

20 SCOB [2025] AD**APPELLATE DIVISION****Present:****Mr. Justice Syed Refaat Ahmed, Chief Justice****Mr. Justice Md. Ashfaul Islam****Mr. Justice Syed Md. Ziaul Karim****Mr. Justice Md. Rezaul Haque****Mr. Justice S.M. Emdadul Hoque****CRIMINAL APPEAL NO.61 OF 2017.**

(arising out of Criminal Petition for leave to Appeal No. 546 of 2016)

(From the judgment and order dated 17.09.2015 passed by the Division Bench of the High Court Division in Criminal Appeal No. 7435 of 2010).

Md. Humayun Kabir.**.....Convict-Appellant.****-Versus-****The State****..... Respondent.**

For the Appellant	:	Mr. Ruhul Quddus, Senior Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Respondent	:	Mr. Aneek-R. Hoque, Additional Attorney General with Mr. Zahirul Islam Sumon, Deputy Attorney General instructed by Ms. Shirin Afroz, Advocate-on-Record.
Date of Hearing	:	27-08-2024 & 28-08-2024
Date of Judgment	:	30-10-2024

Editors' Note:

The appellant herein was convicted under section 302 of the Penal Code and was sentenced to death by the trial court. The specific allegation against him was from his gunshot the deceased was severely injured and died afterwards. The deceased narrated the occurrence to some witnesses while he was being taken to the Hospital.

Later, a Division Bench of the High Court Division after hearing rejected the death reference and commuted the death sentence to imprisonment for life against which the appellant filed appeal before this Division which was dismissed by this judgment.

Key Words:

Section 302 of the Penal Code, Commutation of sentence, Hearsay evidence, Interested and partisan witnesses, Dying declaration, Circumstantial evidence

Sentencing Discretion under Section 302 of the Penal Code: Judicial Principles and Considerations:

With regard to the sentence imposed upon the appellant, we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice Administration Method or Rule to

exercise such discretion. In sentencing process, two important factors come out which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that justice has been done and court responded to the society's cry for justice. Under section 302 of the Penal Code, though discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal justice. ... (Para 74)

JUDGMENT

Syed Md. Ziaul Karim, J:

1. By this Criminal Appeal the convict-appellant has challenged the legality and propriety of the judgment and order of conviction and sentence dated 17.09.2015 passed by the Division Bench of the High Court Division in Criminal Appeal No.7435 of 2010 (heard along with Death Reference No. 66 of 2010 and Jail Appeal No.369 of 2010) rejecting the death reference and partly allowing both the appeals by commuting the sentence of death to one imprisonment for life and also to pay fine of Tk.20,000/- in default, to suffer rigorous imprisonment for 2 (two) years. By the same judgment other 2(two) co-accused were acquitted by the learned Judge of the trial Court.

2. The prosecution case as projected in the First Information Report (briefly as FIR) and unfurled at the trial are that on 06.03.2009 approximately at 11.00 p.m. Md. Asaduzzaman Sonju who was the Security Operator in Civil Aviation Department was sitting with his 3 (three) other friends namely, Md. Humayun Kabir, Md. Zulhas Mia and Md. Fazlu Mia in front of his father's (the informant) shop at Kaola Civil Aviation Welfare Market. At one stage of their altercation the appellant Humayun Kabir fired at him from his pistol. Thereafter, the appellant along with the other accused departed from the scene. The incident was informed by Nilufar Azad (P.W-17) to her father Mohammad Ali (the informant and P.W-1) at 11.15 p.m. The informant was the Security Supervisor in Civil Aviation Department and he was on duty. Upon being so informed of the incident he along with his two colleagues namely, Md. Sowkat Ali (P.W-14) and Md. Shariful Islam (P.W-13) rushed to the spot and found his son Md. Asaduzzaman Sonju in critical condition. They took him to Crescent Hospital, Uttara at 12.15 p.m. and on the way to the hospital the victim told them what had happened to him. As the physical condition of the victim became more critical he was shifted to Dhaka Medical College Hospital wherein on 07.03.2009 at 4.40 a.m. he succumbed to the injuries. The deceased had sustained multiple injuries.

3. The prosecution case was launched by lodging an F.I.R by Mohammad Ali (P.W-1), father of the deceased and the same was recorded as Zia International Airport Police Station Case No. 31 dated 07.03.2009 corresponding to G.R. No.227 of 2009.

4. After investigation police submitted charge sheet under sections 302, 34 of the Penal Code alleging F.I.R. named 3 (three) accused including the appellant.

5. The case was transferred to Druta Bichar Tribunal No. 4, Dhaka for trial. Thereafter, the accused were called upon to answer the charge under sections 302, 34 of the Penal Code, to which they pleaded not guilty and claimed to be tried.

