



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL(J) Nos.29/2015 & 30/2015

CRIMINAL APPEAL No. 98/2015

I. Crl.A.(J) No. 29/2015

Md. Rustam Ali @ Matu,
S/O Md. Mustaf Ali,
Resident of Santipur,
PS-Golaghat, District-Golaghat.

.....Appellant.

-Versus-

1. The State of Assam.
2. Shri Priyatam Barhoi,
S/O Lt. Tilak Ch. Barhoi,
Resident of Nandanpur, Jorhat Town,
PS-Jorhat, District-Jorhat, Assam.

.....Respondents.

Advocate(s) for the Appellant : Ms. B. Devi,
Mr. M. Rahman,
Mr. S. Borgohain,
Mr. G. Gorlosa,
Mr. M. Borgohain.

Advocate(s) for the Respondents : Ms. S. Jahan, Addl. P.P., Assam,
Mr. D. Baruah,
Ms. P. Handique.

II. Crl.A.(J) No. 30/2015

Bidya Sagar Rabi Das @ Badam,
Resident of Hindi School Road,
P.S.-Golaghat, District-Golaghat.

.....Appellant.

-Versus-

1. The State of Assam.

2. Shri Priyatam Barhoi,
S/O Lt. Tilak Ch. Barhoi,
Resident of Nandanpur, Jorhat Town,
PS-Jorhat, District-Jorhat, Assam.

.....**Respondents.**

Advocate(s) for the Appellant : Ms. M. Buzarbaruah,
Amicus Curiae.

Advocate(s) for the Respondents : Ms. S. Jahan, Addl. P.P., Assam,
Mr. D. Baruah.

III. Crl.A. No. 98/2015

1. Fazlul Ali,
S/O Md. Ashraf Ali.
2. Junu Rahman,
S/O Lt. Makbul Rahman.

Both are residents of Santipur, Ward No.3,
PS-Golaghat, District-Golaghat, Assam.

.....**Appellants.**

-Versus-

1. The State of Assam.
2. Shri Priyatam Barhoi,
S/O Lt. Tilak Ch. Barhoi,
Resident of Nandanpur, Jorhat Town,
PS-Jorhat, District-Jorhat, Assam.

.....**Respondents.**

Advocate(s) for the Appellants : Mr. H.R.A. Choudhury (Sr. Adv.),
Mr. I.A. Hazarika,
Mr. A. Ahmed,
Mr. A. Matin.

Advocate(s) for the Respondents : Ms. S. Jahan, Addl. P.P., Assam,
Mr. D. Baruah.

BEFORE
HON'BLE MR. JUSTICE N. KOTISWAR SINGH
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Dates of Hearing : 26.08.2022, 02.09.2022 & 22.09.2022

Date of Judgment : ***27.12.2022***

JUDGMENT AND ORDER (CAV)

[*N. Kotiswar Singh, J.*]

Heard Mr. S. Borgohain, learned counsel for the appellant in Crl.A.(J) 29/2015; Ms. M. Buzarbaruah, learned *amicus curiae* for the appellant in Crl.A.(J) No.30/2015 as well as Mr. A. Ahmed, learned counsel, appearing for the appellants in Crl.A. No.98/2015. Also heard Ms. S. Jahan, learned Additional Public Prosecutor, Assam, appearing for the respondent No.1 and Mr. D. Baruah, learned counsel appearing for the respondent No.2.

2. These three appeals have been taken up together as these arise out of the same judgment dated 09.03.2015 rendered by the learned Sessions Judge, Jorhat, in Sessions Case No.118(J-J)/2008, by which 4(four) accused, namely, (i) Md. Rustam Ali @ Matu, (ii) Bidya Sagar Rabi Das @ Badam, (iii) Fazlul Ali and (iv) Junu Rahman, have been convicted under various sections of the Indian Penal Code, 1860 IPC (hereinafter referred as IPC).

The appellant in Crl.A.(J) No.29/2015, namely, Md. Rustam Ali @ Matu and the appellant in Crl.A.(J) No.30/2015, namely, Bidya Sagar Rabi Das @ Badam, have been convicted under Sections 302/34 & 380/34 of IPC.

On the other hand, the two appellants in Crl.A. No.98/2015, namely, Fazlul Ali and Junu Rahman have been acquitted of the charge under Sections 302/34 IPC, but convicted under Section 411 of IPC and Section 380 of IPC, respectively.

Crl.A.(J) No. 29/2015

3. Mr. S. Borgohain, learned counsel for the appellant in Crl.A.(J) No.29/2015 submits that apart from the retracted confessional statement of the appellant, none of the prosecution witnesses has leveled any allegation against the appellant and the Trial Court convicted the appellant based on a presumptive fact, which did not exist, relying on the statement of one witness (PW1) that the appellant had whitewashed house of the PW1, who was brought by another appellant (Bidya Sagar) and the PW1 had owed some money for the works done by the appellant Rustom Ali which was paid about 4/5 days before the incident.

Crl.A.(J) No.30/2015

4. Ms. M. Buzarbaruah, learned *amicus curiae* for the appellant in Crl.A.(J) No.30/2015 has also submitted that the appellant cannot be convicted under Section 302 of IPC in as much as except for the confessional statement of the co-accused, namely, Md. Rustam Ali @ Matu, the other appellant, there is no other evidence to sustain the conviction. It has been submitted that even the aforesaid confessional statement of Md. Rustam Ali @ Matu was retracted by him during the trial and as such, it being a very weak piece evidence it could not be used to convict the appellant Bidya Sagar Rabi Das @ Badam without any corroboration, which is missing.

Crl.A. No.98/2015

5. On the other hand, it has been submitted by Mr. A. Ahmed, learned counsel for the other appellants, namely, Fazlul Ali and Junu Rahman, in Crl.A. No.98/2015 that though the learned Trial Court had acquitted both these appellants of the charge of committing offence under Section 302/34 of IPC, yet convicted them under Section 411 of IPC and Section 380 of IPC, respectively, even though there were insufficient material evidence against them.

6. In order to appreciate the aforesaid submissions advanced, we will briefly refer to the background facts.

The criminal justice system was put into motion after an FIR was lodged on 29.05.2006 by one Priyatam Barhoi (PW-1), the grandson of the deceased woman, namely, Manki Neog, aged about 85 years, alleging that at around 10 o'clock on 29.05.2006 some unknown persons had killed his grandmother by sawing her throat and they also looted movable properties including ornaments, computer, DVD, cash, etc. On the basis of the said FIR lodged, a police case being Pulibar P.S. Case No.77/2006 under Section 396 of IPC was registered in Pulibar Police Station.

Accordingly, the investigation was launched. After carrying out the investigation by examining the relevant witnesses and recovery of stolen goods, on completion of the same, charge-sheet was filed against the aforesaid 4(four) accused persons, namely, (i) Md. Rustam Ali @ Matu, (ii)

Bidya Sagar Rabi Das @ Badam, (iii) Fazlul Ali and (iv) Junu Rahman before the Court. The learned Trial Court, accordingly, after committal, on the basis of the aforesaid charge-sheet framed the following charges against them, which, as recorded in the original file, are reproduced hereinbelow,

“Firstly- That you on or before or during (date/period) on 29/05/06 at about 10 a.m. you committed murder with an intention to cause death of Manki Neog in furtherance of common intention. And thereby committed an offence punishable under Section 302 of the I.P.C., R/W 34 I.P.C. Act and within my cognizance/cognizance of this court.

Secondly- That you on or about or during (date/period) on the same date, place and time you dishonestly detained stolen properties, i.e. Gold ornaments, D.V.D., Computer and cash amount knowing the said properties to have been transferred by the commission of dacoity or had the reason to believe to belong to a gang of dacoits and thereby committed an offence punishable under Section 412 of the I.P.C./34 I.P.C. Act and within my cognizance/cognizance of this court.”

7. In support of the prosecution case, the prosecution examined as many as 25(twenty five) witnesses and exhibited a number of documents including the statements recorded under Section 164 of Cr.P.C. of some of the witnesses as well as the confessional statement made by the prime accused Md. Rustam Ali @ Matu, the appellant in CrI.A.(J) No.29/2015.

8. The learned Trial Court after appreciating the evidence on record, convicted the two accused, namely, Md. Rustam Ali @ Matu and Bidya Sagar Rabi Das @ Badam, under Sections 302/34 & 380/34 of IPC and convicted Fazlul Ali under Section 411 of IPC and Junu Rahman Section 380 of IPC.

