

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Syed Mahmud Hossain, *Chief Justice*
Mr. Justice Hasan Foez Siddique
Mr. Justice Obaidul Hassan

**JAIL APPEAL NOS.04-06 OF 2014 WITH CRIMINAL APPEAL
NOS.50-51 OF 2012 AND JAIL PETITION NO.17 OF 2012 WITH
CRIMINAL APPEAL NO.26 OF 2020**

(From the judgment and order dated 09.04.2012 and 18.04.2012 passed by the High Court Division in Death Reference No. 87 of 2006 with Criminal Appeal Nos.4552, 4553, 4259, 4364 and 4256 of 2006 and Jail Appeal Nos.910-916 of 2006, and Jail Appeal No.530 of 2007)

Zamir and others	: <u>Appellants</u> (In Jail Appeal No. 04 of 2014)
Masum	: <u>Appellant</u> (In Jail Appeal No. 05 of 2014)
Sohel Rana and others	: <u>Appellants</u> (In Jail Appeal No.06 of 2014)
Sirajul Islam and others	: <u>Appellants</u> (In Criminal Appeal No.50 of 2012)
Kabir Hossain @ Kabir	: <u>Appellant</u> (In Criminal Appeal No.51 of 2012)
Md. Kabir Hossain	: <u>Petitioner</u> (In Jail Petition No. 17 of 2012)
Masum	: <u>Appellant</u> (In Criminal Appeal No.26 of 2020)

-Versus-

The State	: <u>Respondent</u> (In all the cases)
For the Appellants (In Jail Appeal Nos.4-6 of 2014)	:	Mr. A.B.M. Bayezid, Advocate
For the Appellants (In Criminal Appeal Nos.50-51 of 2012)	:	Mr. Sarwar Ahmed, Advocate, instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For the Petitioner (In Jail Petition No.17 of 2012)	:	Not represented.
For the Appellant (In Criminal Appeal No.26 of 2020)	:	Mr. Syed Mizanur Rahman, Advocate, instructed by Mr. Mohammad Abdul Hai, Advocate-on-Record.
For the Respondents (In Jail Appeal Nos.4-6 of 2014)	:	Not represented.

- For the Respondents** : Mr. Biswajit Debnath, Deputy
(In Criminal Appeal No.50 of Attorney General, instructed by
2012) Mr. Md. Shamsul Alam,
Advocate-on-Record.
- For the Respondent** : Mr. Biswajit Debnath, Deputy
(In Criminal Appeal No.51 of Attorney General, instructed by
2012) Mr. Gias Uddin Ahmed,
Advocate-on-Record (died)
- For the Respondents** : Not Represented.
(In Jail Petition No.17 of 2012)
- For the Respondent** : Mr. Biswajit Debnath, Deputy
(In Criminal Appeal No.26 of Attorney General, instructed by
2020) Mrs. Shirin Afroz, Advocate-
on-Record.
- Date of Hearing : 17.11.2020 & 02.02.2021
- Date of Judgment : 24.02.2021

JUDGMENT

Obaidul Hassan, J. These Jail Appeal Nos.04-06 of 2014 with Criminal Appeal Nos.50-51 of 2012 and Jail Petition No.17 of 2012 with Criminal Appeal No.26 of 2020 have arisen out of the judgment and order dated 09.04.2012 and 18.04.2012 passed by the High Court Division in Death Reference No.87 of 2006 with Criminal Appeal Nos.4552, 4553, 4259, 4364 and 4256 of 2006 and Jail Appeal Nos.910-916 of 2006 and Jail Appeal No.530 of 2007 accepting the Death Reference and thereby dismissing all the appeals and jail appeals and confirming the conviction and sentence passed by the Judge, Druto Bichar Tribunal, Chittagong (hereinafter referred to as the Tribunal/the trial Court) in Druto Bichar Case No.9 of 2006 in respect of the condemned-prisoners arising out of Brahmanbaria P.S. Case No.62 (10)2005 corresponding to G.R. No.788 of 2005.

The condemned-appellants filed Jail Appeal Nos.04-06 of 2014 with Criminal appeal Nos.50-51 of 2012 and Jail Petition No.17 of 2012 with Criminal Appeal No.26 of 2020. These Jail Appeal, Criminal Appeals and Jail Petition have been heard together and are disposed of by this single judgment.

The prosecution case, in brief, is that one Aktar Hossain (shortly, Aktar), son of late Sabje Ali Mia of Brahmanbaria passed B.A. examination and started his business as contractor since 1990. He married Sabrina Afroz Juli (shortly, Juli), daughter of Abdur Rashid of West Pike Para of Brahmanbaria on 21.09.2001. After marriage, Aktar Hossain and his wife Juli used to live with the members of the family of Sirajul Islam (shortly, Sirajul/Siraj), the elder brother of Aktar Hossain, but due to maladjustment, Aktar Hossain and his wife Juli left Sirajul Islam's house and went to Juli's father's house. Aktar Hossain and Juli lived there till the later part of July 2005. In the meantime, Sirajul Islam to meet his problem took a loan of Tk.2,50,000.00 from Aktar Hossain which Sirajul Islam did not pay back to Aktar. Aktar had a shop in the Paurashava Supermarket of Brahmanbaria. Aktar's nephew Soheli, son of Sirajul Islam took Tk.1,50,000.00 from Aktar for the purpose of starting a business of mobile phone dealership, but afterwards Soheli changed his mind and wanted to do the business of shoes to which Aktar did not agree and ultimately Soheli did not return that money to Aktar. Aktar claimed his share of rent of their paternal hotel at Ananda

Bazar of Brahmanbaria, but failed to get his share from Sirajul. Sirajul used to enjoy the income alone of their paternal property at Brahmanbaria town and the native village. Aktar Hossain and his wife Juli wanted their money back from Sirajul and his wife, but failed to get the same, at one point of time during altercation between them Akhtar slapped his sister-in-law Monwara, wife of Sirajul and on these matters enmity grew amongst them. Even while Aktar Hossain was constructing his building on his paternal land adjacent to Sirajul Islam's building, Sirajul and his sons broke down the pillars of Aktar Hossain's newly constructed building. During the continuation of the strained relation between the two families, Sirajul's son Rajib kept his hair unduly long without cutting on the promise that he would not cut the hair until they take revenge by finishing Aktar Hossain and the members of his family. Accordingly with a view to take revenge Sirajul Islam and his sons Rajib and Sohel became successful by killing Aktar Hossain (40), Aktar Hossain's wife Juli, who was in 7 months pregnancy and Aktar Hossain's daughter Arna on the night following 10.08.2005 in between 02:00 am and 03:00 am i.e. on 11.08.2005 in the house of Aktar Hossain by deploying professional killers namely, Masum, Kabir Hossain, Zamir, Manik and Babul of Brahmanbaria locality. In the meantime suppressing the actual fact Sirajul Islam, the elder brother of the deceased Aktar Hossain, being informant lodged the First Information Report (hereinafter referred to as the FIR) upon

which Brahmanbaria Police Station Case No.283 dated 17.10.2005 was started. But after holding investigation, a final report was submitted in the said case being No.22 and the S.I. Md. Abdus Samad of Brahmanbaria Police Station, being informant, lodged the instant Case No.62 on 20.10.2005 for the offence punishable under Sections 302/201/182/109/120B/34 of the Penal Code, 1860 (hereinafter referred to as the Penal Code) against Sirajul Islam and 7 others.

The Brahmanbaria Police Station Case No.62 dated 20.10.2005 has been investigated by Sub-Inspector Mr. Abdus Samad of Brahmanbaria Police Station. During his investigation, he prepared inquest report of the dead bodies of Aktar Hossain, Sabrina Afroza Juli and Arna Akter and sent the dead bodies to morgue for post mortem examination and obtained the postmortem reports. He prepared four seizure lists and one query list. He visited the place of occurrence and prepared the draft sketch map with index. He took step for recording the confessional statement under section 164 of the Code of Criminal Procedure, 1898 (shortly, the Code) of accused Babul and convict-prisoners Piyas and Zamir. After giving his confessional statement, accused Babul died before submission of the charge sheet. The Investigating Officer recorded the statement of the witnesses under Section 161 of the Code of Criminal Procedure, 1898 and collected the postmortem reports. After investigation, the Investigating Officer submitted charge sheet being No.588 dated

01.11.2005 against 8 accused persons namely Sirajul Islam, Rajib Ahmed, Sohel Rana, Masum, Kabir Hossain, Piyas, Zamir and Manik for the offence punishable under Sections 302/201/182/109/120B/34 of the Penal Code, 1860.

On 17.04.2006 the Druto Bichar Tribunal, Chittagong framed charge against the aforesaid 8 charge sheeted accused namely Sirajul Islam, Rajib Ahmed, Sohel Rana, Masum, Kabir Hossain, Piyas, Zamir and Manik for the offence punishable under Sections 302/201/182/109/120B/34 of the Penal Code, 1860. All the seven accused except accused Manik being present in the Tribunal pleaded not guilty and claimed to be tried. Accused Manik was absconding since inception of this case till paper notification and other due courses took against him. State defence lawyer was engaged for him in the Tribunal.

During trial the prosecution examined as many as 15 witnesses and the defence examined none.

The defence case, as it transpires from the trend of cross examination of the prosecution witnesses, is that in view of a conspiracy of Aktar Hossain's father-in-law Abdur Rashid Sarkar and one Rafiqul Islam, a retired Officer-in-charge of a Police Station, accused Sirajul Islam and his two sons Rajib and Sohel have been falsely implicated in this case and they were not connected with the alleged murder and that the accused Masum, Piyas, Zamir, Kabir and Manik were also not involved in the said murder and they have

also did not take any amount of money for committing any such murder as alleged, the Investigating Officer has submitted a charge sheet in this case against them quite falsely after conducting a perfunctory investigation.

The convict-prisoners were also examined under Section 342 of the Code of Criminal Procedure, 1898 and they also pleaded not guilty once again.

The Tribunal having heard both the parties and considered the materials on record, passed the judgment and order of conviction and sentence dated 19.09.2006 convicting all the above named 8 accused persons under Sections 302/34 of the Penal Code, 1860 and sentencing them to death by hanging by neck.

Being aggrieved by the judgment and order of the Tribunal, the convict-prisoners preferred jail appeals and regular criminal appeals before the High Court Division and the High Court Division by its judgment and order dated 09.04.2012 and 18.04.2012 confirmed the conviction and sentence in respect of the present condemned-prisoners.

