

GAHC010117002019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/33/2019

MD. SAIFUL ISLAM
S/O. MD. MOHAMMAD ALI, VILL. BAKULGURI, NALARPAR.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : Ms. B SARMA (AMICUS CURIAE)

Advocate for the Respondent : Ms. S. Jahan, APP, ASSAM

Linked Case : Crl.A./164/2019

MD. KHAIRUL ISLAM
S/O- MOINA MIYAN
R/O- BAKULGURI
NALARPAR
P.S. KAMPUR
P.O. BARAPATIA
DIST.- NAGAON
ASSAM
PIN- 782428.

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE P.P.

ASSAM.

2:ILIASH ALI
S/O- LATE KALA MIYAN

R/O- BOKULGURI
NALARPAR
P.S. KAMPUR
P.O. BARAPATIA
DIST.- NAGAON
ASSAM
PIN- 782428.

Advocate for : MR K K MAHANTA
Advocate for : Ms. S. Jahan, APP
ASSAM appearing for THE STATE OF ASSAM AND ANR

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT & ORDER (CAV)

Date : 21-06-2024

(Suman Shyam, J)

Heard Mr. K.K. Mahanta, learned Sr. counsel assisted by Ms. N. Begum, learned counsel appearing for the appellant in CrI. Appeal No. 164-2019 and Ms. B. Sarma, learned *Amicus Curiae* appearing for the appellant in CrI. Appeal (J) No. 38/2019. Also heard Ms. S. Jahan, learned Addl. P.P. Assam appearing for the State in both the appeals.

2. These two appeals are directed against the judgment and order dated 13-12-2018 passed by the learned Addl. Sessions Judge No. 1, Nagaon in connection with Sessions Case No. 77(N)/2017 whereby, both the appellants/ accused persons were convicted under Section 302/34 IPC for committing murder of *Anowar Hussain* and each of them

were sentenced to undergo rigorous imprisonment for life and pay fine of Rs. 1000/- each, in default, to undergo rigorous imprisonment for further one month. Since both the appeals arise out of a common judgment and order passed by the learned trial court, hence, we propose to dispose of the appeals by this common order.

3. The prosecution case, as unfolded from the materials on record, briefly stated, is that on 27-06-2017, *Anowar Hussain*, the 14 years old minor son of the informant Iliyas Ali, was found dead in the betel nut plantation situated at the north of the house of the deceased with injuries on the neck. On 28-06-2017, the father of the deceased, *viz.* Iliyas Ali lodged an ejahar before the Officer-in-Charge of Kampur Police Station reporting the incident. Based on the ejahar dated 28-06-2017, Kampur P.S. Case No. 169/2017 was registered under Section 302 IPC. Thereafter, the police had conducted investigation in connection with the police case. The two appellants, *viz.* *Khairul Islam* and *Saiful Islam* were also arrested during the course of investigation. On being lead by the accused persons, the police had also recovered the shirt of the deceased which was concealed in the vicinity of the place of occurrence. After conclusion of investigation, police had submitted charge-sheet against the two accused persons under Sections 120(B)/364/302/201/34 IPC. Based on the charge-sheet submitted by the police, the learned trial court had framed charge against the accused persons under Section 302/34 IPC. However, the charge having been read over and explained to them, both the accused persons have pleaded not guilty and claimed to be tried. As such, the matter went up for trial.

4. The prosecution case is based on circumstantial evidence. In order to prove the

charge brought against the accused persons, the prosecution side had examined as many as 11 (eleven) witnesses including the Doctor(PW-5) who had conducted the postmortem examination on the dead body and the Investigating Officer (PW-11) who had conducted investigation in the police case and had submitted charge-sheet.

5. After recording the evidence led by the prosecution, the statement of the accused persons were recorded under Section 313 Cr.P.C. whereby, both of them had denied all the incriminating circumstances put to them. However, the defense side did not adduce any evidence.

6. Upon conclusion of trial and on appreciation of the materials available on record, the learned trial court was of the opinion that the prosecution has succeeded in establishing the murder charge brought against both the accused persons beyond reasonable doubt and accordingly, convicted them under Sections 302/34 IPC and awarded the sentences, as noted above.

7. Assailing the impugned judgment and order dated 13-12-2028 passed by the learned trial court, Mr. K.K. Mahanta, learned Sr. counsel appearing for the appellant Khairul Islam in Crl. Appeal No. 164/2019 has argued that save and except the alleged disclosure statement, there is not even an *iota* of evidence against his client to prove the murder charge. The learned Sr. counsel has also argued that even the disclosure statement leading to the alleged discovery of the shirt of the deceased is inadmissible in the eyes of law since there is no independent witness to the disclosure statement. By relying upon and referring to the decisions of the Supreme Court rendered in the case of ***Rajesh & Anr. Vs the State of Madhya Pradesh*** rendered in ***Crl. Appeal Nos. 793-***

794/2022 as well as the decision rendered in the case of **Ramanand @ Nandalal Bharati Vs. State of UP** rendered in the case of **Crl. Appeal Nos. 64-65/2022**, Mr. Mahanta has further argued that in the absence of independent witness, the disclosure statement cannot be relied upon as the sole basis for convicting the appellant.

