IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mr. Justice Syed Mahmud Hossain.

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

CRIMINAL APPEAL NO.81 OF 2016.

(From the judgment and order dated 11.02.2016 passed by the High Court Division in Criminal Appeal No.468 of 2009.)

Mufti Abdul Hannan Munshi alias Abul Kalam and another:	Appellants.
=Versus=	
The State:	Respondent.

For the Appellants:	Mr. Mohammad Ali, Advocate, (appeared with the leave of the court), instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.
For the Appellants: (As State defence counsel)	Mr. Helaluddin Mollah, Advocate, Instructed By Mrs. Nahid Sultana, Advocate-On-Record.
For the Respondent:	Mr. Mahbubey Alam, Attorney General, instructed by Mrs. Sufia Khatun, Advocate-on-Record.

Date of hearing: 30th November and 6th December, 2016.

Date of Judgment: 7th December, 2016.

J U D G M E N T

Surendra Kumar Sinha, CJ: This constitutional appeal is directed from a judgment of the High Court Division by which it has confirmed the death sentences of the appellants Mufti Abdul Hannan Munshi alias Abul Kalam, Sharif Shahidul Alam alias Bipul

and non-appealing accused Md. Delwar Hossain alias Ripon for killing A.H.I. Habib, Rubel and Kamal Uddin by detonating grenade on 21st May, 2004 at noon and injuring several persons.

The incident took place at the gate of Hazrat Shahjalal (R), when Mr. Anwar Chowdhury, the High Commissioner of United Kingdom was returning after saying Jumma prayer in the shrine the grenade was hurled aiming at him. Prosecution has examined 56 witnesses in support of the charge of the murder. None of these witnesses saw the incident of charging grenade aiming at the High Commissioner. The entire case rests upon the circumstantial evidence and the confessional statements of the appellants and another.

The High Court Division elaborately assessed the evidence and by a lengthy judgment maintained the conviction and sentence holding that the confessional statements are true and voluntary; that if the confessions are found to be true and voluntary, the

retraction at a later stage does not affect the voluntariness of the confessions; that Md. Abul Kalam Azad (P.W.48) has corroborated the confessions in material particulars; that in a case of conspiracy, confession of co-accused can be used as evidence against other accused in view of the fact that a conspirator is considered to be an agent of his associate in carrying out the object of the conspiracy and anything said, done or written by him during the continuance of the conspiracy in reference to the common intention of the conspirator is a relevant fact against each one of his associates, for the purpose of proving the conspiracy as well as for showing that he was a party to it; that each one is an agent of the other in carrying out the object of the conspiracy and in doing anything in furtherance of the common design and in furtherance of the accused's common plan, policy and design, they had attacked Mr. Anwar Chowdhury with grenade killing three innocent persons.

Before we consider the confessions, we would like to consider the evidence of P.W.48 who is a very vital witness in this case. This witness is related to none. He is a tea vendor of Badda Main Road, Dhaka. He stated that sometimes in 2002 one bearded man used to come to his shop for sipping tea and talked about Islam saying that the Islam's image is being tarnished by reason of gambling, atrocities to women and, singing and dancing everywhere in the country. He was impressed with his views and on one occasion, the bearded person invited him to his place. His name is Ahsan Ullah of Faridpur and sometimes in 2003, Ahsan Ullah took him to a Madrasha at Badda. He found different Moulanas at that place and he served tea to them, among them were Mufti Abdul Hannan, Abu Jandal, Mofiz, Ratan and Moulana Abu Zafar. They used to discuss the activities of Harkatul Zihad. In the first part of 2004, he was talking with Mufti Abdul Hannan, Mofiz, Abu Jandal and Ahsan Ullah in a room of Ahsan Ullah and at that

time one tall man came. Ahsan Ullah gave him taka fifty to bring tea and chanachur (crisply snack)and while he was serving tea-chanachur, the tall man was telling that innocent people are being killed due to bomb explosions. In course of conversation, he came to know that the name of that tall man was Bipul of Sylhet. Mufti Hannan then told that they would prevent Awami League people and then Bipul said how it could be implemented. Mufti Hannan then said he had grenade and henceforth, they would charge grenade against Awami League leaders. In April 2004, one evening Ahsan Ullah, Mofiz, Abu Jandal and himself were talking when Bipul came with another with a computer box in his hands. At that time Ahsan Ullah talked with someone over mobile phone about the arrival of the Bipul(s). He then came to know that the other person was Ripon. Ahsan Ullah then handed over four packets and then Bipul and Ripon left the room keeping the packets inside the computer box. After one and half months, he heard that there was

charging of grenade at Hazrat Shahjalal (R) shrine in which 3/4 persons died, the High Commissioner along with others injured. He was confirmed that those four packets carried by Bipul were hand grenades. Thereafter, he concealed himself by packing up his tea stall.

The defence has thoroughly cross-examined him but failed to discredit his testimony in any manner save and except that he was examined at a belated stage by the police. This witness stated in clear terms that Ahsan Ullah, Abdul Hannan, Abu Jandal, Mofiz, Ratan, Moulana Abu Zafar and Bipul were activists of Harkatul Zihad, a terrorist organisation, and Mufti Abdul Hannan directed his followers to explode grenade to prevent Awami League leaders including those of Sylhet and that at one stage, he supplied four pieces of grenades to Bipul which he kept in his possession through Ahsan Ullah and within one and half months, the innocent victims succumbed to grenade explosion.

The medical evidence prepared by Dr. Sheikh Emdadul Hoque (P.W.25) transpired that the victims had sustained multiple punctured wounds and on dissection of the bodies, it was found 'tattooing, scorcthing & blackening of external injuries due to splinters effects'. The words 'scorcthing' and 'blackening' are very significant. The injuries associated with scorcthing and blackening are sufficient to come to the conclusion that the injuries were caused by explosive substances. There is no doubt that granade contains explosive substances. In his opinion P.W.25 observed that the victims succumbed injuries 'due to bomb blasting'. In course of cross-examination, he reaffirmed that বোমা বিস্ফোরনের ফলে বোমার স্প্লীন্টারের কারনে জখম হয়। -----দ্বিতীয় মৃতদেহটিও বোমা বিস্ফোরন জনিত জখম ছিল ও সে কারনে তাহার মৃত্যু ঘটে। This statement is the reaffirmation of his statement in chief and corroborative to the opinions in the autopsy reports. The defence could not elicit anything by way of cross-examination of this witness that the deaths

were caused by injuries other than explosive substances. Therefore, the prosecution has been able to prove the cause of death of the victims.