6. In course of trial the prosecution examined 22 witnesses out of 30 charge sheeted witnesses and the defence examined none.

7. The defence (appellant herein) case as it appears from the trend of cross-examination of the prosecution witnesses are that of innocence and false implication. It was divulged in defence that due to conflict between them over the local enmity they were falsely implicated out of vengeance.

8. After closure of the prosecution case the accused present on dock were examined under section 342 of the Code of Criminal Procedure and again they repeated their innocence but led no evidence in defence.

9. After trial learned Judge of the trial Court by the judgment and order of conviction and sentence dated 19.10.2010 convicted the appellant under section 302 of the Penal Code, and sentenced him to death by hanging. However, the learned Judge acquitted the other two co-accused namely, Md. Julhas Mia and Md. fazlu Mia holding:

- (a) *The prosecution successfully proved the charge of murder against the appellant beyond all reasonable doubt;*
- (b) *The evidence regarding murder of the deceased Md. Asaduzzaman Sonjuare consistent, uniform and corroborative with each other with all material particulars. Therefore, the plea taken in defence recoils against him.*

10. The matter was referred to the High Court Division for confirmation of death sentence which was recorded as Death Reference No.66 of 2010, meanwhile the appellant preferred Criminal Appeal No.7435 of 2010 and Jail Appeal No.369 of 2010 before the High Court Division. Afterwards, Criminal Appeal No.7435 of 2010 was heard alongwith Death Reference No.66 of 2010 and Jail Appeal No.369 of 2010. After hearing a Division Bench of the High Court Division by the judgment and order of conviction and sentence dated 17.09.2015 rejected the Death Reference No.66 of 2010 and altered the sentence of death to one of imprisonment for life and also to pay fine of Tk.20,000/-, in default, to suffer rigorous imprisonment for two years more.

11. Feeling aggrieved the appellant preferred the instant Criminal Appeal No. 61 of 2017 before this Court.

12. The learned Senior Advocate appearing for the appellant seeks to impeach the impugned judgment and order of conviction and sentence on three fold arguments:

Firstly: The High Court Division erred in law and in fact in its consideration of hearsay evidence, by failing to direct itself as to the inherent problems with hearsay evidence, the implications of the Evidence Act, and the test for reliability and probative value to weigh hearsay evidence.

Secondly: The High Court Division erred in law and in fact by failing to direct itself on the proper application for the assessment of identification of evidence, and in failing to consider and apply the relevant approach to assess the identification of evidence of prosecution witnesses.

Thirdly: The prosecution failed to produce even a single disinterested witness in this case and the witnesses produced in this case are all partisan and they cannot be believed without any suspicion and as such the conviction and sentence are liable to be set aside.

13. The learned counsel lastly submits that the judgment, and order, of conviction and sentence of the Courts below are based on misreading and non-consideration of the evidence on record and, therefore, the same cannot be sustained in the eye of law.

14. The learned Additional Attorney-General appearing on behalf of the State-respondent opposes the appeal and submits that the occurrence took place on 06.03.2009 at 11.00 p.m. and at the very earliest point of time, the deceased disclosed the name of the assailant Humayun Kabir. He adds that the charge was proved by consistent and corroborative evidence. He next submits that the appellant fired gunshot from his pistol against the deceased with the clear intention for causing death which is culpable homicide amounting to murder and the same will come within the ambit of section 300 of the Penal Code.

15. In support of his contention he refers the case of Abdul Quddus vs. The State 43 DLR (AD) 234 wherein it was held:

“The testimony of the solitary eye witness could not be shaken in any manner by the defence in cross-examination for which it is difficult to disbelieve her testimony as she narrated the prosecution case in details. Even a child witness can be relied if he/she is capable of understanding and replying the question intelligently.”

16. In the case of Yogeshwar Gope vs. The State BCR 2006-267 it was held:

“(a) PWs 1-4 being father, mother and sisters of the deceased deposed before the Court and in cross-examination put to them their evidence remained unshaken and unblemish. From the evidence of aforesaid witnesses it is also proved that they established their claim of lighting kupa light and there is nothing to disbelieve them. The occurrence taking place in the house of PW.1 at about 3:00 a.m. it is not unlikely that the inmates of the house would become the natural witnesses. Only because of their relationship their evidence cannot be thrown away unless the evidence is found to be untrue or tainted with motive.”

17. The learned Counsel submits that all the prosecution witnesses deposed in a very consistent manner, there were no discrepancies or contradictions in their evidence.

