

**IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)
(ITANAGAR PERMANENT BENCH)**

CRL. APPEAL No.01(AP)2017

Mr. Najrul Islam,
S/o Mr. Jovan Ali,
Permanent Resident of Gohaindoloni,
P.O.-Daulatpur,
P.S. Bhipuria,
District-North Lakhimpur, Assam
..... Appellant

-versus-

1. The State of Arunachal Pradesh,
Represented by the Public Prosecutor of Government of
Arunachal Pradesh, Itanagar.

2. Shri Nawang Phuntso,
S/o Late Tashi, Resident of Mangnam,
P.O. and P.S.- Lumla,
District-Tawang, Arunachal Pradesh.
.....Respondents

::BEFORE::

**HON'BLE MR. JUSTICE MANOJIT BHUYAN
HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN**

For the Appellant : Mr. B. Picha,
Advocate.

For the Respondents : Mr. K. Tado, Public Prosecutor,
Arunachal Pradesh

Date of Hearing : 17.07.2018

Date of Judgment : 20.07.2018.

JUDGMENT & ORDER (CAV)

(Mrs. R.K. Phukan, J.)

Heard Mr. B. Picha, learned counsel appearing for the appellants and Mr. K. Tado, learned Public Prosecutor appearing for the State of Arunachal Pradesh.

2. The present appeal has been preferred against the judgment and order passed by the learned Sessions Judge, in Sessions Case No. 07/2010(YPA), under Sections 380/457/302/34 IPC.

3. On 11.06.2008, two ladies namely, Rinchin Pema, aged about 26 years and Leki Dema, aged about 20 years were killed inside their beauty parlour called "Natural Beauty Parlour" situated at Ganga Market, Abotani Building, Itanagar and some articles of the deceased were also stolen. Brother-in-law of the said deceased persons namely, Nawang Phuntso lodged the FIR on 12.06.2008 before the Officer-in-Charge, Itanagar P.S. On the basis of the FIR criminal law was set into motion and the crime scene was preserved. The available materials were examined as found in the place of occurrence. Investigation reveals that the assailant/miscreants entered into the said parlour through the ventilator and the dead bodies of the deceased were lying on the floor in a pool of blood and the house hold articles were lying scattered. Articles like wearing apparels, suspected weapons of offence i.e., one piece of 20 ml. GI pipe and one aluminum pipe and blood stained wooden piece were recovered. Both victim were found naked on the below waist region and pieces of GI pipes was found inserted into the private parts of the deceased.

4. The investigation further reveals that the murderer committed theft in other adjacent shops and one pair blue rubber chappal was found in the alley below the entry point of ventilator of the shop. After conducting the inquest upon the dead bodies, it was sent for post-mortem to examine the cause of death and whether the victims were subjected to sexual assault or not. The fingerprint collected from the crime scene could not be sent to the FSL due to having no clarity. As per the post-mortem report both the victims died due to brain injury caused by heavy weapon and sharp cutting weapon leading to hemorrhage which is homicidal in nature however, no sign of sexual assault was found. All incidents occurred at the dead hour of night and at the initial stage, even after thorough investigation, I.O. could not get any clue. Subsequently, on 02.09.2008, one Md. Anirul Islam was caught red-handed while committing theft in Sekey Colony and during interrogation, said Anirul disclosed that he along with others Md. Mujibur Rahman and Md. Najrul Islam committed burglary and stole a mobile handset and also admitted that about few months back they have committed burglary in the Abotani Colony at Ganga Market.

5. On the disclosure statement made by said Anirul, the whole episode of the matter came to light and he led the police to a place between Division-IV, Abotani Colony where other accused changed their clothes after the incident. During search in the said place, one damaged book namely, 'Beginning of Mod' front page was found. The said Anirul also

identified the seized chappal which belonged to Mujibur Rahman who had left the chappal at the place of occurrence on the night of the incident i.e., on 11.06.2008 after commission of the crime. Accordingly, Anirul Islam and Md. Mujibur Rahman were arrested but Najrul Islam was found absconding. The TIP was conducted to identify both seized book and the chappal. It was found that both the arrested accused persons Anirul Islam and Md. Mujibur Rahman were habitual offender as they have admitted about the occurrence and their confessional statement was recorded under Section 164 Cr.P.C. by the learned Magistrate. At the conclusion of the investigation, Charge-Sheet was submitted against the three accused persons Md. Anirul Islam, Md. Mujibur Rahman and Md. Nujrul Islam, showing Nurjul as an absconder.