8. It is also the submission of Mr. Mahanta that even if the testimony of the I/O (PW-11) is taken on the face value it is apparent that the disclosure statement of the co-accused *Saiful Islam* was recorded first in point of time. As such, the police was aware of the place of concealment of the shirt even before the disclosure statement of the appellant *Khairul Islam* was recorded by the police. Under the circumstances, submits Mr. Mahanta, the disclosure statement of *Khairul Islam*, i.e. Exhibit-10 would be inadmissible in law.

9. Mr. Mahanta has also argued that PW-4 is a chance witness of seizure list Exhibit-2 and, therefore, no credence can be given to his testimony.

10. Contending that the prosecution has failed to establish the motive for committing the alleged offence, Mr. Mahanta has also submitted that the materials brought on record are wholly unsafe for convicting the appellant *Khairul Islam* for the murder charge brought against him. On such ground, Mr. Mahanta has prayed for acquittal of his client.

11. Ms. B. Sarma, learned *Amicus Curiae* representing the appellant in Crl. Appeal (J) No. 33/2019 has by and large adopted the submission advanced by Mr. Mahanta but has added that the "last seen together" circumstance brought against her client *Saiful Islam* is a weak kind of evidence. Therefore, the same cannot also be the basis of conviction of

the appellant in CrI. Appeal (J) No. 33/2019. As such, Ms. Sarma has also prayed for acquittal of *Saiful Islam* of the murder charge brought against him.

12. Responding to the above argument, Ms. S. Jahan, learned Addl. P.P. Assam has argued that there is no requirement in law to have the presence of independent witness in a disclosure statement. She submits that in view of the bulk of evidence available on record, merely because there was no independent witness to the disclosure statement, the same cannot be a ground to discard Exhibit-9 and 10.

13. Ms. S. Jahan has further argued that the "last seen together" circumstances available against the appellant *Saiful Islam* can be relied upon if there is other circumstantial evidence available on record to establish the charge brought against the accused persons. According to the learned Addl. P.P., the evidence of PW-2 clearly brings on record cogent evidence of "last seen together" circumstance of the victim and the appellant *Saiful Islam* having been seen together immediately prior to the occurrence and therefore, the same has rightly been relied upon by the learned trial court to convict the accused persons.

14. It is also the submission of Ms. Jahan that the material on record clearly suggests that both the accused persons had hatched a conspiracy to kidnap the victim for a ransom of Rs. 20,00,000/- (twenty lakhs) and accordingly, they had also booked their railway tickets for Mumbai and Chennai just a few days prior to the incident. The aforesaid fact, according to the learned Addl. P.P., clearly brings on record the motive behind the crime and therefore, it is not a case where the prosecution has failed to establish the motive behind the crime. Contending that the learned trial court has

meticulously scanned the evidence available on record to arrive on a conclusion that the charges brought against the accused persons under Section 302/34 IPC has been proved beyond reasonable doubt, Ms. Jahan has prayed for dismissal of both the appeals.

15. We have considered the arguments advanced at the Bar by the learned counsel for the contesting parties and have also carefully gone through the evidence available on record. Since the basic argument of the appellants' counsel is to the effect that the evidence adduced by the prosecution side are wholly insufficient to establish the murder charge brought against the accused persons beyond reasonable doubt, we propose to briefly analyze the evidence brought on record.

16. As noted above, the informant in this case is the father of the victim. He was examined as PW-1. This witness has deposed that the victim *Anowar Hussain* was his son. The incident took place on 27-06-2017, at around 6/7 pm. On the day of the occurrence, at around 06:00 pm, his son *Anowar Hussain* went out of the house. At that time, he was wearing a '*lungi*' and one red and black full shirt. At that time, PW-1 was in his house. He thought *Anowar* would return soon, but when his son did not return home, he started searching for him here and there. Fatima Begum, the wife of his elder brother told him that she had seen *Anowar* with accused *Saiful Islam*. Then he went to the '*tiniali*' shop and other places searching for his son and finally searched for his son in his betel nut garden. By that time, it was dark. Then his relatives found his son lying in the betel nut ground of his elder brother Amjad Ali. At that time, his son was without any cloths in the upper part of the body and there was injury marks in the neck but he was wearing '*lungi*'. When they started a '*hulla*', people gathered there and stated that his son was still alive

and advised them to take him to a Doctor. He and his elder brother Amjad Ali took his son to the Jamunamukh Hospital, but on the way, they could realize that Anowar had already expired. As such, they returned home. Many people including the VDP person had gathered in the place. The VDP had informed the police over telephone. The police immediately came to the place of occurrence and took the dead body of his son. On 28-06-2017, he had lodged an ejahar at 09:30 am. Exhibit-1 is the ejahar and Exhibit-1(1) is his signature. PW-1 has stated that after lodging the FIR, the police had recorded his statement.

17. PW-1 has further deposed that on 11-07-2017, at about 09:30 am, the police, accompanied by the two accused persons, came to his village and called him to accompany the police and the accused persons. Then both the accused persons had lead him and the police to the place where they had killed his son. On reaching there, from a distance of about 10/15 meters from the place of occurrence, the accused persons brought out the shirt his son was wearing, from a hidden place under the bush in the jungle. They handed over the shirt to the police. At the time of recovery of the shirt, Amjad Ali, Ajad, Sahid Hussain and Abdul Malek were also present. Police had seized the shirt of his son from the place of recovery by preparing seizure list Exhibit-2, which bears his signature Exhibit-2(1). This witness had also identified material Exhibit-1 as the shirt of his son which was seized by the police. The witness has further deposed that both the accused persons had confessed before the police in his presence that they had committed the murder in order to demand ransom from him after going to Bombay and Chennai.