18. In support of his contentions he refers the case of State vs. Sree Ranjit Kumar Pramanik 45 DLR 660 held:

“When discrepancies in testimony were mere discrepancies, and not contradictions, they did not affect the truth of what was stated in Court.”

He adds that in a case like this motive is immaterial.

19. In support of his contentions he refers the case of The State vs. Giasuddin and others 18 BLD-254 wherein it was held:

“When there is sufficient direct essence to prove an offence, motive is immaterial and has no vital importance. While trying a case under section 302 of the Penal Code or hearing an appeal involving Section 302, the Court must not consider first the motive of the murder, because motive is a matter of speculation, and it rests upon the mind and special knowledge of the accused persons. Motive is not a necessary ingredient of an offence under section 302 of the Penal Code. The Court will see if sufficient direct evidence is there or not. If not, motive may be a matter for consideration specially when the case is based on circumstantial evidence.”

20. The learned Additional Attorney-General lastly submits that the learned Judge of the Court below after considering the evidence on record rightly convicted the accused which calls for no interference by this Court.

21. In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions.

22. Let us now weigh and sift the evidence on record as adduced by the prosecution to prove the charge.

23. P.W-1 Mohammad Ali is the informant and father of the deceased Asaduzzaman @ Sonju. He is not an eye witness of the occurrence. He deposed that at the relevant time of occurrence he was on duty as Supervisor under Civil Aviation Department. During the night following 06.03.2009 from 8.00 p.m. to 7.00 a.m. he was on duty. At 11.15 p.m. on that night his daughter Nilufar Azad informed him over mobile phone that her brother Sonju was lying in front of Nilu Enterprise of Civil Aviation Market. He along with his colleagues Khandaker Sowkat Ali and Md. Shariful Islam rushed to the spot and found his son Sonju lying there in critical condition, wherein he also found other staffs namely, Khabirul Alam, Driver Iqbal, Night Guard Abdul Hamid and Abdul Wadud Khan. Then they carried the victim to the Crescent Hospital, Uttara. On the way his son Sonju disclosed that accused Kabir shot him and co-accused Julhas and Fazlu caught hold of him. Their conversation was recorded in a cassette recorder and he gave it to the police who seized it. As Sonju's condition was very critical he was shifted to the Dhaka Medical College Hospital wherein at 4.30 a.m. he succumbed to the injuries. On the following day on 07.03.2009 the informant lodged the F.I.R which he proved as Exbt-1 with his signature appended on it exhibited as Exbt-1/1.

24. In cross-examination he stated that among so many shops on the Airport Road the occurrence took place in front of Patowary General Stores. He asserted that accused Humayun Kabir cultivates fish in water bodies taken on lease. He contended further that there was a dispute between his son and accused Humayun Kabir and that his son was also involved in many business in the airport area. He denied the suggestion that deceased Sonju was never in a position to disclose the name of the accused.

25. P.W-2 Md. Akter Hossain was a resident of the place of occurrence though not an eye witness of the occurrence. He deposed that on the night following 06.03.2009 at 12.00 p.m. he heard from the informant (Mohammad Ali) that his son was shot. Then, they went to the spot wherein at 1.00/1.30 p.m. they took the victim to the Crescent Hospital, Uttara. As his condition was critical the victim was sent to the Dhaka Medical College Hospital wherein at 4.30 a.m. he succumbed to the injuries.

26. In cross-examination he denied the suggestion that the deceased was involved in car and dish business with the informant.

27. P.W-3 Syed Sajjad Hossain, P.W-4 Md. Mozibur Rahman, P.W-5 Sonjoy Ghosh are local seizure list witnesses but they did not see the occurrence. P.W-6 Md. Abdul Hannan and P.W-7 Md. Abdul Mannan carried the dead body to the morgue.

28. P.W-8 Dr. A.K.M Shafiuzzaman held post mortem examination upon the dead body of deceased Sonju and found the following injuries:

"a) Bullet wound:-Entry one entry bullet injury measuring $\frac{1}{3}$ " \times $\frac{1}{3}$ " with the presence of burning, singing, blacking found in the left side of cheek which lies $\frac{1}{2}$ " above from the left angle of the mouth.

b) Exit-Exit wound found right side of the upper neck size $\frac{1}{3}$ " \times $\frac{1}{2}$ " which lies 2" right from back of the middle of the neck and $3\frac{1}{2}$ " below the right mastoid process.

c) Direction-directed obliquely forwards upwards and laterally to the right. During its course, it has skin, soft tissues, muscles, left eye-gonitic, left maziya, great vessels of the left side of the neck.