9. Before we consider the submissions of the appellants, firstly, we will briefly refer to the evidences on record.

PW-1 is Priyatam Barhoi, the complainant, who stated that on the day of occurrence, his grandmother was alone at home and when he came home he found his grandmother dead with her neck cut. He also found the ornaments, clothes, IBM computer, DVD player, a 'takeli' containing money missing. Substantial quantity of gold ornaments were also found missing. He also stated that articles worth about Rs.60,000/- or Rs.70,000/- were missing. He stated that earlier, Rustam Ali had whitewashed his house and it was the appellant Bidya Sagar Rabi Das alias Badam, who had brought Rustam to whitewash their house. Rustam, also known as Matu. Rustam, had worked in their house for about 4/5 months and had paid him about Rs.100/- some 4/5 days prior to the incident and Rustam had sent his younger brother to collect the money. He also mentioned about the recovery of dao and a towel which were lying near the dead body which were seized by the police.

10. PW-2 is one Smt. Momi Saikia Barhoi, wife of PW-1. She also stated that when she came to the house she found many household articles missing and the godrej almirah was found opened and the jewellery box, computer, DVD, etc. were missing. She also stated that she recognized Rustam Ali as well as Bidya Sagar, and Rustam had whitewashed their house and Bidyasagar who sells peanuts, had called Rustam to their house for the whitewashing.

11. PW-3 is one Smt. Pranati Borah, the daughter of the deceased. She was the first person who entered the house i.e. the place of occurrence to

enquire about her mother who found the door open and did not find anybody but found her mother dead with a cut injury on her neck and the head severed. Thereafter, she started wailing and on hearing the hue and cry, people arrived at her house. She also stated that the household articles of her mother were looted.

12. PW-4 is one Smt. Padumi Neog, who is also a daughter of the deceased, and was staying in the same house with the deceased. On being informed about the incident over phone by her son she came and she found her mother dead with her neck cut. She also stated that articles including jewellery, computer, cash, etc. kept in the almirah (godrej) were looted. She also stated that she did not know who had committed the crime. In the cross-examination she stated that some of the articles looted by the dacoits were recovered.

13. PW-5 is one Amiya Kr. Neog, who is the neighbour of the deceased, who went to the place of occurrence after he heard the hue and cry. He was a witness to the seizure of a dao and also when the inquest was held on the dead body.

14. PW-6 is one Bitopan Borah, who was a witness to the seizure of a computer which was recovered from the house of appellant Fazlul Ali, though he stated that he did not know how the computer was found there.

15. PW-7 is one Deep Majumdar, who is a witness to the seizure of one DVD. He stated that there is one wine canteen nearby and at the time while

he was playing, the police came in a vehicle and the people who were taking liquor in the wine canteen fled from the place. He stated that the police said that a bundle was in the canteen and asked them to bring that bundle. Then his younger brother and elder brother brought the bundle and delivered it to the police and he put his signature on the seizure memo of the said bundle. He was, however, declared hostile by the prosecution and was accordingly allowed by the Trial Court to be cross-examined by the prosecution. He denied having stated before the police that on 29.04.2006 Md. Mustaf Ali had delivered him a DVD and asked him to keep it under his custody and that Mustak told him that the said DVD belonged to him and when police came, he delivered the DVD to the police whereupon they seized the same.

He, however, stated that when the police went there, they took Mustaf Ali, along with them. Joy Majumdar, who is his cousin, put his signature in the Exhibit-5, the seizure list of the DVD in his presence and he identified the signature of Joy Majumdar.

In the cross-examination by the defence, he, however, stated that he did not produce any article to the police and he did not see what article was seized, but he was told that it was a DVD. He also stated that he did not know any Mustak by name nor did Mustak give him anything.

16. PW-8 is one Mrs. Nureda Begum, who is the mother-in-law of the appellant Fazlul Ali. She stated that on 30.05.2006, the police from Jorhat Police Station accompanied by the police from Golaghat Police Station came to their house and seized one CPU and a mouse, both of which are of IBM brand,

from their house. She stated that her son-in-law had kept those seized articles in their house. She also stated that when the police came to their house, she produced those articles to them and she also proved the Exhibit-6 which is a seizure list wherein she had put her signature as Exhibit-6(1). She of course stated that she had not seen the seized articles in the Court. She also stated that she had made a statement before the Magistrate earlier, which was Exhibit-7 and proved the same by identifying her signature as Exhibit-7(1). In the cross-examination she stated that while making statements before the Trial Court and before the police, she stated that it was Junu, who had kept those articles in her house and that it is not a fact that she did not make the aforesaid statement. She also stated that it is not a fact that she did not put her signature in the seizure list at her home. She also stated that it is not a fact that Junu Ali did not keep any article in her house.

17. PW-9 is one Md. Jalal Ahmed, who is the father-in-law of appellant Fazlul Ali and the husband of PW-8. He stated that appellant Fazlul Ali is his son-in-law, and on 30.05.2006 the police came to their house and seized one CPU and a mouse from their house, which was kept by Junu Ali. He stated that later on coming to know that these articles were stolen goods, he informed the Merapani Police Station about it and after a while, the police came to his house taking his son-in-law and his daughter along and recovered these articles. He stated that his son-in-law Fazlul Ali and daughter Eli Begum showed the police those articles. He also stated that his daughter is no more. He also proved the Exhibit-6, which is the seizure list and identified his

signature therein as Exhibit-6(2). In his cross-examination he stated that it is not a fact that he did not state before the police that Junu Ali had kept these computer accessories in his house. He also stated that it is not a fact that he did not state before the police that going to his house along with the police, his son-in-law and daughter had produced those seized articles from his house. He denied that Junu Ali had not kept anything in his house. He also denied the statement that going to his house, Fazlul and his daughter had produced these articles to police is false.

18. PW-10 is one Bhaikan Bora, who came to the place of occurrence after being informed by the grandson of the deceased when he took the dead body to the hospital in a vehicle. However, he was declared hostile by the prosecution. In the cross-examination he denied that the accused Rustam Ali had demonstrated before the police at the place of occurrence how the crime was committed by them. In the cross-examination by the defence, he stated that on being called by the police, he went to the place of occurrence but did not meet any accused there.

19. The next prosecution witness is one Prabin Ch. Bora, who was examined as PW-11, who was in a neighbourhood of the deceased's house. He deposed that when he went to the place of occurrence, he saw the two accused persons, who were along with the police, who demonstrated to the police as to how they had entered the house and killed the woman and how they had committed the crime. As shown by them, the police drew the sketch map and PW11 put his signature to the said sketch map (Exbt.-8). He also

stated that the appellant Rustam Ali was present when the sketch map was drawn. In the cross-examination by the defence, he denied that while putting his signature in the sketch map, he did not sign in a white paper, though he did not remember what were drawn on it. He also stated that he put his signature but he did not remember who else had put their signatures therein.

20. Next prosecution witness is one Md. Abul Ali, who was examined as PW-12, who was a witness to the seizure of certain articles from the house of the appellant Fazlul Ali. He stated that he was a neighbour of the accused persons. He stated that on 01.06.2006 the police went to Fazlul Ali's house by taking Fazlul along with them. He stated that the police displayed some gold ornaments on a table but he did not know from where those articles were brought. He stated that he saw the accused Rustam Ali in the police vehicle and Ashraf Ali, the father of Fazlul was there with him. At that time he was declared a hostile witness at the instance of the prosecution and he was allowed to be cross-examined by the prosecution.

In the cross-examination by the prosecution, he denied having stated before the police that after coming to the residence of Fazlul along with the police, Rustam Ali had asked Fazlul to bring out the articles Rustam had robbed whereupon Fazlul had produced three small packets wrapped with polythene from his latrine drain and the nearby jungle and these packets had contained gold ornaments.

In the cross-examination by the defence, he stated that he went to the house of the accused on receiving a phone call from one of his neighbours. He

stated that he did not see from where the police had brought those articles and how, but he saw Fazlul there with the police. He also stated that he did not know anything except for the fact that he had put his signature and that he had seen the articles being displayed on the table. He also stated that the contents of Exhibit-9 were not read over to him and he was just told that the articles had been found.

21. The next witness examined is Md. Ashraf Ali, as PW-13, the father of accused Fazlul Ali, who was living separately. He stated that on 01.06.2006, the police went to Fazlul's house and he was called there. He stated that Rustam Ali was there with the police and the police seized some articles from the house of Fazlul stating that these had been recovered and showed these bundles stating that these are stolen articles, he put his signature on Exhibit-9. At that stage, he was declared a hostile witness at the instance of the prosecution and he was allowed to be cross-examined by the prosecution.

In the cross-examination by the prosecution he denied having given the statement before the police that Rustam said that he had delivered the articles which he robbed, to his son Fazlul to be kept and concealed and when Rustam asked Fazlul to produce these articles, the latter produced two packets wrapped with polythene from the latrine drain of his house and one from the nearby jungle. He however stated that the three packets contained gold ornaments.

In the cross-examination by the defence, he stated that the police did not show him any article and he did not know the contents of the paper.