As regards the place and manner of occurrence, the defence has not challenged the prosecution version. Md. Shamsuzzaman (P.W.1) stated that the British High Commissioner Mr. Anwar Chowdhury came towards the Mazar Gate at 1.40 p.m after saying prayer, when there was explosion in which 40/50 people rolled down on the ground by sustaining injuries including the British High Commissioner and Deputy Commissioner Abul Hossain. There was no challenge about the place and manner of the occurrence narrated by this witness. Md. Jahangir Alam (P.W.2), Nitai Chandra Dey (P.W.3), Rayboti Chandra Chakma (P.W.4), Yasin Mia (P.W.5), Salam Mia (P.W.6) a victim, Shahidul Islam (P.W.7), Pradip Kumar Das (P.W.8), Subinoy Deb (P.W.9), Nur-e-Alam-Al Kowser (P.W.10), Md. Gias Uddin (P.W.11), a victim, Md. Abdul Hai Khan (P.W.12), President of the

District Bar Association, Sylhet, Abdul Mukit (P.W.13) a victim, Md. Sadrul Alam (P.W.14) a victim, Md. Mozibur Rahman (P.W.16), H.M Khokan Rana (P.W.17), a victim and Jibon Mia (P.W.18) a victim made statements in unison as regards the time, place and the manner of explosion. Therefore, as regards the death caused due to explosion in the manner, place and time, there is unimpeachable corroborative evidence.

Besides the above evidence, the prosecution heavily relied upon the confessions of three accused, Md. Sharif Shahidul Alam alias Bipul, Md. Delwar Hossain Ripon and Mufti Abdul Hannan. Accused Md. Sharif Shahedul Alam alias Bipul in his confession stated that he had talks with Mufti Abdul Hannan, Liton and one bearded man and in course of discussions, it was surfaced that the Awami Leaguers were working against Islam; that they decided to prevent them from their activities; that at one time Mufti Hannan told that he had grenades which he would

give to them; that as per Mufti Hannan's direction, Rahi Md. Kajal brought grenades which were kept concealed inside wardrobe and made over them to Ovi, which the latter gave to Mufti Hannan; that after the discussions Mufti Hannan directed to prevent Awami Leaguers of Sylhet; that in April, 2004 he along with Ripon of Kulaura went to Mufti Hannan's office at Badda and they also asked Ripon to come there; that he asked Kajal about the grenade 'সে মুফতি হান্নানের অনুমতি নিয়া রুমের ভেতর হতে গ্রেনেড নিয়া আসে, অপর ১জন কাজী খাটোমতো, বয়স ২০/২২, মুখে হালকা দাড়ি, নাম মমিন তার হাতে দেয়। সে ৪টি শক্ত কাগজের প্যাকেটে ৪টি গ্রেনেড আমার হাতে দেয়। আমি ও রিপন ভাই গ্রেনেড ৪টি কম্পিউটারের মনিটরের কার্টুনে রাখি। So, he admitted that the grenades were supplied by Mufti Hannan and that with the permission of Mufti Hannan, grenades were brought from the room and handed over to him and then he along with Ripon kept the grenades inside computer monitor's carton. Then he said '২০০৪ সালের মে মাসের ২১ তারিখ বৃটিশ হাই কমিশনার সিলেট আসবেন-এর আগের দিন সকালে আবু আবদুল্লাহ পরিচয়ে সংগঠনের একজন কর্মী আমাকে মোবাইলে জানায় সে বলে আমাকে আপনি চিনবেন না। বৃটিশ হাই কমিশনার সিলেট যাচ্ছে। একটু

খেয়াল রাখবেন। এর অনুমান ১/২ ঘন্টা পর রাহী মোহাম্মদ কাজল আমাকে মোবাইল ফোনে বলে যে, বৃটিশ হাই কমিশনার আসতেছে, তাকে দাওয়াত দিতে হবে। দাওয়াত খাস সংগঠনের ভাষায় আমরা বুঝি আক্রমন করা।---- বৃটিশ হাই কমিশনারকে হত্যা করতে পারলে সংগঠনের পক্ষে একটি বড় ধরনের কাজ হবে বিশ্বাস করি। বৃটিশ হাই কমিশনারের উপর গ্রেনেড হামলার সিদ্ধান্ত নেই। ------- আমি বৃটিশ হাই কমিশনারের খোজে মূল মাজারের নিকট যাই। তাকে না পেয়ে নীচে নেমে আসি। ২জন আলোচনা করে সিদ্ধান্ত নেই যে, বৃটিশ হাই কমিশনার যেখানেই থাকুক না কেন মূল গেইট দিয়েই যাবেন। আমরা মূল গেটের নিকট চলে আসি। কিছুক্ষন পর বৃটিশ হাই কমিশনার লোকজনের সাথে হ্যান্ডশ্যাক করতে করতে এগিয়ে আসে। দেখতে পাই। আমার নির্দেশে রিপন ভাই গ্রেনেডের পিন খুলে বৃটিশ হাই কমিশনারের উদ্দেশ্যে ছুড়ে মারে। ৩/৪ সেকেন্ড এর মধ্যে গ্রেনেড বিস্ফোরিত হয়। -------ফোনে ঘটনা মুফতি হান্নাকে জানাই। ----”

He was a party in the discussions in which Mufti Hannan was also present and in the said discussion, it was decided to kill the British High Commissioner and then when the British High Commissioner was approaching towards the main gate of the shrine, Ripon threw the bomb aiming at the High Commissioner which exploded and then he intimated the incident to Mufti Hannan, the latter praised Ripon for the act. He also admitted that in the said attack three police personnel died, the British High Commissioner, the

Deputy Commissioner and many persons sustained injuries. He has narrated the vivid picture of the manner of attack aiming at the British High Commissioner and the manner of explosion causing injuries. This statement corroborated the evidence of the witnesses.