6. The accused Md. Anirul Islam and Md. Mujibur Rehman faced the trial after filling of the Charge-Sheet, they denied the charges framed under Sections 457/380/302/34 IPC. The other accused Md. Najrul Islam was arrested in the year 2012 and same charge was framed and explained to him to which he pleaded not guilty. To bring home the charge, the prosecution examined as many as 15 witnesses and defence examined none. Plea of defence is of total denial. During the course of trial, one of the accused Md. Anirul Islam was sent for separate trial by JJB, he being a juvenile and another accused, Md. Mujibur Rahman absconded.

7. At the conclusion of the trial, the accused Md. Najrul Islam was found and held guilty under Sections 457/380/302/34 IPC and was convicted under said sections of law. He was sentenced under section 302 IPC to R/I for 12 years and a fine of Rs. 20,000/- in-default R/I for 2 years. Further, he was sentenced under section 457 IPC for R/I to 7 years and a fine of Rs. 7,000/- in default R/I for six months. He was also sentenced to R/I for 5 years and a fine of Rs.3,000/- in default for R/I for 2 months under section 380 IPC with a direction that all the sentences will run concurrently. Being aggrieved with the order of conviction and sentence, present appeal has been preferred.

8. We have heard the submissions of Mr. Picha, learned counsel for appellants at length and also the submissions of Mr. Tado, learned Public Prosecutor for the State.

9. The basic contention of the learned counsel for the appellants is that in the present case, there is no eye-witness to the occurrence, no substantive evidence at all and no FSL report to suggest the complicity of the accused appellants with the offence charged. It has been urged before this Court that the learned trial Court has failed to appreciate certain material aspects while arriving at the guilt of the accused. The retracted confession of the absconding accused Mujibur Rahman has been relied upon by the trial Court which is per se

illegal. More so, such a confession was made for the second time while at the initial stage the accused refused to make any such confession. The learned Magistrate failed to apply judicial mind while recording such confessional statements by making necessary inquiry as to why such confession was made at subsequent stage, as it was declined earlier. It is contended that such a confessional statement is totally false and it has been made on pressure from different corner. It has also been vehemently urged that such a confessional statement cannot be accepted as per Section 30 of the Evidence Act as the statement was made by the co-accused prior to the arrest of the present appellant and there was no joint trial. Moreover, there is no proof that the appellant is a resident of Arunachal Pradesh and no separate charge-sheet was filed against him.

10. On the other hand, the learned Public Prosecutor, highlighting the factual scenario of the case, submits that the occurrence took place at mid night and there happens to be no eye-witness to the occurrence. Only after arrest of one Md. Anirul, the prosecution got the clue and incriminating material was recovered as led and shown by the said accused. After such recovery of articles, coupled with the other evidence on record, as well as the confession made by the co-accused, the complicity of present appellant in the crime is made out. Attention of this Court is drawn to the evidence of the Investigating Officer/P.W-15, who has elaborated the facts of the case and has submitted that at the initial stage the appellant himself was absconding and was arrested during the later part of the trial but, in the meantime, the other accused Mujibur turned absconder. Fact remains it was a joint trial against all the accused persons and they faced the same charges and trial proceeded on the same set of evidence. Further, it is contended that two TIPs were held during the investigation establishing the complicity of the present appellant. It is submitted that the learned trial Court has rightly appreciated the materials on record and correctly relied upon the confessional statement of the co-accused having regard to supporting evidence.

11. We have given our due consideration to the submissions of the learned counsel for both the parties. To appreciate the rival submissions made above, let us have a look at the evidence adduced by the prosecution and other evidence on record.

12. So far as the evidence of P.W-1, Sri Raju Mizar is concerned, he has no knowledge about how the murder of the deceased took place. At the relevant time, he was a salesman in the nearby shop of the beauty parlour owned by the deceased. In the year 2008 at night, somebody had stolen Rs. 12,000/-13,000/- from his shop. He also came to know that in the same night, in the adjacent beauty parlour two ladies were killed by some unknown persons. Police seized the lock of their shop.