Police told him that they had found some articles but did not tell him from where those articles had been found and he did not see any article being recovered from the house of Fazlul.

22. The next witness examined was Md. Mustaq Ali, PW-14, who is the father of the appellant Rustom Ali. PW-14 stated that he does not live with his son but stays in a separate rented room. He stated that a man named Hussain gave him a DVD to keep in his custody. He stated that Hussain has a PCO or a cycle store. After receiving the DVD from him, he had kept it in a wine shop near the Hindi School. When the police asked him about the whereabouts of the DVD, he showed the place where it was kept but he did not know from where Hussain got the DVD and at that stage, he was declared a hostile witness and was allowed to be cross-examined by the prosecution.

In the cross-examination by the prosecution, he denied having stated before the police that at around 3/4 p.m. Hussain took him to his PCO and gave him a DVD saying that his son Rustom had asked the DVD to be kept there. He also stated that he made a statement before the Magistrate earlier but he denied that Hussain told him that Rustom had given the DVD

In the cross-examination by the defence, he stated that it is not a fact that he did not tell the police that Hussain had given him the DVD.

23. The next witness examined was Md. Naushad Hussain, PW-15. He is an employee of a PCO. He stated that the accused Rustom had given him a bundle and asked him to deliver to his father. The bundle was inside a bag.

He asked Rustom's father to come into the PCO where he delivered the article. He stated that he cannot say what article it was. He proved the statement made by him under Section 164 of Cr.P.C. He stated before the Magistrate that the accused Rustom Ali had given the DVD.

In the cross-examination, PW-15 stated that he had kept the article in his custody as he was acquainted with Rustom, the appellant, and when Rustom's father took that article from him, he informed that it was a DVD but he did not know whether the DVD belonged to the accused or not. He stated that Rustom's father took the article and left the place.

24. The next witness examined was Manikanta Chamuwa, PW-16, who was working as an S.I. at Golaghat Police Station. He stated that on getting information from the Pulibar Police Station regarding concealing of some stolen articles in connection with Pulibar P.S. Case No.77/2006 in the house of one Jalal Ahmed (PW9), he was entrusted to search the house of Jalauddin Ahmed (PW9) and accordingly he searched the house of Jalaluddin Ahmed on 30.05.2006 and seized one CPU(IBM), one mouse of IBM. which were produced in presence of the witnesses. The said seizure list was exhibited as Ext.6 and he identified his signature thereon. He stated that when he seized the articles, Jalaluddin had informed him that one Junu Ali of Golaghat, Santipur had kept the said articles in the house on the same day. He also recorded the statements of seizure witnesses, Jalaluddin Ahmed (PW9), Nureda Begum (PW8),appellant Fazlul Ali and handed over the seized articles to the Pulibar Police Station.

In the cross-examination, PW-16 stated that witnesses, Md. Jalal Ahmed (PW9), Forida Begum and appellant Md. Fazlul Ali had given statement before him under Section 161 of Cr.P.C. He stated that he did not prepare the sketch-map of the house from where the said articles were seized and also did not mention specifically the place from where the seized articles were seized. But he stated that Smt. Nureda Begum(PW8) resides in the house wherefrom the seized articles were seized and Smt. Nureda Begum had disclosed before him that accused Junu Ali had kept those articles in her residence, but she did not mention the name of Fazlul Ali, the other co-accused in her statement made under Section 161 of Cr.P.C. He also stated that witness Md. Jalal Ahmed (PW9) had specifically named the accused Junu Ali but did not name the other co-accused Fazlul Ali. He also did not question the accused Junu Ali about the recovery of the articles. He denied the suggestion of the defence that Md. Jalal Ahmed (PW9) did not state before him that the accused Junu Ali had kept the aforesaid articles in his residence. He also denied the suggestion that Smt. Jubeda Begum was not present at the residence of her daughter at the time of seizure.

25. The next witness examined was Pranjali Ch. Borah, PW-17, who was working at a PCO who stated that the appellant Bidya Sagar used to sell peanuts near the shop.

26. One Sri Krishna Kanta Dutta was examined as PW-18 who was the Inspector of Police, CID who took part in the investigation of the case. He stated that the O/C of Pulibor P.S. had informed him that one Junu Rahman

had already surrendered at Golaghat Police Station and he was brought to Pulibor Police Station and accordingly, he recorded his statement.

27. The next witness, Dr. Balin Kharghari was examined as PW-19 who conducted the post-mortem examination on the dead body and made the following observations:

“Injury :

Sharp fresh cut wound over root of neck transversely present, size 3” x 3” x 2”.

Divided all the underlying structure carotid artery both with neck muscle.

THORAX

Larynx and trachea : congested and Trachea divided vessels : carotid artery divided.

The cut injury over the neck is antemortem in nature.

As per the opinion as revealed in the postmortem, the cause of death is syncope as a result of Haemorrhage.

Exbt.11 is the said postmortem report. Exbt.11(1) is the signature of Dr. Arif Ahmed Zaman which I know and Exbt.11(2) is my signature.

The injury at the root of the neck which is transversely present. Size 3” x 3” x 2”, divided all the carotid artery with neck muscle is sufficient to cause death.”

According to Dr. Balin Kharghari, PW-19, the cause of death was syncope, as result of haemorrhage. He also stated that the injury at the root of the neck which divided all the carotid artery with muscle neck was sufficient to cause death.

28. The next witness examined was Sri Dwijendra Barman, PW-20, who was also involved in the investigation of the case as the Investigating Officer.

He narrated how he undertook the investigation and recorded the statement of the witnesses including the accused. We will make reference to his statement later on.

29. The next witness examined was Sri Arpan Kumar Saikia, PW-21 who conducted the inquest over the dead body.

30. Sri Mridul Kumar Saikia, PW-22 was the next witness, who was working as the Judicial Magistrate, First Class, Jorhat before whom the appellant Rustom Ali made the confessional statement. In his evidence, he (PW-22) stated that he recorded the confessional statement of appellant Rustom Ali after being satisfied that he was making the statement voluntarily and after taking all the due precautions as required under the Rules by giving him three hours' time of reflection before he made the confession and also after informing him that he was not bound to make any confession and that such confessional statement could be used against him.

He was also the Magistrate before whom some of the witnesses, namely, Ms. Nureda Begum (PW-8), Md. Mustaq Ali (PW-14) gave their statement which were recorded under Section 164 of Cr.P.C. One witness, Smt. Elina Begum who died before the trial, also gave her statement recorded under Section 164 of Cr.P.C.

31. The next witness examined was Sri Tilak Chandra Sarmah, PW-23 who was posted at Golaghat Police Station who accompanied the Investigating Officer while visiting the residence of appellant Fazlul Ali from where certain

articles, i.e., one blue coloured polythene packet containing two gold bangles, one white polythene packet containing one gold Magalsutra along with one black pearl in between and one gold chain with locket; one red coloured polythene packet containing one gold bangle; two numbers of small bangles; one gold necklace; one small gold necklace with locket; one gold chain with alphabet "S"; one gold designed necklace with one small chain bearing locket with alphabet "A" were recovered and he proved the seizure list as a witness to the same. He also proved the signature of other witnesses to the said seizure list (Ext.9). He denied the suggestion made by the defence that Rustom Ali and Fazlul Ali did not lead S.I. Dwijendra Barman to the place from where the aforesaid articles were seized. He stated that as the seized articles were given on Zimma, he had not seen the seized articles in the Court.

32. The next witness examined was Sri Joy Mazumdar, PW-24, who was related to Dip Mazumdar, examined as PW-7. PW-24 stated that on 31.05.2006, the police seized one DVD (Takai brand) from the residence of Dip Mazumdar in his presence and other witnesses. In the cross-examination, PW-24 stated that he did not know from where Dip Mazumdar, PW-7, had got the DVD player.

33. The next witness examined was Smt. Mona Borah, PW-25 who was living in the neighbourhood of accused Fazlul Ali. Smt. Mona Borah, PW-25 was examined by the prosecution. She identified the accused persons in the dock.

34. After the aforesaid witnesses were examined and the material exhibits exhibited, the accused were examined under Section 313 Cr.P.C. and were confronted with the incriminating evidences which were disclosed in course of the trial.

35. We will refer to the relevant questions and answers given by the accused when we discuss the relevant evidences later on.

Crl.A.(J) No. 29/2015

36. The learned Trial Court convicted the appellant Md. Rustom Ali @ Matu on the basis of his confessional statement recorded under Section 164 of Cr.P.C. which he retracted while being examined under Section 313 of Cr.P.C., and on the basis of discovery of stolen items at his instance, which according to the Trial Court corroborated his confessional statement.

37. Accordingly, we will first examine as to the correctness of such finding by the learned Trial Court in convicting the appellant Rustom Ali for the aforesaid reasons.