Md. Delwar Hossain Ripon in his confession admitted that Bipul inspired him towards Islami Zihad; that on the second occasion when he came to Dhaka Bipul gave him four packets containing grenades telling that they would carry on the same to Sylhet and that they had business at Sylhet; that he carried the grenades concealing them inside the computer monitor packet; that then he said "এক সময় বৃটিশ হাই কমিশনার লোকজনের সাথে হ্যান্ডশেক করতে করতে গেইটের দিকে আগাইয়া আসে। আমি ও বিপুল প্রধান গেইটের সামনে দাড়াই। বিপুল আমাকে গ্রেনেডের পিন খুলে ছুড়ে মারতে বলে, সামনে অনেক লোক ছিল, আমি বলি আমিতো সামনে কিছু দেখতে পাচ্ছি না। সে বলে দেখার দরকার নাই। তুমি পিন খুলে ছুড়ে মার। আমি তার কথামত প্যান্টের পকেট হতে ১টি গ্রেনেড বের করে পিন খুলে ছুড়ে মারি। আমি ৫/৭ ফিট দুর হতে গ্রেনেড ছুড়ে মারি। মারার সাথে সাথেই বিকট শব্দে তা বিস্ফোরন হয়।" So, this accused also corroborated the statement of other accused so far as

it relates to carrying grenade concealing inside a computer's monitor packet and detonating bomb as per order of Bipul and that soon thereafter, grenade exploded with monstrous sound. He then said "গ্রেনেড ছুড়ে মারার সময় আমার মধ্যে একটা জোস কাজ করিতেছিলো। ছুড়ে মারতেই হবে।" This statement proved that he was fond of detonating of grenades that a sense of earnest interest worked in him while detonating grenade.

Hafez Moulana Mufti Abul Hannan in his confession stated that in 1994, he met Harkatul Zihad's leaders Mufti Shafiqur Rahman, Mufti Abdul Hai, Moulana Abdur Rob, Moulana Saidur Rahman at Ghardanga Madrasha and on being inspired by their call he joined Harkatul Zihad organisation. He narrated different incidents and then narrated about his complicity in the terrorist activities at Sylhet stating "তাজউদ্দীন তার বাসায় পেটি খুলে গ্রেনেডের কাপড়ের ব্যাগসহ প্রথম ৩টি ব্যাগ দেয়। প্রতি ব্যাগের ৮টি করে গ্রেনেড ছিল। আমরা বলি প্রতি ব্যাগে ২টি করে দেন। তখন আরো একটি গ্রেনেড ভর্তি ব্যাগ দেয়। মোট ৩২টি গ্রেনেড ব্যাগে রাখা হয়। ব্যাগটিতে গ্রেনেড রাখার পর ভর্তি না হওয়ায় কাপড় চোপড় দিয়ে ভর্তি করতে বলি এবং আরও বলি যে, আমি বারে বারে আসতে পারবো না।----- পরে আবু জান্দালকে দিয়ে

৩২টি গ্রেনেড মোহাম্মদপুর থেকে বাড্ডায় মাদ্রাসার একটি কক্ষে ওয়াল ড্রপের মধ্যে রেখে দেই। ----- সিলেটের বিপুল আমাদের হরকাতুল জিহাদের সদস্য এবং সিলেটের নেতা ছিল। সে ১৯৯৯ সালে লিবিয়া চলে যায়।---- তবে আমার কাছে কিছু গ্রেনেড আছে যেহেতু আমাদের সংগঠন আওয়ামীলীগের বিরূদ্ধে কাজ করে তাই সিলেট এলাকায় আওয়ামীলীগ নেতাদের উপর আক্রমন করার জন্য বিপুলকে সময়মত আমাদের নিকট হতে গ্রেনেড নেওয়ার জন্য বলি।----- ২০০৪ সালের এপ্রিল মাসের দিকে বিপুল ও রিপন আমার ঢাকার বাড্ডার অফিসে আসে। কাজল আমাকে ফোনে জানায় যে, বিপুল ও রিপন গ্রেনেড নিতে এসেছে।----- আমি বিপুলকে ৪টি গ্রেনেড দেবার জন্য কাজলকে নির্দেশ দেই। কাজল বিপুলকে ৪টি গ্রেনেড দিয়ে আমাকে জানায়।আমার সরবরাহ করা গ্রেনেড দিয়ে বিপুল ও রিপন সিলেট হযরত শাহ জালাল (রঃ) এর দরগায়ে বৃটিশ হাই কমিশনারকে হত্যা করার জন্য গ্রেনেড নিক্ষেপ করে তাতে ৩ জন মারা যায় এবং ৬০/৭০ জন আহত হয়।”

This accused admitted that he is an activist of Harkatul Zihad and received 32 grenades from Tajuddin out of which he directed Kajal to give four grenades to Bipul and Ripon from his Badda office and that Bipul and Ripon exploded the grenade at Hazrat Shahajal (R)shrine, Sylhet killing three persons and injuring 60/70 persons. He knew that a grenade contains highly explosive substances and kept the grenades with a view to using against Awami Leaguers and as per his direction four grenades were given to

activists of Harkatul Zihad for attacking Sylhet Awami Leaguers and that with the grenades supplied by him, Bipul and Ripon charged a grenade for killing British High Commissioner.

These confessions are natural, voluntary, inculpatory and corroborative to each other thus one cannot harbour any doubt that those have been procured from them by means of coercion, duress or torture. One confession was recorded at Dhaka and the other two at Sylhet by different officers. There are corroborative statements as regards supply of four grenades by accused Mufti Abdul Hannan to Bipul and Ripon of Sylhet from his Badda office and that out of the same Bipul and Ripon used one grenade killing three persons and injuring innumerable persons at the gate of Hazrat Shahjalal (R). These confessions are inculpatory in nature and conviction can be based upon them. There is no doubt about it. That Mufti Hannan became an activist of the terrorist organization is admitted from his confession and in

due course he became a leader and philosopher of the organisation is also revealed from the statement. He monitored all terrorist activities which are evident from the statement of Bipul that after the detonation he had informed Mufti Hannan that the blasting was successfully conducted.

Mohammad Nur-e-Alam Siddiqui (P.W.47) proved the confession of Md. Sharif Shahedur Alam alias Bipul and Md. Delwar Hossain Ripon. He stated that he gave sufficient time to refresh the memories of the accused and cautioned them that the confessions would be used against them; that they made voluntary statements and that their statements are true and voluntary. He dined the defence suggestion that the statements were not recorded in accordance with law. He also denied the defence suggestion that Ripon made any application for retracting his confession.

Md. Shafiq Anwar (P.W.49) recorded the statement of Hafez Moulana Mufti Abdul Hannan in connection with Ramna P.S. Case No.46(4)(1). He

stated that he gave sufficient time to refresh the memory of the accused and explained to him the implications of the statement made by him to which the latter admitted that it was the true version and then he put his signature. He further stated that the statement was true and voluntary. In course of cross-examination, he stated that after the statement he made a memorandum in which he put his signature and then accused put his signature. He denied the defence suggestion that after recording the confession the accused was not remanded to the jail custody. These witnesses proved the confessions which were recorded in accordance with law. The defence failed to point out anything to show that the statements were recorded by coercion, threat or inducement. So, there is no reason to discard their evidence on the ground that the confessions were not recorded in accordance with law.

