

**In the Supreme Court of Bangladesh  
High Court Division  
(Criminal Appellate Jurisdiction)**

**Present:**

**Mr. Justice Ashish Ranjan Das**

**And**

**Mr. Justice Md. Riaz Uddin Khan**

**Death Reference No. 170 of 2016**

The State

-Vs-

Md. Masud and others

...Condemned-Prisoners

With

**Criminal Appeal No. 14487 of 2017**

Md. Babla

...Convict-appellant

-Vs-

The State

...Respondent

With

**Criminal Appeal No. 14492 of 2017**

Md. Monir Hossain @ Sontrashi Monir

...Convict-appellant

-Vs-

The State

...Respondent

With

**Criminal Appeal No. 4034 of 2023**

Al-Amin @ Alam

...Convict-appellant

-Vs-

The State

...Respondent

With

**Criminal Appeal No. 9799 of 2023**

Shafiqul Islam alias Robin

...Convict-appellant

-Vs-

The State

...Respondent

With

**Jail Appeal No. 217 of 2018**

Md. Masud

...Convict-appellant

-Vs-

The State ...Respondent

With  
**Jail Appeal No. 306 of 2019**  
Al-Amin ...Convict-appellant

-Vs-

The State ...Respondent

With  
**Jail Appeal No. 75 of 2023**  
Shafiqul Islam @ Rabin ...Convict-appellant

-Vs-

The State ...Respondent

Mr. S.M. Asraful Hoque, D.A.G with  
Mr. Sheikh Serajul Islam Seraj, D.A.G  
Ms. Fatema Rashid, A.A.G  
Mr. Md. Shafiquzzaman, A.A.G. and  
Mr. Md. Akber Hossain, A.A.G -----For the State

Mr. Helal Uddin Mollah, with  
Ms. Zinat Akhter, Advocates  
(in Criminal Appeal No.14487 of  
2017, 14492 of 2017 and 4034 of  
2023)

Mr. Hafizur Rahman Khan, with  
Mr. Md. Shafikul Islam, Advocates  
(in Criminal Appeal No. 9799 of  
2023)

...For the convict-appellant

Ms. Nargis Akter, Advocate  
(in Jail Appeal No. 217 of 2018 and 75  
of 2023)

...For the State Defence

**Judgment on: 14.12.2023**

**Md. Riaz Uddin Khan, J:**

This Death Reference No. 170 of 2017 has been referred by the Druto Bichar Tribunal No. 4 (Special Sessions Judge), Dhaka to the High Court Division of

the Supreme Court under section 374 of the Code of Criminal Procedure for confirmation of the sentence of death of 4 persons namely Md. Masud, Al-Amin @ Alam, Shafiqul Islam @ Robin and Md. Jahangir Hossain who have been convicted and sentenced to death under sections 302/34 of the Penal Code. On the other hand Criminal Appeal Nos. 14487 of 2017 and 14492 of 2017 have been filed by convict appellants Md. Babla and Md. Monir Hossain. Criminal Appeal No. 4034 of 2023 along with Jail Appeal No. 306 of 2019 preferred by condemned prisoner Al-Amin @ Alam and Criminal Appeal No. 9799 of 2023 with Jail Appeal No. 75 of 2023 have been preferred by condemned prisoner Shafiqul Islam @ Robin and Jail Appeal No. 217 of 2018 has been preferred by condemned prisoner Md. Masud while condemned prisoner Md. Jahangir Hossain being fugitive was represented by state defence.

Condemned-prisoners Md. Masud and others are alleged to have killed deceased Sujjan @ Rana son of Chan Meah of village- Baunia, police station- Morolgonj, district- Bagerhat.

As the prosecution gradually developed in course of the investigation it will be convenient to set out the facts leading to the prosecution of the condemned prisoners and others in chronological order.