2.a) Entry one entry bullet wound size $\frac{1}{3}$ " \times $\frac{1}{3}$ " with the presence of burning, singing, blacking found in the left side of the lower abdomen which $2\frac{1}{2}$ " left from midline and $1\frac{1}{2}$ " above from left clearal chest.

b. Exit-One exit wound found in the middle of right genital region in the presence of burning, singing, blacking size $\frac{1}{2}$ " \times $\frac{1}{3}$ " which lies 4" right from mid furrow.

c) Direction obliquely down-wards forward and to the right. During its course it has perforated skin, soft tissue, muscle meatery attached to the coils of large intestine, injury to the right hipbone. Liquid and clotted blood found in the pelvic cavity. Mention injuries are ante mortem.

Opinion:- In my opinion the cause of death was due to hemorrhage followed by shock as a result of above mentioned bullet injuries which are ante mortem and homicidal in nature."

29. P.W-9 Md. Joynal Abedin and P.W-12 Md. Feroz Miah, member of the Ansar Battalion, deposed that at the time of their duty they found that the victim was sitting with 4/5 people in front of the tea stall. P.W-10 S.I Md. Abu Mia was the seizure list witness. P.W-11 Md. Sabdar Ali was the ballistic expert. He submitted a ballistic report and supported the prosecution case. P.W-13 Md. Shariful Islam and P.W-14 Md. Sawkot Ali were the official colleagues of the informant. They went to the Hospital with the informant and heard about the occurrence from the deceased.

30. P.W-15 Ferdous Ara (Magistrate, First Class) recorded statement of witness Md. Shariful Islam under Section 164 of the Code of Criminal Procedure.

31. P.W-16 Constable Md. Amanullah was the seizure list witness. In his presence the Audio record was seized.

32. P.W-17 Nilufar Azad, daughter of the informant who first reported the incident to her father over mobile phone.

33. P.W-18 Md. Abdul Wadud Khan, the night guard who deposed that on the date of occurrence on 06.03.2009 he found that Sonju, Kabir, Julhas and Fazlu were gossiping in

front of the tea stall.

34. P.W-19 FaysalAtik Bin Kader, Magistrate, First Class, recorded statement under Section 164 of the Code of Criminal Procedure of witness Md. Abdul Wadud Khan and Md. Abdul Hamid.

35. P.W-20 S.I Md. Bazlur Rahman deposed that he heard that Kabir shot the victim Sonju.

36. P.W-21 S.I Murshed Zaman was an investigating officer of the case and he partly investigated the case.

37. P.W-22 Md. Shamsuddin Saleh also investigated the case and submitted charge sheet under Sections 302/34 of the Penal Code against 3 (three) accused including the appellant.

38. These are all of the evidence on record adduced by the prosecution to prove the charge.

39. Now the question calls for consideration how far the prosecution has proved the charge under Section 302 of the Penal Code against the appellant. Such question along with the submissions in favour of the appellant should be answered in the following manner:

40. In approaching and answering to the points drawn up, the cardinal principles of criminal jurisprudence in awarding conviction followed by sentence upon an indicted person demands meditation. A legal survey of law, appraisal of evidence browsing eye on materials brought on record, analysis of facts and circumstances of the case, inherent infirmities disturbing and striking facts of prosecution are also required to be taken into consideration. Rival contentions surged forward from both sides shall be also addressed and considered by us.

41. One of the fundamental principles of criminal jurisprudence and justice delivery system is that the accused should be presumed to be innocent until the charges are proved against him beyond reasonable doubt on the basis of clear, cogent and credible evidence and the onus of proving everything essential to the establishment of charge against the accused lies upon the prosecution which must prove charge substantially as laid to hilt and beyond all reasonable doubt on the strength of clear, cogent credible and unimpeachable evidence. In a criminal trial, the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and on its failure; it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon. Proof of charge must depend upon judicial evaluation of totality of evidence, oral and circumstantial, and not by an isolated scrutiny. Prosecution version is also required to be judged taking into account the overall circumstances of the case with a practical, pragmatic and reasonable approach in appreciation of evidence.

42. It is always to be remembered that justice delivery system cannot be carried away by heinous nature of crime or by gruesome manner in which it was found to have been committed and graver the charge is greater is the standard of proof required. It should also bear in mind that if the accused can create any doubt by adducing evidence or cross-examining the PWs in the prosecution case, the accused is entitled to get benefit of doubt. It is conveniently observed that though sad, yet is a fact that in our country there is a tendency on the part of the people to rope in as many people as possible for facing trial in respect of

any criminal case: It has been even found that innocent person, including aged, infirm and rivals, are booked for standing on dock. Some are acquitted by the Court of first instance and some by appellate Court, but only having been in incarceration for years. Such efforts on the part of relatives of victim and other interested persons invariably is done and thus it becomes difficult on the part of a Court to find out the real culprit. Under such circumstances and in view of the prevalent criminal jurisprudential system, a judge is to find out the truth from a bundle of lies and to shift the grain out of chaff. A Judge does not preside over a criminal trial merely to see that no innocent person is punished. A Judge, also presides to see that guilty man does not escape. Both are public duties. Law therefore, cannot afford any favour other than truth and only truth.