Being aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the present condemned-prisoners preferred these jail appeals with criminal appeals and jail petition before this Division.

Mr. A.B.M Bayezid, the learned advocate, appearing for the appellants–Zamir, Md. Manik Miah and Piyas in Jail Appeal Nos.04-

06 of 2014 took us through the judgment and order passed by the High Court Division, the FIR, the inquest report, the charge sheet, the post mortem report, other connected materials on record and submits that the High Court Division failed to appreciate that police initially submitted final report against the condemned-prisoners as no involvement of the condemned-prisoners were detected by the police at the time of investigation. Afterwards, the interested parties convinced the police to submit charge sheet against the condemned-prisoners. He further submits that the prosecution could not prove the case beyond reasonable doubt and, as such, the impugned judgment and order is liable to be set aside for the ends of justice. He also submits that the Courts below misread and misconceived the facts and circumstances of the case as well as the aspects of law. The Courts below could not find out the truth and arrived at a wrong decision and, as such, the impugned judgment and order is liable to be set aside for the ends of justice. He adds that the Tribunal did not duly comply with the mandatory provision of Section 342 of the Code of Criminal Procedure, 1898 and, as such, the condemned-prisoners have not been inspired to express the real truth lying with their mind and, as such, they have been seriously prejudiced. He also adds that the Tribunal did not consider the statements of the PWs and could not arrive at the right decisions and, as such, the condemned-prisoners have been highly prejudiced. He again submits that the confessional statements were not given

voluntarily and the co-accused's statements cannot be binding upon other co-accused, since no eye witness of the occurrence is there, thus the confessional statements are not reliable at all and the impugned judgment is liable to be set aside for the ends of justice.

Mr. Sarwar Ahmed, the learned advocate, appearing for the condemned-prisoners-Sohel Rana, Rajib Ahmed and Kabir Hossain @ Kabir in Criminal Appeal Nos.50-51 of 2012 submits that the trial Court and the High Court Division erred in law as well as on merit in passing the judgment and order of conviction and sentence and, as such, the same is liable to be set aside. He further submits that the death of confessing accused Babul Miah in custody and the mark of injury on his nose at the time of making confession clearly shows that it was obtained by torture and coercion and under duress, as such, it was neither voluntary nor true. Therefore, there was no legal premise for the Courts below to rely upon the confession of co-accused Babul Miah. He also submits that by taking into consideration the confessions of Piyas and Zamir and using it to prove the guilt of the appellant, the Courts below deviated and disregarded the well settled principle that the confession of a co-accused cannot be used against another co-accused until strongly corroborated by other evidence. He adds that there is no credible evidence against the appellant, the trial Court wrongly passed the judgment and order of conviction and sentence, which was also wrongly affirmed by the High Court Division. He also adds that the

High Court Division erred in law in relying upon the circumstantial evidence to convict the appellants as they have neither been proved beyond all reasonable doubt nor do they unerringly point to the guilt of the accused. He again submits that one of the circumstances relied upon is the fact of seeing two boys at 1:45 am loitering on the street by PW 10, but the same incident has not been proved beyond all reasonable doubt, which is evident from his deposition. He next submits that the High Court Division failed to appreciate the fact that the seizure list prepared on 04.09.2005 relating to the seizure of the weapons namely an 18 inch dao and a 30 inch ram dao shows that those weapons were recovered on the showing of Babul (since deceased) and Piyas whereas co-accused Babul had died on 21.08.2005. Finally, he submits that the High Court Division came to the wrong conclusion in convicting the appellants. All the witnesses were partisan witnesses, who were relied upon to give conviction. Finally he submits that the courts below have convicted and sentenced the condemned-prisoners on the sole basis of confessions of the three co-accused which are contrary to all established principle of law governing Section 30 of the Evidence Act, 1872.

Mr. Sarwar Ahmed, the learned advocate, appearing for the condemned-prisoners-Masum in Criminal Appeal No.26 of 2020, submits that the inclusion of the name of the condemned-prisoner Masum in the second FIR is a matter of afterthought; none of the witnesses made statement involving the appellant with the alleged

offence except the formal witnesses and PWs 4 and 6, the brother and paternal uncle of deceased Juli. In their deposition PWs 4 and 6 did not make any specific allegation against the convict-appellant they mentioned about some hearsay evidence which are not supported by any independent witness and the circumstantial evidence whatsoever on the record and also inadequate to award conviction and sentence like death sentence to the convict-appellant. There is no corroborative evidence and substantive evidence against the convict-appellant, so, without evidence of any eyewitness, circumstantial evidence or corroborative and substantive evidence only depending upon hearsay evidence conviction and sentence of the appellant is illegal, arbitrarily, unsafe and against the settled principle of law and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and is liable to be set aside. He further submits that accused Piyas, Zamir and Babul made confessional statement under Section 164 of the Code before the Magistrate. On plain reading of those confessional statements, it is evident that all of three confessional statements are exculpatory and contradictory to each other and also contradictory to the inquest report in respect of injury. Moreover, from the evidence of concerned Magistrate, who recorded the confessional statement it would be seen that concerned Magistrate admitted that after police remand accused persons were produced before him for recording confessional statements of the accused persons. The learned

Magistrate also stated that he got sign of several injuries on the body of the accused persons. From this it is crystal clear that the confessional statements of the accused persons were not voluntary rather result of torture and coercion. However, the confessional statement were not made voluntarily still the accused namely Piyas and Zamir retracted their confessional statements by filing application at the time of examination under Section 342 of the Code. They stated that under threat and coercion by the investigating officer, they were compelled to make confessional statements. He also submits that the convict-appellant is quite innocent, he did not commit any offence as has been alleged against him. He has been implicated in the instant criminal case out of suspicion. The tribunal misread, misconceived and misinterpreted the evidence on record and law and thereby convicted and sentenced him erroneously upon mere conjecture and surmise in absence of any legal and corroborative evidence and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and liable to be set aside. He adds that the Magistrate before whom they made confessional statement has examined as PW 8, in his deposition as witnesses the Magistrate said that convict-appellant Masum denied to make statement under Section 164 of the Code. The Courts below failed to consider this important aspect of the case, thus committed serious miscarriage of justice and, as such, the judgment and order of the High Court Division is not

sustainable in the eye of law and liable to be set aside. He further adds that the confession of a co-accused is not a substantive piece of evidence against another co-accused and as such evidence alone without substantive and corroborative evidence cannot form the basis of conviction of a co-accused. Moreover, confessional statements are all exculpatory. The Courts below misread and misinterpreted Section 30 of the Evidence Act, 1872 and thereby took into consideration confessional statement of other accused against the appellant and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and liable to be set aside.

He also adds that the High Court Division out of misreading, misinterpretation and misconception of law and fact held that the appellant had common intention to kill the victims. Common intention referred to in Section 34 of the Penal Code presupposes a prior concert, a pre-arranged plan. The prosecution failed to adduce a single piece of evidence in this regard against the appellant and there is no ingredient of Section 34 of the Penal Code against him and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and thus liable to be set aside. Furthermore, he submits that although law permits to put/place a convicted person into the condemned cell subject to confirmation of the conviction order. In the present case, the tribunal vide its judgment and order dated 09.04.2012 and 18.04.2012 found the

convict-appellant guilty of the offence under Sections 302/34 of the Penal Code and convicted and sentenced him to death hanging by the neck till death subject to the confirmation of the sentence of death by the High Court Division. The judgment and order of the Tribunal is a proposed order of conviction and sentence by the trial Court which may or may not be confirmed by the High Court Division. The Jail Authority put the appellant into condemned cell instantly after the pronouncement of the judgment of the trial Court. So, placement of the convict-appellant into the condemned cell is illegal, arbitrarily and without any sanction of law and the appellant has been suffering unbearable mental torture. The High Court Division failed to consider this aspect of the case and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and liable to be set aside. He again submits that no chemical report on fingerprint expert report of seized articles has been taken in order to identify the actual offender. Without any chemical report or fingerprint expert report of seized articles and only on the basis of confessional statement of co-accused, the conviction and sentence of the appellant is illegal, arbitrarily, unsafe and also against the settled principle of law and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and liable to be set aside. He next submits that in order to determine whether a confession is a voluntary or not the attending circumstance must be subjected to very close, minute and

rigid scrutiny, in the present case the Tribunal as well as the High Court Division does not state or find such attending circumstance or corroborative evidence or any link or materials in the confessional statement and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and liable to be set aside. Besides, he submits that there is no legal and independent witness against the accused-appellant and he has been convicted depending upon confessional statements of co-accused which cannot be the basis of conviction until it is corroborated by legal and independent witness. In the instant case, there is no legal and independent witness to corroborate the confessional statement of co-accused. The High Court Division without considering this aspect of the case committed serious miscarriage of justice and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and liable to be set aside. He next submits that the trial court without considering the material evidence on record, facts and circumstances of the case, depositions made by the witnesses in those true perspectives convicted the accused appellant. The High Court Division without considering this aspect of the case and discussing the evidence on record in its true perspective and without independent evaluation of evidence on record and giving its own findings and observations allowed the Death sentence and dismissed all the criminal appeals and jail appeals and, as such, the judgment and order of the High Court Division is not sustainable in

the eye of law and liable to be set aside. Finally, he submits that the High Court Division failed to consider that the Tribunal did not make any specific findings upon the material evidence on record or discuss anything to establish alleged offence against the accused-appellant and the accused appellant was convicted and sentenced basing upon unreliable and unbearable evidence. The High Court Division without considering this aspect of the case allowed Death Reference and dismissed the appeals and, as such, the judgment and order of the High Court Division is not sustainable in the eye of law and liable to be set aside.