On 10.01.2009 at about 18.05 hours one Md. Abul Kalam, S.I., Demra Police Station, DMP, Dhaka lodged a First Information Report (FIR) against unknown

miscreants under Sections 302/201/34 of the Penal Code stating *inter alia* that the informant along with his companion forces while were on duty on 10.01.2009 received an information over phone from S.I. Abdul Mannan of Demra thana that an unknown male dead body was fallen on the land of one Abdul Alim of Shunya Tengra village under Demra thana; having such news the informant party went to the place of occurrence at about 14.45 hours and saw the dead body of the deceased aged about 25/26 years who was killed by the unknown miscreants by cut throat injury and then the informant prepared the inquest report and sent the dead body for autopsy and lodged the FIR.

After receiving the dead body the doctor performed postmortem and the Police took up the matter for investigation. After completion of the investigation the Police submitted charge sheet against condemned prisoners along with convict appellants under sections 302/201/34 of the Penal Code. After completion of formalities the case was sent to the Metropolitan Sessions Judge, Dhaka for trial and thereafter the case was transferred to the Druto Bichar Tribunal No. 4, Dhaka for trial and charge was framed against the convict appellants and others under the aforesaid sections of the Penal Code.

At the trial the prosecution in total examined 11 witnesses out of 25 charge sheeted witnesses while the defence examined none.

After closing the prosecution witnesses the trial court examined the convict appellants and others under section 342 of the Code of Criminal Procedure wherein they pleaded not guilty and refused to produce any defence witness.

The trial Court after conclusion of the trial on 12.12.2017 convicted the condemned prisoners 01. Md. Masud, 02. Al-Amin @ Alam, 03. Shafiqul Islam @ Robin, and 04. Md. Jahangir Hossain under section 302/34 of the Penal Code and sentenced them to death and convicted Md. Babla under section 302/34 of the Penal Code and sentenced him to life imprisonment with a fine of Tk-20000/- in default to suffer 1(one) year imprisonment more while convicted Monir Hossain @ Sontrashi Monir under section 302/119 of the Penal Code and sentenced him to imprisonment for life with a fine of Tk-20000/- in default to suffer 1(one) year imprisonment more.

Being aggrieved by and dissatisfied with the aforesaid Judgment and order of conviction and sentence dated 12.12.2017 passed by the Judge of Druto Bichar Tribunal No.4, and Special Sessions Judge, Dhaka in Special Sessions Case No. 239 of 2015 corresponding to G.R. No. 07 of 2009 arising out of Demra Police Station Case No. 07 dated 10.01.2009 under sections 302/201/34 of the Penal Code the aforementioned criminal appeals along with jail appeals are preferred before this Court.

The learned Deputy Attorney General has placed before us the FIR, the depositions of the PWs. and

other materials on record and he submits that the prosecution has able to prove the case beyond all reasonable doubt. Though there is no eye witness but 2 accused namely Md. Masud and Al-Amin @ Alam made confession vividly describing how they have committed the offence along with other co-accused and the trial court rightly convicted and sentenced the accused. The conviction can be maintained on the basis of confession against the maker and also against the co-accused with a bit corroborative evidence. In support of this submission the learned DAG cited the decisions reported in 74 DLR (AD) 11, 44 DLR (AD) 51 and 13 BLC (AD) 84.

On the other hand the learned Advocate Mr. Helal Uddin Mollah with Ms. Zinat Akhter, (In Criminal Appeal Nos. 14487 of 2017, 14492 of 2017 and 4034 of 2023) submits that the informant of this case is not eye witness and in fact there is no eye witness in this case. There are glaring inconsistencies between the evidence of the prosecution witnesses regarding the occurrence as alleged by the prosecution. The prosecution failed to prove that the dead body is of Sujan @ Rana who allegedly was killed by the condemned prisoners and there is reasonable doubt for a conclusion that the victim may died in otherwise. The trial court failed to examine the entire evidence carefully and failed to distinguish the chaff from the grain. The entire evidence is to be tested, scrutinized and assessed along with circumstances in order to disengage the