43. *We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged with crime, the following principles should be taken into consideration.*

- a) *The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.*
- b) *The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.*
- c) *In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffers.*
- d) *There must be clear and unequivocal proof of the corpus delict.*
- e) *The hypothesis of delinquency should be consistent with all the facts proved.*

44. *In spite of the presumption of truth attached to oral evidence under oath if the Court is not satisfied, the evidence in spite of oath is of no avail.*

45. On going through the materials on record it transpires that the prosecution examined 22 witnesses out of 30 charge sheeted witnesses. Among them P.W.1 is the informant and father of the deceased Asaduzzaman Sonju, P.W.2, P.W-3, P.W-4, P.W-5 are local seizure list witnesses and also not eye witnesses of the occurrence. P.W-6 is the Constable who carried the dead body to the morgue. P.W-7, P.W-9 are the Constables and seizure list witnesses but not eye witnesses. P.W-8 Dr. A.K.M Shafiuzzaman, P.W-10 S.I Md. Abu Miaare the seizure list witnesses, P.W-11 Md. Sabdar Ali is a ballistic expert, P.W-12 Md. Feroz Mia his a member of Ansar Battalion, P.W-15 Ferdous Ara is a Magistrate, P.W-16 Constable Md. Amanullah, P.W-19 FaysalAtik Bin Kader, Magistrate, First Class, P.W-20 S.I BazlurRahman, P.W-21 S.I Murshed Zaman and P.W-22 S.I Md. Shamsuddin Saleh Ahmed Chowdhury all are official witnesses; of them P.W-8 held autopsy upon the cadaver of the deceased and P.W-22 submitted charge sheet against the 3(three) accused including the appellant.

46. On critical analysis of the above witnesses, we find that the prosecution case absolutely rests upon the evidence of P.W-1 Mohammad Ali who is the father of the deceased and informant of this case who heard about the occurrence from her daughter Nilufar Azad (P.W-17) and rushed to the scene with P.W-13 Md. Shariful Islam and P.W-14 Md. Sowkat Ali. The deceased also disclosed about the occurrence and firing by Humayun Kabir. The other witnesses were examined to corroborate the evidence of P.W-1, P.W-13, P.W-14 and P.W-17. We also find that P.W-9 Constable Md. Joynal Abedin, P.W-12 Md. Feroz Miah member of the Ansar, P.W-18 Md. Abdul Wadud Khan, night guard; they categorically stated

that they found 4 (four) persons including the appellant were gossiping in front of the tea stall. Their such assertion was also made by the deceased to the P.W-1 and other witnesses. Therefore, we find that presence of the appellant at the scene of occurrence were well corroborated by the evidence on record.

47. Therefore, we find that the evidence against the appellants are also consistent, uniform and corroborative with each other. So, the same are also invulnerable to the credibility. The appellant unsuccessfully attempted to set a different case of enmity, but in support of which led no evidence in defence. So, the plea raised by the appellant has no leg to stand and as such on his behalf having not deliberately led any evidence in support of his pseudo plea, so it recoils against him.

48. On critical analysis of the above witnesses, we find that all the witnesses categorically narrated the manner of occurrence by which the appellant committed murder. Informant, P.W-1 Mohammad Ali is not an eye-witness. Other witnesses namely P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6 categorically corroborated the evidence of P.W. 1. Therefore, we find that the evidence against the appellants are consistent, uniform and corroborated with each other. So, the same are invulnerable to the credibility.

49. In this particular case we find that the prosecution tried to prove its case by producing 22 witnesses. They are all competent and their evidence are also self-contained. The appellant did not led any evidence although he had an explanation to the effect that there was an internal feud between them. In such situation the plea raised by the appellant has no leg to stand and as such on his behalf having not deliberately led any evidence in respect of his false/pseudo plea. So it recoils against him. It is significant to point out that there are consistent, uniform evidence against the convict-appellant by which the deceased succumbed to the injuries. So, in our view in the absence of any other reasonable explanation asto the safe departure of such facts, no conclusion other than the guilt of the appellant can be drawn.

50. It is true that P.W.1 is the informant and father of the deceased who did not expressly mentioned some facts from the ejahar but in his evidence he categorically stated all the facts which he witnessed and heard.

51. In our view such omission does not materially affect the prosecution case having regard to other evidence on that point.