In addition with the argument submitted by Mr. Sarwar Ahmed, the learned advocate, Mr. Syed Mizanur Rahman another learned advocate, made his submissions on some additional grounds on behalf of the condemned prisoners Kabir Hossain @ Kabir and Masum. He submits that the confessional statements made by Babu, Piyas, Masum and Zamir were not made voluntarily rather the confessional statements were the result of torture and coercion of the police. He further submits that in the present case, Sub-Inspector lodged the FIR and he himself investigated the case and in such a situation an impartial investigation report was beyond expectation from him, because not only he, nobody will furnish police report contradicting his own case. The investigating officer recorded statement of witnesses under Section 161 of the Code, but all these statements were recorded in connection with FIR No.22

dated 11.08.2005, but illegally used in the present Case No.62 lodged by him on 20.10.2005 and hurriedly submitted charge sheet on 01.11.2005 when Higher Authority of police ordered investigation of the case by CID of police. He also submits that the tribunal framed charge on 17.04.2008 against 8 accused persons in a lump, violating provision of Section 235(1) of the Code, which is incurable. He again submits that the prosecution in order to substantiate charge under Section 120B of the Penal Code tried in vain to show a meeting was held 7 days prior to occurrence, a payment in advance was made, subsequently another payment after the occurrence was made, chewing betel leaf by Sirajul Islam, playing cassette recorder in the following night, Rajib cut his hair etc. were absent in the 161 statement. There was no direct evidence to prove such allegation and circumstance. He adds that the investigating officer prepared another seizure list on 14.08.2005 allegedly on the showing of Babul Miah, but no seizure list witness proved the same. It is to be considered in a criminal trial that for non compliance of any mandatory provisions of law, the accused became prejudiced. If examination of the convict-appellants under Section 342 of the Code are assessed, it will be found that no attention was drawn on incriminating evidence, even on confession. No attention in order to substantiate charge under Section 120B of the Penal Code was drawn regarding alleged prior meeting at Birashar ground, alleged payment of advance money, playing cassette, chewing betel leaf,

cutting of hair by convict Rajib and so many things on which prosecution tried in vain to establish a case of criminal conspiracy with an unbroken chain of circumstantial evidence prior or after the occurrence. So as to make the evidence relevant under Section 10 of the Evidence Act, 1872 unless attention on incriminating evidence oral, documentary or circumstantial are drawn and opportunity of explanation as required under Section 342 of the Code is given to the accused, no conviction and sentence be given or maintained under the law. Nobody proved anything against appellant Masum and Kabir. There is no sufficient substantial evidence against them except unfounded hearsay evidence. He further submits that in this case important witnesses were not examined. Amongst 40 charge sheeted witnesses, only 15 witnesses were produced. If those witnesses were so unimportant, then why they were cited as witnesses in the charge sheet. The only presumption is that had they been examined they would not support the prosecution story involving the convict-appellant and, as such, the appellants are entitled to be presumed innocent as per Section 114G of the Evidence Act, 1872. Moreover, he submits that in this case, there are two fold charges, one is of conspiracy and the later one is of commission of murder. The prosecution failed to adduce any iota of evidence as to when, where and who conspired with whom, or made any evil design to commit murder. The only evidence is confession recorded in violation of the mandatory directions of law.

Finally, he submitted that the death of 3 persons are painful, shocking, but it is also equally shocking that there is no legal evidence against the appellants and they are counting days with mental agony for more than 15 years in the condemned cell. Confession of co-accused is no evidence against an accused. It may be relevant as per Section 30 of the Evidence Act, 1872 which permits, so far independent corroboration of substance evidence is concerned.

In reply, Mr. Biswajit Debnath, the learned Deputy Attorney General, appearing on behalf of the State-respondents in all cases, made submission in supporting the judgment and order of the High Court Division and prays for the dismissal of the appeal. He submits that in the confessional statement of Zamir, he categorically stated that 7 days before the occurrence, the accused No.1 Sirajul Islam came to the field of Birasha and offered them Tk.2,00,000.00 and paid Tk.1,00,000.00 as advance to kill the victims and after killing, convict Sirajul Islam and his son convict Sohel paid Tk.1,00,000.00 to the other convict-persons. It shows that there was a criminal conspiracy to kill the victim and as per Section 10 of the Evidence Act, 1872 all the accused persons are guilty for committing the offence.

The respondent in support of his submissions cited the decisions as decided in the following cases.

- i. Major Bazlul Huda Vs. State [62 DLR (AD) 1]

- ii. State Vs. Nalini [(1999) 5 S.C.C.-253]
- iii. Yakub Abdur Razzak Memon Vs. State of Maharashtra [(2013) 13 S.C.C. 1]
- iv. Firoz Uddin Bashir Uddin and others Vs. State of Kerala [(2001) 7 S.C.C. 596]
- v. Zulfikar Ali Bhutto Vs. State [All Pakistan Legal Decision Vol. 39, P-53]
- vi. Md. Khalid Vs. State of West Bengal [(2002) 7 S.C.C. 334]

He further submits that as per pointing of convict Babul and Piyas, some equipments which were used in committing the offence were recovered from a pond and, as such, it can be said that the provision of Section 27 of the Evidence Act, 1872 is applicable in the present case. He adds that the convict Zamir made a confessional statement describing all the facts implicating himself and the participation of other co-accused in the occurrence and it can be safely said that the Section 30 of the Evidence Act, 1872 is applicable in the present case. In this regard learned Deputy Attorney General referred the case of Nausher Ali Sarder Vs. The State [39 DLR (AD) 194]; wherein their Lordships observed that confession when proved against confessing accused can be taken into consideration against co-accused in same offence. He also adds that after considering all the materials on record and evidence of the prosecution witnesses, the High Court Division rightly held that the convict-prisoners knowingly and deliberately made the criminal conspiracy and in furtherance of their common intention they

brutally committed the murder of Aktar Hossain, his pregnant wife Juli and their daughter Orna Aktar and the prosecution was able to prove its case beyond all reasonable doubt and, as such, these instant appeals are liable to be dismissed.

In this case 15 PWs were examined. From the evidence of PW 1, Md. Abdus Samad, a Sub-Inspector of Police a vivid picture of the circumstances which followed murder of the victims could be found.

Md. Abdus Samad, the Sub-Inspector of Police, who is the informant as well as the investigating officer of this case, appeared as PW 1. It reveals from the statement of PW.1 that a strained relation was there between accused Sirajul Islam and his two sons Sohel and Rajib with the deceased Aktar Hossain over giving a loan of Taka 1.5 lacs to accused Sohel by deceased Aktar Hossain for mobile phone business and also over another loan of Taka 2.5 lacs given by the deceased Aktar Hossain to his elder brother accused Sirajul Islam and also over the claim of deceased Aktar Hossain of the share of the paternal properties from his elder brother Sirajul. This PW 1 has also stated that only 8/9 days before the occurrence, there was some altercation between Monowara Begum, the wife of accused Sirajul Islam and deceased Juli and at one stage, Aktar Hossain slapped Monowara Begum which made the accused Rajib and Sohel both sons of Sirajul Islam angered and they took resort to a conspiracy to eliminate their uncle Aktar Hossain and the

members of his family from this world. After the occurrence took place, the demeanor of accused Sirajul Islam, Rajib and Sohel appeared to be very much doubtful. He further stated that accused Rajib cut his long hair after 12 O'clock immediately after the dead bodies were removed from the place of occurrence for post mortem examination. Accused Sirajul saw the dead body of his brother once and then went to the Court for filing a case, accused Sohel Rana was quite normal and no repentance was found in them and that after the dead bodies were buried at 11 in the night they enjoyed television programmes and the songs from the deck set was heard. This sort of demeanor gave rise to doubt Sirajul his sons of being involved with the brutal killing of the deceased. This witness further stated that after the occurrence, dissatisfaction cropped up amongst the persons involved in the alleged crime over the distribution of Taka 2 lacs received from accused Sirajul Islam, whereupon Babul was arrested and, on interrogation, he confessed his complicity as well as of the condemned-prisoners. Thereafter, accused Zamir and Piyas were arrested and they also made confessional statement recorded under Section 164 of the Code of Criminal Procedure confessing their involvement as well as of other condemned-prisoners in the alleged offence wherein they gave a vivid picture of the occurrence as to how they committed the murder of the deceased persons. As per statements of the accused Babul and Piyas and as shown by them he recovered dao, ramdao

and instruments for breaking grill which they and their other accomplices threw in the nearby Municipal pond and its vicinity. He has further stated that amongst the accused persons accused Babul died on 22.08.2005 while he was detained in Brahmanbaria Jail Custody.

During cross-examination, PW 1 Has denied the fact of having any false investigation by not examining any inhabitants of the house of Haradhan Nath. In cross, he stated that he has not examined any brother of Siraj but he has examined Tuni, the maid servant of Siraj. He further stated that he has become aware of maladjustment between Siraj's wife Monowara and Aktar Hossain's wife Juli from neighboring witness Shah Alam. In cross-examination, he denied the fact of non-receiving of Tk.2,50,000.00 by Siraj from his younger brother Aktar and also of non-paying of the said Taka by Siraj to Aktar. In cross-examination, the investigating officer stated that during an altercation between Siraj's, wife Monowara and Aktar's wife Juli, Aktar slapped on the face of Monwara 8/9 days prior to alleged occurrence took place. In cross, he had denied of not giving the said slap by Aktar.

PW 2, Farida Begum, the mother of the deceased Juli stated that on the 11th August 2005 at about 10 a.m. in the morning a neighboring girl while going to the school informed her that her son-in-law Aktar, daughter Juli and the granddaughter Arna Akter have been chopped to death and having heard this, she raised alarm

and rushed to the house of Aktar Hossain and on going there she saw a crowd of people at the gate of Aktar Hossain's house. She asked accused Soheli to open the gate of the house and asked to show her daughter and granddaughter, Soheli replied that he did not have the key of the gate, but she saw that the key of the gate was in his hand. Then she was taken inside the house of Aktar Hossain by two women when she embracing the wife of Sirajul loudly cried out and asked her to let her know about her daughter and granddaughter. Upon entering into the house of accused Siraj, she came to see that all the inmates of the house of Sirajul were quite normal when some of them were chewing betel nuts, someone was taking breakfast and did not see anybody mournful or shedding tears in that house. The wife of accused Sirajul told her that they were there, but the people present there were saying that all the three have been chopped to death and having heard these she (Farida, PW 2) fainted. She has stated that Sirajul took loan of Taka 2.5 lacs from deceased Aktar Hossain for the purpose of business and when Aktar Hossain asked for return of that money, the relation between them became strained. Besides, Soheli also took loan of Taka 1.5 Lacs from deceased Aktar Hossain for mobile phone business but afterwards while Soheli wanted to do shoe business instead of mobile phone business, Aktar Hossain did not give his consent whereby the relation amongst them also became strained. When Akhtar started constructing his house upon three

decimals of his paternal land, accused Sirajul and his two sons resisted the construction and at one stage, Siraj and his two sons dismantled the pillars of the building. In spite of the fact, Aktar constructed the building and about 20 days before their brutal murder Aktar Hossain with his wife and daughter started living in that newly constructed building. Besides, there was also disappointment and strained relation between Aktar Hossain and accused Siraj over their paternal properties situated in the town and village for long time. This witness further stated that on the date of the alleged occurrence, upon entering into the house of the accused Siraj, she saw that the prevailing circumstances of the house tended to show that no one else but Siraj along with his sons murdered the deceased.