18. During his cross-examination, PW-1 has replied that the house of the accused

Khairul Islam is about 200 meters away from his house and the house of *Saiful Islam* is situated at a distance of about 600-700 meters away from his house. He has further deposed that the accused persons were in visiting terms with them and his son used to address them as 'khura' (uncle). He has stated that he could not file ejahar immediately as he was not in a normal state. The witness had denied the suggestion made by the defense counsel that the accused persons did not confessed before him of having murdered *Anowar Hussain* and the fact that they were planning to demand ransom of Rs. 20,00,000/- after going to Mumbai and Chennai.

19. PW-2, Musstt. Fatima Begum is the wife of Amjad Ali, the elder brother of the informant. She lived in the neighborhood of the deceased. PW-2, in her evidence, has confirmed that the occurrence took place at around 6/7 pm. Around that time, she came out to the path in front of her homestead gate at around 6:00-6:30 pm and saw *Anowar Hussain* was standing on the road at a distance of about 15/20 meters. He was wearing 'lungi' and one shirt. At that time, the accused *Saiful Islam* came and took away *Anowar* towards the north where their betel nut ground is situated. Thereafter, she had returned back to her home. After about 30 minutes to one hour of her return from the road, the mother of *Anowar* started searching for him. She came to their house and searched for *Anowar*. The other family members were also searching for *Anowar* here and there. At around 07:00 pm, *Anowar Hussain* was found lying dead in their betel nut ground where the accused *Saiful Islam* had taken *Anowar*. This witness has further deposed that her statement was recorded by the Magistrate under Section 164 Cr.P.C. on oath and Exhibit-3 is the said statement. She has identified her signature as Exhibit-3(1) and Exhibit-3(2). In

her cross examination, PW-2 has denied that she had not stated before the police that on the date of occurrence in the evening, she had come out to the path in front of her house and saw *Anowar Hussain* standing on the road and *Saiful Islam* came and took him. PW-2 could not be shaken during her cross-examination by the defense side.

20. PW-3, Abdul Jalil was the President of the VDP when the incident took place. He has also confirmed that the occurrence took place on 27-06-2017. At around 08:00 pm on the day of occurrence, when he was in a nearby market, he had heard from the people that the son of Ilias Ali (informant) had been murdered. Then he immediately went to the house of the informant and saw that many people had gathered there and the dead body was lying on the floor. He had noticed marks on the neck of the deceased. After consulting the members of the informant's family, he had informed the police of Kampur Police Station over telephone. After about 1 hour police came to the house of Ilias Ali. This witness has also deposed that he had come to know from Amjad Ali, the elder brother of Ilias Ali, that the dead body was found inside the betel nut garden which is at a certain distance from the house of Amjad Ali. PW-3 has also deposed that they had found one "Hawai Chappal" lying in the place of occurrence. Police seized the 'chappal' of the deceased from the place of occurrence in his presence vide seizure list Exhibit-4 by obtaining his signature therein which is Exhibit-4(1). According to PW-3, after taking permission of the Officer-in-Charge of Kampur Police Station, he himself, the village head Taher Ali, Sorupai Bora, Saifuddin, Mirjan Ali and some others had asked the accused as to where they had committed the crime. The accused persons replied that for demanding ransom, they had kidnapped the son of the complainant and in the process he died. This

fact was disclosed after 3-4 days since their arrest by the police.

21. PW-4 Md. Abdul Malik is the seizure witness of the shirt of the victim. This witness has deposed that after about 10-12 days of the occurrence, one day, at around 09:00 – 09:30 am, when he was coming to Bakulguri village on his bicycle, he saw both the accused persons along with the police and the informant as well as his family members on the village path. Having seen them, he got down from the bicycle in order to find out the actual facts. At that time, the accused persons had lead the police and the other persons towards a betel nut ground of Amjad Ali who is the elder brother of the complainant Iliyas Ali, on the other side of the village path. They showed the police the place of occurrence and stated that they had left the dead body of *Anowar Hussain* after killing him. He had also accompanied the police following the accused persons. According to this witness, the accused persons had confessed before the police that they had kept the wearing shirt of the deceased concealed. Accordingly, they had shown the shirt of the deceased around 15 – 20 meters away from the place of occurrence in the betel nut garden. The shirt was kept concealed in a bush. He had seen the shirt of the deceased which was seized in his presence. This witness has confirmed that Exhibit-2(2) is his signature on seizure list, Exhibit-2 and material Exhibit-1 is the shirt which is accused persons had shown to them. PW-4 has further deposed that in his presence, the accused persons had told the villagers that they had kidnapped *Anowar Hussain* in order to demand ransom of Rs. 20,00,000/- from his father and he was killed.

22. During his cross-examination, this witness has remained firm and reiterated that he had seen the accused persons lead the police and the other people to the place of

occurrence. Police did not ask him about the occurrence and he did not know how the occurrence took place. The police also did not ask him whether the accused persons had confessed that they had committed the crime in order to demand ransom from Iliyas Ali. The witness has denied the suggestion that he had falsely deposed to the effect that the accused persons had lead the police to the place of occurrence and he saw the shirt of the deceased which was kept concealed in a bush and that the police had seized the same in his presence.

