty has culled out the following board heads:

"76. ...Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P. C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances

leading to commission of such heinous crime."

162. In the case of B. Kumar alias Jagen Kumar alias left Kumar alias S. Kumar (Supra), the Supreme Court found that the appellant, who was imposed with death penalty, committed the offence of 376 (1) driven by lust and being panicked committed murder of one of the victim and ruthlessly attacked two others. It has been observed that the appellant had attacked the deceased with a view to ensure a safe escape from the scene of crime and further eliminating evidence against himself. Of course the appellant carried a sharp edged weapon in his west by which he silted the throat of the deceased, after committing rape on her. Before that he had tied and gagged two other inmates of the house threatening them not to make shout by keeping the weapon on the neck of the deceased. Considering the mitigating circumstances and the appellant's conduct after the commission of the crime, the Supreme Court observed that the case was not a case for falling in the category of rarest of rare case and the amended conviction and other sentences except death sentence were upheld. Consequently, the death sentence was modified to life sentence requiring to suffer life sentence for the remainder of his life.

163. In the case of Sandesh alias (Sainath Kaliash Abhog) (Supra), the Supreme Court while commuting the death sentence to life imprisonment held that young age of the accused, possibility of reform/rehabilitation and non involvement in criminal case of similar crimes are relevant consideration.

164. In the case of State of Arunachal Pradesh (Supra), conviction was based on circumstantial evidence and extra judicial confession. A Division Bench of this Court, considering the post crime conduct of the appellant, modified the death sentence to life imprisonment.

165. In the case of Sushil Sharmah (Supra) death penalty was imposed by trial Court on the basis of circumstantial evidence. On appeal, the Supreme Court considering the possibility of rehabilitation and antecedents of the appellants, converted the death penalty to life imprisonment.

166. In the case of Sahankar Kishan Rao Khade (Supra) the Supreme Court held that pendency of criminal case against the accused cannot be an aggravating factor to be taken note of while granting appropriate sentence, unless the accused is found guilty and convicted in those cases.

167. As held in the said case absence of previous criminal record, young age of accused, absence of premeditation for commission of the crime, possibility of reformation of the accused are some of the mitigating circumstances. In the said case the accused was an young person of 28 years. He was tried for committing the offences of kidnapping, rape and murder of a minor girl. Death sentence by the trial court was confirmed by the High Court. On appeal, the Supreme Court converted the death sentence to life imprisonment.

168. In the case of Wakkar (supra), the Supreme Court held that in order to base

conviction on circumstantial evidence each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances must form a complete chain leading to the irresistible conclusion about the guilt of the accused to the exclusion of any other hypothesis consistent with the innocence of the accused.

The Supreme Court held that in the absence of any direct evidence regarding the manner of causing the death and the role played by each and every accused person, though the offence is found to be committed in cold blood but quite stealthily and if the entire case rest on circumstantial evidence the case can't be held to be a case falling in the category of "rarest of rare cases".

169. In the case of Brishnu Prasad Sinha (supra), the Supreme Court referring to various decision, including the cases of Machi Singh (supra), Bashan Singh (supra), Sharad Birdhi Chand Sarda (supra), observed that, if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded.

170. In view of the above principles, laid down by the Apex Court, it is found to be well settled principles of law that death penalty can be awarded only in the cases which fall in the category of rarest of rare cases.

171. In determining the appropriate penalty in a murder case, the aggravating and mitigating circumstances and the fact and circumstances of the particular case are to be taken into consideration and due weightage is to be given to the mitigating factors. Death penalty is to be imposed in the cases where life imprisonment is found to be inadequate.

172. In the present case it has been found that the deceased, who was abducted and taken into confinement for the purpose of extortion of money, was killed on the said night, by using only one gun shot. There is no other evidence to show that he was killed in a brutal manner by inflicting any other injuries or torture.

173. As discussed above, it has also been found that the deceased was abducted for the purpose of extortion of money. As revealed from the evidence of PW-9 and PW-21, it is found that the decision to kill the deceased was taken after he was abducted and taken into confinement, and in order to avoid identification and complication, inasmuch as, the deceased, after regaining sense, became uncontrollable. Hence, it appears that there was no prior plan or conspiracy to kill the deceased. The primary crime, in the case at hand, was abduction for extortion and the death of the deceased is found to be the consequence of the said primary crime.