During cross-examination, PW 2 had stated that witness Abdur Rashid Sarkar of this case was her husband and he served in Bangladesh Army and he did not have business anymore as a contractor in Army. In cross-examination she has stated that she did not know as to whether Siraj was owner of their 17 decimals of land at West Medda. In cross, she denied the suggestion that she gave false evidence implicating the convict-appellants.

PW 3, Haji Abdul Rashid, father of the deceased Sabrina Afroz Juli stated that before his marriage Aktar Hossain used to reside in the house of Sirajul and even after he got married, he and his wife Juli used to reside in the house of Sirajul Islam, but after few days

because of their maladjustment with the wife of Sirajul, Aktar Hossain and Juli left that house and started living in his (PW 3) house. Juli was studying LL.B. and then she gave birth to Arna. Aktar Hossain told his daughter Juli and Juli told him that Siraj received an amount of Taka 2.5 lacs as loan from Aktar. His son-in-law Aktar Hossain got a shop allotted in the Municipal Market wherein for the purpose of mobile phone business Soheli, son of Siraj, took loan of Taka 1.5 lacs from his uncle Aktar Hossain, but when Soheli desired to run a business of shoes instead of mobile, a strained relation cropped up between Soheli and Aktar. Besides, a strained relation also cropped up between Aktar and Sirajul over the share of rent of a two storied paternal shop situated at Ananda Bazar and over these matters the sons of Sirajul engaged themselves in scuffling with Aktar, he heard all these matters from his daughter Juli. This witness further stated that Aktar asked his brother to pay back the loan money of Taka 2.5 lacs for constructing his house upon 3 decimals of his paternal land. Siraj asked him not to construct his house therein. In spite of the fact, Aktar Hossain started constructing his house upon that land when the sons of Sirajul dismantled the pillars of that house twice. He further stated that about 10:00 am of the date of occurrence someone present at the house of Siraj took him to the drawing room of Siraj where he saw Siraj was in normal mood chewing betel nuts and when he asked about his son-in-law, daughter and granddaughter, he told him that

a dacoity has been committed in the house of Aktar and the dacoits took away motorcycle and other valuables and at the same time a man said to him that no dacoity has been committed and Aktar Hossain and his daughter have been murdered and having heard this he fainted. His brother Humayun Kabir Sarkar, advocate, came to his house at 4:30 pm and asked him to file a case and on coming to Brahmanbaria Police Station, he saw Siraj, Sohel and others present there and Siraj told him that he already filed a case. After two days of the occurrence, accused Babul was arrested by the police on suspicion and then he came to learn that Sirajul and his two sons pursuant to an agreement with the hired killers for 2 lacs got Aktar Hossain, his daughter and granddaughter murdered. He further stated that the circumstances cast doubt on Siraj about the alleged murder since earlier, but he became confirmed of the fact when accused Babul was apprehended.

During cross-examination PW 3 denied the fact of having the land of Siraj Mia and his brothers at west Medda was the land of Siraj alone. He stated in his cross-examination that the said land was the paternal land of Siraj and his brothers. In cross-examination, he also denied the fact of giving false evidence by implicating Siraj and others in this case. In cross-examination, he also denied of not getting allotment of a shop at Poura Market by his son-in-law. He further stated in cross-examination that Aktar has given the said shop to a courier service company on rent.

PW 4, Md. Hasan Iqbal Lavlu, the brother of the deceased Sabrina Afroz Juli, stated that about 4 years back the alleged occurrence took place, his sister was married to Aktar Hossain and, a daughter was born at their wedlock and at the time of alleged occurrence, she (Sabrina Afroz Juli) was carrying for 7 months. After 2-3 weeks of the marriage, because of their disagreement with the members of the family of Siraj Mia, they came to the paternal house of Juli. Sohel and Rajib both sons of Siraj on 2/3 occasions dismantled the pillars of the house of Aktar and the matter was settled by the other members of their families and Siraj threatened Aktar to see him. Besides, there was also a strained relation between Siraj and Aktar over the income of the paternal shop, hotel and landed properties claimed by Aktar for which there was a scuffle between them. He heard these facts from Juli and also heard that Aktar had a shop being No.76 at Super Market where Sohel intended to run a business of shoes but Aktar rented the same to Sundarban Courier Service at a monthly rate of Tk.2,000.00, which seriously angered Sohel and he heard this from Aktar Hossain. He further stated that having heard of the alleged occurrence from the people, he and others rushed to the house of Aktar Mia where he came to see that Siraj Mia and other members of his family were all quite in usual mood when Sirajul was chewing betel leaf, Sohel was quite usual and Rajib with his long hair was moving over the blood of the deceased persons. The faces of the members of the family of

Siraj Mia were seen with no sign of mourning. He saw these atrocities at about 10 in the morning on that fateful day and about after 2 hours Raju cut his long hair to show him polished which cast doubt in his mind as well as in the mind of others present there. Siraj and others got his sister, sister's husband and their daughter murdered with the help of hired killer in a planned manner. Thereafter, from the people as well as from the news published in the newspaper, he came to learn that Siraj, Sohel and Rajib with the help of hired killers namely Masum, Zamir, Piyas, Babul, Kabir and Manik had committed the alleged murders. He further stated that in the chamber of the Officer-in-Charge of the police station he also heard that Piyas told that Siraj with a view to eliminate Aktar Miah and his descendants from the world and also with a view to grab the properties of Aktar got this murder committed in a planned manner.

During cross-examination PW 4 denied having of any house measuring 20x20 feet of Sadiq Mia to the eastern side of Siraj and northern side of Maju Mia's house. He stated in cross-examination that he went to Aktar Mia's newly constructed house. He further stated that there is a pond to the west of Siraj Mia's house. he stated that two or three days after the marriage, while Juli was at the house of Siraj, she was dictated to clean the floor of the house instead of cleaning by maid servant though the maid servant was present at the house of Siraj Mia and from that event misunderstanding

started. He further stated in cross-examination that Siraj Mia and his sons demolished the pillars of Aktar's newly constructed building, but Aktar Mia did not lodge any complaint to any authority, however, it was solved internally. He further stated that they had no any relation or rivalry with investigating officer of this case.

PW 5, Zafar Iqbal Litan, another brother of the deceased Sabrina Afroz Juli was tendered by the prosecution and the defence declined to cross-examine him. Thereafter, on recall by the prosecution, he stated that on 14.08.2005 in his presence police recovered 24" long rod of 8 'suta' diameter used for breaking grill which he exhibited as material Ext.XII and the same was recovered from the abandoned drain to the north of Lutfa Manjil and in the middle place of houses of Saju Miah, Sayed Saheb and Akbor Manjil as shown by accused Babul and the same was seized by preparing a seizure list in his presence which he exhibited as Ext.11 and his signature thereon as Ext.11/1.

During cross-examination by defence, he denied the defence suggestion that nothing was recovered in his presence as he stated above.

PW 6, Advocate Humayun Kabir Sarkar said that deceased Sabrina Afroz Juli was the daughter of his elder brother and she was married to Aktar Hossain about 4 years before the alleged occurrence took place and after marriage Aktar Hossain and Juli

lived with Siraj Mia and after 2-3 weeks, because of maladjustment, they came to the house of Juli's father. Juli had been studying LL.B. and Aktar was doing business. After the death of Juli, the result of the examination was published and Juli passed LL.B. in second division. In 2004, after the flood, Aktar Hossain started constructing his building upon the paternal land of his share when there was exchange of words among Siraj, Sohel and Rajib with Aktar over the boundary and location of that land. At one stage Rajib and Sohel removed the boundary pillars of Aktar's building, whereby a strained relation cropped up between them. There was a common paternal hotel and shop upon a two storied building at Anandabazar and there was a discontentment of Siraj with Aktar over those paternal properties which Siraj used to control and enjoy. Besides, a strained relation of Sohel also cropped up with Aktar in respect of his shop at Municipal Supermarket wherein Sohel intended to establish a business of shoes, but Aktar did not agree which seriously angered Sohel. He further stated that because of the reasons stated above about seven days before the date of alleged occurrence, Siraj Mia with Masum, Babul, Piyas, Zamir, Manik and Kabir conspired at the field of Birasha to kill Aktar and the members of his family for which they entered into an agreement with Masum to pay an amount of Taka 2 lacs. Pursuant to that conspiracy, all the aforesaid accused persons including Rajib and Sohel, in furtherance

of their common intention of all, brutally committed the murder of the deceased persons.

During cross-examination, he denied the fact of giving false evidence as to the involvement of accused Piyas, Zamir, Masum and as to illegal contract of committing murder by them and recording of video CDs. In cross-examination, he denied the fact of giving false evidence and also denied that the O.C, I.O, retired O.C. Rafiqul Islam being biased worked in favour of them (PW. 6). In cross he also denied the fact of giving false evidence as to the involvement of accused Kabir in this case.

PW 7, Constable No.1039, Kamal Hossain of Sadar Police Station, Brahmanbaria on 11.08.2005 at about 12/12:15 hours carried the dead bodies of Aktar Hossain, Juli and their daughter Arna to the morgue of Brahmanbaria Sadar Hospital for autopsy vide 3 chalans and he exhibited his signature therein as Exts.5/2, 6/2 and 7/2. He exhibited the seizure list marked as Ext.10 whereby the I.O. Mr. Samad seized the wearing apparels of the dead bodies in his presence. He exhibited the seized alamots as material exhibits No.VIII to IX. Defence declined to cross-examine this witness.

PW 8, Syed Md. Nurul Basir, Upazilla Nirbahi Officer, on 15.08.2005 at about 10:00 am recorded the statement of accused Babul under Section 164 of the Code of Criminal Procedure, 1898 which he exhibited as Ext.12 and his own five signatures thereon as exhibits-12/1, 12/2, 12/3, 12/4 and 12/5. He exhibited the signature

of accused Babul put thereon as Ext.12/6. After recording the confessional statement of accused Babul he was sent to the custody.

During cross-examination by defence this PW 8 stated that after remand accused Babul was produced before him from Brahmanbaria Police Station for recording his confessional statement. He asked 5 questions to the accused. He did not ask the accused as to why he would make the confessional statement and also did not ask as to how police dealt with him. He did not tell the accused that he would not be sent back to the police custody after making confessional statement but he assured the accused orally that he would not be sent back to police custody whether or not he made the confessional statement. However, he denied the defence suggestion that because of physical torture by police on Babul he was in a dying condition at the time of recording the statement. He stated that he came to know that after making the confessional statement accused Babul died in the jail hajat, but he did not know after how many days he died. He denied the defence suggestion that the confessional statement made by Babul was not true and voluntary. He also denied the defence suggestion that he did not record on memorandum as required under Sub-section (3) of Section 164 of the Code. He also denied the suggestion that he recorded the confessional statement of accused Babul without holding real and substantial inquiry.