23. PW-5, Md. Amir Ali belongs to the same village where the deceased and the accused lived. He has deposed that the deceased *Anowar Hussain* is the son of the informant. The occurrence took place on the day following Idd-uz-Zuha in the year 2017. He had come to know about the occurrence at about 06:00 pm. On the day of the occurrence, from about 01:30 pm to 07:00 pm, he, along with the accused *Khairul Islam*, *Saiful Islam* and Abdul Hoque were playing cards under a bamboo tree of the garden of Amjad Ali. About 03:30 pm, *Khairul Islam* stopped playing and went away. Abdul Hoque, *Saiful Islam* and he went on playing cards till up-to 05:30 pm. At 05:30 pm, *Saiful Islam* also left the place. Thereafter, he went on playing cards along with Abdul Hoque for a few more minutes. After that, they started playing games in the mobile phone. Around 06:30 to 07:00 pm, when it was getting dark, *Khairul Islam* and *Saiful Islam* returned to the place where they were playing cards. Nur Jamal and three others also came near them for watching the playing cards. At that time, the informant Iliyas Ali came there and enquired about his son nick named '*Laden*'. At that time *Khairul Islam* replied that *Laden* had not come. Thereafter, the informant left the place. Following him, Nur and three

others also went away. However, he had continued playing cards. After about 15 – 20 minutes, he had heard a cry coming from the house of the informant. When the cry became louder, he ran towards the house of the informant and saw that the informant was holding *Anowar Hussain* on his lap. He had enquired from Sahid Ali, the son of Amjad Ali, as to what had happened to *Anowar Hussain*. Sahid Ali replied that someone had murdered *Anowar Hussain* in the betel nut garden. The testimony of this witness also could not be shaken during his cross-examination.

24. PW-6, Dr. Ajit Goswami was on duty at the Nagaon B.P. Civil Hospital on 27-06-2017. He had conducted the postmortem examination on the dead body of Anowar Hussain. PW-6 has deposed, as to his findings on conclusion of the postmortem examination, which is as follows:-

“There are four symmetrically placed finger like impregnation on the neck found two in both sides. Size- 4cm X 2cm.

Fracture of thyroid cartilage and lateral corner of the hyoid bone. There is accumulation of fluid beneath the skin and there is engrossment of the vessels.”

PW-6 has opined that the cause of death is due to venous engrossment leading to asphyxia as a result of throttling. Injuries are *ante mortem* in nature and were within 6 – 7 hours.

25. PW-7 Sri Nabajyoti Gogoi was an employee of Railways posted at the Jamunamukh Railway Station. This witness has deposed that one Saddam Hussain accompanied by *Khairul Islam* had come to the Jamunamukh Railway Station, 2/3 days after the Idd-ul-Fitre. *Khairul Islam* and Saddam Hussain had told him that they want railway tickets for travelling to Chennai after 03 days. Accordingly, they had given him Rs. 3,100/- as price

of the tickets and asked him to get the tickets. After 10 minutes they went away. On the next evening at around 07:30 – 08:00 pm *Khairul Islam* and Saddam Hussain made a telephonic call to him and asked him to cancel the railway tickets. They told him that in view of the police case against them, tickets are required to be cancelled. According to PW-7, both these persons had also told him that if police asked anything about them, he should tell that they were with him up-to 06:30 pm on the previous evening.

26. PW-8 Md. Abdul Hoque was one of the persons who were playing cards in the afternoon of the date of the incident. This witness has deposed that on the date of the occurrence, while they were playing cards under the bamboo groves of the garden of the informant, at about 03:00 – 03:30 pm accused *Khairul Islam* left the place. Then *Saiful*, Amir and himself continued to play cards. At about 05:00 – 05:30 pm *Saiful Islam* also left the place saying that he would again come to play cards. Then he and Amir continued to play cards. At around 06:30 – 07:00 pm *Saiful Islam* and *Khairul Islam* came back together to the bamboo grove where they were playing cards. At about 07:00 pm, informant Iliyas Ali came to the place where they were playing cards and asked if they had seen his son *Laden @ Anowar Hussain*. At that, *Khairul Islam* reacted sharply by saying that *Laden* had not come there. Then the informant Iliyas Ali left the place. After about ½ an hour, they had heard 'hulla' and came towards the road and then went to the house of the informant where he had seen *Anowar @ Laden* lying there. He had observed marks of violence on the neck of *Anowar Hussain*.

27. Md. Azad Ahmed is a co-villager. Informant Iliyas Ali is his paternal uncle. He was examined as PW-9. This witness has deposed that on the date of occurrence, he was at

his home. At that time, the family members of the informant had visited their house in search of their son *Anowar Hussain*. Since *Anowar* had not come to their house, hence, he also started to search for him. They had searched *Anowar* in the house of their neighbours. His aunt Fatima Begum (PW-2) had told him that she had seen *Anowar Hussain* along with accused *Saiful Islam* coming towards their betel nut garden. Accordingly, they went to the betel nut garden in search of *Anowar Hussain* and saw *Anowar* was lying inside the jungle only wearing a 'lungi' and without a shirt. He and Sahid lifted *Anowar* and brought him to the house of Iliyas Ali. *Anowar* was not making any sound and he was not in a talking position. He had noticed injury marks on the neck of *Anowar*. They tried to take him to the hospital but half way through, he had expired and hence, they returned home. This witness has also deposed that the police came to their place at night and recorded his statement.