truth from the falsehood but the trial Judge convicted and sentenced the appellants Babla and Monir on mere surmise and conjecture which is not justified. Mr. Mollah further submits that it is a case of no evidence and the informant as an investigating officer investigated the case with an ulterior motive and for collateral purpose. The convict appellants did not commit such offence as alleged and have falsely been implicated in the instant case on the basis of confessional statements which were not voluntarily made. The convict appellants were not named in the FIR but convicted on the basis of untrue and involuntary confessional statements. There is no incriminating materials against them except the untrue and involuntary confessional statements. On being inhuman torture by the police the condemned prisoner Al amin @ Alam was compelled to make a confessional statement under section 164 of the Code of Criminal Procedure which was not voluntarily made. He was not named in the FIR, but was suspiciously arrested and implicated in the instant case by the police due to previous enmity and grudge and was fully made the victim of the circumstances. The prosecution miserably failed to produce vital witnesses in the case and the benefit should have gone to the accused.

Mr. Hafizur Rahman Khan with Mr. Md. Shafikul Islam, learned advocate appearing in Criminal Appeal No. 9799 of 2023 submits that the impugned judgment and order of conviction and sentence dated

12.12.2017 is bad in law and facts. The learned Judge failed to consider the defence case and this caused a serious miscarriage of Justice. There is no direct circumstantial evidence against the condemned prisoner Shafiqul Islam @ Robin and conviction had been made on mere surmise and conjecture. The informant lodged the F.I.R. without mentioning any name of the accused which proves that the informant is not an eye witness and in fact there is no eye witness in this case. The impugned judgment and order of conviction is not tenable in the eye of law as the prosecution failed to prove the time, place and manner of occurrence beyond reasonable doubt. The prosecution completely failed to establish any motive whatsoever, on the part of the appellant Robin to kill the deceased who was convicted on the basis of confession of co-accused without any corroborative evidence. The prosecution has failed to produce some vital witnesses including the investigating officer which are very fatal according to section 114(g) of the Evidence Act. The benefit should go in favour of the accused-appellants. He finally submits that some vital prosecution witnesses including the Investigating Officer (IO) were not examined for which the convicts are seriously prejudiced and in that view of the matter the case may be sent on remand to the trial Court for re-trial.

Ms Nargis Akter the learned advocate for the state defence adopted the submissions of Mr. Mollah

and Mr. Khan, the learned advocates. She then submits that condemned prisoner Jahangir Hossain was convicted only on the basis of confession of co-accused without any corroborative evidence. She further submits that both the confessing accused were in police custody beyond the period sanctioned by law for which confession of the accused should not be considered as voluntary and true.

In support of their submissions the learned advocates for the convicts have cited the decisions reported in 49 DLR (AD) 111, 36 DLR 185, 37 DLR (AD) 139, 50 DLR 220, 11 MLR (AD) 270, 4 BLC 386, 41 DLR 435, 3 BLC (AD) 53, 32 DLR 5, All Pakistan Legal Decisions Vol.IX page 555 and 2 other Indian decisions in Criminal Appeal No. 463 of 2001 and Criminal Appeal (DB) No. 722 of 2005.

We have perused the evidence on record and consider the submissions of the both sides of the Advocates and also perused the impugned judgment and order of conviction. In order to appreciate the points raised by the learned Advocates of both the parties it is necessary to state the facts narrated by the witnesses adduced in the court.

PW-1, the Informant, S.I. Md. Abul Kalam stated that he along with his companion forces (including PWs-5 and 6) while were on duty on 10.01.2009 received an information over phone from S.I. Abdul Mannan of Demra thana that an unknown male dead body was fallen on the land of one Abdul Alim of Shunya Tengra village under Demra thana; having such news

they went to the place of occurrence at about 14.45 hours and saw the dead body of the deceased aged about 25/26 years who was killed by the unknown miscreants by cut throat injury along with some other injuries and found an iron made bloodstained knife of ১৩"½" তশধ ত লফশনঁথাতফ থনড়ভধন ঢুবন ধনতধ থফধঁ; then in presence of PWs-3 and 4, the local UP member and Chowkider he prepared the seizure list and inquest report and sent the dead body for autopsy and lodged the FIR. He marked the FIR, seizure list as exhibits and the knife as material exhibit.