52. In the case of State vs. Abdus Sattar and others 43 DLR (AD) 44 it was held:

"FIR can be used only to corroborate or contradict the maker thereof- There is neither any law nor any principle on the basis of which the testimony of another witness can be ignored or rejected because the informant had made an omission to mention about the fact which the witness stated in his deposition."

53. In the said case at paragraph 18 it was observed that:

"The first objection which is taken against the impugned judgment is that the learned Judges of the High Court Division have put forward such a ground for disbelieving PWs.4 and 5 (eye- witnesses), and this was the only ground, which was plainly in disregard of the accepted principles regarding the appreciation of the evidence. Both these witnesses claimed that they had been the respondents dragging away the deceased Abdul Hakim towards the house of respondent Nurul Haque by putting a gamcha on his neck. P.W-4 Arab Ali who was inside his house at that time was

actually called out by P.W-5, Arshed Ali who first saw the dragging of the deceased. P.W-4 came out of his house and obstructed the respondents but he was driven away by some of the companions of the respondents. P.W-1, Abdur Rab, the informant, stated in his evidence that after the recovery of the dead-body of Abdul Hakim from the ditch, P.Ws.-4 and 5 informed him and others that they had seen the dragging of Abdul Hakim by the respondents. It has been noticed that P.Ws- 4 and 5 along with others accompanied P.W-1 to the house of Nurul Haque and the recovery of the dead body was made in their presence. P.W-1, however, did not mention the FIR that P.Ws-4 and 5 had informed them that they had seen the dragging away of Abdul Hakim by the respondents. The learned Judges observed that there was no reason to omit this part of the story from the first information report and "accordingly we cannot place any reliance on the statement of P.Ws-4 and 5". It well-established that the FIR can be used only to corroborate or contradict the maker thereof, there is neither any law nor any principle on the basis of which the testimony of another witness can be ignored or rejected because the informant had made an omission to mention about the fact which the witness stated in his deposition. To reject the evidence of a witness only on such ground is against the accepted norms of the administration of criminal justice."

54. In the case of Dipok Kumar Sarkar vs. The State 8 BLD (AD) 109 it was held:

"First information Report-Its value in case of apparent omission of fact-FIR is not a piece of substantive evidence but may be used for corroborating or contradicting the maker only- The attention of the P.W having not been drawn to his omission in cross-examination, the defence could not take advantage of the contradiction (be omission)- Even otherwise this omission does not materially affect the prosecution case having regard to other evidence on the point-Evidence Act (1 of 1985) s. 145."

55. In the said case at it was observed at paragraph 12 that:

"As to the first ground it is seen that P.W-10 C. Bagharpara P. S. stated in his evidence that on reaching the P.O. he arrested the appellant and on his admission the dead-body of his wife was recovered from the latrine well of Pulin Sarkar and the appellant himself was engaged in bringing out and washing the dead-body. This statement, however, is not therein the F.I.R. made by him. There he stated that he received source information that the appellant had killed his wife and her dead-body had been concealed in the latrine well of Pulin Sarkar of the same village at a distance of about 200 yards. He lifted the dead-body from the well and go it washed in presence of witnesses and took the appellant into custody. Thus, there is apparently an omission in the FIR as to the recovery of the dead-body by the appellant himself following his admission. FIR is not a piece of substantive evidence out may be sued for corroborating or contradicting the maker only. Admittedly the attention of P.W-1 was not drawn to his omission in cross-examination. The defence could not take advantage of the contradiction (by omission) without drawing the attention of P.W-1 under Section 145 of the Evidence Act. Even otherwise we think this omission in the F.I.R. does not materially affect the prosecution case having regard to the other evidence in the point. P.W.B Jagadish Chandra Biswas, Dafadar, stated in his evidence that Dipak (appellant) pointed out the dead-body and himself brought it out from the latrine well. P.W-11 Md. Golam Mostafa, Commissioner, Narail Pourashava, (witness named in the FIR) also stated that Dipak admitted in his presence that he had concealed the dead-body of his wife in the Latrine well of Pulin and he himself brought it out therefrom. These two witnesses are disinterested

persons, they have no enimus against the appellant or his family and as such there is no reason to disbelieve their testimony as to the recovery of the dead-body by the appellant himself following his admission. It will be seen that the appellant himself admitted in his confession (which we shall presently consider) that on his admission police took him to the house of Pulin and caused him to bring out the dead-body of his Wife. Thus we are of the opinion that the aforesaid omission in the FIR could not be a reason for discarding the evidence of the witnesses on the point nor the same made the prosecution case doubtful in any manner."