13. Smti. Netan Dema/P.W-2 is silent about the occurrence. In the evidence, the informant, Nawang Phuntso/P.W-3, he has stated that his two sister-in-law, Rinchin Pema and Leki Dema, who were running a beauty parlour in the name and style "Natural Beauty Parlour" at Ganga Market, Abotani Building, Itanagar were killed by some miscreants in the intervening night of 11.06.2008. On being informed, he rushed to the place of occurrence and informed the Police. The Police started investigation and seized certain articles belonged to the deceased like mobile handset, cloths etc. which is exhibited as Ext. No.3, 4 and 5 and the inquest report vide Ext. 1 and 2 was prepared by the I.O. After about 3 months of the incident, police recovered one book which belonged to the deceased Leki Dema with her own handwriting from the place at Division-IV and he identified the said book vide Ext. M1 as it was given by him to said Leki Dema. Police told him that they have recovered the book as led by one of the accused Anirul Islam, where the accused changed their dress after committing the murder of the two girls.

14. P.W-4/D. Khandu Lama and P.W-5/Mrs. Anita Saha have no knowledge about the occurrence. P.W-6/T.Padun is a police constable and according to him while he was at Itanagar P.S., the I.O. of the case was recording the disclosure statements of one accused Md. Anirul Islam and he stated that they have changes their clothes at Abotani Colony, Itanagar. As has been asked by the I.O., he put his signature on the P.Ext.-12. Thereafter, he along with one constable Karling Dodum/P.W-7 accompanied the said accused Anirul who led them to Division-IV area where from M.Ext.-1, a history book was recovered as shown by the accused vide Ext.-6 which is the seizure list. According to him, at the time of his signature on P.Ext.-12, there was no any public servant in the P.S. other than the police personnel.

15. Supporting the factum of recovery of a book as stated by P.W-6, said K. Dodum/P.W-7, a police constable has stated that as per the instruction of the O.C., Itanagar, he accompanied one of the accused to Divison-IV area and as led and shown by the said accused, a book M.Ext.-1 was recovered from said place which was seized by the I.O. vide Ext.-6 and Ext.6B is his signature.

16. One relative of the deceased Dr. K.W. Thongdok/P.W-8 identified the dead body after the incident and signed the inquest report as well as the seizure list. He has no knowledge about the occurrence.

17. P.W-9/Dr. K. Riba, has conducted the post-mortem of deceased, namely, Lekhi Drema & Rinchin Pema.

The injuries found on the dead body of Lekhi Dema are as follows:

1. External injuries:-

- (i) Blunt injury on right side forehead with same fracture of forehead.
- (ii) Blunt injury on the left cheek with same fracture sign of bones.
- (iii) There was sharp injury on the right tentus on right forehead, which was going up to right elap of the nose. Nasal bruise sharp injury up to the tip of the nose. Sharp injuries above the left eye. All these sharp injuries were similar to corresponding fracture bones.

2. Internal injuries:-

Fracture on the forehead injury the corresponding membrane & injury to the brain matter corresponding to the fracture in the head.

The cause of death due to injuries on the brain, due to injury to the brain caused by heavy object & sharp cutting weapon which lead to hemorrhage.

After examination, he prepared the post-mortem report, P. Exh-7 P. Exh-7 (a) is his signature & P.Exh. 7 (b) is the counter signature of the CMO of General Hosital.

The injuries found on Late Rinchin Pema are as follows:

1. External injuries:-

- (i) Blunt injury on forehead and left eye both were followed by bony fracture.
- (ii) Sharp injury in the forehead left side and upper lip extending up to right maxilla with fracture, sharp injury in the left check and sharp injury in the below left lower lip.

2. Internal injuries:-

- (i) There was fracture on forehead in the left and right side and fracture of the right maxilla, injuries corresponding to the brain membrane, there was injury to the brain matter.

He had opined that cause of death was head injuries by heavy object and sharp weapon, P.Ext.8 is the PM report and P. Ext.8(a) is his signature and P.Ext.8(b) is the signature of CMO of General Hospital."