In his cross-examination he stated that he could know about the occurrence through phone call at 14.00 hours on 10.01.09 and went to the place of occurrence by foot at 14.45 hours; around 30/40 persons including local member were gathered near the place of occurrence and he asked them regarding the occurrence but no one could say anything; GD No.352 dated 10.01.09 is mentioned in the seizure list; one moneybag was recovered and which was belonged to whom is determined on the basis circumstances; he denied the suggestion that he did not visit the place of occurrence or the ejahar or seizure list is prepared on presumption or deposed falsely.

PW-2, Md. Najir Hossain, a seizure list witness stated that the occurrence took place on 10.01.09; he came to know that a dead body was found in a village 3 K.M away from their village and after

going there he found many people and police; police prepared seizure list on which he put his signature which he marked as exhibit. The defence declined to cross-examine him.

PW-3, Md. Iqbal Hossain, the local UP member stated that on phone call from police he went to the place of occurrence at 11.00 hours and saw many people and the dead body lying on the field and put his signature on the seizure list which is marked as exhibit. The defence declined to cross-examination him.

PW-4, Md. Afaz Uddin, local chowkider stated that he came to know about death of a man and on hearing that he went to the place of occurrence and saw the dead body and beside a bloodstained knife; police recovered the dead body and he put his signature on the paper which is marked as exhibit. The defence declined to cross-examine this witness.

PW-5, A.S.I. Md. Mizanur Rahman deposed that he went to Demra thana for emergency duty from Rajarbag and went to the place of occurrence with S.I Abul Kalam and found a cut throat dead body of a young man and Abul Kalam prepared the inquest report. The defence declined to cross-examine him.

PW-6, A.S.I. Md. Jamal Hossain stated that on 10.01.09 he went to the place of occurrence with S.I Abul Kalam and found a cut throat dead body; there were injuries on bally button and rib; a knife was also found. He was not cross-examined by the defence.

PW-7, Md. Mominul Hasan deposed that on 08.03.09 when he was a Magistrate of Dhaka Metropolitan accused Md. Masud was produced before him by the police and he allowed sufficient time to the accused for reflection and when the accused voluntarily wanted to confess, he recorded the statements under section 164 of the Code of Criminal Procedure upon which the accused after hearing put his 5(five) signatures and he also put his 5 (five) signature on it and marked it as exhibit. In his cross-examination he denied the suggestion that he obtained the confession showing fear on the accused or recorded it in presence of the I.O or as per statement of police or names of accused Monir and Babla are mentioned in the confession out of enmity; this witness further stated that he gave 3 hours to the accused for reflection and recorded the statement from 4 to 6 PM; he observed the accused and did not get any complaint of torture; he denied the suggestion that he recorded the confession showing fear or as per suggestion of the I.O or the confession was not voluntary.

PW-8, Faysal Atiq Bin Kader stated that on 29.07.09 when he was a Magistrate of Dhaka Metropolitan accused Al Amin @ Alam was produced before him by the I.O and he allowed sufficient time to the accused for reflection and when the accused voluntarily wanted to confess, he recorded the statements under section 164 of the Code of Criminal Procedure upon which the accused after hearing put

his 2(two) signatures and he also put his 5 (five) signatures on it and marked it as exhibit.