56. It is true that amongst the witnesses P.Ws-1 and 17 are the close relations of the deceased; they were vital witnesses. The defence extensively cross-examined them but nothing could be elicited to shake their credibility in any manner whatsoever, so only for such cause their evidence should not be discarded.

57. The credit to be given to the statement of a witness is a matter not regulated by rule of procedure, but depends upon his knowledge of fact to which he testifies his disinterestedness, his integrity and his veracity. Apportion of oral evidence depends on such variable in consistence which as a human nature cannot be reduced as a set formula (40 DLR 58).

58. The weight to be attached to the testimony of witness depends in a large measure upon various consideration some of which are in the face of it his evidence should be in consonance with probabilities and consistent with other evidence and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility, it is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because of some suggestion regarding relationship against truthfulness of the witness.

59. Evidence of close persons of the victim cannot be discarded more particularly when close persons does not impair the same. Straightforward evidence given by witness who is closed to deceased cannot be rejected on sole ground that they are interested in prosecution. Ordinarily close person will be last person to screen real culprit and falsely implicate a person. So relationship far from being ground of criticism is often a sure guarantee of its truth (40 DLR 58).

60. From the materials on record, we failed to discover any express motive of accused in the crime of murder, for such cause prosecution will not fail, since motive is not ingredient of offence, prosecution is not bound to prove the motive of the accused for committing the crime 42 DLR (AD) 31; 10 MLR (AD) 175.

61. Motive does not play an effective role when premeditated and cold blooded murder is committed and established by irrefutable evidence. What is important is the nature of evidence and not the motive which may or may not be proved. Non-proof of motive cannot be a ground to discard the unimpeachable evidence (PLD 2001 SC 333).

62. Proof of motive or previous ill feeling is not necessary to sustain conviction when court is satisfied that appellants are assailants of the victim, but once motive was setup it was to be proved by the prosecution beyond doubt and failure to furnish cogent and reliable evidence could lead to adverse inference against prosecution (PLD 2000 Kar 128). Absence of motive is not ground for acquittal (PLD 1999 Lah 56). Particularly when ocular evidence

is reliable and corroborated by medical evidence (AIR 2003 SC 3975). Appellate Division repeated the same view 57 DLR (AD) (2005) 75.

63. When offence proved motive is immaterial. Weakness of the motive alleged, though a circumstances to be taken into account, cannot be a ground for rejecting the direct testimony of ocular witness which is otherwise of a reliable character. If the offence has been satisfactorily proved by direct evidence then it is immaterial as to whether the motive has been established or not (1968 P. Cr. W 1251). 7 MLR (2002) 119. If there is no sufficient direct evidence motive may be matter for consideration specially when the case is based on circumstantial evidence (51 DLR 103).

64. Motive is a matter of speculation for what moves a person to take the life of another is within his special knowledge and does not constitute a necessary ingredient of the offence of murder, (1968 Cr.W 962).

65. In the case of Noor Md. Vs. State 1999 MLD (Pakistan Monthly Law Digest)-60 held:
"Eye witnesses were natural witnesses of the occurrence who had not only furnished convincing account of incident in details, but had also withstood hard test of cross-examination successfully-No rancour had been ascribed to appellant-Relationship of eye witnesses with the deceased was not by itself sufficient to discredit their testimony-Record did not indicate any sign to support the idea of substitution of accused with real culprit, if any-ocular account was fully supported by medical evidence and attending circumstances-conviction of accused was upheld in circumstances."

66. In the case of Md. Azeem Vs. State 1998 Pakistan Criminal LawJournal-175 it was held:

"Eye-witnesses who had no ill-will or motive against the accused had plausibly explained their presence at the spot and had corroborated their version given in their statements before the police-Ocular testimony was not in conflict with medical evidence-Prosecution had, thus, proved its case against accused beyond doubt- Conviction and sentence of death awarded to accused by trial Court were confirmed in circumstances."

67. Therefore, we find that the prosecution successfully proved the charges against the convict by cogent, convincing, unimpeachable evidence and beyond all reasonable doubt.

68. At the event of aforesaid situation, we also find support of our views by the following decisions.

(1) *When there is enough material to prove the commission of offence of murder by the accused and that the evidence of eyewitnesses, though declared hostile, was reliable to some extent, the accused could be convicted for murder - Deepak v. State 1989 Cr.L. J. 143(MP).*

(2) *If the evidence of the solitary witness to murder is corroborated by medical evidence and FIR is promptly filed and there is absence of any evidence of grave and sudden provocation, the accused can lawfully be convicted for murder-Radhakrishnan v State (1989}1 Crimes 721 (Mad) (DB).*

(3) *If there is consistent evidence of two eyewitnesses and FIR is lodged quickly naming the accused and there is corroborative medical evidence, the Supreme Court will not interfere to disturb the conviction- Bikkar v State(1989) 2 Crimes 1 (SC).*

(4) *If the evidence of the eyewitnesses is corroborated by the circumstantial evidence, the accused must be convicted for murder- Harish v State (1989) 2 Crimes 72 (Del)*

(DB).