18. Mr. B. Panggam/P.W. 10 is the JMFC cum Circle Officer who recorded the confessional statement of two accused Md. Anirul Islam and Md. Majibur Rehman under section 164 Cr.PC. after giving them sufficient time for reflection and kept them under his observation till recording of confession. He explained all the rules and consequences of making confession that they are not bound to make confession but even thereafter, the accused persons voluntarily made confession.

The accused Anirul Islam who was produced before him on 30.12.2008, made a confessional statement before him as follows -

"On the night of occurrence, he was outside the building and rest two accused Mujibur Rahman and Najrul Islam entered into the room. After sometime he heard some screaming from inside the room, breaking of door and screaming of female. Thereafter, three of them left the place with some stolen goods with bags.

Thereafter, accused Majibur Rahman had gave him a jean and Rs.1000/- and they left for Division-IV area and both the accused have changed their dress on the said area. On the next morning they went towards the Banderdewa and people were gathering at the place of occurrence. Thereafter, he went to his native village.”

P.Ext-9 is the confessional statement recorded by him and P.Ext.9(a),(b) and (c) are his signature. P.Ext.9(d), (e), (f), (g), (h),(i) and (j) are the signature of the accused.

He also recorded the confessional statement of accused Majibur Rahman on 07.01.2009 who made the confessional statement before him as follows –

“Six months back he along with Najrul Islam and Anirul Islam tried to enter in the rook of Ice-cream shop near Akashdeep, Ganga Market. Md. Anirul Islam was kept outside to watch the movement of people. Accused Majibur Rahman along with Najrul Islam tried to break the door of Ice-Cream shop but could not break the door. Therefore they went backside of the room and they found two girls inside the room. As in presence of girls they could not commit theft, therefore, they decided to kill the girl and Majibur Rahman took a rod from bathroom and Najrul Islam took a khilibari (iron rod) and went near to two sleeping girl and beated on them on their head and face. Then two girls died after slight moment than they searched all rooms for ornaments and money. Thereafter, they went to next clothes shop attached to room by opening shutter and from there they got money, cloths and jeans. Thereafter, they come out from the room. Then the accused Najrul Islam suggested to see the private parts of the deceased persons and accused Majibur Rahman stated that the opened the skirt of one girl and another accused opened the skirt of another dead girl. Then he got the emergency light which he brought and went out from the room and joined Anirul Islam, who was waiting outside and after ten minutes Najrul also come out and joined them. Mujibur further stated that he left his blue slipper near the ventilator. Thereafter, they went to Division-IV and changed their cloths. Next morning they come to Ganga market and went to Banderdewa. He gave Rs. 1000/- and one jean pant to Md. Anirul Islam. Therefore, they went to home and distributed the stolen money and cloths.”

P.Ext.10 is the confessional statement of Md. Majibur Rahman and P.Ext 10(a),(b) and (c) are his signature. P.Ext.10(d), (e), (f), (g), (h), (i), (j), (k) and (l) are the thumb impression of accused Majibur Rahman.

19. That apart he recorded the statement of one witness Smt. Banesa Begum under Section 164 CrPC. which is as follows –

“Her brother Samil Ali brought Majibur (Ali) Rahman to work at Arunachal Pradesh and stated that they were neighbors by partitioned their house. once her brother Samir told that he along with Majibur had stolen Rs.6000/- from one Sri Techi Tasso. Further she stated that once Majibur’s wife told her that her husband had stolen mobile from Gaon Bura house. She also stated that it was routine of Majibur Rahman to go out at late night. It was also stated that once she asked the Mazibur’s wife why Majibur go out at night? She replied that he goes out for toilet. She further stated after three days on 14th june, she heard that Majibur Ali @Rahman disclosing the murder of two girls at Itanagar. She further stated that on query, wife of Majibur Rahman told her that he murdered two girls and gave her one silver chain for not to disclose anyone. Accused also revealed before his wife that they had murdered two girls as they were resisting them to take away anything from their house.”

P.Ext-11 is the signature of witness Banesa Begam, P. Ext.11(a) is his signature and Ext. 11 (b) and 11 (c) are the thumb impression of the witness.

20. Further more, P.W. 10 has also conducted TIP for identification of a book and a chappal that was recovered during the course of investigation vide M. Ext. 1 is the book and M. Ext. 6 is the chappal. He prepared the note of the TIP vide Ext. 25 and Ext. 26 after the witness identified those articles.