28. PW-10 Md. Hussain Ahmed is a nephew of the informant. Deceased *Anowar* was his cousin. PW-10 has deposed that the occurrence took place on the next day of Idd-ul-Fitre of the year 2017. 3/4 days prior to Idd-ul-Fitre there was a Namaz of Sabe-Barat performed in the public mosque. He, along with *Anowar Hussain* and others went to the village mosque to perform Namaz. While he was returning from the Namaz, as soon as they were about to reach their house, accused *Saiful Islam* suddenly came and asked *Anowar* to find out Rs. 500/-, which he had lost. *Saiful Islam* dragged him towards his house. When he told *Anowar* that his father was coming, at that time, *Saiful Islam* had released him and returned home.

29. PW-11 SI Someswar Konwar is the Investigating Officer (I/O) in connection with

Kampur Police Station Case No. 169/2017. PW-11 has deposed that on 27-06-2017, when he was posted at the Kampur Police Station as Officer-in-Charge (O/C) at around 09:30 pm, he had received a telephonic information from Md. Abdul Jalil, VDP President saying that *Anowar Hussain*, 14 year old son of Md. Iliyas Ali, has been found dead in a nearby betel nut garden and the local people suspected that the boy has been murdered. Accordingly, he had made Kampur GD Entry No. 530 dated 27-06-2017 and started investigation. The I/O has exhibited GD Entry No. 530 as Exhibit-6 by identifying his signature therein. This witness has further stated that he, along with his staff, had visited Nalarpar and arrived at the house of the informant. There, he had found the dead body of Anowar Hussain which was kept covered with a cloth in the front room of the house. After examining the dead body, he saw injury marks on the neck. He had examined witness Md. Azad Ahmed and Md. Sahid Ahmed in the house and also visited the place of occurrence on the same night. The place of occurrence was shown to him by the local people. On reaching the place of occurrence, he had found one pair of blue coloured "Aqualite Chappal" and seized the same in presence of witnesses by preparing seizure list, Exhibit-4. On 28-06-2017, Md. Iliyas Ali, the father of the victim had lodged a formal ejahar at the Kampur Police Station at around 09:10 am, on the basis of which, he had registered Kampur PS Case No. 169/2017 under Sections 302/34 IPC. He, thereafter, took up the investigation himself. Inquest on the dead body was conducted by the Circle Officer of Kampur Revenue Circle vide inquest report Exhibit-7. The I/O has further stated that after conducting the inquest, the dead body was sent to Nagaon B.P. Civil Hospital for postmortem examination. He had again visited the place of occurrence and drew up a

sketch map on 28-06-2017, which is Exhibit-8. He had recorded statement of the witnesses including the informant.

30. PW-11 has further deposed that during investigation, on receiving information that from 02:00 pm onwards some boys, viz. Md. Amir Ali, Abdul Hoque, *Khairul Islam* and *Saiful Islam* were playing cards at a distance of about 20 meters from the place of occurrence, he called those persons to the Police Station for interrogation. However, *Saiful Islam* did not turn up. Witnesses Amir Hussain @ Amir Ali and Abdul Hoque had stated that they along with *Khairul Islam* and *Saiful Islam* were playing cards under the bamboo grove on 27-06-2018 in the vicinity of the place of occurrence and on the same day, at about 03:00 pm, at first *Khairul Islam* left the place at about at about 05:30 pm and *Saiful Islam* had also left the place where they were playing cards in a suspicious circumstance. At about, 07:00 pm, *Saiful Islam* and *Khairul Islam* came back together and again started playing cards. After about 10 minutes of arrival of *Saiful Islam* and *Khairul Islam*, the dead body of Anowar Hussain was recovered from the place of occurrence.

31. PW-11 has also confirmed that he had got the statement of PW-2 Fatima Begum recorded through a Magistrate under Section 164 Cr.P.C., had examined Nabajyoti Gogoi and Hussain Ahmed; arrested *Khairul Islam* and *Saiful Islam* and took them in custody. He had interrogated *Saiful Islam* at first on 03-07-2017 and recorded his statement. Thereafter, on the same day, he had interrogated *Khairul Islam* and recorded his statement. During the course of investigation accused *Saiful Islam* on 10-07-2017 had stated before him that "On 27-06-2017 at about 6:45 pm as per previous plan, I called Anuwar Hussain @ Laden. Thereafter, I along with my co-villager *Khairul Islam* removed

the wearing shirt of Laden and gagged his mouth and strangled him to death. We have kept concealed the wearing shirt with which we gagged his mouth. Now, I can show the said shirt of Laden."

PW-11 has deposed that the disclosure statement of accused *Saiful Islam* was recorded on 10-07-2017 and the same is Exhibit-9

32. PW-11 has further stated that on 10-07-2017, while in his custody, the accused *Khairul Islam* had stated before him that "*On 27-06-2017 at about 6:30 pm, I arrived at my house from Jamunamukh and met Saiful Islam on the way. Having seen Anowar Hussain @ Laden standing on the road in front of his house, I kept myself hiding in the betel nut garden of Amjad Ali and asked Saiful Islam to call Laden. Accordingly, Laden was tactfully called and brought to the betel nut garden. Thereafter, I and Saiful Islam removed the wearing shirt of Laden and gagged his mouth with his shirt; but as Laden was resisting. I and Saiful Islam pressed his neck as a result he died. We have kept concealed the said shirt of Laden in the jungle and I can show it."*

The statement of *Khairul Islam* is Exhibit-10, which was recorded by him.

