

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain,

Chief Justice

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

Mr. Justice Abu Bakar Siddiquee

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

CRIMINAL APPEAL NO.45 OF 2012 WITH JAIL PETITION NO.15 OF 2012 AND
CRIMINAL APPEAL NO. 48 OF 2015 AND CRIMINAL PETITION FOR LEAVE TO
APPEAL NO.366 OF 2017.

(From the judgment and order dated 19.05.2011 passed by the High Court Division in Criminal Appeal No.4905 of 2009 heard analogously with Death Reference No.47 of 2009 and Criminal Appeal Nos.4888,4898,4911,4931,5029,4922 , 7970 of 2009 and 569 of 2010 and Jail Appeal Nos.497,498,499 and 500 of 2009.)

Iqbal Hossain and another	:	Appellants (In Crl.A.No.45/2012).
Joynal and others	:	Petitioners (In J.P.No.15/2012).
Zakir Hossain	:	Appellant (In Crl.A.No.48/2015).
Zaman	:	Petitioner (In Crl.P.No.366/2017).

=Versus=

The State	:	Respondents. (In Cr.A.No.45/12 & J.P.No.15/12 & Crl.P.No.366/17)
The State and others	:	Respondents (In Crl.A.No.48/15)

For the Appellants (In Crl.A.No.45/12& J.P.No.15/12) : Mr. Abdur Razzaque Khan, Senior Advocate(with Mr. Abdul Wadud Bhuiya, Senior Advocate and Mr. Sarwar Ahmed, Advocate) instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the Appellant (In Crl.A.No.48/15) : Mr. Nozrul Islam Chowdhury, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the Petitioner (In Crl.P.No.366/17) : Mr. Munsurul Hoque Chowdhury, Senior Advocate instructed by Mr. Md. Mazibar Rahman, Advocate-on-Record.

For the Respondents (In Crl.A.Nos.45/12, J.P.No.15/12 & Crl.P.No.366/17) : Mr. Mehadi Hassan Chowdhury, Additional Attorney General (with Mr. Biswajit Debnath, Deputy Attorney General) instructed by Mr. Md. Shamsul Alam and Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent No.1 (In Crl.A.Nos.48/15) : Mr. Mehadi Hassan Chowdhury, Additional Attorney General (with Mr. Biswajit Debnath, Deputy Attorney General) instructed by Mrs. Mahmuda Begum, Advocate-on-Record.

Respondent Nos.2-4 (In Crl.A.No.48/15) : Not represented.

Date of hearing on : 09.06.2021 & 15.06.2021.

Date of judgment on : 22.06.2021.

J U D G M E N T

Hasan Foez Siddique, J: The appellants Iqbal Hossain and Joynal Abedin of Criminal Appeal No.45 of 2012, appellant Zakir Hossain of Criminal Appeal No.48 of 2015 and petitioner Zaman of Criminal Petition for Leave to Appeal No.366 of 2017 were convicted in Sessions Case No.1279 of 2006 corresponding to G.R. Case No.1210 of 2003 arising out of Siddirgonj P.S. Case No.15 dated 18.12.2003 for commission of offence punishable under Sections 302/34 of the Penal Code by the Additional Sessions Judge, Court No.1 Narayangonj. They were sentenced to death by the trial Court.

The prosecution case, in short, was that at about 5.30 p.m. on 16.12.2003 P.W.1 Ambia Khatun along with her husband victim Kafiluddin went to their Haji Kafil Uddin Super Market, Sanarpar for collecting rent from the tenants of their shops. After collecting rent from some of the tenants when they were waiting for rickshaw for returning home then, all on a sudden, 16 accused persons including the present appellants and petitioner (named in the FIR) armed with deadly weapons surrounded them. Accused Zaman and Tafazzal pointed a pistol on the chest of the P.W.1 and threatened to kill her. Accused Toyeb Ali, Masum and Ismail dragged her husband at a little distance of 3 /4 yards. Accused Shamsul Alam, Shamsul Haque and Haji Malek passed order of killing the victim. Pursuant to that order, accused appellants Iqbal Hossain, Zakir Hossain and Joynul Abedin shot at random targeting the victim Haji Kafil Uddin who fell down on the ground receiving gunshot injuries. The

accused petitioner Zaman pressed the throat of the victim for confirming his death. Thereafter, the accused persons left the place of occurrence towards west shooting openly by their fire arms. The victim was shifted by the P.W.1 and others to Dhaka Medical College and Hospital where the doctor declared him dead. After holding post-mortem examination, the dead body of the victim was handed over to the informant on the next day and, thereafter, the victim was buried. On 18.12.2003, the informant(P.W.1) lodged First Information Report (Exhibit-1).