PW 9, Mr. Habibur Rahman, Magistrate 1st Class, Brahmanbaria on 20.8.2005 recorded the confessional statement of accused Piyas under Section 164 of the Code of Criminal Procedure, 1898 which he has exhibited as Ext.13 and his own 5 signatures thereon as Exts.13/1-13/5. He has exhibited the signature of accused Piyas thereon as Ext.13/6.

On 17.09.2005, he recorded the confessional statement of accused Zamir under section 164 of the Code which he exhibited as Ext. 14 and his own 5 signatures thereon as Exts.14/1-14/5 and the signatures of accused Zamir thereon as Exts.14/6 and 14/7.

During cross-examination by defence he stated that both the accused Piyas and Zamir were produced before him from police remand for recording their confessional statements. He denied the suggestion that Piyas was in injured condition and there were marks of torture on his person when he was produced before him. He did not ask as to why he wanted to make the confessional statement. He stated that in reply to question No.4 of the 164 statement recording form regarding giving threat by the police, the accused Piyas answered in affirmative and said 'yes'. However, he has denied the suggestion that the aforesaid confessional statement of accused was not made voluntarily. He further stated that he did not ask whether he was threatened by any body or as to why he had confessed his guilt. He denied the defence suggestion that there were marks of

torture on the person of accused Zamir when he was produced before him. He denied the defence suggestion that the aforementioned confessional statement of accused Zamir was not done voluntarily. He further stated that he did not mention in writing specifically that they would not be sent back to the police custody, but to the judicial custody whether or not they made any confessional statement. He denied the defence suggestion that the confessional statement of those accused Zamir and Piyas were obtained by undue threat, influence and coercion.

PW 10, Mr. Abdur Rahman, T.S.I., Brahmanbaria Police Station on 10.08.2005 at 23:00 hours vide a G.D.E. went out on petrol duty and in that night at 1:45 hours (1:45 am) when he reached near Madrasha of West Medda saw two boys were loitering on the road and on query they said that they belonged to the nearby house and had been waiting there to receive their relatives, who were scheduled to come and that amongst those two boys, one was long haired and other was of fair complexion. Then he left the place to do his petrol duty in other areas of the town. On the following day, at about 11:00 hours having known to the fact of murder of Aktar Hossain, he at once came to the place of occurrence and saw the Senior Police Officers and others at the house of Aktar Hossain and also saw those two boys whom he saw in the preceding night and on query to the people present there, the PW 10 came to know that those two boys were nephews of Aktar and of them the long haired

boy was Rajib and other was Soheli. After some time he came to see that Rajib cut his long hair and made it short at about 12:30 hours. He also came to see that television programme was going on and cassette recorder was being played in the house of Siraj. Besides these the scenario of the place of occurrence house gave rise to doubt as to the alleged murder as there was no mournful atmosphere in the house of accused Siraj and amongst the members of his family. Afterwards, the accused Piyas and Rajib were arrested, the PW 10 came to learn that Siraj, Soheli and Rajib premeditated to kill Aktar and the members of his family and got it done through accused Piyas, Babul and other accused persons by paying a contractual amount of Taka 2 lacs to them.

During cross-examination by defence this witness stated that he reported as to those boys Rajib, Soheli and other facts as he observed as above to his superior officers, though he did not record the same in the G.D.E. He stated that he made his statement before the Investigating Officer perhaps on the 20th day of that month (August). His attention was drawn denying the facts stated by him as above which he denied.

PW 11, Jharu Mia is a witness to the seizure list. He stated that on 04.09.2005 at about 17:55 hours police seized two *daos* by preparing a seizure list in his presence. He exhibited the seizure list

as Ext.15 and the said two *daos* as material Exts.XIII and XIV. He exhibited his own signature in the seizure list as Ext.15/1.

During cross-examination by defence he stated that he put his signature on the seizure list at the police station and also said that when he came out of the mosque after saying Asar prayer, police took him to the police station from the road.

PW 12, Dr. A.S.M. Musa Khan, R.M.O. Sadar Hospital, Brahmanbaria on 11.08.2005 held post mortem examination on the dead bodies of the deceased Aktar Hossain (40), Sabrina Afroz Juli (25) and Arna Akter and prepared postmortem report as the bodies were produced by Constable 1039 Kamal Hossain vide G.D.E. No.714. Upon holding the post mortem examination on the dead body of deceased Aktar Hossain, he found the following injuries on his person.

- i. One incised injury on the left side of the vault of the head ($3'' \times 1\frac{1}{2}'' \times \text{B.D.}$) with cutting of the underlying left parietal bone through which brain matter is coming out.
- ii. One incised injury on the left temporo parietal region of the head ($2'' \times 1\frac{1}{2}'' \times \text{B.D.}$)
- iii. Deformity of the left frontal region of the head with eyes.

On deep dissection, the frontal bone was found accumulated under the scalp of the left frontal region. The left parietal bone was

found cut through from which the brain matter was coming out of the head.

He opined that the death was due to shock and hemorrhage resulting from the above mentioned injuries which were ante-mortem and homicidal in nature.

Upon holding postmortem examination on the dead body of deceased Sabrina Afroz Juli, he found the following injuries on her person.

- i. One incised injury on the right external ear (1 ½"X ½"X full thickness)
- ii. One incised injury on the right parietal region of the head (3½"X 1 ½"XB.D.) with cutting of the underlying bone.
- iii. One incised injury on the dorsum of the left hand (1 ½"X ½"X B.D.)
- iv. The face, neck and right axilla were covered with dried up blood.
- v. One incised injury on the occipital region of the head (3"X 1 ½"X B.D.) with cutting of the underlying occipital bone.

On deep dissection, right parietal bone and occipital bone were found cut through and fractured. The brain and meninges were found injured and clotted blood found accumulated in the

cranial cavity uterus contained a dead male foetus of about 28 weeks of gestational period.

He opined that the death was due to shock and hemorrhage resulting from the above mentioned injuries which were ante-mortem and homicidal in nature.

Upon holding the post mortem examination on the dead body of deceased Arna Akter, he found the following injuries on her person.

- i. one abrasion (2"X1) with underlying diffuse swelling of the right fronto-parietal region of the head.

On deep dissection, right side of the frontal bone was found fractured (depressed). The meninges and the brain matter were found injured. Clotted blood was found accumulated in the cranial cavity.

He opined that the death was due to shock and hemorrhage resulting from the above mentioned injuries which were ante-mortem and homicidal in nature.

He has exhibited the post mortem examination reports of the deceased Aktar Hossain, Sabrina Afroz Juli and Arna Akter as Exts.16,17 and 18 respectively. Defence declined to cross-examine him.

PW 13, Md. Nawab Mia stated in his deposition that on 11.08.2005 police in his presence held inquest of the dead bodies of the deceased Aktar Hossain, Sabrina Afroz Juli and Arna Akter and prepared the inquest report. He exhibited his signatures on the inquest reports as Exts.2/2,3/2 and 4/2 respectively. Defence declines to cross-examine him.

PW 14, Amir Hossain was the business partner of deceased Aktar Hossain. He stated that he had been a business partner of Aktar for about $1\frac{1}{2}$ years and of the three business works, one work was completed in the lifetime of Aktar and the final bill of the two other works under the name and style of Aktar Hossain Construction Firm remained pending in the L.G.E.D office and for the bills of those works he and Aktar Hossain had been in the L.G.E.D office in the evening of the previous day of the alleged occurrence. On the following day, at about 10:00 am Aktar Hossain was scheduled to go to the L.G.E.D office for the bill, but at about 10 a.m. in the morning on the day one Shahanoor Khan informed him (PW 14) over telephone that Aktar Hossain along with the members of his family had been killed and having heard this, he rushed to the place of occurrence and saw the dead bodies at 10:45 am and in his presence and others, police took away the dead bodies for post mortem examination. After they being buried at their native house,

he left for his house at about 8/9 in the evening. Defence declined to cross-examine him.

PW 15, Alamgir Hossain was tendered and defence declined to cross-examine him.

We have heard both the learned counsels appearing on behalf of both the parties, perused the FIR, the charge sheet, the judgment and order passed by the High Court Division and the connected materials on record.

Now, the question for determination is whether the prosecution has been able to prove the complicity of the convict-appellants in the commission of the alleged crime i.e. the convict-appellant committed the murder of the deceased Aktar Hossain, Sabrina Afroz Juli and Arna Aktar.

From the materials on record, it appears that the accused Sirajul Islam and Zamir are dead. So the case is abated against both of them.

The convict Sirajul Islam (since deceased) lodged Brahmanbaria Sadar P.S. Case No.22 dated 11.08.2005 through filing an FIR in which Brahmanbaria Sadar P.S. final report No.283 dated 17.10.2005 has been submitted by Investigating Officer S.I. Mr. Abdus Samad. Later on, on 20.10.2005 Mr. Abdus Samad himself lodged this FIR being Brahmanbaria Sadar Case No.62 in which the Investigating Officer submitted charge sheet being No.588 dated

01.11.2005 against 8 accused persons namely Sirajul Islam, Sohel, Rajib, Masum, Kabir, Zamir, Manik and Piyas.

The learned advocate for the convict-appellants submitted that as S.I. Abdus Samad, being informant, lodged the second FIR, he was highly interested and biased. But this connotation is not true and acceptable and in this respect there is no bar in law to lodge second FIR in the same incident and investigate by the same Investigating Officer. In the instant case, initially final report was submitted upon the FIR lodged by the convict Sirajul Islam and as the true picture was not revealed in the FIR lodged earlier in point of time, there is no bar to lodge the second FIR and the same got investigated by the informant who holds the rank of Sub-Inspector of Police. Only being the informant cannot incapacitate him in law to hold the investigation. During investigation based on the earlier FIR, he found that separate cognizable offence had been disclosed and observing the flaws of fact, as a law abiding person, he became aggrieved and filed the subsequent second FIR. Regarding lodging the second FIR, opinion given in *Pervaiz Rasheed and others vs. Ex-officio Justice of Peace and others [2016 YLR 1441]* runs as under:

"It is well settled proposition of law that second FIR can be registered if a distinct and separate cognizable offence is disclosed or if any aggrieved person got reservation about the first FIR grousing that contents of the FIR already registered does not disclose the true picture of the occurrence."