In his cross-examination he stated that the accused was produced at 1.10 PM and gave 3 hours for reflection though it was not written specifically and cannot remember how much time was spent for recording the confession; the accused was on 3 days police remand from where he was produced; he asked the accused whether he was tortured and did not find any mark of injury; the accused was warned that he will not be handed over to police or even he does not want to confess he will not be taken on remand; this witness denied the suggestion that though the accused showed mark of injury but he did not write it or confession was recorded in violation of rules and procedure or recorded the confession in accordance with the suggestion of police though names of accused Monir and Babla were not mentioned.

PW-9, Dr. Md. Maksud deposed that when he was in service at Mitford Hospital in forensic department on 11.01.09 a dead body of a man aged about 25 years was brought before him by constable Samir Kanti and he performed autopsy on the body and found various injuries and opined that cause of death was due to hemorrhage and shock resulting from cut throat injuries which is ante-mortem and homicidal in nature. In cross-examination he stated that he did not mention the time of death; the victim died of hemorrhage and cut throat which he mentioned in the report.

PW-10, Shipon deposed that he went to the place of occurrence after hearing that a dead body was lying and saw a knife and a moneybag beside the dead body; police prepared inquest report and he put his signature on it and marked as exhibit. In cross he stated that police did not read over to him and he did not know what was written in that paper.

PW-11, Jakir Hossain Bhuiyan stated that occurrence took place in 2009 and he went to the place of occurrence after hearing the news and saw a cut throat dead body of a man aged 25/26 years and a knife beside the dead body and he put his signature on the inquest report which is marked as exhibit. In his cross-examination he stated that people from different area went to the place of occurrence and he cannot remember the date; he went there at about 3 PM and signed on blank paper.

Beside these depositions of the prosecution witnesses there are 2 (two) confessional statements made by 2 (two) condemn prisoners Md. Masud and Al Amin @ Alam.

Condemn prisoner Md. Masud in his confession recorded under section 164 of the Code of Criminal Procedure stated that-

“অনুমান দুই মাস আগে বিকাল সাড়ে তিনটার দিকে রবিন আমাকে ফোন দিয়ে বলে ভাইগা তুমি কোথায়। আমি বলি আমি বাসায়। সে আমাকে ঘন্টা খানেক পরে বিপ্লবের সেলুনে যেতে বলে। প্রায় একঘন্টা পর আমি বিপ্লবের সেলুনে যাই। আমি যাওয়ার পর রবিন ফোন দিয়ে জাহাঙ্গীর এবং বাবলাকে সেলুনে নিয়ে আসে। রবিন ঐখানে বলে যে, রানাকে শেষ করে ফেলতে হবে। রবিন