The Investigating Officer, holding investigation, submitted charge sheet against the present appellants, petitioner and 12 others accused persons under sections 302/34 of the Penal Code. The accused persons were ultimately tried by the Additional Sessions Judge, Court No.1 Narayangonj who framed charges against the appellants, petitioner and others for commission of offences punishable under sections 302/34 of the Penal Code. The accused persons, on dock, pleaded not guilty and claimed to be tried. In the trial Court, the prosecution examined 17 witnesses out of the 26 charge sheeted witnesses. On the other hand, the defence examined 3 witnesses in support of the defence case. The defence case was that they were innocent and had been implicated in the case falsely.

The trial Court convicted the present appellants; petitioner and some other accused persons under Section 302/34 of the Penal Code. It sentenced the present appellants and petitioner to death. The rest convicts were sentenced to imprisonment for life. Thereafter, the trial Court transmitted the case record in the High Court Division for confirmation of sentence of death, which was registered as Death Reference No.47 of 2009. The condemned prisoners, namely, Iqbal Hossain, Zakir Hossain, Joynul

Abedin and Zaman preferred Criminal Appeal No.4905 of 2009 in the High Court Division. Accused Zaman also preferred Criminal Appeal No.488 of 2009 and Jail Appeal No.497 of 2009, Zakir Hossain preferred Jail Appeal No.498 of 2009, Joynul Abedin preferred Jail Appeal No.499 of 2009 and Iqbal Hossain preferred Jail Appeal No.500 of 2009. The High Court Division by the impugned judgment and order accepted the death reference so far the same relates to appellants Iqbal Hossain, Joynul Abedin and Zakir Hossain is concerned and it dismissed the appeals and Jail Appeals preferred by them. The High Court Division rejected the death reference so far the same relates to accused petitioner Zaman is concerned. However, it upheld the conviction of Zaman and commuted his sentence from death to one of imprisonment for life upon dismissing his criminal appeal and jail appeal. The condemned prisoner Iqbal Hossain and Joynal Abedin preferred Criminal Appeal No.45 of 2012 and Jail Petition No.15 of 2012; Zakir Hossain preferred Criminal Appeal No.48 of 2005. On the other hand, Zaman filed Criminal Petition for Leave to Appeal No.366 of 2017 which was tagged by this Division for hearing the same with the aforesaid two Criminal Appeals and Jail Petition.

Mr. Abdur Razzaque Khan and Mr. Abdul Wadud Bhuiya, learned Senior Counsel and Mr. Sarwar Ahmed, learned Advocate along with Mr. Zainal Abedin, learned Advocate-on-Record appeared for the appellants in Criminal Appeal No.45 of 2012 and Jail Petition No.15 of 2012. Mr. Nozrul Islam Chowdhury, learned Senior Counsel along with Mr. Mazibar Rahman, learned Advocate-on-Record appeared for the appellant in Criminal Appeal No.48 of 2015. Mr. Md. Munsurul Haque Chowdhury, learned Senior Counsel instructed by Mr. Md. Mazibar Rahman, Advocate-

on-Record appeared on behalf of the petitioner in Criminal Petition for Leave to Appeal No.366 of 2017. On the other hand, Mr. Mehedi Hasan Chowdhury, learned Additional Attorney General and Mr. Biswajit Debnath, learned Deputy Attorney General appeared on behalf of the respondents in all the appeals and petition.

Learned Advocates appearing on behalf of the appellant in Criminal Appeal No.45 of 2012 submit that the instant F.I.R. was lodged after thought upon collecting the names and particulars of the accused persons after two days of the occurrence implicating the accused appellants falsely. They submit that P.W.2 in his testimony stated that he did not see P.W.1 at the time of occurrence so the testimony of P.W.1 that she was present at the place of occurrence with her victim husband was liable to be left out of consideration. They submit that P.Ws.7,8 and 10 are chance witnesses and they are closely related to the victim and P.W.1, so the order of conviction on the basis of the testimonies of P.W.1, 7, 8 and 10 is unsafe. Mr. Abdur Razzaque Khan, learned Senior Counsel relying upon the inquest report, which was prepared subsequent after the occurrence in presence of some of the witnesses, submits that witnesses cited in the inquest report did not mention the names of the accused persons. He submits that non-disclosure of the names of the accused persons by the witnesses present at the time of preparing inquest made the prosecution case doubtful and that the prosecution had developed its case implicating the appellants in the occurrence out of previous enmity. They submit that since inquest was held and seizure list was prepared on the basis of a G.D. made with Siddirgonj Police Station before lodging exhibit-1 that G.D. was the first information in point of time. The prosecution did not produce that G.D. in the Court

with ulterior motive and the Court erroneously treated the exhibit-1 as first information in point of time.