(5) *Supreme Court will not interfere in appeal against order of conviction for murder passed by Sessions Judge and upheld by the High Court, when prosecution case was consistent with medical evidence and there was no delay in lodging F.I.R.- Amrik Singh V. State of Punjab 1981 Cr. L. J. 634; AIR 1981 SC 1171; 1981 SCC (Cr.) 252; 1981 Cr. L. J. (SC) 158.*

(6) *If circumstantial evidence is absolutely conclusive and clinching conviction for murder will not be set aside merely on ground that murder-spotand recovery of some ornaments were not proved- Murari Lal v State of U.P.1980 Cr.L. J. 1408; AIR 1981 SC 363(1979) SCC 612.*

(7) *If the circumstantial evidence against the accused in a murder case is firmly established and the circumstances unerringly point to the guilt of the accused and form a complete chain proving the guilt, the Supreme Court will not interfere with the concurrent findings except in case of grave injustice Ashok V State 1989 Cr. L. J. 2124, AIR 1989 SC 1890; (1989)2 Crimes 423:)*

69. The material points to be determined now is that the injuries sustained by the deceased, whether these will constitute the offence of murder. The doctor P.W.8 opined that the death was due to hemorrhage followed by shock resulting from the bullet injuries which were ante mortem and homicidal in nature. On consideration of the injuries sustained upon the deceased the cause of murder we are to keep in touch with the provisions of culpable homicide and murder.

Firstly: The provision of section 300 of the Penal Code provides for murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly: If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

Thirdly: If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly: If the person committing the act knows that it is so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause of death;

70. The provisions of section 299 provides for causing death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that is likely by such act to cause death or commits the offence of culpable homicide.

71. It is pertinent to point out that the witnesses who claimed to be vital witnesses they categorically deposed that prior to the occurrence there was an altercation held between them relating to use of passage, but there was no intention or premeditated plan for causing death. It is difficult to hold that the injuries were caused with the intention to cause the death nor such injuries appear to be sufficient to cause death in the ordinary course of nature. But these injuries though caused intentionally are of such a nature that these are "likely to cause death". We do not think that this Criminal act of causing the death falls into any of the four categories of Criminal acts which constitute "murder" as prescribed in section 300 of the Penal Code. We rather find that this criminal act was done with the intention of causing such injuries as are likely to cause death, as described in section 299 of the Penal Code. As such, it constitutes culpable homicide not amounting to murder, punishable under section 304 Part 1 of the Penal Code. With these regard reliance can be placed in the case of State Vs. Montu

alias Nazrul Islam and others 44 DLR (AD)-287 and Joyaray Vs. State of Tamil Nadu 1976 CrL. L.J. 1186(SC).

72. Moreover, the impugned judgment and order of conviction and sentence in its entirety is well founded in the facts and circumstances of the case. So, the submissions advanced by the learned Counsel for the appellant in respect of merit of the case are not the correct exposition of law and facts. On the contrary the submissions advanced by the learned Additional Attorney-General prevails and appears to have good deal of force.

73. In the light of discussions made above and the preponderant judicial views emerging from the authorities referred to above, we are of the view that the impugned judgment and order of conviction and sentence suffers from no legal infirmity with regards to the merit which calls for no interference by this Court. Thus, the appeal having no merit fails.

74. With regard to the sentence imposed upon the appellant, we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice Administration Method or Rule to exercise such discretion. In sentencing process, two important factors come out which shall shape appropriate sentence (i) Aggravating factor and (ii) Mitigating factor. These two factors control the sentencing process to a great extent. But it is always to be remembered that the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that justice has been done and court responded to the society's cry for justice. Under section 302 of the Penal Code, though discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal justice.

75. Therefore, the learned Judge of the High Court Division rightly sentenced him to suffer imprisonment for life and also to pay fine of Tk. 20,000/- in default to suffer rigorous imprisonment for 2 (two) years.

76. In view of foregoing narrative.

77. The appeal is dismissed.

78. The judgment and order of conviction and sentence dated 17.09.2015 passed by the Division Bench of the High Court Division in Criminal Appeal No.7435 of 2010 (heard along with Death Reference No. 66 of 2010 and Jail Appeal No. 369 of 2010) is hereby confirmed.

79. The office is directed to send down the record at once.