21. The witness was tested at length in cross-examination and he has testified that the accused persons were produced before him from judicial custody for recording their confessional statement on two different dates. It is stated that at the time of recording statement of Mujibur Rahman, accused Najrul was absconding and the other accused Anirul was a minor. He has enquired from the accused persons whether they were subjected to torture by police and they replied in the negative. The defence could not exploit anything about any illegalities committed by the Magistrate while recording confessional statement and nothing can be inferred that such a confession was the outcome of any torture and/or harassment from any corner or of the police. The Magistrate has given certificate about voluntariness about the statement given by the accused.

Challenge to the confessional statement:

22. It can be noted here that the challenge to such confessional statement by the defence side cannot be sustained, there being no any sort of irregularities or illegalities. The Magistrate has given due warning and proper time for reflection prior to recording such confession, along with the enquiry about any sort of harassment. Only aspect raised that needs consideration is as to whether the confessional statement made by the accused at the subsequent stage can be accepted while at earlier point of time they refused to give such confession? Bare perusal of the record would go to show that immediately after arrest of the accused and while they were produced before the Court from police custody they refused to give any confessional statement but the accused persons while producing from judicial custody has agreed to such confession which indicates that they are not under any sort of pressure at the subsequent stage while such confessional statement was recorded. There is also no restriction under the Code that the accused cannot be produced for recording statement for the second time before the Court of law. Further, an officer of a Court is not a party to the prosecution so as to take part in the investigation and to record such confession without satisfying itself as to the authenticity of such statement. Whenever an accused is produced before the Court for recording such confession the Court is under an obligation to observe certain procedure as is provided in the format under Section 164 Cr.P.C., which procedure was fully complied with by the Magistrate/P.W. 10 in the case. Therefore, we are unable to accept the contention of the learned counsel for the appellant on this score.

Retracted confession:

23. As regard the another contention of the appellant side that the Trial Court has illegally relied upon the retracted confession of the co-accused Mujibur Rahman while convicting the accused appellant, it can be noted that the said accused Mujibur gave statement on 07.01.2009 and thereafter he turned absconder during the course of trial and he never retracted his confession and only at the time of giving statement under Section 313 Cr.P.C. on 22.08.2012, he has denied such statement. As has been held in Shankaria Vs. State of Rajasthan, 1978 SC 124 retraction during the examination under Section 313 Cr.P.C. is unacceptable as it was not retracted at the earliest opportunity.

24. There are catena of decisions of the Hon'ble Apex Court that a retracted confession can form the basis of conviction if the Court is satisfied that it is true and has been voluntarily made and it is corroborated by medical and other evidence and such a conviction is not illegal. The Hon'ble Supreme Court has laid down that it is not an inflexible rule of practice or prudence that in no circumstances conviction can be based without corroboration on a retracted confession. However, such a corroboration is required not as a rule of law but only as a rule of prudence. It is well settled that confession made voluntarily and truthfully is an efficacious proof of guilt. A confession duly recorded by strictly observing the formalities of provision under Section 164 Cr.P.C. and found to have been voluntarily made with true narration of the incident, conviction can safely be based on it, even if it is retracted in course of trial. This being the position of law, we are of considered opinion that the contention raised by the learned counsel for the appellant is not maintainable.

Other evidence on record:

25. As has been stated above that after the said brutal incident there was no evidence before the Investigating Agency and it is only when one Anirul Islam was apprehended by police, the whole matter came to light. The evidence of P.W. 11, who is a S.I. at the Itanagar Police Station, is on the line that in the month of September while said Anirul Islam was apprehended by police while committing theft at Itanagar at backside of Akashdeep and was brought to the Itanagar Police Station and on interrogation he made a disclosure statement that he committed burglary at Akashdeep area along with Majibur Rahman and Najrul Islam. He was present at the time of making such statement vide Ext. 12 before the I.O. and this is the linking evidence how the subsequent investigation proceeded. Subsequently, on the basis of confessional statement of the said accused, Anirul Islam, other two accused persons were apprehended. The accused Majibur Rahman was apprehended at first, who also made a similar statement as that of Anirul Islam and the accused Najrul Islam

absconded for quite long period after filing of Charge Sheet for which trial proceeded after the case was split up as against the present accused person. The Charge Sheet was filed on same accusation against all accused persons showing the present accused appellant as absconder and the investigation was not continuing as against the present accused appellant, so there appears no any necessity to submit the supplementary Charge Sheet as has been contended by appellant herein. We find no substance in the submission made in this regard.

