

5 SCOB [2015] HCD 9**High Court Division**

CRIMINAL APPEAL NO. 4289 OF 2009
 WITH
 CRIMINAL APPEAL NO. 4322 OF 2009
 WITH
 CRIMINAL APPEAL NO. 4324 OF 2009
 WITH
 CRIMINAL APPEAL NO. 4358 OF 2009
 WITH
 JAIL APPEAL NO. 452 OF 2009
 WITH
 JAIL APPEAL NO. 453 OF 2009
 AND
 DEATH REFERENCE NO. 43 OF 2009

Abdul Mazid @ Khoka

...Condemned-appellant.

Versus

The State

....Respondent.

-And-

Abdur Rahman

...Condemned-appellant.

Versus

The State

....Respondent.

-And-

Md. Faruk @ Faruk and others

...Convict-appellants.

Versus

The State

....Respondent.

-And-

Asadul

...Convict-appellant.

Versus

The State

....Respondent.

-And-

Abdul Mazid @ Khoka

...Condemned-appellant.

Versus

The State

....Respondent.

-And-

Abdur Rahman

...Condemned-appellant.

Versus

The State

....Respondent.

The State

.....Petitioner

Versus

Abdul Mazid @ Khoka and another

.....Condemned-prisoners.

Mr. Md. Nazrul Islam Khan with

Mr. Md. Golam Rabbani, Advocates

....For the condemned-appellant in

Criminal Appeal No. 4289 of 2009.

Mr. Moudud Ahmed with

Mr. Sheikh Muhammed Sirajul Islam,

Mr. Md. Kalimullah Mazumder,

Mr. Anwarul Islam Shahin and

Ms. Tasmia Prodhan, Advocates

....For the condemned-appellants

in Criminal Appeal Nos. 4322 of 2009 and

4358 of 2009.

Mr. Md. Shamsur Rahman, Advocate

For the appellants in Criminal

Appeal No. 4324 of 2009.

Mr. Md. Hatem Ali, Advocate appointed

by the National Legal Aid Committee,

Dhaka, Bangladesh.

.....For the condemned-appellant in

Jail Appeal No. 452 of 2009.

Mr. Md. Khabir Uddin Bhuiyan, Advocate

appointed by the National Legal Aid

Committee, Dhaka, Bangladesh.

.....For the condemned-appellant in

Jail Appeal No. 453 of 2009.

Mr. Md. Khurshedul Alam, DAG with

Mr. Delowar Hossain Somadder, AAG and

Mrs. Mahmuda Parveen, AAG

....For the State in Criminal Appeal

Nos. 4289 of 2009, 4322 of 2009, 4324 of

2009 and 4358 of 2009 and Jail Appeal

Nos. 452 of 200 and 453 of 2009 and

Death Reference No. 43 of 2009.

Heard on 24.01.2013, 27.01.2013, Judgment on 03.02.2013 & 04.02.2013,
28.01.2013,29.01.2013 & 30.01.2013.

Present:

Mr. Justice Moyeenul Islam Chowdhury

And

Mr. Justice Kazi Md. Ejarul Haque Akondo

Evidence of interested witnesses:

The rule that the evidence of interested witnesses requires corroboration is not an inflexible one. It is a rule of caution rather than an ordinary rule of appreciation of evidence. ... (Para 107)

Prosecution must bear the responsibility for all its laches and lapses:

In the present case before us, there are many laches and lapses as noticed above and those lapses may be by default or by design and the prosecution must bear the responsibility for all its laches and lapses. ... (Para 122)

Section 342 and 537 of CrPC:

Assuming for the sake of argument that the accused-appellant Abdul Mazid was examined by the learned trial Judge in a slipshod and cavalier fashion, that is curable by Section 537 of the Code of Criminal Procedure and in this perspective, the question of suffering any prejudice by the accused-appellant Abdul Mazid in his defence can not be acceptable to us. ... (Para 124)

Penal Code, 1860

Section 302

Benefit of doubt:

From the foregoing discussions and in the facts and circumstances of the case, it is ex-facie clear that the defence version of the case has received some indication or support from the cross-examination of some of the prosecution witnesses as detailed above. Consequently, we are inclined to award the benefit of doubt to the accused-appellants. ... (Para 131)

Judgment

MOYEENUL ISLAM CHOWDHURY, J:

1. The Criminal Appeal Nos. 4289 of 2009, 4322 of 2009, 4324 of 2009, 4358 of 2009 and the Jail Appeal Nos. 452 of 2009 and 453 of 2009, at the instance of the convict-appellants, are directed against the judgment and order of conviction and sentence dated 22.06.2009 passed by the learned Additional Sessions Judge, 1st Court, Bogra in Sessions Case No. 14 of 2002 arising out of G. R. Case No. 242 of 1999 corresponding to Adamdighi Police Station Case No. 13 dated 25.12.1999. By the impugned judgment and order, the learned Additional Sessions Judge convicted the appellant Abdul Mazid @ Khoka under Sections 302/34/307 and the appellant Md. Abdur Rahman under Sections 302/34 of the Penal Code, 1860 and sentenced each of them thereunder to death and also convicted the appellant Faruk, son of Abdul Jalil and Asadul under Sections 302/34/324 of the Penal Code and sentenced them thereunder to suffer imprisonment for life and to pay a fine of Tk.50,000/- each, in default, to suffer imprisonment for a further period of 3(three) years

each and further convicted the appellants Maznu, Bhola and Shutka under Sections 302/34/323 of the Penal Code and sentenced them thereunder to suffer imprisonment for life and to pay a fine of Tk. 50,000/- each, in default, to suffer imprisonment for a further period of 3(three) years each and acquitted the co-accused Bakul, Zano, Sirajul, Shahidul, Anisur, Mukul, Jamal, Abul, Abdur Rahim, Ferdous, Delwar and Faruk, son of Anisur of the charge levelled against them under Sections 302/34/324/323 of the said Code.

2. The learned Additional Sessions Judge also made a Reference to the High Court Division under Section 374 of the Code of Criminal Procedure for confirmation of the death sentence imposed upon the two condemned-prisoners, namely, Abdul Mazid @ Khoka and Md. Abdur Rahman.

3. All the appeals and the Death Reference have been heard together and are disposed of by this consolidated judgment.

4. The prosecution version of the case, in short, is as follows:

On 24.12.1999 at 2:00 A.M., the accused Ferdous and Faruk set ablaze the haystack in the courtyard of the informant-party at village Jurpukuria under Police Station Adamdighi, District- Bogra and the informant-party and the villagers came to the spot and extinguished the fire. Thereafter the informant-party went to the house of the local Chairman, namely, Towhidul Islam to apprise him of this incident. When the informant-party were returning from the house of the Chairman at 6:00 A.M., the accused Abdul Mazid @ Khoka, Maznu, Anisur, Mukul, Bakul, Faruk son of Anisur, Jamal, Abul, Sirajul, Zano, Rahim, Abdur Rahman, Asadul, Ferdous, Faruk, Shutka, Delwar, Bhola and Shahidul being variously armed with deadly weapons encircled them in their courtyard and the accused Abdul Mazid ordered the co-accused to beat up the informant-party. At this, the accused Abdur Rahman dealt a Chinese axe blow on the head of the father of the informant Md. Ishak Ali, namely, Ismail as a result of which he fell down on the ground. Then the accused Abdul Mazid landed a Chinese axe blow on the head of Mozammel resulting in a bleeding injury thereon. The accused Bakul dealt a knife blow on the left eye of the witness Moslem and the accused Maznu assaulted the witness Aminul with a lathi. The accused Zano dealt a knife blow on the right elbow of the witness Lutfor and a knife blow on the back of the witness Alamgir. The accused Asadul landed fala blows on the left forehead and left ear of the witness Sirajul and the accused Sirajul assaulted the witness Jalal with a lathi. The accused Faruk landed a Chinese axe blow on the head of the witness Rashid and the accused Shutka inflicted lathi blows on the right ear of the witness Saiful and the accused Shahidul struck the left wrist of the witness Azizar with a lathi. The accused Bhola dealt ram dao blows on the right occipital region, left elbow and wrist of the informant Md. Ishak Ali. Thereafter all the accused damaged the doors and windows of the house of the informant. Eventually the accused took to their heels following an outcry from the informant-party and the informant Md. Ishak Ali lodged an ejahar with Adamdighi Police Station against the accused.

5. The Investigating Officer of the case is Sub-Inspector Md. Riaz Uddin of Adamdighi Police Station, Bogra. During investigation, he visited the place of occurrence, made a sketch-map thereof along with a separate index, examined witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure. However, having found a prima facie case, the Investigating Officer Sub-Inspector Md. Riaz Uddin submitted charge-sheet no. 30 dated 30.03.2000 against the appellants and others under Sections 148/149/448/323/324/302/34/427/435/114 of the Penal Code.