38. First we will reproduce the confessional statement of the appellant Rustom Ali made before the Magistrate on 03.06.2006 which reads as follows,

“Around 10.00 a.m. on 29/05/06, in furtherance of our previously hatched plan Junu, Badamwala (a peanut seller) and I went to Dada’s house at Nandanpur to commit dacoity. Arriving at there, we called the grandmother. As soon as Badamwala saw the grandmother, he pressed the throat of her. Since she did not die, Badamwala asked me to fetch a dao and cut her. Then, I dealt a cut blow in her neck with that dao. Later, Badamwala sawed her throat with that dao as a result of which she died. Then, I came out of the house taking the

D.V.D. along and the rest two persons took the computer, gold ornaments, cash etc. away. We sent those articles to Golaghat. I myself took the D.V.D. by bus.”

39. The said confessional statements has been questioned by Mr. S. Borgohain, learned counsel for the appellant Rustom Ali on various grounds,

40. Mr. Borgohain submits that the said confessional statement is totally unreliable to form the basis for conviction as it was subsequently retracted. It has been submitted that otherwise also, though apparently the confessional statement appears to have been recorded by the Magistrate as provided under Section 164 of Cr.P.C., on a closer scrutiny of the same, it would be seen that the Magistrate while recording the confessional statement did not take appropriate care and caution to ensure that such statement was made voluntarily and in fact, it would be seen that it was recorded perfunctorily by the Magistrate in a mechanical manner.

41. It has been submitted that the Magistrate did not verify as to how and when the appellant was arrested before his statement was recorded in the form as provided under Section 164 of Cr.P.C. in which the Magistrate (PW22) recorded the confessional statement of the appellant Rustom Ali. It is seen that the said confessional statement was recorded on 03.06.2006 and in the form it has been recorded by the Magistrate that the appellant was arrested at 2:00 P.M. on 02.06.2006 in a Town Pulibor though the appellant was arrested on 29.05.2006 as stated by the I.O. of the case (PW20), and as such, wrong recording of the date of arrest by the Magistrate clearly indicates that the

Magistrate did not verify as to when the appellant was arrested before he was produced before him for making the confessional statement, which indicates lack of seriousness on the part of the Magistrate while recording the confessional statement.

42. It has been also submitted that perusal of the so called confessional statement would indicate that the Magistrate did not take appropriate steps to ensure that the confessional statement was made voluntarily and if confessional statement is not found to be truly voluntarily made, it cannot be acted upon, relying on the decisions of the Hon'ble Supreme Court in ***Shankaria Vs. State of Rajasthan, (1978) 3 SCC 435, Shivappa Vs. State of Karnataka, (1995) 2 SCC 76, Preetam Vs. State of M.P., (1996) 10 SCC 432.***

43. It has been submitted that since there is nothing on record to show that the Magistrate was satisfied that the confession by the appellant Rustom Ali was made voluntarily, the said confessional statement cannot be relied upon. It has been submitted that once the confessional statement is not found to be voluntarily made, the prosecution case would fall flat, inasmuch as there will be nothing except the alleged discovery of certain stolen items at the instance of the appellant would be the sole basis for conviction. It has been also submitted that the aforesaid alleged recovery of the stolen items allegedly at the instance of the appellant Rustom Ali is also not proved.

44. Mr. Borgohain also submits that perusal of the confessional statement would show that no question was asked from the appellant Rustom Ali by the

Magistrate before the confessional statement was recorded, to ascertain the voluntariness of the appellant to make the confessional statement. He submits that on the contrary, it is seen that after the confessional statement was made the Magistrate merely recorded his satisfaction that it was made voluntarily, which is not permissible. Such satisfaction of the Magistrate ought to have been recorded before the aforesaid statement was recorded by the Magistrate.

45. In ***Shankaria*** (supra), the Hon'ble Supreme Court held that when a conviction of an accused is primarily based on the confessional statement made under Section 164 of Cr.P.C., the Court must apply the double tests, namely, whether the confession is perfectly voluntary and if so, whether it is true and trustworthy. The Hon'ble Supreme Court further went to observe that satisfaction of the first test is *sine qua non* for the admissibility of evidence. Thus, if the conviction appears to the Court to have been caused by any inducement, threat or promise, it must be excluded and rejected *brevi manu*. If this test is satisfied, the Court must then reach a finding that it is true and reliable, and there cannot be any rigid formula for judging the reliability of any evidence, but in the case of a confession, the Court must examine the confession and compare it with the rest of the evidence and if on such examination, the confession appears to be a probable catalogue of events and naturally fits in with rest of the evidences and the surrounding circumstances, it can be said that the confession satisfies the second test.

46. It was also observed in ***Shankaria*** (supra) that it becomes more important to critically examine the confessional statement if it is retracted.

47. In ***Preetam*** (supra), the Hon'ble Supreme Court found that the Magistrate before recording the confession, did not put questions to ascertain the voluntary nature of the confession and as such, held that the confessional statement was inadmissible in evidence. The Hon'ble Supreme Court in the said case of ***Preetam*** (supra) found that though the Magistrate explained to the accused that he was not bound to make confession and if he did so, it may be used against him, the other requirement which obligates the Magistrate to put questions to the accused to satisfy himself that the confession was voluntary so as to enable him to give the requisite certificate under sub-Section 4 has not been fulfilled, for the learned Magistrate did not ask any question whatsoever, to ascertain whether the appellant was making the confessional statement voluntarily.

48. In ***Shivappa*** (supra), the Hon'ble Supreme Court found that before recording the confessional statement, the Magistrate did not disclose to the accused that he was a Magistrate and that the confession was being recorded by him in that capacity. The Hon'ble Supreme Court also found that the Magistrate did not make any enquiry to find out whether the accused had been influenced by anyone to make the confession. The Hon'ble Supreme Court also found that the Magistrate did not lend any assurance to the accused that he would not be sent back to the police custody in case he did not make the confessional statement. The Hon'ble Supreme Court also noted that the Magistrate did not question the appellant as to why he wanted to make the confession or as to what had prompted him to make the confession.

It was held that, thus, there was a failure on the part of the Magistrate to make a real endeavour to ascertain the voluntary character of the confession which persuaded the Hon'ble Supreme Court to take the view that the confessional statement made by the accused under Section 164 of Cr.P.C. was not voluntary.

49. The submission made by Mr. Borgohain, learned counsel for the appellant Rustom Ali, based on the aforesaid decisions of the Hon'ble Supreme Court has been seriously contested by Ms. S. Jahan, learned Additional Public Prosecutor and submitted that the confessional statement made by the appellant Rustom Ali was indeed voluntary in nature and as such, it can be relied upon.

50. We have minutely gone through the confessional statement of the appellant Rustom Ali recorded by the Magistrate (PW22).

51. The Magistrate recorded that the appellant was arrested at about 2:00 P.M on 02.06.2006 on the basis of the statement made by the appellant though the appellant was already arrested on 29.05.2006. We are of the view that the said discrepancy as to the actual date of arrest of the appellant Rustom Ali may not go to the root of the voluntariness of the statement, if we find otherwise from the materials on record. Accordingly, we will examine the other parts of the said confessional statement to ascertain whether it was truly voluntary or not.

52. From the records, as also noted by the learned Trial Court, the appellant was first produced before the Magistrate on 02.06.2006 at 3:45 P.M. when the Magistrate explained all the legal consequences that would follow from his voluntary statement which the appellant desired to make, but since it was already 3:45 P.M., the Magistrate felt that there was lack of sufficient time for reflection and the Magistrate directed the Constable on duty in the Court to take the appellant to jail by directing the jail authorities to produce the appellant on 03.06.2006 for recording his statement on the next day at 10:00 A.M. Accordingly, on 03.06.2006, the appellant was produced before the Magistrate and then the Magistrate again explained all the legal matters and consequences that would follow from his confessional statement, and thereafter, he allowed 3(three) hours time for reflection to the appellant. After expiry of 3(three) hours, the appellant was again produced before the Magistrate who then again explained to him the legal consequences to which the appellant desired to make the confession and accordingly, different relevant questions were asked to him in Assamese language and it was narrated to him and after the appellant admitted to the correctness of the same who recorded after obtaining his signature in the confessional form.

53. We have also noted that the Magistrate specifically put the questions to him in Assamese language that he is not a police officer but a Magistrate which was understood by the appellant. Thereafter, the Magistrate asked the appellant whether he understood that he was not bound to make his statement to which he replied in the affirmative. The Magistrate also

specifically informed the appellant that the confession which he was going to make could be used against him. The appellant was asked as to whether he was giving the statement on his own without being influenced by anybody, to which he replied in the affirmative. The appellant was also informed that even if he does not give any confessional statement, he will not be handed over to the police custody. Thereafter, the Magistrate made his certification that he had recorded the statement by strictly observing the provisions of Rule 23 of High Court General Rules and Circular Order and by following the provisions under Section 164 of Cr.P.C. The Magistrate also specifically recorded that he had explained to the appellant that he is not bound to make confession and that if he does so, any confession may be used as evidence against him further. The Magistrate also made a recording that on being asked the reason behind his making the confession, the appellant replied that he repented his guilt and was ready to accept any sentence against him for the sin he has committed.