Mr. Nozrul Islam Chowdhury, learned Senior Advocate appearing for the appellant in Criminal Appeal No.48 of 2012, adopting the submissions made by the learned Advocates of Criminal Appeal No.45 of 2012 adds that even a telephonic message may be treated as First Information Report of a cognizable offence since on the basis of telephonic message a G.D. was lodged with local Police Station and police started investigation on the basis of said G.D. so that G.D. was the first information in point of time and Exhibit-1 is to be treated as the statement of the witnesses recorded under section 161 of the Code of Criminal Procedure. He submits that the prosecution has failed to prove its case against the accused Zakir Hossain beyond all reasonable doubt by examining any disinterested and independent witness of the locality. Though there are many shops situated near the place of occurrence, none of the shop keepers was examined to prove the prosecution case. He submits that the learned Courts below committed an error of law in convicting the appellant Zakir on the basis of the testimonies of the interested witnesses.

Mr. Md. Munsurul Hoque Chowdhury, learned Advocate appearing for the petitioner of Criminal Petition for Leave to Appeal No.366 of 2017, submits that the testimonies of the P.Ws.1, 7 and 10 so far the same relates to presence of petitioner Zaman at the time and place of occurrence is concerned is contradictory and they made different statements as to the manner participation of accused Zaman. He further submits that the order

of conviction of Zaman upon the unreliable and contradictory testimonies of the P.Ws.1, 7 and 10 is unsafe so the same should be set aside.

Mr. Mehadi Hasan Chowdhury, learned Additional Attorney General and Mr. Biswajit Debnath, learned Deputy Attorney General appearing for the respondent State, submit that the P.W.1 is the eye witness of the occurrence and she had been able to identify the accused appellants and petitioner Zaman at the time of occurrence. They further submit that testimony of P.W.1 was fully corroborated by P.W.7 and 10. They submit that the learned Courts below, relying upon the testimonies of P.Ws.1,7 and 10, rightly convicted the appellants and petitioner. They further submit that P.Ws.4,5,6,7, 8 and 10 in their testimonies categorically stated that they saw P.W.1 in the place of occurrence at the time of commission of offence and she, with the help of others, shifted the victim from P.O. to Dhaka Medical College and Hospital through a C.N.G. They further submit that since P.W.1 was present at the time of occurrence with her husband, she had been able to identify these appellants and petitioner. They, lastly, submit that P.W.1 specifically stated that the appellants shot the victim in her presence and that her testimony has been corroborated by the other witnesses, particularly, the P.Ws 7 and 10, the learned Courts below rightly convicted and awarded sentences of the appellants and petitioner.

From the testimony of P.W.1, it appears that she along with her husband victim Haji Kafil Uddin went to their market, namely, Hazi Kafil Uddin Super Market, Sonerpara at about 5.30 p.m. for realization of the rent from their bharatias. She stated that after realization of rent from some of their bharatias when they were waiting for returning their home, accused persons including present appellants, petitioner and others surrounded

them. Accused Tofazzal and Zaman pointed a pistol towards her chest. Accused Toyeb Ali, Masum, Ismail and Jashim dragged the victim at a little distance. Thereafter, pursuant to the order given by Hazi Malek, Shamsul Huq and Shamsul Alam, appellants Iqbal Hossain, Joynal Abedin and Zakir Hossain shot the victim abruptly who receiving gun shot injuries fell down on the ground. Then accused Zaman pressed the throat of the victim for confirming his death. Thereafter, they left the place towards west. In her cross-examination, she stated that at the relevant time the market was open. They have 14 shops in their market. They went to the market for realization of rent from their tenants and realized the same from Bashir, Faruque and 4/5 others. She stated that Moklesh, Bashir, Faruque and Nasir went to the place of occurrence after the occurrence. She denied the defence suggestion that it was not true that her husband was not killed at the place and time of occurrence and she was not present at the relevant time. Relying upon the testimony of P.W.2, who stated that he did not find P.W.1 in the crime spot, learned Advocates for the appellants and petitioner submit that P.W.1 was not present at the time of occurrence. P.W.2 may not see P.W.1 but other witnesses namely, P.W.7 Abdul Huq and P.W.10 Kamal Ahmed saw P.W.1 in the crime spot at the time of occurrence. Similarly, P.W.4 Mezbah , P.W.5 Mohua, P.W.6 Matin and P.W.8 Mahbub, arriving at the place of occurrence subsequent after the occurrence, found P.W.1 Ambia in the spot. We do not find any inconsistency in the testimonies of P.Ws.4,5,7,8 and 10 so far the same relates to presence of P.W.1 at the time and place of occurrence along with her husband victim Hazi Kafil Uddin. P.W.1 being an eye witness of the occurrence specifically narrated the names of the appellants Iqbal Hossain,