বাবলাকে জিজ্ঞাসা করে যে, রানা কোথায়? রবিন রানাকে ফোন দিয়ে জিজ্ঞাসা করে তুমি কোথায়? রানা বলে যে, সে যাত্রাবাড়ী আসতেছে। ৫/১০ মিনিট সময় লাগবে। রানা বিপ্লবের সেলুনে আসে। রানা আসার পরে রবিন বলে যে, চল সবাই স্টাফ কোয়ার্টার যাই। আমরা স্টাফ কোয়ার্টার নামার পর রবিন আলমকে ফোন দেয়। আলম বলে যে, সে একটি সেলুনে বসে আসে। আমরা সবাই সেলুনে যাই। সেলুন থেকে বের হয়ে আমরা দুটি রিকশাতে স্টাফ কোয়ার্টারের মডেল টাউনে যাই। এখান থেকে হেঁটে রবিনদের গ্রাম শুকনা টেংরায় যাই। এখানে আমরা একটি খোলা মাঠে বসি। রবিন এখানে তার গ্রামের দুটি ছেলেকে ফোন দিয়ে নিয়ে আসে। ঐ ছেলে দুটোর নাম জানিনা। আলম গ্রামের ছেলে দুজনকে পাঁচশ টাকার একটি নোট দেয় এবং একটি এক লিটার আর,সি এবং দুইটি টিপ বিস্কুট আনায়। রবিন তার গ্রামের ছেলে দুজনকে এক পাশে নিয়ে কি জানি কথা বলে, আমরা শুনিনি, আরসি এবং বিস্কুট খাওয়া শেষ হওয়ার পর রবিন হঠাৎ করে রানার পেটে ছুরি দিয়ে ঘাই মেরে বসে। ছুরি রবিনদের গ্রামের ছেলে দুটি নিয়ে আসে। রানা মা-মা করে চিৎকার দিয়ে পরে যায়। তখন অনুমান রাত ৮.০০/৮.৩০ টা হবে। তারপর গ্রামের ঐ দুই ছেলে সহ রবিন, জাহাঙ্গীর, আলম সবাই মিলে রানাকে ঝাপটাইয়া ধরে। আলম রবিনের কাছ থেকে ছুরি নিয়ে গলায় পোচ দেয়। রানাকে প্রথমবার ছুরি মারার সাথে সাথেই আমি আর বাবলা দুরে সবে গিয়েছিলাম। রানার কাছে একটি মোবাইল ছিল। আলম এই মোবাইলটি নিয়ে নেয়। আলম মোবাইল নেবার পর জাহাঙ্গীর মোবাইলটি তাকে দিতে বলে। তখন আলম বলে যে, মোবাইলটি তার বস মনির ভাইকে দিতে হবে। মনির ভাই এর কথা মতই আলম রানাকে মারার জন্য রবিনকে বলে। রানার লাশ ফেলে দিয়ে সবাই মডেল টাউনে চলে আসি। মডেল টাউনে যাওয়ার পর আলম, মনিরকে ফোন দিয়ে বলে যে, কাজ হয়ে গেছে। তারপর স্টাফ কোয়ার্টার এসে আলম একটি সি,এন,জি দিয়ে চলে যায় এবং আমরা একটি লেগুনা করে যাত্রাবাড়ী চলে আসি। পরদিন আমি, রবিন এবং জাহাঙ্গীর যশোর চলে যাই। যশোর যাওয়ার দুদিন পর সবাই বাড়ী চলে আসি। তারপর রবিনের সাথে বা অন্য কারও সাথে আমার আর দেখা হয়নি। রবিনের সাথে পরে যোগাযোগ না করলে রবিন আমাকে আমার বোনের মোবাইলের মাধ্যমে হুমকি দেয়। বলে যে, আমাকেও মেরে ফেলবে। এই আমার জবানবন্দী।”

Condemn prisoner Al Amin @ Alam in his confession recorded under section 164 of the Code of Criminal Procedure stated that-