33. PW-11 has further deposed that on being led by *Khairul Islam* and *Saiful Islam*, he along with the accused persons went to the place where the shirt of the deceased was kept concealed by the accused persons. According to PW-11, both the accused persons had shown him the shirt of the deceased *Anowar Hussain* which they had kept concealed inside the jungle of the betel nut garden near the place of occurrence. Accordingly, he had seized the shirt in presence of witnesses and the accused persons. The shirt was identified by Ilayas Ali, the father of the deceased. He has seized the shirt of the

deceased vide seizure list Exhibit-2 in presence of witnesses, wherein he had also obtained the signatures of accused persons. The I/O has proved the signature of accused *Khairul Islam* and *Saiful Islam* in the seizure list as Exhibit-2(3) and 2(4) respectively. This witness has further deposed that he had recorded the statement of the seizure witnesses. Material Exhibit-1 is the shirt which he had recovered on being shown by the accused persons from under the jungle near the place of occurrence.

34. PW-11 has also deposed that he had collected the postmortem report of deceased *Anowar Hussain* and on conclusion of the investigation, he had submitted charge-sheet (Exhibit-11) against both the accused persons. During cross-examination, PW-11 has remained firm.

35. In the backdrop of the aforesaid evidence lead by the prosecution, this Court is called upon to examine as to whether, the prosecution has succeeded in establishing the murder charge brought against both the accused persons beyond reasonable doubt.

36. As would be apparent from the materials on record, the prosecution case is heavily based on the disclosure statement, Exhibits-9 and 10. Apart from that, the "last seen together" circumstance is also a circumstance pressed into service by the prosecution. However, it is to be noted herein that the "last seen together" circumstance is available only in case of appellant *Saiful Islam* but not against appellant *Khairul Islam*.

37. From the evidence of PW-6, it is established beyond doubt that the deceased *Anowar Hussain* has suffered a homicidal death on account of strangulation. The prosecution has also lead cogent evidence to establish that the incident occurred on 27-06-2017 at around 06:00 – 07:00 pm and the dead body was recovered in the betel nut

garden belonging to Amjad Ali, i.e. the elder brother of the informant.

38. PW-2 has categorically deposed that minutes prior to the occurrence, she had seen the deceased *Anowar Husasin* and accused *Saiful Islam* together going towards the betel nut ground. The evidence adduced by the PW-2 on such count is consistent with her statement recorded before the Magistrate under Section 164 Cr.P.C. which has been brought on record as Exhibit-3. The evidence of PW-2 on the above count also finds due corroboration from the testimony of PW-9 who has also categorically deposed that when he, along with the family members, were searching for *Anowar Hussain*, at that time, PW-2 told him that she had seen *Anowar Hussain* with *Saiful Islam* going towards the betel nut garden.

39. The evidence on record also clearly establishes the fact that within an hour from the time when *Anowar* was seen going along with *Saiful* towards the betel nut ground in the evening hours of 27-06-2017, the dead body was found lying in the aforesaid betel nut garden. From the above evidence, it is firmly established that the victim was last seen together with the accused *Saiful Islam* in the vicinity of the place of occurrence and the dead body was also recovered from that place soon thereafter. In such view of the matter, we are of the opinion that the "last seen together" circumstance of the accused *Saiful Islam* being in the company of deceased *Anowar Hussain* just before the occurrence has been fully established in the present case.

40. Law is firmly settled that the "last seen together" circumstance is a weak kind of evidence. In ***Satpal Vs. State of Haryana*** reported in **(2018) 6 SCC 610**, the Supreme Court has observed that the circumstance of "last seen together" is a weak kind

of evidence. One of the fundamental tenets of the "last seen together" theory is that there should be very little gap between the time when the accused was last seen with the victim and the recovery of the dead body. However, if the "last seen together" circumstance is established by cogent evidence and is duly corroborated by the other evidence available on record then the said circumstances can be relied upon for convicting accused person.

41. In ***Kanhaiyalal Vs. The State of Rajasthan*** reported in **(2014) 4 SCC 715**, the Hon'ble Supreme Court after taking note of various earlier decisions on the point, has held that "last seen together" circumstance does not, by itself, lead to the inference that the accused had committed the crime. There must be something more on record establishing the link between the accused and the crime.

42. In the case of ***Ashok Vs. State of Maharashtra***, reported in **(2015) 4 SCC 393**, the Supreme Court has held that initial burden of proof to adduce sufficient evidence pointing towards the guilt of the accused would be on the prosecution. However, in case of "last seen together" circumstances the prosecution would be exempted from proving the exact happenings of the incident as it is the accused who would have special knowledge of the incident and thus would have the burden under Section 106 of the Evidence Act to offer explanation. It was, therefore, held that the last seen together, circumstance itself would not be conclusive prove but treated along with the other circumstances surrounding the incident, the same may lead to presumption of guilt.

43. In the case of ***State of Rajasthan Vs. Kashiram*** reported in **(2006) 12 SCC 254**, the Hon'ble Supreme Court has observed that if a person is last seen with the

deceased, he must offer explanation as to how he had parted company with the deceased and also furnish explanation which appears to the court to be probable and satisfactory.