This opinion was also reflected in the following case: *Imtiaz Ali vs. Province of Sindh through Home Secretary and 8 others* [2017 MLD 132] which runs as follows:

"It is well settled that lodgment of second FIR against the same offence is neither prohibited nor restricted by the law, nevertheless the controverting set of allegations narrated in second FIR must emanate a quite separate and distinct offence, and same should be examined prudently in the purview of facts stated regarding the incident in earlier FIR as well as documentary evidence collected and statements of PWs recorded under section 161, Cr.P.C. by earlier Investigating Officer, to curb and defeat the fabrication of events with mala fide intention and false involvement of any innocent person."

Admittedly, there is no eye witness in the instant case. The trial Court as well as the High Court Division convicted and sentenced the convict-appellant based on circumstantial evidence and the confessional statement made by Md. Babul Mia, Piyas and Zamir under Section 164 of the Code of Criminal Procedure, 1898.

The confessional statement of Babul (since dead) under Section 164 of the Code of Criminal Procedure, 1898 is as follows:

“মাসুম নামের একটা ছেলে বাবার নাম জানিনা, মেডডা এলাকার নামকরা সন্ত্রাসী-আমাকে বলে একটা কাজ আছে। তোর কেমন সাহস আছে দেখমু। আমি বলি কি কাজ, বলে আইলে কমু। ঘটনার দিন বুধবার, তারিখ মনে নাই-দিবাগত রাত দুইটায় কথামত আলিয়া মাদ্রাসার সামনে যাই। সেখান থেকে আরও পাঁচজন-সবাইকে চিনি-নাম কবির, পিয়াস, জামীর, মানিক ও মাসুম নিজে সহ আমরা মাসুমের কথামত প্রথমে পুকুরপাড়ে কড়ি গাছের ওখানে যাই। আমাকে ওখানে দাঁড় করাইয়া ওরা পশ্চিমে একটি বাড়িতে যায়। কেউ আসে কিনা আমাকে দেখতে বলে। পুকুর পাড় থেকে বাড়িটা দেখা যায়। বিদ্যুতের আলোতে মাসুম ও কবীর পাশের গলি দিয়ে যায় এবং ছাদে উঠে। বাকী তিনজন বাড়ির সামনের ওয়াল টপকাইয়া ঢুকে। এরপর আর কিছু আমার এখান থেকে দেখা যায়না। প্রায় এক ঘণ্টা পর সবাই রক্ত ঘাম মাখা অবস্থায় আসে। মাসুমের হাতে রড, কবীরের হাতে চাপাতি, মানিকের হাতে ছুরি। এগুলো ওরা পুকুর

সহ ওয়ালের পাশে বিভিন্ন জায়গায় ফেলে দেয়। মাসুম বলে কাউকে বললে তোরে পরিবারসহ শেষ কইরা দিমু। পরে আমাকে মাসুম ১০ হাজার টাকা দেয়। পরের দিন কবীরের কাছে শুনি, নিহতদের বড়ভাই দুই লাখ টাকা দিছে।”

Babul was an accused of this instant case, who gave confessional statement but he died during investigation of this case and prior to the submission of the charge sheet.

The confessional statement of accused Piyas recorded under section 164 of the Code of Criminal Procedure, 1898 is as follows:

“ঘটনার এক সপ্তাহ আগে বিরাশাল মাঠে মাসুম, মানিক ও জামিলকে সংবাদ দিয়ে নিয়ে আসে। রাত সাড়ে ১০.৩০ টার সময় সিরাজ মিয়া আসে। সিরাজ মিয়া মাসুমকে বলে যে, আক্তার মিয়াকে শেষ করে দেয়ার জন্য। মাসুম ও সিরাজ মিয়া আমাকে ১০/০৮/২০০৫ ইং রাত ২.০০ টার সময় আলিয়া মাদ্রাসার সামনে আসার জন্য বলে। আমি ঘটনার দিন শেষে রাত ২.০০ টার সময় আলিয়া মাদ্রাসার কাছে যাই। আলিয়া মাদ্রাসার সামনে মাসুম, জামিল, বাবুল, কবীরসহ ৫ জন হাজির হয়। সিরাজ মিয়ার পুত্র রাজীব এসে আমাদের নিয়ে যায়। আমাদের কে আক্তার মিয়া বাসার সামনে নিয়ে যায়। প্রথমে মাসুম জানালার গ্রিল ভেঙ্গে কবির ঘরে ঢুকিয়া দেয় কবির ঘরে গিয়ে ঘরের এবং ছাদের দরজা খুলে ফেলে। আমি দরজার পাশে দাঁড়িয়ে ছিলাম বাকীরা আক্তার মিয়ার ঘরে ঢুকে। মাসুম আক্তার মিয়ার মাথায় কোপ মারে জামিল মুখে ধরে রাখে। আবার মাসুম আক্তার মিয়াকে কোপ মারে। আমি দরজায় ছিলাম। মানিক আক্তার মিয়ার মেয়েকে মেরেছে। মাসুম ও জামিল আক্তার মিয়ার স্ত্রীকে কোপাইয়া মেরেছে। কাজ শেষে সবাই ছাদ দিয়ে বাহিরে চলে আসি।”

The confessional statement of Zamir recorded under section 164 of the Code of Criminal Procedure, 1898 is as follows:

“ঘটনার ৭ দিন আগে মাসুম আমাকে বিরাশার মাঠে ডাকে। সাথে দেখি পিয়াস আছে। রাত ১০.৩০ টার দিকে সিরাজ মিয়া আমাদের কাছে আসে এবং তার ভাই আক্তার মিয়াকে শেষ করে দেয়ার জন্য। মাসুম এ কাজের জন্য তার কাছে ৩ লক্ষ টাকা চায়। সে ২ লক্ষ টাকা দিতে রাজি হয়। সাথে সাথেই সিরাজ মিয়া মাসুমের কাছে এক লক্ষ টাকা দেয়। মাসুম টাকাটা নিয়ে আমাকে ও পিয়াসকে ১০ তারিখ আলিয়া মাদ্রাসার সামনে আসতে বলে। ১০/০৮/০৫ইং রাত্র ২ টার সময় আমি, মাসুম, পিয়াস, মানিক, কবীর, বাবুলসহ ৬ জন হই। সোহেল ও রাজিব রাত ২.১০ মিঃ এর সময় এসে আমাদেরকে আক্তার মিয়ার ঘর দেখিয়ে দেয়। মাসুম দক্ষিণ পার্শ্বের জানালার গ্রীল ভাঙ্গে। ভাঙ্গা গ্রীল দিয়ে কবীর বাসায় ঢুকে। কবীর ঘরে গিয়ে ছাদে সিড়ির দরজা খুলে। আমরা ৬ জন দক্ষিণ পাশের সানসেট দিয়া ছাদে উঠে সিড়ি দিয়ে ঘরে ঢুকি। প্রথমে আক্তার মিয়াকে আমি, পিয়াস ও বাবুল মুখে ও হাতে ধরে কোপাই এবং মাসুম দা দিয়ে মাথায় কোপ দিয়ে মেরে ফেলে। পরবর্তীতে তার স্ত্রীকে একইভাবে ধরি। মানিক রাম দা দিয়ে কোপাইয়া মেরে ফেলে। কবির আক্তার মিয়ার স্ত্রীকে সাফল দিয়ে

বারি মারে। মানিক বাচ্চাটাকে পায়ে ধরে মাথায় দেয়ালে বারি মারে। কাজ শেষে সিঁড়ি দিয়ে ছাদে উঠে সানসেট দিয়ে নিচে নেমে আসি। তখন সিরাজ মিয়া বলেছে তোমরা হাত মুখ ধুয়ে মাদ্রাসায় চলে যাও। আমি সেখানে আসতেছি। আমরা আমাদের ২টি সাফল, ১টি লাঠি, ১টি গ্রিল ভাঙ্গার যন্ত্র সবই পুকুরে ফেলে দিয়েছি। অনুমান ৩/৩.৩০ টার সময় সিরাজ মিয়া এবং তার ছেলে সোহেল এসে ১ লক্ষ টাকা মাসুমের কাছে দেয় এবং বলে তোমরা চলে যাও। আমাকে মাসুম ৫০০/- টাকার ৫০ টি নোট দিয়ে বলে চলে যাও। আমি চলে গেছি। কাকে কত টাকা দিয়েছে তা আমি জানিনা।”

On perusal of the above three confessional statements, it appears that the convict-appellant Sirajul Islam along with his two sons had conspired to kill the deceased Aktar Hossain and other members of his family. Among the 8 charge sheeted accused persons Piyas, Zamir and Babul made confessional statement. It has been mentioned earlier that though Babul made confessional statement, but he died before submitting the charge sheet. Before examining the propriety of the conviction and sentences of condemned prisoners Sirajul Islam, Sohel and Rajib, we find it convenient to examine the propriety of the conviction and sentence of accused Masum, Piyas, Kabir, Zamir and Manik first.

From the prosecution case and materials on record, it is found that the convict-appellant Masum, Piyas, Zamir, Kabir and Manik had no previous relationship or enmity with the deceased Aktar and his family members.

The confessional statements made by Piyas and Babul are exculpatory in nature. From their confessional statements, it is found that they made the statements without incriminating/involving themselves directly with the killing of the

deceased persons. Babul in his confessional statement stated that he was not present at the place of occurrence rather he was waiting near the pond which was situated far from the house of Aktar to guard whether anybody went there. Besides, accused Piyas in his confessional statement stated that he was standing beside the door of the house of Aktar Hossain and the rest entered into the house of Aktar. So, according to Piyas he did not participate at the killing of the deceased persons. It is well settled that an accused can be convicted on the sole basis of the confessional statement recorded under section 164 of the Code of Criminal Procedure, 1898 if the confessional statement so made voluntarily and it is true. Now let us see whether the confessional statement made by the accused Babul and Piyas were true and voluntary.