Joynal Abedin and Zakir Hossain who shot the victim abruptly. Section 134 of the Evidence Act clearly terms that no particular number of witnesses is necessary for proof of a fact. Evidence is to be weighed and not counted. If a single witness is entitled to full credit, it is sufficient for a decision. It is a sound and well established rule of law that the Court is concerned with the quality and not the quantity of the evidence. Conviction can be based on the sole testimony of an eye witness. It is true photographic picturisation of the assaults in an attack cannot be excepted from witnesses. Moreover, in this case, the testimony of P.W.1 was corroborated by P.W.7 Md. Abdul Huq who saw the appellants Iqbal Hossain, Zakir Hossain and Joynal Abedin to shoot the victim Hazi Kafil Uddin. He stated that after receiving bullet injuries the victim fell down on the ground and accused Iqbal Hossain, Zakir Hossain and Joynal Abedin left place towards west. Then his bhabi P.W.1 and he caught hold the victim. Similarly, P.W.10 Kamal Ahmed, in his testimony, stated that he was present in the place of occurrence at the time of commission of the offence. He saw that the victim Haji Kafil Uddin was standing in front of "Allar Dan Verities Store". At that time, accused Tofazzal and Zaman pointed pistol towards the chest of Hazi Kafil Uddin. Accused Siraj, Toyeb Ali dragged him. Thereafter, Haji Malek and Shamsul Alam passed the order to kill the victim. Then accused appellant Iqbal Hossain shot the victim by his pistol and, thereafter, appellant Joynal Abedin and Zakir Hossain shot the victim abruptly. That is, P.W.7 and P.W.10, who are the eye witnesses of the occurrence, corroborated the testimony of P.W.1 Ambia Khatun in respect of material particulars. There are some minor discrepancies in the testimonies of P.Ws.1, 7 and 10 but different persons

seeing an event give varying accounts of the same. That is because the perceptiveness varies and recount of the same incident is usually at variance to a considerable extent. Those discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. From the testimonies of P.Ws.1,7 and 10 it appears that they consistently stated that they saw the appellant Iqbal Hossain, Zakir Hossain and Zoynal to shoot the victim Kafil Uddin. The evidence of the P.Ws.1, 7 and 10 in the present case appears to have the touch of intrinsic truth and the variations are within limits. The discrepancies are not substantial and are in fact minor. Minor discrepancies in testimony of a witness, if not affecting its credibility, would not make the testimony unreliable.

It appears from the post-mortem report that the doctor, P.W.12 holding post-mortem examination of the person of the victim, found following injuries:-

- “1. One entry wound of bullet ($\frac{1}{2}$ ” X $\frac{1}{3}$ ”) on right side of neck 2” below the right mastoid process 1” below and $\frac{1}{2}$ ” to the right from root of right ear.
2. Corresponding exit wound ($\frac{1}{2}$ ” X $\frac{3}{4}$ ”) on the occipital area 1” above and $1\frac{1}{2}$ ” to the left of the occipital protuberance.
3. One entry wound of bullet($\frac{1}{3}$ ” X $\frac{1}{3}$ ”) on the left side of abdomen 1” below and 2” to the left of umbilicus.”

The doctor opined that death was caused due to hemorrhage and shock as a result of fire arm injuries which are anti-mortem and homicidal in nature. The doctor, Md. Nur Hossain P.W.12 proved the post-mortem report exhibit-3 and his signature (exhibit-3/1). The evidence of P.W.12 Dr. Nur Hossain and post-mortem report proved that the victim was killed due to hemorrhage and shock as a result of fire arm injuries. The autopsy report clearly established that death of the victim was caused by fire arms injuries. The post-mortem report (ext.3), inquest report, the testimonies of P.Ws.1, 7 and 10 are in line with each other and there is no noticeable conflict between them.