54. Thus, from the above, it is clearly evident that the Magistrate did ask the appellant the reason for his giving confessional statement which the appellant did so by way of repentance. We are satisfied that the Magistrate did ask the appellant as to why had had given this confessional statement which was by way of repentance. Therefore, we are satisfied that the said confessional statement made by the appellant was voluntary.

55. We may also observe that in the case ***Preetam*** (supra), the Hon'ble Supreme Court did not find that the Magistrate put questions to the accused

to satisfy himself that the confession was voluntarily made. But in the present case, we find that the Magistrate did ask questions to the appellant as to the reason why he was making the confession voluntarily, of which we are satisfied.

56. Similarly, as regards **Shivappa** (supra) relied on by the learned counsel for the appellant as discussed above, we are of the view that in the said case what the Hon'ble Supreme Court found was that the Magistrate did not disclose to the appellant that he was the Magistrate, which is not in the present case.

57. Similarly, in **Shankaria** (supra), it was observed by the Hon'ble Supreme Court that sufficient time should be given for reflection before recording the confessional statement. In the present case, what we have noted is that though the appellant was produced before the Magistrate on 02.06.2006, since it was late, the Magistrate did not record his statement and sent him for judicial custody for one day after explaining the legal implications of the confessional statement. On the next day also, after he was produced in the Court, the appellant was given 3(three) hours time for reflection, and as such, we are of the opinion that sufficient time was granted to the appellant by the Magistrate for reflection.

58. We have also considered the submission advanced by Mr. Borgohain, learned counsel for the appellant relying on the decision of the Hon'ble Supreme Court in **Aloke Nath Dutta and Anr. Vs. State of West Bengal, (2007) 12 SCC 230** that since the confession of the appellant was retracted

during the trial, the Court while arriving at a finding of guilt should not ordinarily rely solely on the confessional statement and should look for corroboration of the material particulars. It has been submitted that in the present case, though the prosecution claims that the confessional statement is corroborated by subsequent discovery of stolen items at the instance of the appellant, recovery of the said items has not been proved.

59. As regards this submission, we have noted that the appellant did not retract the confession at any point of time during the trial, but belatedly during his examination by the Court and recording of his statement under Section 313 of Cr.P.C. He did not retract the confession at any earlier stage before his statement was recorded under Section 313 of Cr.P.C.

60. Any retraction of confession which would dilute the value of the confession made, has to be examined keeping in mind the surrounding circumstances. In the present case, the appellant made the confessional statement on 03.06.2006 and he retracted the said confessional statement only on 06.06.2014 i.e. after a long gap of 8(eight) years. If the appellant had retracted his statement soon after it was made, it would have lent some credence to any suggestion that it was not obtained voluntarily but under duress or coercion.

61. Interestingly, though the appellant denied having made any confessional statement before the Magistrate, while his statement was recorded under Section 313 of Cr.P.C., he admitted that he was produced before the Magistrate, and stated that the Magistrate had written down a

different version in his statement. It may be noted that however, the appellant never mentioned about any coercion or threat or influence by anyone including the police which impelled him to make the confessional statement on 03.06.2006.

62. We have also examined the evidence of the Magistrate (PW22) who recorded the confessional statement and there was not even a suggestion from the defence during the cross-examination that it was made under duress. In the cross-examination of PW22, the only plea taken was that there was no sufficient time for reflection. There was no suggestion in the cross-examination that at the time of recording of the confessional statement, the police were within the precinct or premises which would have indicated that he was under some kind of pressure. Though it is on record that he was kept under the observation of the Court Constable Rana Bora, the Magistrate clarified that at the relevant time, there was no Court Peon. The service of said Constable Rana Bora was used as he was not in any manner involved with the investigation of the case. Thus, in our opinion, if a Constable is on Court duty and not connected with the investigation of the case, keeping the appellant under his supervision in the Court premises cannot be said to have vitiated the atmosphere as regards the voluntariness or that it is an indication of presence of any threat or influence by the police on the appellant. It is seen that at no point of time, the appellant had taken the plea that it was not voluntarily made and was under the influence of the police or any other person.

63. Thus, merely because the appellant retracted his confession after a gap of long 8(eight) years, it would not render the confessional statement made by him suspect.

64. Be that as it may, we will proceed to examine as to whether the said confessional statement of the appellant had been corroborated by other evidence on record.

65. It is on record that appellant Rustom Ali was acquainted with the other appellant and accused Bidya Sagar inasmuch as he had worked in the house of the deceased for white washing at his instance, as per the evidence of PW1 and PW2.

66. It is also on record that Shri Prabin Ch. Bora, PW11 who is a neighbor of the deceased victim, stated that he was present on 29.05.2006 when the police came to the house of the deceased for investigation and two accused persons, one of whom was identified as appellant Rustom Ali, demonstrated before the police as to how they had entered the house, how they killed the woman, and how they had committed the crime. On the basis of the statement made by the appellants, a sketch-map was drawn which was exhibited as Ext.8 which was proved by PW11.

67. It may be mentioned that though Sri Baikan Bora who was examined as PW10 had turned hostile, he also mentioned about the sketch map drawn by the police at the place of occurrence, which was exhibited as Ext.8 and he admitted his signature in the said Exhibit. He also stated that Prabin Ch. Bora

(PW11) was also present at the place of occurrence when the police came with the appellant Rustom Ali which corroborates the evidence of PW11 (Prabin Ch. Bora).

68. Md. Asraf Ali (PW13) is the father of Fazlul Ali (another co-accused) who stays separately from his son. PW13 stated that on 01.06.2006, police went to Fazlul's house where PW13 was called and he went there. The police took Rustom Ali along and thereafter, the police seized these articles there stating that some articles had been recovered and the police showed him some bundles and told him that these were stolen articles. He (PW13) put his signature on the seizure list which was exhibited as Exhibit 9 and his signature as Exhibit 9(2). However, he (PW13) stated that at that time, Fazlul was at home and he did not hear what the appellant Rustom had said. At that stage, the said witness (PW13) was declared hostile and was allowed to be cross-examined by the prosecution.

The prosecution cross-examined with reference to his statement made under Section 161 of Cr.P.C. when he was alleged to have said that Rustom said that he had delivered the articles he had robbed to his son Fazlul to keep those concealed and when Rustom asked Fazlul to produce those articles, the latter produced two packets wrapped with polythene from the latrine drain of his house and one from the nearby jungle and the three packets contained gold ornaments.

69. Though in the cross-examination by the defence, PW13 stated that the police did not show him any article and he did not know the contents of the

paper, and police told him that they had found some articles but did not tell him as to where those articles had been found. He stated that he did not see any article being recovered from the house of Fazlul.

70. In spite of the said PW13 being declared hostile, what however, can be noted is the fact that police had gone to the house of Fazlul Ali, the son of PW13 has come on record. That the police along with Rustom Ali, went to the house of Fazlul Ali, the other co-accused, stands established. The fact that the police seized some articles there also stands established. The statement of PW13 establishes the fact that police stated that these articles had been recovered. It also establishes the fact that the police had shown these bundles as stolen articles. PW13 also did not deny his signature on the seizure list.

71. Though the statement made by witness recorded under Section 161 of Cr.P.C. cannot be used for any purpose but can be used for contradiction, in the present case, what we have noted is that the prosecution sought to contradict PW13 when he turned hostile by referring to his statement recorded under Section 161 of Cr.P.C. Thus, though the witness PW13 may have turned hostile, yet his statement establishes the fact that certain articles were recovered from the house of appellant Fazlul.

72. Thus, reading of the evidence given by said Md. Asraf Ali (PW13), father of appellant Fazlul Ali, we are of the view that it is established that certain articles were recovered from the house of Fazlul in the presence of the appellant Rustom Ali.

73. For arriving at the conclusion that such articles were recovered at the instance of the appellant Rustom Ali, we refer to the evidence of the I.O., Sri Dwijendra Barman (PW20).