The murder of the deceased, who was an unarmed young college student, is certainly found to be a brutal and shocking incident. No doubt, the said murder was an aggravating factor. That apart, the act of making demand and realization of extortion money from the father of the deceased, even after killing his son by giving an impression that he was alive, is also another aggravating circumstance.

The manner, in which, the deceased was abducted alluring him to go with his friend Mr. Rajani Talukdar and making him unconsciousness after offering intoxicated corex to drink followed by his death, on the same night, is also an aggravating circumstances.

174. Admittedly, both the accused persons under death sentence i.e. Mr. Selim Uddin (24) and Mr. Hifjur Rahman (21) were of the age group of 21 to 24 years.

The age of the victim, who was a college student, was about 21 years. Hence, it is found that the victim and the said accused were young persons of same age group.

There is no evidence of any previous conviction against the accused persons. The prosecution failed to substantiate, by adducing evidence, that the appellants were earlier convicted in any other criminal case.

175. Though the learned Additional Public Prosecutor has submitted that the criminal cases, including the case of murdering PW-1 i.e. the father of the deceased, are pending against the accused persons, the pendency of criminal cases, unless conviction is proved, can't have any adverse affect in determination of sentence. Because, no one can be condoned as guilty unless the charge is proved by due process of law. There is no substantive evidence to show that the appellants were involved in causing death of the father of the deceased.

176. There is also no evidence to show that the accused persons, one of whom is a political activist (Mr. Selim Uddin), being young person would not be reformed or rehabilitated. The young age, absence of any other record of conviction in criminal case, possibility of reformation and rehabilitation are found to be mitigating circumstances.

177. The fact that the accused persons had abducted the victim for extortion of money due to greed of money and that they had killed the deceased, after abduction, since the victim after regaining sense became too wild to be controlled clearly indicates that they had no plan to eliminate the deceased. Hence, the said circumstances under which the death was caused is also found to be a mitigating circumstance.

178. In view of the above, balancing the said aggravating and the mitigating circumstances, surfaced from the evidence, on-record, we find the balance heavier in favour of the mitigating circumstances. We don't find that the accused- appellant will be nuisance to the society.

That apart, considering the young age and the scope for reformation and rehabilitation of the accused persons, we find no sufficient reasons to conclude that the death penalty would be the only and just penalty and that the life imprisonment would not be adequate.

179. In view of what has been discussed above, we don't find it to be a case falling into the category of rarest of rare case requiring elimination of the said

convicted persons. Therefore, in our considered opinion, the alternative penalty i.e. life imprisonment would be sufficient to meet the ends of justice.

180. Accordingly, we refuse to confirm the sentence of death, imposed on Mr. Selim Uddin alias Shilu and Mr. Hifjur Rahman alias Hiju.

Therefore, while maintaining their conviction under Section 302 IPC, the death sentence awarded by the trial Court against the appellants, namely, Mr. Selim Uddin alias Shilu and Mr. Hifjur Rahman alias Hiju, is modified and accordingly, we sentence them to suffer imprisonment for life and pay fine of Rs. 15,000/- each, in default, suffer rigorous imprisonment for another period of 1 (one) year.

181. Before we part with this record, we acknowledge with appreciation the services, rendered by Mr. T.J. Mahanta, learned Senior Counsel as Amicus Curiae, in Death Reference No. 1/2014 and Criminal Appeal (J) No. 51/2014, Mr. A. Ali, learned Amicus Curiae, in Criminal Appeal (J) No. 52/2014 and Mr. B.N. Gogoi, learned Amicus Curiae, in Criminal Appeal (J) No. 54/2014. We order that remuneration at the rate of Rs. 7,500/- (Rupees Seven Thousand Five Hundred) be paid to the said learned Amicus Curies, by the Assam State Legal Service Authority.

182. With the above directions and the modifications, as indicated therein, the death reference and the appeals aforesaid are disposed of.

183. Return the LCR.