Under the Scheme of the Evidence Act confession is included in the category of 'admission' spelt out

in sections 17 to 31. A confession is admissible in evidence because the maker acknowledges a fact in issue to his detriment. The maker acknowledges his/her culpability provided it is true and voluntary. Section 24 is a rule of exclusion, that is to say, if the confession is not voluntary it is not admissible. It must be free from inducement, threat or promise. It must also be free from police influence. Its wording shows that prima-facie a confession is to be deemed relevant without formal proof of voluntariness. The ground of reception is the same as that of 'admission'. The language used in this section shows prima-facie that a confession duly recorded as required by law is deemed to be relevant. The expression 'confession' has been defined by Stephen in his 'Digest of the Law of Evidence' that 'A confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime.'

Section 25 is broadly worded and it absolutely excludes from evidence against the maker of the same made to a police officer under any circumstances. Considering the object of the section, the history of the previous legislation and the conduct of the police generally, the Indian Law Commission report shows that 'the police have a tendency to extract confessions by inducement, undue influence, torture and oppression and thus with a view to preventing the abuse of their power sections 25 and 26 have been incorporated in the Act, not that confession to police is not relevant'. Section 26 re-enacts the provisions of section 149 of the Code of Criminal Procedure, 1861, with some alterations. This section goes further what the preceding section makes a confession inadmissible that a confession made by a person while he is in custody of the police is inadmissible unless made in the immediate presence of a Magistrate. It is because a person in the custody of the Police is presumed to be under their influence

and the presence of a Magistrate is a safe-guard and guarantees the confession as not made by influence.

Section 27 is an exception to sections 25 and 26, that is to say, a statement made by an offender in police custody which distinctly relates to the fact discovered is admissible against him. In this connection Sir John Beaumont in Pulkuri Kottaya V. R, AIR 1947 P.C. 67 observed: 'clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.....'

Section 80 of the Evidence Act states about "*Presumption as to documents produced as record of evidence*–Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and

purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the court shall presume- that the document is genuine; that any statements as to the circumstances under which it was taken purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."

Section 80 gives legal sanction to the maxim *Omnia Praesumuntur rite et solemniter esse acta donee probetur in contrarium*, which means all things are presumed to have been done regularly and with due formality until contrary is proved (Ballentine's Law Dictionary). When a deposition or confession is taken by a public servant, there is a degree of sanctity and solemnity which affords a sufficient guarantee for the presumption that everything was formally, correctly and duly done. The presumption to be raised under this section which deals with depositions or confessions of offenders is considerably wider than those under section 79, which provides about

presumptions so as to genuineness of certificates, certified copies and certified by other documents, that is to say, where a person acts in an official capacity, it shall be presumed that he was duly appointed and it has been applied to a great variety of officers. The presumption embraced not only the genuineness of the confession but also that it was duly taken and given under the circumstances recorded therein. It deals not only with relevancy but also with proof, if it was recorded in accordance with law. On the strength of these presumptions it dispenses with the necessity of formal proof by direct evidence what it would otherwise be necessary to prove.

A confession by an accused in accordance with law is admissible without examining the Magistrate who recorded it in view of the fact that the Magistrate was a public servant who recorded the statement in discharge of his official duty provided that it was recorded in accordance with law. The

usual presumption arises under this section that the confession is voluntarily made. The burden is on the accused of showing that his confession is not voluntarily made. The Magistrate's mere admission in the cross-examination that he filled up the form in question and answer required by section 164 of the Code in recording the confession, is sufficient in itself that he has recorded it properly. This section dispenses with the necessity of formal proof of a confession recorded in accordance with law. Genuineness under the section can be presumed only when the confession has been recorded substantially in the form and in the manner provided by law.

In Babul V. State, 42 DLR(AD)186, seven confessions had been used by the prosecution and the said confessions were not formally proved by examining the Magistrate. "Even so the High Court Division was justified in holding that under section 80 of the Evidence Act, the court was entitled to presume that the documents (containing confession)

were genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it were true and that the confessions were duly taken", this court observed, but disbelieved the confessions taking into consideration the fact that the confessions of the seven accused were taken within a space of three hours and that the accused retracted their confessions, but the court did not afford the accused an opportunity to cross-examine the Magistrate. So when a confession is retracted it is imperative for the prosecution to produce the Magistrate to cross-examine him for ascertaining the voluntariness of the confession.

In the present case the confessions have been corroborated by circumstantial evidence proved by the witnesses. Even if there is no corroborating evidence, if a confession is taken to be true, voluntary and inculpatory in nature, a conviction can be given against the maker of the statement relying

upon it subject to the conditions mentioned above. In view of the above proposition of law, there is no legal ground to interfere with the conviction of the appellants and co-accused since the confessions are not only inculpatory but also true and voluntary. Deliberate and voluntary confession of guilt, if clearly proved, are among the most effectual proofs in the law – their value depending on the sound presumption that a rational being will not make admission prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience.

But the question is whether the accused can be convicted under sections 302/120B of the Penal Code relying upon the confessions. The High Court Division was of the view that the court can convict the accused relying upon such confessions in view of section 10 of the Evidence Act which 'clearly provides special provisions that in a case of conspiracy the confession of a co-accused can be used

as evidence against other co-accused'. In this connection the High Court Division has relied upon Major Bazlur Huda V. State, 62 DLR(AD)1 and some other Indian cases observing that "A conspirator is considered to be an agent of his associates in carrying out the objects of the conspiracy and anything said, done or written by him, during the continuance of the conspiracy, in reference to the common intention of the conspirators, is a relevant fact against each one of his associates, for the purpose of proving the conspiracy as well as for showing that he was a party to it. Each is an agent of the other in carrying out the object of the conspiracy and in doing anything in furtherance of the common design".