PW20 stated that, "we used sniffer dog at the place of occurrence and the sniffer dog led us to the house of Md. Rustom Ali. Md. Rustom Ali was arrested. While we interrogated Md. Rustom Ali he stated before us that he can show the place where the articles of the dacoity were kept concealed. Accordingly, his statement was recorded. Exhibit 12 is the statement of accused Md. Rustom Ali. Exhibit 12(1) is my signature in the aforesaid statement. Md. Rustom Ali led us to Golaghat district on 01.06.2006 to the house of Md. Fazlul Ali. Fazlul Ali handed over the articles which are kept concealed beside the latrine of his house. The said seized articles are as follows

(1) one blue colour polythene packet in which there were two gold bangles;

(2) one white polythene packet inside which there was a gold Mangalsutra along with one black pearl in between and one gold chain with locket; and

(3) one red colour polythene packet which contained one gold bangle, two numbers of small bangles, one gold necklace, one gold small necklace with locket; one gold chain with alphabet 'S'; one gold designed necklace; one small chain bearing locket with alphabet 'A'. Exhibit 9 is the seizure list which was prepared by him and in presence of witness and PW13 who had apparently put his signature in Exhibit 9 did not deny putting his signature."

(emphasis added)

74. The relevant portion of the statement of the appellant Rustom Ali recorded under Section 161 of Cr.P.C., leading to discovery of articles which is admissible under Section 27 of the Indian Evidence Act, 1872 can be found from the following portion of the statement.

“My name and address are as mentioned herein above. I am about 22 years old and I work on daily wage basis. I have been staying in house of Mridul Khaund at Naosalia, Jorhat along with my wife and 1½ years old daughter for three months as a tenant. About one month ago, I painted Dadu’s house at Nandanpur. Bidya Sagar Rabi Das, a pea nut seller has married my mother and has been staying in a rented room near my house. Around 8.30 a.m. on 29/05/06, Junu ali of Janpar, Golaghat came to my house and drank water. Thereafter, Badam came to my house. We, the three made a plan for committing dacoity in Dudu’s house. Around 10.00 a.m., we the three came out of my house. They had ‘paan’ from the shop in front of the road of Bahotia Gaon. They also gave me a ‘centre fresh’. When we were proceeding towards Dudu’s house, we saw police at Servicing Centre whereupon I stopped there and both of them proceeded towards that house. Both of them entered Dadu’s house first and then, I followed suit. I showed Junu Ali the room where the computer was kept. Thereafter, Junu Ali opened the iron almirah. The key of the almirah was hanging from the almirah itself. Before the almirah had been opened, I saw the ‘buri aita’ (old lady). Then, Badam pressed the throat of the old lady and took her to the room to the extreme end and asked me to fetch a dao. I fetched a dao from kitchen and hacked the old lady in her neck with it. Thereafter, Badam sawed her neck with it. Junu took out a D.V.D. from the

almirah and delivered it to me. Junu also took gold (ornaments) from the almirah. Taking the D.V.D. I came out of the house. Junu and Badam brought the computer by tying it up with a piece of cloth. Coming out of Dudu's house, I went to Golaghat taking the D.V.D. along. We committed this in Dudu's house between 10.10 a.m. and 10.30 a.m. and then came out from the house. Going to Golaghat, I kept (the D.V.D.) in the P.C.O. of Nausad Ali saying him that I would take it back again. Thereafter, I again came back to my rented house in Jorhat whereupon police nabbed me.

The old lady had seen me and since she had known me from before, I cut her throat thinking that otherwise she would tell others about it. I met Junu Ali in Golaghat and then we went to Fazlul's house at Shantipur. We kept the computer and gold (ornaments) in his house. We examined the gold (ornaments) piece by piece on the bed of Fazlul's house. Fazlul and Junu kept the gold ornaments concealed. I can show the place where the gold had been kept concealed."

(emphasis added)

75. In the above quoted portion of the statement of the appellant Rustom Ali recorded under Section 161 of Cr.P.C. what would be admissible is that the appellant had kept the computer and gold or ornaments in the house of Fazlul and that he can show the place where the gold ornaments had been concealed.

76. The seizure list was exhibited as Exhibit 9 which reads as follows,

“SEARCH & SEIZURE LIST

Ref: Pulibor P.S. Case No.77/06 u/s 396 I.P.C.

MR No.-31/06

Z. No.17/06

I S.I.D. Barman of Pulibor P.S. do hereby search the house & premises of Md. Fozlul Ali, S/o Md. Ashrof Ali of Santipur, P.S- Golaghat, on being leaded and shown by accd. Md. Rustom Ali and seized the following described articles in conn. With the above ref. case, in presence of the undersigned wits.

The said article were kept conceal in a drain by the side of Latrine.

Description of seizure

- 1) Two gold bangles packed in blue polythene bag.
- 2) A gold mangalsutra (a necklace or chain worn by a married woman from the marriage day onwards, throughout her life) with a few black beads in between and a gold chain with a locket, packed in a white polythene bag.
- 3) A gold bangle, two small bangles, one gold necklace, one necklace with a small gold locket, one gold chain with a design ‘S’, one gold designer chain, an small chain with a letter ‘A’ inscribed on the locket and a earring, all packed in a red polythene bag.

.....”

77. The said seizure list had been witnessed by Asraf Ali (PW13) and other witnesses. Asraf Ali has not denied being a witness to the said seizure list as

discussed above. In the seizure list, it has been mentioned that the articles were seized, on being led and shown by the appellant Rustom Ali.

78. We would further examine as to whether the confessional statement of the appellant Rustom Ali is corroborated by other evidences including the discovery of the stolen articles when we examine the prosecution case as regards the other two appellants namely, Fazlul Ali and Junu Rahman.

We will deal separately the case of Bidya Sagar Rabi Das @ Badam as his conviction is based only on the confessional statement of the appellant Rustom Ali and that he was absconding at a later stage.

Crl.A. No.98/2015

79. Though the learned Trial Court acquitted the said Fazlul Ali for committing offence under Section 302 of IPC, he has been convicted under Section 411 of IPC. Similarly, Junu Rahman, appellant in Crl.A.98/2015 was also acquitted of charge under Section 302 of IPC but was convicted under Section 380 of IPC for committing theft.

80. As far as the two appellants, Fazlul Ali and Junu Rahman are concerned, it has been submitted by Mr. A. Ahmed, learned counsel appearing for the appellants in Crl.A. No.98/2015 that their conviction under Sections 380 and 411 of IPC cannot be sustained.

81. It has been submitted that as far as the conviction of the appellant Fazlul under Section 411 of IPC is concerned, it has to be first established that he had knowledge or had reason to believe that the articles to be stolen

property and mere receipt of any property without the knowledge that such a property was stolen would not be sufficient to invoke Section 411 of IPC.

82. It has been submitted by Mr. Ahmed that in the present case, it cannot be said on the basis of the evidences which have been brought on record that accused Fazlul knew that these goods were allegedly recovered from his house were stolen. Mere recovery of certain property from his residence is not sufficient to draw the provision of Section 411 of IPC since in the present case, the prosecution has not been able to show that Fazlul knew these articles which were recovered from his residence were stolen.

83. In this regard, Mr. Ahmed has submitted that it is on record that Fazlul had gone to the police station along with his wife, namely, Smt. Elina Begum who gave her statement before the Magistrate during the investigation under Section 164 of Cr.P.C. which was also exhibited as Ext.17 in which she had stated that after the accused Fazlul arrived in his house at around 10:00 p.m., his wife along with him went to the Police Station and intimated the fact that Junu had kept a computer in their house.

Mr. Ahmed submits that there was no reason for the appellant Fazlul to go with his wife to the Police Station if he had not known that these articles were stolen. The fact that he voluntarily went along with his wife to the Police Station to inform the police about keeping of articles by Junu would clearly indicate that he did not have any intention to keep such an article knowing it to be stolen. This fact itself would indicate to lack of *mens rea* of keeping any stolen property in his house. Mr. Ahmed further submits that if the computer

monitor was recovered from his house in connection with which a seizure list was prepared as Ext.4 in which Fazlul put his signature as a witness, he would not have put his signature as witness if he was himself responsible for keeping the said article knowing it to be a stolen property.

84. It has been also submitted by Mr. Ahmed that when appellant Fazlul was examined under Section 313 of Cr.P.C., no specific question was asked to him about this incriminating fact that it was a stolen property which was kept in his house and since no such specific question was put to him, he did not have the occasion to explain the presence of such property in his house.

85. Coming to the other seizures made purportedly from his residence about seizure of two gold bangles packed in blue polythene bag, a gold mangalsutra with a few back beads in between and a gold chain with a locket, packed in a white polythene bag etc. which was recorded under Ext.9, it has been submitted that the seizure was made on 01.06.2006 by one S.I. of the Pulibor Police Station.

86. However, the said seizure was made apparently at the instance of other appellant Rustom [appellant in CRL.A.(J) No.29/2015] who led the police to the place to make the said recovery purportedly as per the statement made by the said Rustom Ali to the police. On the other hand, it is on record that the said Rustom Ali was arrested only on 02.06.2006 at 2 p.m. as recorded in his confessional statement and as such, there is certain inconsistency in the prosecution case inasmuch as if the said Rustom Ali was arrested on

02.06.2006, he could not have led the police one day prior on 01.06.2006 to effect the said recovery, which was apparently before the arrest of Rustom.