26. The other witness Smt. Mihin Yallo, P.W. 12, is the next door shopkeeper of the deceased beauty parlour and she has simply stated about the factum that on the fateful day after opening her own shop she did not hear the voice of the deceased girls from their parlour despite repeated call, so she informed the police and after arrival of the police two dead bodies of the girls was recovered lying on the floor inside the room. She also stated that on the same night her shop was also looted by burglars and an amount of Rs. 2 Lakhs was looted for which she has also lodged complain. P.W. 13, M. Loyi, was an EAC and signed the inquest report prepared by the police and subsequently, accused persons, Majibur Rahman and Anirul Islam were produced before him for recording confession on 17.09.2008, but they declined to give confessional statement.

27. The evidence of P.W. 14, Miss T. Mina, is not relevant as she has no knowledge about the occurrence.

28. Lastly, the P.W. 15, S.I. C A Namchom, is the Investigating Officer, who has stated all about the investigation starting from the receipt of the FIR, seizure of articles, preparation of sketch map etc. In his long, detail evidence, he has stated about the arrest of the accused, Anirul Islam while committing theft in the month of September who made the disclosure statement before him and also led the police to the place of occurrence wherefrom the book of one of deceased was recovered with name therein (Leki Dema). It is stated by him that the present accused appellant was absconding and he was arrested only on 20.06.2012. The other accused, Anirul Islam and Mujibur Rahman made the confessional statement before the I.O. and thereafter they were produced before the Court and their confessional statements were recorded by the Magistrate. He has also stated about the preparation of inquest report and the seizure of other articles and exhibited all the documents vide Ext. 1 to Ext. 26. Ext. 1 and Ext. 2 are the inquest reports of the deceased which reveals aluminium curtain rod was inserted inside the vagina of both the deceased. By Ext. 3, wearing apparels along with the aluminium rod about 1 metre, GI pipe of 1 foot were seized, one damaged history book was seized through Ext. 6, as shown by the accused Anirul Islam, the Ext. 12 is the disclosure statement made by the accused Anirul Islam (in

first person) while leading to the discovery, by Ext. 13 several articles of the deceased was seized along with one pair of rubber chappal found hidden in one corner near the ventilator in the entry point of the house and also wooden pieces of about 1 ½ feet long with blood stain. After recovery of the said articles, the I.O. also conducted the TIP for identification of the said book and the chappal, wherein, the witnesses have identified the book belonging to deceased Leki Dema and the chappal belonging to accused Mujibur Rahman.

29. The I.O., in his cross-examination, has replied that although some fingerprints were collected from the place of occurrence, the same could not be sent to FSL as it was not clear. It is also stated that the accused Najrul Islam was arrested after absconding for 4 (four) years.

30. Obviously, it is a case of no eye witness to the occurrence and whole case is on circumstantial evidence as well as the confessional statements made by the co-accused. The accused Mujibur Rahman, who made the confessional statement, turned absconder during the course of trial for which judgment has been rendered against the present accused appellant. The learned counsel for the appellant has vehemently submitted that solely on the basis of retracted confession of co-accused, present accused appellant cannot be convicted in absence of any eye witness to the occurrence merely on suspicion, however strong it may be. In support of his contention reliance has been placed on the following decisions -

1. Kashmira Singh Vs. State of MP, 1952 SC 159;
2. Hari Charan Kurmi & Ors. Vs. State of Bihar, AIR 1964 SC 1184;
3. Param Hans Yadav & Sadanand Tripathi, 1987 2 SCC 197;
4. Huidrom Birjit Sinch @ Goroba Singh Vs. State of Manipur, 1996 (III) GLT 610;
5. Sidharth & Ors. Vs. State of Bihar, 2005 12 SCC 545;
6. Dhana Chandra Malsum Vs. State of Tripura, 2009 (4) GLT 890; and
7. M. Nageshwar Rao Vs. State of Andhra Pradesh, 2011 2 SCC 188.