The other cases relied upon by the High Court Division are Mohd. Khalid V. State of West Bengal, (2002) 7 SCC 334, Ferozuddin Basheeruddin V. State of Karalla, (2001) 7 SCC 596, State V. Nalini, (1999) 5 SCC 283 and some other decisions. Possibly the High

Court Division failed to follow the dictum in Major Bazlur Huda and Mohd. Khaled, Feroz Uddin Bashir Uddin (supra). In Firozuddin Basheeruddin, the question of confession was not involved and therefore the ratio in that case is not applicable. In Nalini, in the majority opinion Thomas,J. observed that 'normally a conspirator's connection with the conspiracy would get snapped after he is nabbed by the police....' and in the other opinion, Wadhwa,J. observed 'Fixing the period of conspiracy is, thus important as the provisions of section 10 would apply only during the existence of the conspiracy'. In Bazlur Huda this court noticed section 10 of the Evidence Act, the case of Mirja Akbor V. King Emperor, AIR 1940 PC 176; Bhagwan Swarup V. State of Maharashtra, AIR 1965 SC 682; Zulfikar Ali Bhutto V. The State, PLD 1979 SC 53 and State V. Nalini, (1999) 5 SCC 283 and observed in paragraphs 134 and 135 as under:

> "But however statement made after the conspiracy has been terminated on achieving its object or it is abandoned or it is frustrated or the conspirator leaves the conspiracy in between, is not admissible against the co-conspirator. Fixing the period of conspiracy is important as the provisions of Section 10 of the Evidence Act would apply only during the existence of the conspiracy.
>
> In view of the legal position as stated above it appears that the above confessional statements of Farooque Rahman, Sultan Shahriar and Mohiuddin (Artillery) are not relevant fact to prove the charge of conspiracy framed against the appellants."

The language of section 10 is so clear that no further explanation is necessary, that is, fixing the period of conspiracy is important to apply section 10 of the Evidence Act. It is only during the existence

of the conspiracy. Narrative of past acts after the conspiracy has been carried out into effect is not relevant. A statement made by one conspirator in the absence of the other with reference to the past acts done in the actual carrying out of the conspiracy after it has been completed, is not admissible under section 10. The words 'common intention' signify a common intention existing at the time when the thing was said, done or written by any one of them. In Bazlur Huda, this court discarded the confessions of Farooque Rahaman, Sultan Shahriar and Mohiuddin (Artillery) observing that those confessions were not relevant fact to prove the charge of conspiracy and then on assessment of the oral evidence found that the prosecution has been able to prove the charge of conspiracy against the accused. The High Court Division wrongly applied the ratio of those cases. Similar views have been taken in Mobile Quader V. State (Criminal Appeal Nos.22-24 of 2010). In view of the above consistent views expressed by the Privy

Council and Supreme Courts of India, Pakistan and Bangladesh, there is hardly any scope to consider the confessions of three accused to prove the charge under section 120B of the Penal Code. Even if the charge under sections 320/120B is failed, there will be no difficulty in maintaining the sentences of the appellants and co-accused on alteration of the charge.

There is no doubt that the confessions of the present accused are inculpatory in nature. The confessions are so natural and spontaneous that one cannot harbor any doubt about its' voluntariness. Mufti Abdul Hannan participated in the Afghanistan war in 1992 and after returning to the country he joined Harkatul Zihad organisation. He collected grenades from another terrorist Tajuddin for committing terrorist activities in India and Bangladesh. He believed that singing and dancing are un-Islamic, so also the followers of Awami League. According to him, those who indulged in anti-Islamic

acts should be eliminated from the society. His belief is fanatic and inconsistent with the tenets of Islam. In order to implement his belief, he distributed grenades to different persons. He collected grenades for transporting them to India for terrorist activities and gave four of them to Bipul and Ripon. Bipul and Ripon corroborated his claim. Ripon admitted that he hurled grenade by opening the pin that he received from Hannan and communicated the act of implementation instantaneously to accused Hannan. There is no denial of this assertion by Ripon.

One crucial point that has been argued in the High Court Division is whether the confession of Mufti Abdul Hannan can be used in evidence since his confession has been made in connection with Ramna Police Station Case No.46(4)/2001. The High Court Division relying upon the cases of State of Maharastra V. Kamal Ahmed Mohammad Vakil Ansary, (2013) 12 SCC 17 and State of Gujarat V. Mohd. Atik,

AIR 1998 SC 1686 held that confessional statement made by the accused in another case would be admissible if he is an accused in both the cases and that if the requirements of law are satisfied - it is immaterial whether the confession was made in one particular case or in a different case.

The question of law involved in the case of Kamal Ahmed (supra) is whether the confession of three accused made in another case can be used in that case by examining the witnesses who recorded the confessions or in the alternative, those confessions can be used by examining the persons before whom such confessions are made. After the closure of the defence case, the accused filed an application for examination of four defence witnesses, witness Nos.63, 64, 65 and 66 who recorded confessions of accused Sadiq Israr Shaikh, Arif Bodaruddin Shaikh and Ansar Ahmed Badsha in Special Case No.4 of 2009. This accused is not an accused in Special Case No.24 of 2006, and those three accused are not accused in

Special case No.21 of 2006. He also did not pray for summoning those confessing accused for affirming or denying correctness of the confessions. The prayer was made to show that in those confessions accused had admitted that they carried out the bomb blasts on the train on 11.7.2006 on which the incident took place. The High Court allowed the prayer. The Supreme Court set aside the order on the reasoning that the object of the accused to examine those witnesses is not to rely on the factum of confessions but it is to achieve exculpation of blameworthiness on the basis of the truth of the confessions made before the witness Nos.63-66 and that the witnesses sought to be produced could not vouchsafe the truth or falsity of confessions made by those accused since it is the truthfulness of confessions which is the real purpose sought to be achieved, only those who made the confessions could vouchsafe for the same and that can be done under the provisions of the Evidence Act.

In Mohd. Atik, some cases were registered with different police stations following the instances of bomb blasts at different places. Accused Abdul Latif made a confession in connection with a case. Said confession was sought to be used in another case. The Supreme Court was of the view that in the absence of inhibition for such use of confession, there is no reason for the court to introduce a further fetter against the admissibility of the confession. However, the court did not assign proper reason for its applicability.

Though this point has not been raised in course of hearing of the appeal, learned Attorney General has drawn our attention in this regard and submits that this issue is required to be resolved by this court for two reasons, firstly, there are cases on the same issue and the State’s lawyers are confused about the admissibility of such confessions, secondly, this court has not resolved the issue. We noticed in some cases that after a terrorist is

detained by the investigation agencies, he makes confession disclosing different incidents of his complicity. Under the circumstances this court feels that it is a fit case to lay down the guidelines as to the admissibility of confession of the nature.

This confessing accused made statement in connection with the Ramna Police Station case in which he has admitted his complicity in this case and some other cases. In his confession he admitted that he was the mastermind for committing terrorist activities through out of the country and in India as well. He was an Afgan returnee fighter and then joined the Harkatul Zihad organisation. He admitted that he was involved in the bomb explosions at Udichi, Jessore, the principal conspirator to kill Sheikh Hasina by planting powerful bomb at Kotwalipara, the supplier of grenades to his two disciples and the bomb blasting at Raman Batamul on first Baishak, 2001.