87. Further, this evidence that recovery of the aforesaid articles as mentioned in Ext.9 was made at the instance of accused Rustom, would indicate that it was Rustom who knew about the property. This discovery was not made at the instance of accused Fazlul Ali and as such, no knowledge can be imputed to Fazlul Ali as regards the concealment and the subsequent discovery which was at the instance of Rustom Ali. Accordingly, it has been submitted that the appellant Fazlul Ali could not be linked to the said stolen goods which were recovered at the instance of Rustom Ali. It was Rustom Ali who knew about the property and it was Rustom Ali who was responsible for stealing it and not Fazlul Ali and it has been accordingly submitted that the prosecution has failed to prove beyond reasonable doubt that Fazlul had knowledge of the aforesaid articles to be the stolen properties, only when Section 411 could have been invoked.

88. Coming to the other appellant Junu Rahman, it has been submitted by Mr. Ahmed that to convict him under Section 380 of IPC as had been done by the learned Trial Court, it had to be proved by the prosecution that he himself was part of the crime to commit the theft in the house of the deceased. It has been submitted that except for the confessional statement of Rustom Ali, there is no evidence that he was present in the house of the deceased at the place of occurrence when the incident occurred. The only way the prosecution

sought to link him with the seized property was with the alleged recovery of the D.V.D.

89. As far as the recovery of D.V.D. is concerned, the said D.V.D. was seized from the house of Dip Mazumdar who was examined as PW7. According to Mr. Ahmed, learned counsel for the appellants, the said Dip Mazumdar, PW7 ought to have been also implicated as an accused inasmuch as the said article, DVD was recovered from him but instead of making him an accused, he was made a witness. Further, as per the evidence of PW7, the said DVD was given to him by Mustaq Ali who was also not made an accused but was made a witness and was examined as PW14.

90. As far as Mustaq Ali, PW14, is concerned, he stated that a man called Hussain had given him the DVD There is no reference about the role of Junu. As far as the said stolen DVD is concerned, Mr. Ahmed submits that it is not the case of the prosecution that Junu had stolen and given it to Dip Mazumdar or Mustaq Ali, in which event, he could have been implicated for stealing the DVD from the house of the deceased. Mustaq Ali, PW14 is the father of other accused Rustom Ali.

91. Referring to the evidence of PW15, Md. Naushad Hussain, it has been submitted that the said PW15 stated that the accused Rustom Ali had given him a bundle and asked him to deliver to his father i.e. the father of Rustom Ali. Thus, it has been submitted that the role of Junu was never mentioned by any of these witnesses while dealing with the stolen DVD.

92. It has been further submitted that while the appellant Junu was examined under Section 313 of Cr.P.C., this aspect has not been brought to the notice of the appellant Junu that he had stolen the said property from the house of the deceased. Thus, it has been submitted that there is no evidence to uphold the charge of committing the offence punishable under Section 380 of IPC against the appellant Junu Rahman.

93. It has been accordingly, submitted that the conviction of the Trial Court of both the appellants, Fazlul Ali and Junu Rahman cannot be sustained in law and therefore, they are entitled to be acquitted of the aforesaid charge.

FINDING OF THIS COURT

94. As regards the role of Junu Rahman, it is mentioned in the confessional statement of the appellant Rustom Ali in which it has been stated that Rustom Ali along with Bidya Sagar and Junu Ali had gone to the house of the deceased to commit dacoity. In the said confessional statement, no role has been ascribed to assailant Junu Rahman of playing any role in causing the death of the deceased. Rustom Ali only mentions that Junu Ali took away the computer, gold bangles, cash, etc.

Apart from the aforesaid confessional statement of the appellant Rustom Ali to uphold the conviction of appellant Junu Rhaman under Section 380 of IPC, the fact that the appellant Junu Rahman had kept the stolen articles in the house of Fazlul is established by the evidence on record.

In this regard, we may refer to the evidence of Smt. Nureda Begum, PW8, and Md. Jalal Ahmed, PW9, the mother-in-law and father-in-law respectively of the accused appellant Fazlul Ali. They had clearly stated that the appellant Junu Rahman had kept these articles in their house.

95. In the cross-examination of PW8, it was categorically stated by PW8 that it was Junu who had kept those articles in her house. Similarly, PW9, Md. Jalal Ahmed, the father-in-law of accused Fazlul Ali, stated that the articles were kept in their house by Junu Ali. Later on, coming to know that those articles were stolen goods, PW9 informed Merapani P.S. about it. Thereafter, police came to his house along with his son-in-law and daughter, and recovered those articles.

96. It may be mentioned that his daughter Elina Begum who expired before the trial also had given her statement recorded under Section of 164 Cr.P.C. who clearly stated that at around 3.00 P.M. on 29.05.2006, a person Junu by name came to their house carrying a computer wrapped with plastic in his hand and wanted to keep it in their house since her husband had an old acquaintance with him (Junu) and she allowed him to keep the computer in their house and at the time of departure, he (Junu) forbade her to disclose to anybody that he had kept those articles in their house.

97. The statement made by said Elina Begum, wife of appellant Fazlul Ali who could not give testimony in the Court is relevant and admissible as provided under Section 32 of Indian Evidence Act, 1872 and can certainly be used to corroborate the other evidence on record. However, it is not only the

statement of said Elina Begum, now deceased, but also the statement of her father Jalal Ahmed (PW9) and mother Nureda Begum (PW8) who stated that the articles were kept in the house by Junu Ali.

98. Therefore, the corroborative evidence in the form of testimony of the aforesaid witnesses PW8, PW9 and the statement of Elina Begum, now deceased, wife of Fazlul Ali recorded under Section 164 of Cr.P.C. corroborates the confessional statement of appellant Rustom Ali, that Junu Rahman and Bidya Sagar Rabi Das had carried the stolen articles.

99. Accordingly, we are of the view that the prosecution has been able to prove the charge against the appellant Junu Rahman for convicting him under Section 380 of IPC.

100. Coming to the appellant Fazlul Ali, in view of the evidence of PW8, PW9 and also the statement Elina Begum, wife of Fazlul Ali, recorded under Section 164 of Cr.P.C., we are also of the view as submitted by the learned counsel for the appellant Fazlul Ali that Fazlul knew that before Junu kept the stolen materials in the house of Fazlul Ali without his consent and in fact, once PW8 and PW9 and Elina Begum came to know that these goods were stolen, they duly informed the police and thereafter, the stolen items were recovered from their house. Thus, it can be said that they have kept the stolen articles unknowingly and in fact, after coming to know that these are stolen, they duly reported to the police.

101. Under the circumstances, we are of the view that *mens rea* for committing the offence under Section 411 is not made out as far as appellant Fazlul Ali is concerned.

102. Accordingly, we also hold that the prosecution has not been able to prove the charge against the appellant Fazlul under Section 411 of IPC and accordingly, we acquit appellant Fazlul Ali.

103. In this regard, we would also consider the submission advanced on behalf of the appellants that though it has been alleged that the articles were stolen and subsequently, discovered and recovered at the instance of appellant Rustom Ali, since these were not exhibited in the Court, it cannot be said that these articles were indeed stolen.

104. It has been also submitted that it is on record that the I.O. of the case had released the seized articles on Zimma without any authority, as only the competent Magistrate or Court could have released any seized articles on Zimma and not by the I.O.

105. We agree with the submission advanced by the learned counsel for the appellants that the I.O. does not have authority to release any seized articles on Zimma during the investigation or trial inasmuch as it was only the Magistrate or the Court who was competent to direct release of seized articles on Zimma. However, in view of the fact that the seizure list had been properly drawn up which have been proved, non-production of the seized articles in the Court would not vitiate the trial inasmuch as the stolen articles have been duly

reported by the owners in the form of the evidence of PW1 and PW2 to whom the articles were returned on Zimma. No suggestion was even made during the trial that no property was looted or stolen from the house of the deceased.

106. To a question put by the Court to the I.O. of the case, Sri Dwijendra Barman, PW20 as to whether the informant identified the seized articles which were seized vide Seizure list, Exhibit 9, he answered in the affirmative.

107. It may also be noted that though PW1 and PW2 had categorically stated that ornaments, computer, D.V.D. player, money etc. were found missing as stated by them (PW1 and PW2), that evidence was not challenged by the defence. In fact, PW4, the daughter of the deceased stated in course of cross-examination that some of the articles looted by dacoits were recovered.

108. Thus, even if the stolen properties or recovered items were not produced before the Court, since some of the articles seized which have been duly proved, in our opinion, failure to produce the seized articles though a defect, does not vitiate the trial in the present case.