As to the contention raised on behalf of the appellants that the P.W.1 was the widow of the victim and was, therefore, highly interested so her evidence be discarded. Similarly, the learned Advocates for the appellants submit that the P.Ws.1, 7 and 10 are relations among themselves. But relationship cannot be a ground to distrust their evidence unless there is any serious infirmity in the intrinsic merits of their testimonies. It is to be observed that a close relative who is a natural witness cannot be regarded as an interested witness. The term “interested” postulates that the witness must have some direct interest in having the accused somehow or the other convicted either because he/she had some animus with the accused or for some other reason. That is not the case here. Evidence of P.Ws.1,7 and 10 are consistent and straight forward so far the same relates to accused Iqbal Hossain, Zakir Hossain and Joyal is concerned. The Courts below, considering the intrinsic merits, rightly found their evidence reliable. If testimony of an eye witness, even he is found to be an interested witness, is consistent, congruent and straight forward and throughout possess a ring of

truth, it cannot be disbelieved. In such view of the matter, we do not find any wrong in the conclusion arrived at by the learned Courts below in believing the testimonies of P.Ws.1,7,10 and post-mortem report.

Mr. Abdur Razzaque Khan, learned Senior Advocate repeatedly submits that the witnesses present at the place of occurrence, at the time of preparation of inquest of the deadbody of victim, who were examined, had not mentioned the names of the accused persons and manner of occurrence which has made the prosecution case doubtful. The object of the preparation of the inquest of the deadbody is to ascertain whether the victim had died under suspicious circumstances or an unnatural death and, if so, what was the apparent cause of death. The question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope. We find aforesaid view in the case of Podda Narayan V. State of A.P. AIR 1975SC 1252. Non-mention of names of eye witnesses in the inquest report could not be a ground to reject the testimony of eyewitness. The whole purpose of preparing an inquest is to draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating what manner or by what weapons or instruments such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Police to investigate into or ascertain who were the persons responsible for death. The inquest report cannot be treated as substantive evidence.

The learned Advocate for the appellants and petitioner in their submission stated that the instant F.I.R. is not the first information in point of time and G.D. on basis of which Police went to the spot is the F.I.R. It

appears from the materials on record that neither the informant nor on behalf of the informant any one went to the local police station or sent any message to inform the police about the occurrence. Rather the police getting information (source not disclosed) lodged a G.D. and went to the place of occurrence. That G.D. was made only for movement of the police from the police station towards the place of occurrence not for any other reasons. So, that G.D. cannot be said to be the First Information Report in point of time.

It appears from the testimony of P.W.1 that she stated that accused Zaman and Tofazzal pointed out the pistol towards her chest. On the other hand, P.W.7 stated in his testimony that two persons pointed out the pistol towards Ambia Khatun but he could not disclose the names of those two persons. For the first time he identified one of them in dock at the time of his examination but he failed to disclose his name. P.W.10 in his testimony stated that he saw Tofazzal and Zaman had pointed out their pistol to Haji Kafil Uddin. But P.W.1 said that they pointed out the pistol targeting her chest. The contradictory evidence raises a reasonable doubt in the mind of the Court regarding the participation of accused Zaman in the occurrence. Such contradiction of this two vital witnesses made their evidence so far the accused Zaman is concerned unreliable and conviction of Zaman relying upon the testimonies of P.Ws.1 and 10 is unsafe. Such doubt must be resolved in his favour so he is entitled to get benefit of doubt.

Article 103(2)(b) of the Constitution granted automatic right of appeal to the appellate Division in all death sentence cases. This is for the reason that at least three judicially trained minds need to apply their minds at the final stage of the journey of a convict on death row. Death and if not

life, death or life, life and if not death, is a swinging progression of the criminal jurisprudence. The question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realize that he has committed an act which is not only harmful to the society of which he forms integral part but is also to his own future. The sentence should neither be too lenient nor disproportionately to do so. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. All murders are cruel. But such cruelty may vary in its degree of culpability. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society.

The instant occurrence was taken place in 2003 though the P.Ws.1,7 and 10 categorically stated that the appellants Iqbal Hossain, Joynal Abedin and Zakir Hossain shot the victim, but it is difficult to say that for whose fire the victim succumbed to injuries. In such circumstances and facts that the appellants are in death cell for about 12 years, we are of the view that the justice would best be met if their sentence is commuted from death to imprisonment for life. Our considered view is that the extreme penalty of death of three persons need not be inflicted considering their culpability in the offence.

Accordingly, the Criminal Appeals being Criminal Appeal No.45 of 2012 and 48 of 2015 and Jail Petition No.15 of 2012 are dismissed. However, the sentences of the appellants Iqbal Hossain, Joynal Abedin and

Zakir Hossain are commuted from death to imprisonment for life and to pay fine of tk.5,000/- each, in default, to suffer rigorous imprisonment for 15 days more. They shall get benefit of section 35A of the Code of Criminal Procedure. The Criminal Petition for Leave to Appeal No.366 of 2017 is disposed of. The judgment and order of conviction so far the same relates to accused Zaman is concerned is set aside. He is acquitted of the charge. He may be released from custody if not wanted in connection with any other case.

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