Some provisions of the Evidence Act require to be explored to meet the issue, such as, sections 5, 6, 11, 59, 60, 61, 62, 63 and 80. Section 5 reads as under:

> "Evidence may be given of facts in issue and relevant facts - Evidence may be given in any suit or proceeding of the existence or nonexistence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."

This section deals with facts in issue and relevant fact. Evidence may be given in a judicial proceeding to prove the existence or non-existence of every fact in issue or of such other facts which are declared to be relevant by some other provisions of Chapter II, and of no other collateral facts. The facts necessarily involved in the determination of the issue are sometimes called *res gestae*. So Relevancy is the test of admissibility. Facts in issue are necessary ingredients of the litigated

right or liability and they may be given in evidence as a matter of course. Whenever there is absence of direct evidence concerning facts in issue, their existence may be established as satisfactorily by circumstantial evidence as by direct evidence. The existence or non-existence of a fact may be inferred from the existence or non-existence of certain other facts.

Section 3 defines 'facts in issue' means and includes "any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows". It is to be borne in mind that admissibility of evidence is the rule and the exclusion is an exception. It is thus apparent that evidence may be given in a case in respect of any fact which is relevant for the determination of an issue involved in it.

The objects of a trial of a person in a case is to ascertain the truth in respect of the charge made. The court is to estimate at its true worth. In this connection Lord Tenterden,CJ. in Taylor V. Willians, (1830) 2 B & Ad. observed "In deciding the question whether certain evidence be admissible or not, it is necessary to look at the object for which it is produced, and the point it is intended to establish; for it may be admissible for one purpose and not another".

This blue sheet remark makes the point clear that the object of tendering evidence is to ascertain whether the evidence is relevant for the purpose of determining the 'facts in issue' or 'relevant facts' in a particular case. If the real object of a judicial proceeding is to ascertain the existence of facts on which the existence of a right or liability is made, this fact may be given in evidence as a matter of course. Therefore, section 5 should be read subject to the specific provisions governing

admissibility enacted in other parts of the Evidence Act, that is to say, the facts connected in any of the ways mentioned in section 6 to 25. It has been held in Fazal Din V. Karam Hossain, 162 IC 404, that where a document consists of two separate parts, one of which is admissible and the other is inadmissible, the document cannot be rejected as a whole. The principle underlying in this case is that the recitals in the document which is admissible may be taken in evidence if the said recital is relevant for the purpose of ascertaining the facts in issue.

Section 6 of the Evidence Act deals with relevancy of facts forming part of the same transaction. The principle of law embodied in section 6 is usually known as the rule of *res-gestae* recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue 'as to form part of the same transaction.' If facts form part of the transaction which is the subject of inquiry,

manifestly evidence of them should not be excluded (Phipsion Evidence, Eleventh Edition, P.71). Such fact forming part of the *resgestae* should not be excluded without rendering the evidence unintelligible. Sections 6, 7, 8, 9 and 14 are treated under the heading *res gestae.* It is, therefore, evident that it is an exception to the general rule that hearsay evidence is not admissible.

Generally, if the fact is so connected to form part of the same transaction, the statement must have been made contemporaneously with the acts which constitute the offence or at least immediately thereafter. If there is an interval, it is sufficient enough for fabrication and then the statement is not part of the *res gestae*. Stephen defines this term "as a group of facts so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue".

In an English case in R. V. Ellis, 6 B & C 145, it was observed that "where the prisoner was charged with stealing six marked shilling from a till and evidence was tendered of the taking of other money at the same time, the evidence was admissible on the principle that several acts of the prisoner in taking the money were parts of the entire transaction.' In each case the Judge must decide according to the circumstances, drawing the line between the facts which are so connected with the fact in issue as to be part of the same transaction and facts which are beyond that limit. Section 7 deals with 'facts which are the occasion, cause or effect of facts in issue'. This section is used in much wider than those of section 6. The chain of events which make up the transactions may be sometimes difficult of discrimination. When facts though not strictly forming part of the same transaction may be so closely connected with it that they tend to prove or

disprove or explain the transaction under inquiry. So this provision embraces a large area of facts.

Then our consideration is section 8 which deals with "motive, preparation and previous or subsequent conduct". The heading of the section resembles that it is an amplification of the preceding section 7. It embodies the rule of evidence that the testimony of *res gestae* always allowable when it goes to the root of the matter. A motive, preparation, the existence of a design or plan, the conduct of a party are continuance of a criminal action but it is very difficult to prove them in precision. Section 8 states that the conduct whether previous or subsequent of any person of an offence against whom is the subject of an inquiry if is relevant and if the conduct influences or is influenced by any fact in issue or relevant fact. Normally, there is a motive behind every criminal act that is why the court while examining the complicity of an accused

tries to ascertain as to what was the motive on the part of the accused to commit the crime in question.

Section 9 deals with "facts necessary to explain or introduce relevant facts". There are many incidents which, though may not strictly constitute a fact in issue may be regarded as forming a part of it in the sense that they accompany or tend to explain the main facts such as identity, names, dates, places or description, circumstances and relations of the parties and other explanatory and introductory facts of a like nature. All these facts are received under section 9 in explanation of relevant fact or a fact in issue.

Section 11 deals with "When facts not otherwise relevant become relevant". This section reads as under:

> "(1) if they are inconsistent with any fact in issue or relevant fact;
>
> (2) if by themselves or in connection with other facts they make the existence or non-

existence of any fact in issue or relevant fact highly probable or improbable."

This section applies when the question as to whether a fact is relevant and not when the question is whether a particular method of proof is admissible under any provisions of the Evidence Act. Therefore, the words used in the section are very wide. In this connection Wigmore explains: "Its usual logic is that a certain fact cannot co-exist with the doing of the act in question, and therefore that if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. The form sometimes varies from this statement; but its nature is the same in all forms. The consistency, to be conclusive in proof, must be *essential*, i.e. absolute and universal; but since in offering evidence, we are not required to furnish demonstration but only fair ground for inference, the fact offered need not have this essential or absolute inconsistency, but merely a probable or presumable inconsistency; and its

evidentiary strength will increase with its approach to absolute or essential inconsistency". This section declares admissible facts which are logically relevant to prove or disprove the main fact or fact in issue.