“আমি মুনিরের কর্মচারী ছিলাম। যাত্রাবাড়ীতে মুনিরের জেনারেটরের ব্যবসা ছিল। রানা মুনিরের সহযোগী ছিল বাজারের চাঁদার টাকা মুনিরের পক্ষে রানা তুলত। মুনির কিছু দিন জেলে ছিল। তখন রানা টাকা তুলেছিল। মুনির জেল হতে বের হবার পর রানা তাকে ভাগের টাকা দেয় নাই। সে জন্য মুনির রানার উপর রাগান্বিত ছিল। একদিন মুনির আমাকে, রবিন, জাহাঙ্গীর, মাসুদ ও বাবলাকে ডেকে বলে যে, রানা বেশী বাড়াবাড়ি করলে ওকে শেষ করে দিতে হবে। অতপর ০৮.০১.০৯ খ্রি. সন্ধ্যায় যাত্রাবাড়ীর বিপ্লবের সেলুনের ওখানে আমরা এই কয়জন ছিলাম। সেখানে মুনির, রবিন, জাহাঙ্গীর, মাসুদ, বাবলা মিলে রানাকে মারার পরিকল্পনা করে। আমি তাদের কথা শুনি। অতপর ০৯.০১.০৯ খ্রি. রবিন সন্ধ্যা ৭.০০ ঘটিকার দিকে আমাকে ফোন করে ডেমরা স্টাফ কোয়ার্টারে আসে। সেখানে রবিনের সঙ্গে জাহাঙ্গীর, মাসুদ, রানা, বাবলা ছিল। তারপর রবিন বলে চল আমার দেশের বাড়ী শুকনা টেংরা যাই। অতপর আমরা সবাই মিলে সেখানে যাই। সেখানে রবিন ফোন করলে তার গ্রামের দুইজন ছেলে আসে। রবিন আমার নিকট হতে ৫০০/- টাকা নিয়ে তাদের দিলে তারা R.C Cola এবং ২ প্যাকেট বিস্কিট নিয়ে আসে। অতপর আমরা সবাই মিলে সেগুলো খাই। খাওয়া শেষে আমরা দাড়াই। তখন রবিন বলে যে কাজ শুরু করি এবার। জাহাঙ্গীর বলে যে, কি কাজ শুরু করবি। তখন রবিন বলে চুপ কোন কথা নয়। একথা বলেই রবিন রানার পেটে ছোরা ঢুকায় দেয়। তখন রানা মাগো চিৎকার করে পড়ে যায়। রবিনের গ্রামের বাড়ীর ঐ দুইটা ছেলে বাবলা, মাসুম মিলে রানার হাত-পা ধরে জাহাঙ্গীর গলায় পৌঁচ দেয়। জাহাঙ্গীরের পর মাসুম ও রানার গলায় পৌঁচ দেয়। তখন রবিন আমাকে বলে দৌড় দিলে তোকে শেষ করে দেবো। আমরা চলে আসি তারপর। রানার মোবাইল রবিন আমাকে দিয়ে বলে মুনিরকে দিয়ে দিবি। পরদিন আমি মুনিরকে মোবাইলটা দিয়ে আসি। রানা ওখানেই মারা যায়।”

These are the evidences so far produced by the prosecution. It appears that the informant S.I Md. Abul Kalam, who has been examined as PW-1 was also the Investigating Officer (I.O) but was not examined

as the I.O in this case. It further appears from the order sheet dated 04.07.2017 that the trial Court directed the Police to produce the following witnesses namely (1) Md. Abul Kalam, investigating officer; (2) Md. Habibur Rahman Habib, charge sheeted witness No.9 (3) Syed Anowar Hossain Polash, charge sheeted witness No.10; (4) Rubina Begum, charge sheeted witness No.11 and (5) Md. Akkas Ali, charge sheeted witness No.12 but the Police did not produce those witnesses before the Court.

It also appears from case record that the prosecution alleged that the convicted accused before participating in the killing of the deceased Rana, met inside a Saloon of one Biplob Shil. The Police at first arrested him as an accused but was not sent up in the charge sheet for trial who could be a vital witness of this case. Similarly, one Mizanur Rahman was arrested from whom the alleged mobile phone of deceased Rana was recovered who allegedly got it from accused Monir and this Mizanur Rahman was at first arrested as a suspected accused but was not sent up in the charge sheet for trial. These two persons namely Biplob Shil and Mizanur Rahman are vital witnesses of this case who could have been summoned by the trial court under section 540 of the Code of Criminal Procedure (Cr.P.C) to be examined as witnesses. Section 540 of Cr.P.C reads as under:

*540. Any Court may, at any stage of any inquiry, trial or other*

*proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.*

After going through the records it appears to us that the police did not take proper steps to produce witnesses who are very vital and essential witnesses. Beside that the trial court should have asked the police to produce Biplob Shil and Mizanur Rahman who are also vital witnesses and essential to the just decision of this case by using his discretionary power under section 540 of the Cr.P.C. The trial court has concluded the trial with incomplete evidence and convicted all 6 (six) accused persons and sentenced them as stated at the very outset. The conviction cannot be sustained on such incomplete evidence and the trial court should have taken sincere endeavour to ask the higher authority of the police to produce the witnesses in the failure of the local police to produce the witnesses as asked by the court.