PW 8, Syed Md. Nurul Basir, Upazilla Nirbahi Officer, on 15.08.2005 at about 10:00 am recorded the statement of accused Babul under Section 164 of the Code of Criminal Procedure, 1898 which he exhibited the same as Ext.12. In paragraph No.8 of the confessional statement of Babul it was stated by the Magistrate that there was a red mark on the nose of Babul. The relevant portion of the said statement is “আসামীর নাকে একটা লাল দাগ দেখা যায় যা গামছা দিয়া বাধার কারনে হয়েছে বলে সে জানায়।” During cross-examination he stated that, “কেন আসামী স্বীকারোক্তি দিতেছে এই প্রশ্ন আমি আসামীকে করি নাই। থানায় পুলিশ আসামীর প্রতি কি আচরণ করিয়াছে তাহা আমি আসামীকে প্রশ্ন করি নাই, আসামী স্বীকারোক্তি মূলক জবানবন্দি দেওয়ার পর আসামীকে পুলিশের কাস্টডিতে না পাঠাইয়া জেল হাজতে পাঠানো হইবে এই কথা আমি আসামীকে বলি নাই লিখিতভাবে, তবে মৌখিকভাবে বলিয়াছি”।

In the instant case, PW 9, Mr. Habibur Rahman, Magistrate 1st Class, Brahmanbaria on 20.08.2005 recorded the confessional statement of convict-appellant Piyas. During cross-examination, this witness stated that, "আসামী পিয়াস আমার ৪ নং প্রশ্নের জবাবে কেউ ভয় ভীতি দেখানোর বিষয়ে 'হ্যাঁ' বলিয়াছে।"

From the deposition of both the Magistrates, who recorded the confessional statements, it is clear that the confessional statements of the accused persons i.e. Babul and Piyas were not made voluntarily. From their confessional statements, it appears that they were threatened to make the confessional statement. Thus, it can be presumed that the confessional statements were the result of torture. If it appears that the confessional statement was made by the accused out of fear, threat and coercion, then confession would be irrelevant in the court proceedings to convict the accused based on that confession. Section 24 of the Evidence Act, 1872 provides that, *"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."* As the confessional statements of accused

Babul and Piyas were not made voluntarily and the statements are exculpatory in nature as well as they made confessional statement under fear/coercion, so the confessional statements of Babul and Piyas cannot be the basis of their conviction and cannot be used as evidence against other co-accused. Their confessional statements are not acceptable in the eye of law. Hence, their confessional statements are discarded.

However, the recovery of the equipments as per pointing out by Babul and Piyas has not been supported by any neutral and eye witness. PW 5, Jafar Iqbal Liton is the brother of deceased Sabrina Afroz Juli and he has been shown as seizure list witness. He deposed that in his presence, the equipments as per pointing out of Babul (Ext.11) were recovered, but in support of his deposition, the prosecution has not produced any other seizure list witness. PW 11, Jharu Mia in his deposition stated that two *daos* (Ext.15) were recovered in his presence, but in cross-examination he said that he was taken to the police station by police from road and he saw the seized *daos* at the police station. He made contradictory statement. So, it cannot be safely said that the police recovered the seized equipments as per pointing out of Babul and Piyas according to the provision of Section 27 of the Evidence Act, 1872.

On 07.09.2005 PW 9, Md. Habibur Rahman also recorded the confessional statement of Zamir. From the reading of confessional statement of Zamir, it appears that he made confessional statement

incriminating himself as well as other co-accused. His confessional statement is inculpatory in nature. From the confessional statement of Zamir, it is found that the confessional statement recording magistrate had complied with all the formalities instructed to be followed before recording the confessional statement of accused. It appears from the confessional statement recording form under Section 164 of the Code of Criminal Procedure that, the Magistrate carefully explained to the accused Zamir regarding the consequence of making confessional statement and he complied with the provision of para-5 of the form where the accused was sufficiently cautioned that he should not say anything, because other had told him to say it, but he had liberty to say whatever he really desired to say. The concerned Magistrate also cautioned the accused not to make any untrue statement. The following conversations also took place between the Magistrate and the accused, in the *question and answer* form, which is a mandatory duty of the Magistrate as mentioned in the 164 statement recording form.

- ১। আমি পুলিশ নই, ম্যাজিস্ট্রেট, বুঝলেন?– জ্বী।
- ২। আপনি স্বীকারোক্তি দিতে বাধা নয় জানেন?– জ্বী।
- ৩। প্রদত্ত স্বীকারোক্তি আপনার বিরুদ্ধে যেতে পারে, জানেন?– জ্বী।
- ৪। আপনাকে আর পুলিশ রিমান্ডে নেওয়া হবে না?– জ্বী।
- ৫। আপনি সত্য কথা বলবেন কি?– জ্বী।”

It also appears from the format of the 164 statement that there was not any scope to put any question as has been mentioned in the cross-examination of PW 9. However, the learned Magistrate (PW 9)

categorically stated in his cross-examination that “ইহা সত্য নয় যে, আসামী জামির তাহার শরীরের কোন মারধরের জখম আমাকে দেখাইয়াছে বা আমি তাহা নোট করি নাই। ইহা সত্য নয় যে, আসামী জামিরের জবানবন্দী স্বেচ্ছামূলক নয়।”

From the above, it can be said that Zamir did not make confessional statement out of fear or due to any threat, rather he made the confessional statement voluntarily. The accused Zamir retracted his confessional statement during his examination under Section 342 of the Code of Criminal Procedure, 1898. It is well settled that the confessional statement should be retracted at the very earliest opportunity and the belated retraction of confessional statement during examination under section 342 had of no value if it appears before the court that the confessional statement was made voluntarily and it was true. This view was taken by this Division in *The State vs. Lahu Miah and another* [39 DLR(AD) (1987) 117] “Retraction of a confession at an earliest opportunity may lend support to the defence plea that the confession was not voluntary one, but from a belated retraction of a confession no inference adverse to the accused can be made.”

PW 9, Habibur Rahman during cross-examination also stated that, “ইহা সত্য নয় যে, আসামী জামিরকে আমার কাছে উপস্থাপনের সময় তাহার শরীরে মারধরের কোন আঘাত ছিল।” Since the Magistrate did not find any mark of injury on the body of accused Zamir, we are of the view that Zamir made the confessional statement voluntarily and it was true.

From the above discussion, the confessional statements made by Babul and Piyas appear to have not been made voluntarily. Though the confessional statement of Zamir appears to be true incriminating himself as well as others, but the prosecution could not produce any corroborative evidence involving the other accused persons in the alleged killings. In the instant case, there are three confessional statements where the confessional statements of Babul and Piyas were discarded and confessional statement of Zamir appears to be made voluntarily and true. Though Zamir's confessional statement is voluntary and true but convicting the convict-appellants i.e. other co-accused mere relying upon the confessional statement of Zamir without corroborative evidence is not permissible in the eye of law rather his confession only can be taken into consideration and it is mere a relevant fact against the other co-accused. A confessional statement is evidence against its maker but is not sufficient evidence to convict the other co-accused unless corroborated by other evidence. At this stage, we can rely on *State vs. Abdul Kader @ Mobile Kader* [67 DLR (AD) 6]. It has been decided as under:

"The Court cannot proceed with the case relying on the confession of co-accused; it must begin with other evidence and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about of reach. If there is no other evidence against co-accused except the

confession, then, the confession by itself being merely a matter to be taken into consideration, and not being an evidence under section 3, no conviction of the co-accused could be given relying on such confession."

Other accused persons i.e. Masum, Piyas, Manik and Kabir had no previous enmity with the deceased Aktar and his family members and there was no circumstantial evidence as well as eye witness that creates any impetus regarding their involvement in the killing of deceased Aktar Hossain, Sabrina Afroz Juli and Arna Akter. In the instant case, the prosecution failed to produce ample evidence to prove the involvement of the convict-appellants Masum, Piyas, Manik and Kabir in the alleged killings of Aktar Hossain, Sabrina Afroz Juli and Arna Akter except the confessional statement of Zamir. The prosecution failed to prove beyond reasonable doubt that the convict-appellants Masum, Piyas, Manik and Kabir committed murder of the deceased persons.

Though the involvement of the accused persons were described in the three confessional statements in a different view, but the common scenario that can be inferred from the confessional statements of Babul, Piyas and Zamir is that there was a criminal conspiracy among the accused persons to kill the deceased Aktar and his family members where Siraj and his sons Rajib and Sohel were the mastermind to act upon the said criminal conspiracy.

Sirajul Islam, Sohel, Rajib and Zamir hatched a criminal conspiracy to kill Aktar and his family members and Zamir in his confessional statement stated this fact and confessed his own guilt. The learned Magistrate recorded the confessional statement of Zamir under Section 164 of the Code of Criminal Procedure, 1898 following all relevant provisions of law, which is true and voluntary.

As mentioned above, there is no eye witness in the instant case. The Tribunal and the High Court Division convicted the convict appellants on the basis of the confessional statements coupled with the circumstantial evidence. Babul and Piyas made exculpatory confessional statements and Zamir made inculpatory confessional statement and an inculpatory confessional statement can be used as evidence against its maker to convict the accused. The manner of involvement of accused Masum, Zamir, Piyas, Manik and Kabir was narrated in a contradictory way by Babul, Piyas and Zamir, but all of them in their confessional statements supported the criminal conspiracy planned by accused Siraj, Rajib and Sohel in a voice. In the case of *Mohd. Khalid vs. State of West Bengal* reported in (2002) 7 SCC 334 (Para-34), it has been held that, "the first condition which is almost the opening lock of that provision is the existence of "reasonable ground to believe" that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the

aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement "in reference to their common intention". Under the corresponding provision in the English law the expression used is "in furtherance of the common object". No doubt, the words "in reference to their common intention" are wider than the words used in English law." In this case Zamir said that the elder brother of deceased Aktar paid them Tk.2 lacs to kill Aktar along with his family members and at the date of occurrence Soheli and Rajib brought them to the house of Aktar. So, it can be presumed that accused Siraj, Soheli and Rajib were present near the place of occurrence to materialize their criminal conspiracy by killing Aktar and his family members. As there is no eye witness in the instant case, to examine the propriety of conviction and sentence of convict-appellant Sirajul Islam, Soheli and Rajib, we are inclined to examine the circumstantial evidence coupled with the scenario inferred from the confessional statements made by Babul, Piyas and particularly the statement of Zamir.