The above ex-position clearly indicates the admissibility of collateral facts prove inconsistency, probability or improbability. There may be collateral facts which have no connection with the main fact except by way of disproving any material fact proved or ascertained by the other side, i.e. when they are such as make existence of the fact so highly improbable as to justify the inference that it never existed. The language used in section 11 appears to be as a general rule. This provision should not be construed in its widest significant and as a general rule. This section is controlled by section 32 where the evidence consists of statements of persons who are dead or cannot be found; but this rule is subject to certain

exceptions. There is a difference between the existence of a fact and a statement as to its existence. This section makes admissible the existence of facts and not statements as to such existence, unless the fact of making that statement is in itself a matter in issue.

In a judicial proceeding all facts except the contents of a document can be proved by oral evidence (section 59). In Rajendra V. Sheopersun, 10 MIA 438 the Judicial Committee observed: "The consideration of a case upon evidence can seldom be satisfactory unless all the presumptions for and against a claim arising on all evidence offered or on proof withheld, in course of pleading and tardy production of important portions of claim, or defence, be viewed in connection with the oral or documentary proof which per se might suffice, to establish it." The best available evidence must always be given. Section 59 lays down that all facts except the contents of documents may be proved by oral evidence, that is, a

fact is to be proved by direct evidence. Section 60 enacts the general rule against the admission of hearsay. On principle hearsay evidence is rejected as it is untrustworthy for judicial purposes for various reasons, i.e. (a) the irresponsibility of the original declarant, for the evidence is not given on oath or under personal responsibility; (Halsbarry, 3rd Ed. Vol-15) (b) it cannot be tested by cross-examination; (Wigmore S.1362) (c) it supposes some better testimony and its reception encourages the substitution of weaker for stronger proofs; (d) its tendency to protract legal investigation to an embarrassing and dangerous length; (e) its intrinsic weakness; (f) its incompetency to satisfy the mind as to the existence of the fact, for truth depreciates in the process of reception and (g) the opportunities for fraud its admission would open. (Phipson, Evidence, 9th Edn. P223-229). Wigmore is of the view that it is the fact that the adverse party has had no opportunity to cross-examine the maker of an extra-

judicial statement that is the real basis of the exclusion of hearsay. But as Phipson points out: “No single principle can be assigned as having operated to exclude hearsay generally, or from any ascertainable date”.

The principle behind the above rules is that the best available evidence should be brought before the court and sections 60, 64 and 91 are based on this rule. Section 61 says that contents of a document may be proved either by the production of the original document i.e. the primary evidence, and in certain cases by copies or oral accounts of its contents. Cases in which secondary evidence is let in are found in section 65. But the definition of secondary evidence is given in section 63 which includes-

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves

insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some persons who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Clause (2) above-"copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies" refers to all copies made from the original by some mechanical process which ensures their accuracy i.e. copies by photography, lithography, cyclostyle, carbon. Illustration (a) refers to the first portion of clause (1), illustration (b) refers to the second portion of

clause, that is, copies mentioned in the first portion. These are admissible in evidence. Illustration (c) lays down a copy transcribed from a copy but afterwards compared with the original is secondary evidence because on account of its comparison with the original it becomes itself an immediate copy. We are concerned with clause (2).

The next provision is section 65. As mentioned above, the cases in which secondary evidence relating to documents may be given. Clause (c) is relevant for our consideration which read "When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default or neglect, produce it in reasonable time." Where a party can show that non-production was not due to his own default or neglect, secondary evidence would be admissible under this clause to adduce secondary evidence. It is not enough to show that the party who

wants to use it cannot produce it because it was not registered.

On an analysis of the above provisions it is evident that evidence may be given in any proceeding of the existence or non-existence of every fact in issue and of such other facts which are declared to be relevant. The facts which are relevant to the fact in issue and they describe the various ways in which facts though not in issue are so related to each other as to form components of the principal fact i.e. as to form part of the same transaction. In determining the proximity of time, proximity or unity of place; continuity of action and community purpose or design this may be taken in wider prospective. The phrase 'same transaction' occurs also in sections 235 and 239 of the Code of Criminal Procedure. Whether a series of acts are so connected together as to form the part of the same transaction is purely a question of fact depending on proximity of time and place, continuity of action and unity of purpose and design.

A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the same transaction. The circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. A transaction may be continuous one extending over a long period and two places. Therefore, the expression "part of the same transaction" must be understood as including both immediate cause and effect of an act or even also its collocation or relevant circumstances.

Mufti Abdul Hannan, made the confession on 19th November, 2006. The present incident took place on 21st May, 2004. He received the grenades from Tajuddin. Sometimes in 2003 he sent some grenades through Abu Jandal and another unknown person to India and gave four grenades to Bipul and Ripon in April, 2004. Out of those four grenades, one grenade was used in the incident. The supply of grenades

pertains to ‘collateral facts’ which can be brought in evidence if it is a ‘relevant fact’. Certainly there is no doubt that it is a relevant fact. There is a link between the supply of grenades and blasting a grenade out of them at Sylhet and therefore, the rule of *res gestae* is attracted in this case even though the recording of confession took place after about twenty months of the blasting. So this confessional statement is perceived as a part of the same and is admissible under section 6 of the Evidence Act. Such fact as is so connected to a ‘fact in issue’ so as to be treated as a part of it would constitute *res-gestae* and would not be excludable by the rule of hearsay evidence. The blasting of grenade by Ripon is a ‘fact in issue’.

If we read the confession as a whole it cannot be altogether ignored that the collection of grenades from Tajuddin, discussions with Bipul and Ripon at his Badda Office for terrorist activities, the handing of four grenades to Bipul and Ripon through

Kajol and blasting of one grenade are facts which are so connected with the deaths of three victims cannot but form part of the same transaction and therefore, they are relevant and admissible in evidence. The supply of grenades to Bipul and Ripon though occupying a length of time occurring a distinct occasion, they comprise things done partly by one and partly by another though such transactions are several creating distinct offences, which are connected together and form part of the entire transaction. More so, Mufti Abdul Hannan is accused in both the cases. It has been proved by the prosecution that the confession is voluntary and as observed above, when a confession is taken in accordance with law, there is presumption under section 80 of truth of the admission. Further more, there is conclusiveness of the effect of admission under section 31. An admission is the best evidence that the opponent can rely upon, and though not conclusive is decisive of the matter unless

successfully withdrawn or proved erroneous. (Narayan V. Gopal AIR 1960 S.C. 100). It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel. (Avadhikishore V. Ram, AIR 1979 S.C.861)

This confession has been marked as exhibit-9(Kha) and it has been proved by P.W.49. He stated that he recorded the statement in accordance with law. He proved the signature of the accused and his signature. He made direct evidence that accused made a confession and he has been cross-examined by the defence. However, he proved the copy of the statement by secondary evidence. A photostat copy of the original which was obtained by mechanical process ensures its accuracy. It would have been better if the prosecution could produce the certified copy of the confession. This confession is relevant in which he admitted his complicity by supplying grenades to Bipul and Ripon, which he knew that the blasting of

grenade is so dangerous that it would cause death to persons upon whom it would be used and exploded. P.W.49 proved that he recorded the statement by observance of all formalities prescribed by law. From the above conspectus, a confession made by an accused person in connection with another case is found to be relevant in connection with other case and if the offences committed in course of the same transaction and if the confession has been duly recorded in accordance with law. Secondary evidence after fulfillment of the requirements of section 66 may be adduced to prove the confession and if the person making the confession is accused in both or all the incidents of commission of offences.