44. In the present case, as noted above, the gap between the time when the deceased *Anowar Hussain* was last seen together along with accused *Saiful Islam* and the recovery of the dead body is very small. That apart, both of them were also seen together in the vicinity of the place of occurrence. Notwithstanding the same, the accused *Saiful Islam* has failed to offer any plausible explanation as to when and how he had parted with the company of the deceased.

45. Insofar as the disclosure statement Exhibit-9 of appellant *Saiful Islam* is concerned, we find that the I/O, i.e. PW-11 has exhibited the disclosure statement by bringing on record the exact words spoken by the accused *Saiful Islam*. Similar disclosure statement of the other appellant *Khairul Islam* has also been brought on record. There is no cross-examination of the I/O on the truth of his aforesaid evidence. Not only that, the defense side had not even questioned the authenticity of the disclosure statement while cross-examining the I/O (PW-11). Therefore, this Court is of the opinion that the evidence of the I/O regarding the date, time and the circumstances under which Exhibit-9 and 10 were recorded as well as the contents of such disclosure statement, have remained un-rebutted.

46. We also find from the materials on record that on being led by the accused persons/ appellants, the police had recovered the shirt of the deceased which was kept concealed under a bush in the jungle near the place where the dead body was found lying. The shirt was seized by the police in the presence of witnesses who have testified

before the court about the seizure process. Having regard to the evidence on record, there is no element of doubt that disclosure statement Exhibit-9 and 10 have been duly proved. The question, however, would be as to whether, the entire disclosure statements in Exhibits-9 and 10 including the confession of guilt would be admissible in the eyes of law. The answer to the said question would lie in Section 27 of the Indian Evidence Act, 1872, which is reproduced here-in-below for ready reference:-

“27. How much of information received from accused may be proved.

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

47. Law as regards the admissibility of the statement of the accused recorded under Section 27 of the Evidence Act is well settled since the decision of the Privy Council in ***Pulukuri Kotayya Vs. King-Emperor***, reported in ***(1947) 0 Supreme (SC) 4*** wherein it was held that as per Section 27 of the Evidence Act only so much of information leading to actual discovery of facts in consequence of such information would be admissible in evidence but the extent of information admissible must depend on the exact nature of fact discovered to which, such information is required to relate.

48. In ***Sanjay @ Kaka etc. etc. Vs. The State (NCCT of Delhi)***, reported in ***(2001) 1 SCC 692***, the Supreme Court has held that Section 27 of the Evidence Act is an exception to Section 25 and 26 of the Evidence Act which permits statement of the accused under custody of police officer, to be adduced in evidence. However, such statement, termed as disclosure statement, leading to discovery of facts which is

presumably in the exclusive knowledge of the maker, is based on the view that if the fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly, it can be safely allowed to be given in evidence.

49. From the analysis of the principles laid down in the aforesaid decisions it is crystal clear that only so much of the fact, as deposed by the accused person, while in police custody, which leads to actual discovery of fact, would only be admissible and nothing more. Applying the aforesaid legal principle to the facts of the case, we are of the opinion that only the statement of the accused persons regarding concealment of the shirt of *Laden* in the jungle as recorded in Exhibit-9 and 10 would be admissible under Section 27 of the Evidence Act and no further. Therefore, the alleged confession of the accused persons regarding their role in the death of the deceased would be inadmissible in the eyes of law.

50. Mr. Mahanta, learned Sr. counsel for the appellant in CrI. Appeal No. 164/2019 has also made an attempt to assail the disclosure statement on the ground that the same was not recorded in presence of independent witnesses. We, however, find from the decisions of the Hon'ble Supreme Court relied upon by Mr. Mahanta rendered in the case of ***Rajesh & Anr. (Supra)*** as well as ***Ramanand & Anr. (Supra)*** that the said decisions do not lay down the proposition of law that every disclosure statement and/ or panchnama of the police must be recorded in the presence of independent witnesses. Rather, the Hon'ble Supreme Court has observed as to what would be the correct procedure for recording the panchnama and what would be expected from police while preparing

panchnama relating to disclosure.

51. In ***Praveen Kumar Vs. State of Karnataka***, reported in ***(2003) 12 SCC 199***, the Hon'ble Supreme Court had observed that Section 27 does not lay down that the statements made to the police officer should always be in the presence of independent witness. In view of the above, we are of the opinion that the disclosure statements Exhibit-9 and 10 need not be discarded merely on account of the fact that those were not recorded in the presence of independent witnesses.

52. The evidence of PW-5 and 8 goes to show that on the day of occurrence, at about 05:00 – 05:30 pm accused *Saiful Islam* had left the place where he was playing cards with those witnesses and returned back to the place at around 06:30 – 07:00 pm along with accused *Khairul Islam*. From the bulk of evidence available on record, it is apparent that the incident took place sometime in between 05:00 – 07:00 pm and around that time, the deceased was last seen alive in the company of *Saiful Islam* and that too in the vicinity of the place of occurrence. Therefore, the evidence of PW-5 and 8 firmly establishes circumstances indicating that the appellant *Saiful Islam* had left the place where they were playing cards to commit the crime and soon thereafter, he had returned back to the same place. From the aforesaid evidence adduced by the prosecution side the following circumstances are firmly established.

(a) That the incident took place on 27-06-2017 at around 06:00 – 07:00 pm in the betel nut garden belonging to Amjad Ahmed which is situated in the north of the house of the deceased.