31. We have carefully gone through the decision referred to above. In all the decisions it has been categorically held that confession of co-accused cannot be treated as substantive evidence within the meaning of Section 3 of Evidence Act. It could be pressed into service only when the Court is inclined to accept the other evidence on record and feels the necessity of seeking for assurance in support of its conclusion deducible from said evidence. As has been held in criminal trial, there is no scope for applying the principle of moral conviction or great suspicion and the prosecution has to prove the charge beyond reasonable doubt.

32. In the instant case the prosecution has relied upon the testimony of co-accused as well as the other linking evidence. As regards the recording of the confession of the co-accused we have discussed above that there is no sort of infirmity in the same and it can be accepted to be the true version of the accused, the voluntariness of which has been proved

by the officer, who recorded such statement. In the legal parlance when accused makes exculpatory confession implicating the other accused, that sort of confession cannot be the legal basis for the conviction of the accused. If a self inculpatory confession in support of co-accused is there and it is corroborated by other evidence, then this sort of confession or corroboration may be used to supplement or corroborate the other evidence.

33. In the given case, the confessional statement made by another accused, Anirul Islam, is not read in the evidence as he was no more an accused in this case and he has been sent for trial before JJB. However, the confessional statement of co-accused, Mujibur Rahman, can be taken into consideration. Section 30 of the Evidence Act is an exception to the rule that a confession made by an accused is evidence only against the maker and not against the others who may be tried along with him. The principle on which the confession of one accused is allowed to be used against co-accused is that, self implication is supposed to provide some guarantee of the truth of the accusation made against the other. As per the confessional statement of Mujibur Rahman, which also tallies with the confessional statement of Anirul Islam that all three of them went for burglary in the Ganga Market and Anirul Islam was kept outside to keep surveillance and Najrul Islam and Mujibur Rahman entered into the various shops of the locality and committed theft of certain articles including the beauty parlour of two deceased and it is stated by him that to facilitate the commission of such theft, they decided to kill both the girls and thus Mujibur took a pipe in his hand and Najrul took a khilibari (iron rod) and a wood and hit the girls on their heads and faces resulting their death. It is also stated that they pulled out the wearing cloths of the victim to see the private parts at the time of leaving the premises and thereafter they gave a share of Rs. 1,000/- and some clothes to Anirul, standing outside.

34. Now the inquest report would go to show that the lower part of the dead body was found naked without clothes and some sort of GI pipe was also inserted into the vagina. Further, the medical evidence indicates that both the victim sustained severe injuries on their head and face by blunt and sharp weapon and cause of death is of head injuries sustained by the victims. During the course of investigation, police has also recovered such type of weapon like aluminum rod and blood stained wooden piece from the premises of the deceased and all this aspect are found to corroborate the confessional statement mentioned above. The learned Trial Court has also discussed the aspect that the confessional statement of both Anirul Islam and Mujibur Rahman corroborates each other although it was recorded after a long gap but not on the same day. The necessary facts have substantially proved that it was the present accused appellant along with the other accused, Mujibur Rahman and Anirul Islam who were involved with the offence charged. The evidence of P.W. 6 and P.W.

7 and P.W. 11 cannot be discarded only because they are police personnel, there being no any other reason to disbelieve their testimony. In their presence, the other accused, Anirul Islam, made the disclosure statement suggesting complicity of the other accused including the appellant, pursuant to which the book belonging to one of the accused was recovered from the place where the accused persons changed their clothes after the occurrence. In the given circumstantial evidence coupled with the confessional statement of the co-accused, it can be held that the guilt of the accused appellant has been proved beyond all reasonable doubt.

35. We uphold and affirm the impugned judgment and order of the learned Trial Court. We, however, note that the statutory punishment under Section 302 IPC is death or imprisonment for life and also to fine, whereas, the learned Trial Court has awarded punishment of 12 years. In this regard we have heard the counsel for the appellant and as per the minimum punishment statutorily provided under Section 302 IPC, the sentence of 12 years awarded to the appellant is converted to sentence for life by maintaining the other sentences imposed. The appeal stands dismissed.

JUDGE

JUDGE

Lipak