Another point raised in the High Court Division is that the trial of the accused Mufti Abdun Hannan is vitiated by reason of not taking cognizance of the offence by the learned Sessions Judge. The High Court Division relying upon the case of Dharmatar V. State of Horyana, (2014) 3 SCC 306, RN Agarwal V. RC

Bansal, (2015) 1 SCC 48, Haripada Biswas V. State, 6 BSCR 83 held that the trial of the accused has not been vitiated for this reason. Section 193 of the Code of Criminal Procedure provides that:

> "Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been sent to it by a Magistrate duly empowered in that behalf.
>
> (2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Government by general or special order may direct them to try or as the Session Judge of the division, by general or special order, may make over to them for trial."

On reading section 190 along with section 193, there is no gainsaying that a Magistrate shall take

cognizance of an offence as a court of original jurisdiction and unless he takes cognizance of the offence the accused cannot be committed to the court of session for trial. The word 'committed' has been deleted and in its place the word 'send' has been substituted. The object of the restriction imposed by section 193 is to secure the case of a person charged with a grave offence. The accused should have been given an opportunity to know the circumstances of the offence imputed to him and enabled him to make his defence. There was a provision for inquiry under Chapter XVIII of the Code and in such inquiry the accused could have taken his defence, but after the omission of the Chapter, no inquiry is held under the present provision of the Code. Even then the power of the Magistrate to take cognizance of the offence as a court of original jurisdiction has been retained. The Sessions Judge can take cognizance of any offence only after the case is sent to him for trial.

The Indian provision is a bit different from ours. The Indian provision reads as under:

> "Cognizance of offence by a courts of session –Except as otherwise expressly provided by this court or by any other law for the time being enforce, no court of session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a magistrate under this court".

The word 'committed' has been used but in our provision the words 'accused has been sent' have been used. Under the Indian provision, whenever the case has been 'committed' to the court of Sessions by a Magistrate, the Session Judge shall take cognizance as a court of original jurisdiction. The Indian case has been decided in accordance with the provisions of law but ours is a bit different. It is a mandatory provision that the accused must be 'sent' for trial by the Magistrate. The taking cognizance of the

offence by a Session Judge is not so material. The material fact is that the Magistrate empowered to take cognizance must 'send' the case to the court of session under section 205C(a) of the Code after taking cognizance and performing formalities, and then only the question of taking cognizance of offence by the court of Session comes into play. The question of taking cognizance does not arise in this case for the second time. There is no dispute in this case that the learned Session Judge has taken cognizance of the offence and sent the record to the learned Additional Sessions Judge for trial. Thereafter as per decision of the government the record was transmitted to the Dhruta Bicher Tribunal.

Even if it is assumed that the Session Judge has not taken cognizance of the offence after the case was 'sent' by the Magistrate, the trial of the accused shall not be vitiated in view of section 537 of the Code which provides that 'no finding, sentence, or order passed by the court of competent

jurisdiction shall be reversed or altered under Chapter XXVII on appeal or revision of account ...' Chapter XXVII contains sections 374-380. Section 374 provides the sentence of death to be submitted by a court of Sessions to the High Court Division for confirmation. Section 376 empowers the High Court Division to confirm a death sentence or annul a death sentence. So, whenever a death sentence is passed by a court of session, it is sent to the High Court Division for confirmation. The High Court Division has power to confirm the sentence or annul the sentence and by reason of any defect or error in the procedure, death sentence cannot be vitiated. So, the conviction of the accused cannot be set aside by reason of the alleged defect.

Next question is if the appellants conviction under section 302/120B is not tenable in law, what would be their legal conviction. Evidence on record proved that the act of accused Ripon attracts clause 'fourthly' of section 300. This clause provides that

culpable homicide is murder 'if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.' This clause comprehends the commission of imminently dangerous act which must in all probability cause death or cause such bodily injury as is likely to cause death. When such act is committed with the knowledge that 'death' might be probable result and without any excuse for incurring the risk of causing death or injury as is likely to cause death, the offence is murder. It applies to a case of dangerous action without an intention to cause specific bodily injury to any person. The knowledge which accompanies the act must be death. The act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Though this clause speaks of causing bodily injury

not to any specific person, it has been revealed from the confessions of Ripon and Bipul that they wanted to kill the British High Commissioner, but that when the British High Commissioner was returning back, huge number of persons accompanied him towards the gate and at the eleventh hour, accused Ripon could not trace out the actual location of the High Commissioner and that he hurled the grenade on the crowd knowing that the blasting of grenade would cause death of the persons to whom splinters had inflicted. Therefore, this accused cannot escape from the charge of murder punishable under section 302 of the Penal Code.

Accused Bipul directed Ripon to blasting the grenade when the latter could not detect the location of Mr. Anwar Chowdhury. Similarly Mufti Hannan supplied the grenade which was detonated by Ripon. Therefore, the acts of Bipul and Mufti Hannan attract offence of abetement for murder punishable under sections 302/109 of the Penal Code. Accordingly, the

conviction of Md. Delowar Hossain @ Ripon is altered to one under section 302 of the Penal Code and the appellants Sharif Shahedul Alam alias Bipul and Mufti Abdul Hannan Munshi @ Abul Kalam to one under sections 302/109 of Penal Code.

We find no extraneous ground to commute the sentences and the High Court Division has rightly exercised its discretion on the question of sentence on assigning good reasons. We find no reason to depart from the same. The appeal is, therefore, dismissed with the modification of the conviction.

C.J.

J.

J.

J.

The 7th December, 2016

Md. Mahbub Hossain.

APPROVED FOR REPORTING