109. Accordingly, for the reasons discussed above, we are of the view that prosecution has been able to prove the charge against the appellant Rustom Ali beyond reasonable doubts and he has been rightly convicted him under Section 302 of IPC. So is the conviction of appellant Junu Rahman under Section 380 of IPC. However, we hold that the charge against the appellant Md. Fazlul Ali under Section 411 of IPC is not proved.

Crl.A.(J) No.30 of 2015 (Bidya Sagar Rabi Das @ Badam)

110. Coming to the other accused appellant, Bidya Sagar Rabi Das @ Badam, what we have noted is that the learned Trial Court convicted him on the basis of confessional statement made by the another co-accused Rustom Ali. The other corroborating evidence relied upon by the Trial Court is his long abscondance for about a year.

111. We are of the view that though the confessional statement of a co-accused can be used for conviction, it cannot be the sole basis for conviction, not being a substantive evidence as far as the co-accused is concerned. Though the learned Trial Court had held that the fact of abscondance by the appellant Bidya Sagar Rabi Das is an additional circumstance, unfortunately, we are not able to agree with the same, as though the act of abscondance may be a circumstance to indicate guilty mind, it cannot be said to be strong substantive evidence without any other incriminating material linking him with the crime.

112. We have also noted that though appellant Rustom Ali in his confessional statement stated that Bidya Sagar and Junu Rahman carried away looted properties, no evidence is forth coming to link the appellant Bidya Sagar Rabi Das @ Badam to any of the looted stolen properties. In fact, there is no whisper about his role as far as the recovery of the looted property is concerned.

113. Ms. M. Buzarbaruah, learned *amicus curiae* appearing for the appellant, Bidya Sagar Rabi Das @ Badam in CRL.A. (J) No.30/2015 submits that the reference to Bidya Sagar Rabi Das is found in the evidence of PW-1, Sri Priyattam Barhoi and PW-2, Smt. Momi Saikia Barhoi and the confessional statement of the accused Rustom Ali.

114. As far as the evidence of PW-1, Sri Priyattam Barhoi is concerned, what is brought on record through him is that Rustom Ali had whitewashed the house of the deceased and it was Bidya Sagar who had brought Rustom Ali to do the said work. Other than the said fact which does not at all implicate Bidya Sagar, nothing has been mentioned about the role of Bidya Sagar by PW-1, Sri Priyattam Barhoi.

115. Similarly, PW-2, Smt. Momi Saikia Barhoi also mentioned about Bidya Sagar as the one who had brought Rustom to their house to do the whitewashing which also does not implicate the said appellant. Apart from the aforesaid reference to the name of Bidya Sagar, there is no other reference made by PW-2.

116. The rest of the prosecution witnesses also have not stated anything about the role played by Bidya Sagar except the I.O. The reference is to be found in the evidence of I.O. about Bidya Sagar being an absconder at the time of filing of charge-sheet. The most important and significant evidence against Bidya Sagar is the confessional statement of other accused Rustom Ali.

117. Perusal of the confessional statement of the accused Rustom Ali would show that the three accused, namely, Junu, Badamwala, who is also known as Bidya Sagar Rabi Das @ Badam and Rustom Ali, had gone to the house of the deceased to commit dacoity. As per the said confessional statement, it was the Badamwala @ Bidya Sagar Rabi Das after seeing the deceased, who pressed her throat and as she did not die, Bidya Sagar asked Rustom Ali to fetch a *dao* and cut her, whereupon Rustom Ali dealt a cut blow on her neck with a *dao*. Later Bidya Sagar @ Badam sawed her throat with the *dao*, as a result of which she died.

118. Thus, as per the confessional statement of the accused Rustom Ali, the said appellant Bidya Sagar was very much part of the conspiracy to commit dacoity and also subsequent act of murder of the old lady in the house and looting of the valuable properties mentioned therein.

119. According to Ms. Buzarbaruah, learned *amicus curiae* that the aforesaid confessional statement though clearly implicates the appellant Bidya Sagar, there is no other material to implicate him. The only other incriminating factor against him is that he was accused of being absconding, during the investigation. Otherwise, PW-1 and PW-2 though made a reference about the appellant, Bidya Sagar, have not incriminated the appellant Bidya Sagar in any manner except by stating that he was known to Rustom Ali. According to the learned *amicus curiae*, mere acquaintance cannot be a ground to link appellant the Bidya Sagar in the crime and mere acquaintance with another accused is not sufficient to implicate in a crime, though abscondance may be

an indication to the guilty mind of a person, but it is not strong evidence. It can, at best, be a corroborative evidence. The only evidence which clearly implicates the appellant, Bidya Sagar is the confessional statement of accused Rustom Ali which, however, is a very weak evidence inasmuch as the said confession was retracted by the said Rustom Ali. Apart from the confessional statement which had been also retracted by accused Rustom Ali, there are only two evidences, i.e. acquaintance of Bidya Sagar with other accused Rustom Ali by bringing Rustom Ali to do the whitewashing in the house, and the act of abscondance by Bidya Sagar. These two evidences on their own are not sufficient to draw any adverse inference against Bidya Sagar to connect with the crime. It is only with the help of confessional statement made by the accused Rustom Ali that he can be implicated for committing the offence under Section 302 of IPC. The confessional statement of the accused Rustom Ali is the main plank on which the conviction has been based, as otherwise, without the confessional statement other two evidences were not sufficient in ordinary course for conviction of the appellant Bidya Sagar.

120. In this regard, it has been submitted by Ms. Buzarbaruah, learned *amicus curiae* as held by the Hon'ble Supreme Court in ***Surinder Kumar Khanna Vs. Intelligence Officer, Directorate of Revenue Intelligence, (2018) 8 SCC 271*** that it is not proper to convict a person primarily based on confessional statement inasmuch as confessional statement can be acted merely to corroborate other evidences. In the present case, without the

confessional statement, the two other material evidences against the appellant Bidya Sagar are not sufficient to implicate him with the crime.

It has been, accordingly, submitted by learned *amicus curiae* that since the conviction of the appellant Bidya Sagar was primarily based on the confessional statement of a co-accused in the light of the principle laid by the Hon'ble Supreme Court in ***Surinder Kumar Khanna*** (supra) the conviction ought to be reversed

121. The aforesaid two evidences, in our view also, are not good enough to sustain the conviction of the appellant in Crl.A.(J) 30/2015, Bidya Sagar Rabi Das @ Badam under Section 302 of IPC.

122. We are of the view that these evidences are too tenuous to link appellant Bidya Sagar Rabi Das with the crime committed resulting in death. Much more is required, which is missing in the present case against the appellant Bidya Sagar Rabi Das @ Badam.

123. It has been held by Hon'ble Supreme Court in ***Haricharan Kurmi Vs. State of Bihar, AIR 1964 SC 1184*** that the confession by a co-accused cannot be treated as a substantive evidence and can be pressed into service by the Court only when there are other acceptable evidences.

In para No.16 of ***Haricharn Kurmi*** (supra), Hon'ble Supreme Court held as follows,

“16. It is true that the confession made by Ram Surat is a detailed statement and it attributes to the two appellants a major part in the commission of offence. It is also true that the said confession has been found to be voluntary,

and true so far as the part played by Ram Surat himself is concerned, and so, it is not unlikely that the confessional statement in regard to the part played by the two appellants may also be true; and in that sense, the reading of the said confession may raise a serious suspicion against the accused. But it is precisely in such cases that the true legal approach must be adopted and suspicion, however, grave must not be allowed to take the place of proof. As we have already indicated it has been a recognized principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible for the said evidence. In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt. That is precisely what has happened in these appeals.”

(emphasis added)

124. Accordingly, we hold that the prosecution has not been able to prove the charge against appellant Bidya Sagar Rabi Das @ Badam beyond reasonable doubt and the conviction against him under Section 302 of IPC and Section 380 of IPC cannot be sustained.

125. For the reasons discussed above, we allow the appeal, Crl.A.(J) 30/2015 preferred by appellant Bidya Sagar Rabi Das @ Badam and acquit him of the charges under Sections 302/380 of IPC and accordingly, he shall be set at liberty forthwith.

126. As far as appeal, Crl.A. No.98/2015 preferred by appellants, Fazlul Ali and Junu Rahman, is concerned, we dismiss the appeal in respect of appellant No.2, Junu Rahman. However, we allow the appeal, Crl.A. No.98/2015, in respect of appellant No.1, Fazlul Ali.

Accordingly, appellants, Fazlul Ali also be set at liberty forthwith, if he is under detention.

127. Further, for the reasons discussed above, the appeal preferred by appellant Rustom Ali @ Matu, Crl.A.(J) No.29/2015 is dismissed.

128. A copy of this order may be furnished to the concerned jail authority.

129. LCR be remitted to the concerned Court below forthwith.

JUDGE

JUDGE

Comparing Assistant