In such facts and circumstances what should this Court do as an appellate Court? Since the trial court awarded death sentence, it has referred the

instant case to the High Court Division as per provision of section 374 of the Code of Criminal Procedure and without the confirmation by the High Court Division the death sentence cannot be executed. After receiving the proceedings under section 374 of the Code of Criminal Procedure the High Court Division may take recourse as provided under section 375 of the Code, which provides as under:

*375.(1) If when such proceedings, are submitted the High Court Division thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.*

*(2) Unless the High Court Division otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.*

*(3) When the inquiry and the evidence (if any) are not made and taken by the High Court Division, the result of such inquiry and the evidence shall be certified to such Court.*

If the High Court Division thinks that it does not need to direct further inquiry to be made or

additional evidence to be taken then it will proceed as per section 376 of the Code of Criminal Procedure which provides as under:

*376. In any case submitted under section 374, the High Court Division-*

*(a) may confirm the sentence, or pass any other sentence warranted by law, or*

*(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or*

*(c) may acquit the accused person:*

*Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.*

So, from reading of the above provision of law it is clear that when such proceedings, are submitted under section 374 of the Cr.P.C if the High Court Division thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Sessions as per section 375(1) of Cr.P.C. In the present case, we think that the additional evidence is essential directly

connected to the guilt or innocence of the convicted persons.

We are aware that the prosecution should not be given a chance to fill up its lacuna by bringing new evidence which it did not or could not produce in the first trial. But there is no question that the appellate Court has undoubted right to direct a retrial where there has not been a trial in accordance with law. The prime task of the Court is to do justice in accordance with law. There should be a balance in exercise of judicial discretion. Our this view got support from our apex Court in the case of Asiman Begum Vs. State reported in 51 DLR (AD) 18 wherein the Appellate Division observed:

“... there is no there is no question that the Court has undoubted right to direct a retrial where there has not been a trial in accordance with law. A balance has, however, to be struck and that is, what is called the exercise of judicial discretion in the facts and circumstances of a particular case. A judge's mind always swings— To be or not to be.”

We have given our anxious thought in facts and circumstances of the case as mentioned above and our considered view is that ends of justice will be met if this case is sent on remand for re-trial not to fulfill the lacuna of the prosecution but for proper trial after taking additional evidence with a view to do justice to all.

In the result, the Death Reference is rejected and the Criminal Appeal Nos. 14487 of 2017, 14492 of 2017, 4034 of 2023 and 9799 of 2023 are allowed along with Jail Appeal Nos. 217 of 2018, 306 of 2019 and 75 of 2023. The case be send to the trial court on remand for re-trial to take additional evidence by examining the 6(six) witnesses as mentioned above, if they are available and the trial court is directed to conclude the trial within shortest possible time, preferably within 6 (six) months from receipt of this judgment. The police including the Commissioner, Dhaka Metropolitan police (DMP) must take sincere endeavor to produce the witnesses as would be summoned/asked by the trial Court on dates fixed.

It appears from record that convict-appellants Monir Hossain and Babla are on bail granted by this Court; both of them are directed to surrender before the trial court within 2 (two) weeks from receipt of this judgment failing which the trial court will take steps to secure their arrest and trial court is at liberty to deal with their bail matter, if any, in accordance with law. The other accused namely Md. Masud, Al Amin @ Alam, Shafiqul Islam @ Robin will remain in custody till conclusion of the trial. Trial court as well as the police is directed to take step to secure arrest of fugitive accused Md. Jahangir Hossain. The jail authority is directed to shift the condemned prisoners from the condemn cell

to the normal cell in accordance with law until the judgment passed by the trial court after retrial.

Send down the lower court's record along with a copy of this judgment. A copy of this judgment and order be served upon the Commissioner, Dhaka Metropolitan Police (DMP) and Jailor, Central Jail, Dhaka for necessary action.

**Ashish Ranjan Das, J:**

I agree.

Ziaul Karim  
Bench Officer