(b) The deceased was last seen alive a few minutes before the occurrence in the

company of the appellant *Saiful Islam*.

(c) Both *Saiful Islam* and the deceased *Anowar Hussain* were seen walking towards the betel nut garden of Amjad Ahmed minutes before the incident.

(d) Appellant *Saiful Islam* who was playing cards with the other witnesses left the place at around 05:00 – 05:30 pm and returned back at 06:30 – 07:00 pm.

(e) The police had recovered the shirt of the deceased based on the discovery statement of the appellant *Saiful Islam* on being lead by the accused persons.

(f) The appellant *Saiful Islam* has failed to offer any explanation as to the circumstances under which he had parted company with the deceased on the fateful day so as to discharge his burden under Section 106 of the Evidence Act, thus establishing an additional link in the chain of circumstances pointing towards the guilt of the accused *Saiful Islam*.

53. From the above, it is thus apparent that the prosecution has succeeded in establishing each link in the chain of circumstances pointing towards the guilt of the accused/ appellant *Saiful Islam*. Therefore, we are of the opinion that the learned trial court has rightly held that the appellant *Saiful Islam* was guilty of committing murder of deceased *Anowar Hussain* and convicted him in the manner as aforesaid. However, can the same be said for the other accused/ appellant *Khairul Islam*. The answer to the said question, in our considered opinion, has to be in the negative. This we say so for the following reasons:-

i) There is no "last seen together" circumstance involving the appellant *Khairul Islam*.

ii) *Khairul Islam* had left the place of playing cards at around 03:00 pm which was hours before the incident. There is no evidence to show that he went near the place of occurrence on the date of the incident.

iii) The mere fact that *Khairul* had returned back along with the appellant *Saiful Islam*, would no doubt raise a strong suspicion as regards his involvement in committing the crime. However, such suspicion cannot take the place of proof.

54. From the evidence of PW-11, it appears that the I/O had recorded the disclosure statement of accused/ appellant *Saiful Islam* first in point of time and thereafter, the statement of accused *Khairul Islam* was recovered. From the above, it can be reasonably presumed that when the disclosure statement of accused *Khairul Islam* was recorded, at that time, the police was already aware about the concealment of shirt of the deceased by the other accused person from the disclosure statement of *Saiful Islam*. It also appears that *Saiful Islam*, on being accompanied by *Khairul Islam*, had lead the police to the recovery of the shirt of the victim from concealment. However, which of the two accused persons took the lead is not clear from the evidence. There is also no other incriminating material against the appellant *Khairul Islam* so as to connect him with the commission of the crime.

55. In the case of ***Mustkeem @ Sirajudeen Vs. State of Rajasthan*** reported in ***(2011) 11 SCC 724***, the Supreme Court has observed that disclosure of the accused alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence.

What is admissible under Section 27 of the Act is the information leading to leading to discovery and not any opinion formed on it by the prosecution.

56. The prosecution has examined PW-7 to show that the appellant *Khairul Islam* along with one "Saddam Hussain" had made an attempt to purchase railway ticket for travelling to Chennai. However, from the evidence of PW-7, it is not clear as to on which date, *Khairul Islam* had sought to buy railway ticket to travel to Chennai. Moreover, "Saddam Hussain" named by the PW-7 has also not been identified properly through the evidence of the prosecution side. It cannot be said that "Saddam Hussain" is the same person as *Saiful Islam*. Therefore, what role "Saddam Hussain" had to play in this case is completely unknown.

57. Insofar as the attempt on the part of the appellants to kidnap the deceased for ransom is concerned, it is no doubt correct that through the testimonies of PWs-3 and 4, "extra-judicial confession" on the part of the accused persons has been brought on record. From the testimony of PWs-3 and 4 it appears that both the accused persons had confessed before them of having hatched a conspiracy to kidnap the son of the informant for ransom and in the process, the deceased had suffered fatal injury. However, what would be significant to note herein that at the time when the accused persons had allegedly made the "extra-judicial confession" before PWs-3 and 4, they were in police custody. Therefore, the extra-judicial confession would be inadmissible in law. We are, therefore, of the considered opinion that although the materials on record may be sufficient to raise a strong suspicion as regards the involvement of *Khairul Islam* in commission of the crime, yet, such suspicion howsoever, strong cannot take the place of

proof.

58. In view of the discussions made in the forgoing paragraphs, it cannot also be said that the evidence adduced by the prosecution against both the accused persons are one and the same. As such, after analyzing the evidence on record, we find ourselves in agreement with the submission of Mr. Mahanta that it will be highly unsafe to convict the appellant *Khairul Islam* based on the evidence brought on record.

59. We have also noted that although the learned trial court had also framed charge against the accused persons under Sections 120(B)/364/201 IPC, the appellants have neither been convicted nor acquitted by the learned trial court in respect of those charges.

60. For the reasons stated hereinabove, we affirm the conviction of appellant *Saiful Islam* under Section 302 IPC as well as the sentence awarded to him by the learned court below. However, by giving the benefit of doubt to the appellant *Khairul Islam*, we set aside his conviction under Section 302 IPC and set him at liberty.

Appellant *Khairul Islam* may be released from jail, if his custodial detention is not required in connection with any other proceedings.

Send back the LCR.

JUDGE

JUDGE

GS

Comparing Assistant