The principle of circumstantial evidence to prove the guilt of an accused is that the prosecution has to prove the circumstantial evidence beyond reasonable doubt and the chain of circumstances should be cogent and consistent showing that the accused is compatible with the circumstances. To prove the guilt of an accused based on circumstantial evidence, two categories of circumstances

have to be considered. Circumstances before occurrence and circumstances after occurrence. From the materials on record, it appears that over the paternal property, the relationship between Sirajul Islam and Aktar was not good. Aktar demanded his respective share from their paternal properties, but Sirajul Islam denied to give the share of Aktar Hossain. From the depositions of PWs 1,2,3,4 and 6 it appears that a strained relation between accused Siraj and his brother Aktar prevailed over giving a loan of Taka 1.5 lacs to Sohel for mobile business and another loan of Taka 2.5 lacs to Sirajul Islam and also over the claim of paternal properties. From their depositions, it is also found that Sirajul Islam and his sons dismantled the pillars of the constructing building of Aktar Hossain. PW 1 stated that only 8/9 days before the alleged occurrence, there was some altercation between Monowara Begum, the wife of Siraj and deceased Juli, the wife of Aktar Hossain and at one stage, Aktar slapped Monowara Begum and this incident angered Sohel and Rajib. PW 2, the mother of deceased Juli in her deposition stated that in the morning of the date of occurrence, the scenario of the house of Sirajul Islam was as usual. Sirajul Islam was chewing betel nut, some were taking breakfast and there was no sign of tears in the eyes of anybody of the family of Siraj. She also stated that after arrival at the house, where occurrence took place, she asked Sohel to open the door, but Sohel replied that he did not have the key of the gate. But she had seen the key of the gate in the hand of Sohel. PW 3

in his deposition stated that hearing about the occurrence, he rushed to Aktar's house where he found assembly of many people and Soheli was in front of the gate of Aktar. He further stated that on his shouting, he was taken to the drawing room of Siraj's house and at that time Siraj was chewing betel nut normally. He asked Siraj about his daughter, granddaughter and daughter's husband, Siraj Mia replied that dacoity had been committed at the house of Aktar, motor cycle and other necessary goods had been taken away by the dacoits. PW 4 in his deposition stated that having heard of the alleged occurrence from the people, he and others rushed to the house of Aktar Mia where he came to see that Siraj Mia and other members of his family were all quite in usual mood. At that time Sirajul was chewing betel leaf, Soheli was behaving quite normally and Rajib with his long hair was moving over the blood of the deceased persons. The faces of the members of the family of Siraj Mia were seen with no sign of mourning. He saw these atrocities at about 10:00 am in the morning on that fateful day and about after 2 hours Rajib cut his long hair to show him polished which cast doubt in his mind as well as in the mind of others present there. PW 10, Abdur Rahman in his deposition stated that on 10.08.2005 at 23:00 hours vide a G.D.E. he went out on petrol duty and in that night at 1:45 hours (1:45 am) when he reached near Madrasha of West Medda, he had had seen that two boys were loitering on the road and on query they said that they belonged to the nearby house and

had been waiting there to receive their relatives who were scheduled to come. Amongst those two boys, one was long haired and other was of fair complexion. He further stated that on the following day, at about 11 hours having known to the fact of murder of Aktar Hossain, he at once went to the place of occurrence and saw the Senior Police Officers and others at the house of the Aktar Hossain and also saw there that the said two boys whom he saw in the preceding night, and on query to the people present there, they said that those two boys were nephews of Aktar and of them the long haired boy was Rajib and other was Sohel. After some time, he came to see that Rajib got his long hair cut at about 12:30 hours, television programme was going on and cassette recorder was being played in the house of Siraj. He also said that there was no mournful atmosphere at the house of Siraj.

In the instant case, circumstances **before occurrence** which can be inferred from the prosecution witnesses are that, **I. The strained relation between the convict-appellants and the deceased Aktar Hossain over the share of paternal properties, II. The slap inflicted by deceased Aktar to Monowara Begum, the wife of Sirajul Islam which angered Sohel and Rajib, and III. Breaking of pillars of under construction building of Aktar by Sohel and Rajib.**

The demeanor of the convict-appellants can be considered as **circumstances after occurrence. I. As the deceased Aktar is the brother or convict Siraj, it is certain to presume that the persons**

present there would find him to mourn rather he was found chewing the betel nut and at a very usual mood. II. According to the depositions of the witnesses, the song was playing in the cassette player in the morning at the house of Sirajul Islam, III. Rajib was walking on the blood of the deceased without any remorse and very importantly he got his hair cut after the occurrence.

These scenario gives the reflection of the convict-appellants' victory over the killing of the deceased with all members of his family. Again PW 10 found Soheli and Rajib were loitering on the road of West Medda Madrasha before the night of occurrence which creates positive inference regarding their involvement in the alleged killing. On the other hand Zamir in his confessional statement stated that at 02:30 am, Soheli and Rajib pointed out the house of Aktar which also shows their involvement in the alleged killing. Again, Sirajul Islam claimed that dacoity has been committed and the dacoits killed his brother, but nobody gave any evidence regarding the alleged dacoity and the police submitted final report on the reporting of Sirajul Islam of the alleged dacoity. Against the final report, Sirajul Islam did not file any naraji petition. Without knowing the fact properly lodging the FIR claiming the killing has been committed by dacoits rendered the convict-appellants so much interested to conceal the real facts.

Therefore, in a case of conspiracy the subsequent behavior of the conspirators are considered as important factors. In the instant case, the prosecution tried to prove the above mentioned conduct of convict-appellants Sirajul Islam, Sohel and Rajib that lead us to conclude that the convict Sirajul Islam, Sohel and Rajib with Zamir conspired to kill the deceased Aktar Hossain and all of his family members. In case of conspiracy the conspirators conspire among themselves, there remains no eye witness. They make design and prepare plan to execute the same and in furtherance of their conspiracy and common intention execute the plan. In the instant case, the motive, behavior of the convict-appellants are very much clear to execute the alleged killing in a planned way and as per Section 10 of the Evidence Act, 1872 the convict-appellants Sirajul Islam, Sohel and Rajib are guilty for committing the occurrence.

If the evidence is analyzed, we can find the chain of circumstances linking one fact with the others about the complicity of the convict-appellants. **The first chain was the strained relationship of Sirajul Islam with Aktar Hossain over the share of paternal properties. The second chain was inflicting slap by Aktar to Monowara Begum which angered Sohel and Rajib. The third chain was the presence of Sohel and Rana at late night at about 1:45 am on the road of West Medda Madrasa for which they could not assign any reasonable cause. The fourth chain was the lodging of FIR being so much interested claiming the occurrence**

committed by the dacoits. The fifth chain was the normal behavior of Sirajul Islam, Sohel and Rajib after the occurrence. The next chain was Rajib got the long hair cut after the occurrence. If one's uncle with his all family members died, then it is unusual to get the hair cut without being sad. If these facts are considered together, an inevitable conclusion can be drawn up that the convict-appellants Sirajul Islam, Sohel and Rajib became successful to materialise their plan to kill the deceased Aktar Hossain and all of his members out of their previous enmity. We find the consistency of the witnesses regarding the involvement of the convict-appellants Siraj, Sohel and Rajib so far as regards the chain of circumstances disclosed in the instant case. It was held in *the State vs. Arman Ali and others* [42 DLR(AD) (1990) 50] that, "*In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond reasonable doubt.*" In this case, the prosecution has been able to prove the circumstantial evidence involving the complicity of the convict-appellant Siraj, Sohel and Rajib with the alleged occurrence of killing beyond reasonable doubt. The prosecution has also been able to prove beyond reasonable doubt that the convict-appellants Siraj, Sohel, Rajib and Zamir made criminal conspiracy to kill Aktar and his family members and in furtherance of their criminal conspiracy as well as

common intention the deceased persons were killed. Hence the convict-appellants Siraj, Sohel, Rajib and Zamir are guilty of the charges under Sections 120B and 302/34 of the Penal Code, 1860.

From the materials on record, it is found that Sirajul Islam and Zamir died. Sohel and Rajib are in the condemned cell for more than 15 (fifteen) years suffering the pangs of death. It was held in the case of *Nazrul Islam (Md) vs. State* reported in 66 DLR (AD) 199 that, *"Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death."* In view of the decision cited above as well as the circumstances of this case, we are of the view that justice would be sufficiently met if the sentence of death of the appellants Sohel and Rajib be commuted to one of imprisonment for life.

Accordingly, Jail Appeal No.4 of 2014 is **abated** in respect of appellant-condemned-prisoner No.1, Zamir, son of Md. Keramat Ali of Village-Birasher. The Jail Appeal No. 4 of 2014 in respect of condemned-prisoner No.2, Md. Manik Miah, son of Rais Miah, of

Village-South Morail Nagaor and condemned-prisoner No.3, Piyas, son of Tajul Islam, of Village-Narsinghar, at present East Medda Moila Villa, all area are of Police Station and District-Brahmanbaria is allowed. They are acquitted of the charge leveled against them. They be set at liberty forthwith from the jail custody if not wanted in any other case.

Jail Appeal No.5 of 2015 is **disposed of** in the light of the judgment in Criminal Appeal No.26 of 2020.

Jail Appeal No.6 of 2014 is **disposed of** in the light of the judgment in Criminal Appeal No.50 of 2012.

The Criminal Appeal No.50 of 2012 is **dismissed** with the modification of sentence. The sentence of the condemned-prisoners, 1. Sohel Rana, 2. Rajib Ahmed, both sons of Sirajul Islam, of Village-West Medda, Police Station and District-Brahmanbaria (In Criminal Appeal No.50 of 2012) be commuted from death to imprisonment for life with a fine of Tk.10,000.00 each, in default, they will suffer rigorous imprisonment for 03(three) months more. They will get the benefit of Section 35(A) of the Code of Criminal Procedure, 1898 in calculation of the sentence.

The Jail Authority, Kashimpur High Security Central Jail, Gazipur is directed to shift the condemned-prisoners to normal cell from the condemned cell forthwith.

The Criminal Appeal No.50 of 2012 is **abated** in respect of condemned-prisoner Sirajul Islam, son of late Sabje Ali Miah.

The Criminal Appeal No.51 of 2012 is **allowed**. Let the convict-appellant Kabir Hossain @ Kabir, son of late Naziur Rahman adopted son of Abdur Rashid Mia of Village-Maddhaya Medda, Police Station and District-Brahmanbaria be acquitted of the charge levelled against them. He be set at liberty from the jail custody forthwith if not wanted in any other case.

The Jail Petition No.17 of 2012 is **disposed of** in the light of the judgment in Criminal Appeal No.51 of 2012.

Criminal Appeal No.26 of 2020 is **allowed**. Let the convict-appellant (condemned-prisoner) Masum, son of Abu Shama Driver, of Village-Middle Medda, Police Station and District-Brahmanbaria be acquitted of the charge levelled against them. He be set at liberty from the jail custody forthwith if not wanted in any other case.

C.J.

J.

J.