6. At the commencement of the trial of the case, the learned trial Judge charged all the accused under Sections 302/34 and also charged the accused Abdul Mazid and Faruk under Section 307 and further charged the accused Bakul, Asadul and Bhola under Section 324 and also charged the accused Maznu, Sirajul, Shutka and Shahidul under Section 323 of the Penal Code. The charge with various heads was read over and explained to the accused in the dock; but they pleaded not guilty thereto and claimed to be tried as per law.

7. The defence version of the case, as it appears from the trend of cross-examination of the prosecution witnesses, is that they are innocent and have been falsely implicated in the case out of enmity arising from land disputes at the behest of the local Chairman Towhidul Islam and the victim Ismail might have sustained the fatal head-injury at the hands of some unknown terrorist youths resulting in his eventual death at Rajshahi Medical College Hospital.

8. After hearing both the prosecution and the defence and on an appraisal of the evidence and materials on record and having regard to the attending circumstances of the case, the Court below came to the finding that the prosecution brought the charge home against all the appellants and accordingly, it convicted and sentenced them by the impugned judgment and order as aforesaid.

9. Being aggrieved at and dissatisfied with the impugned judgment and order, all the convict-appellants have preferred the appeals. As already observed, the learned trial Judge has also made a statutory reference to the High Court Division for confirmation of the death sentence imposed upon the condemned-prisoners, namely, Md. Abdul Mazid and Abdur Rahman.

10. The only point for determination in the appeals and the Death Reference is whether the impugned judgment and order dated 22.06.2009 is sustainable in law or not?

11. At the outset, Mr. Md. Golam Rabbani, learned Advocate appearing on behalf of the appellant Abdul Mazid in Criminal Appeal No. 4289 of 2009, submits that according to the FIR and the evidence on record, Abdul Mazid was the order-giver and he landed a Chinese axe blow on the head of Mozammel (P.W. 3); but curiously enough, the doctor concerned was not examined by the prosecution in order to prove the alleged injury sustained by Mozammel at the hands of the appellant Abdul Mazid and in this view of the matter, it is crystal clear that no conviction can be recorded against the accused Abdul Mazid under Section 307 of the Penal Code; but the learned trial Judge erroneously convicted the appellant Abdul Mazid thereunder by the impugned judgment causing a miscarriage of justice.

12. Mr. Md. Golam Rabbani next submits that some of the allegedly injured witnesses, that is to say, Moslem, Lutfor, Alamgir, Jalal and Azizar were not admittedly examined by the prosecution in support of the prosecution version of the case and since they are star prosecution witnesses, their non-examination definitely casts doubt as to the veracity of the prosecution story and in this regard, Section 114- Illustration (g) of the Evidence Act, 1872 may be called in aid.

13. Mr. Md. Golam Rabbani further submits that indisputably the P.W. 3 Mozammel @ Md. Mozam and P.W. 11 Md. Emdadul Haque are witnesses to the inquest held on the deceased Ismail on 03.01.2000; but surprisingly enough, the inquest-report is conspicuously

silent about the names of the accused and their alleged overt acts and given this scenario, the prosecution case is doubtful, though the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam are the professed eye-witnesses to the occurrence; but the lower Court did not consider this aspect of the case causing a failure of justice.

14. Mr. Md. Golam Rabbani also submits that the examination of the convict-appellant Abdul Mazid under Section 342 was not done in accordance with the provisions of Section 364 of the Code of Criminal Procedure and as such the accused Abdul Mazid was prejudiced in his defence entitling him to an order of acquittal.

15. Mr. Md. Golam Rabbani further submits that it is in the cross-examination of the P.W. 1 Md. Ishak Ali that there was blood-stained earth to the extent of $1/1\frac{1}{2}$ feet at the courtyard (place of occurrence); but admittedly the Investigating Officer (P.W. 9) failed to seize the blood-stained earth therefrom and the non-seizure of any blood-stained earth therefrom renders the prosecution case doubtful.

16. Mr. Sheikh Muhammed Serajul Islam, learned Advocate appearing on behalf of the appellants in Criminal Appeal Nos. 4322 of 2009 and 4358 of 2009, contends that according to the prosecution version of the case, the condemned-prisoner Abdur Rahman allegedly landed a Chinese axe blow on the head of Ismail resulting in his eventual death; but the alleged injury sustained by the deceased Ismail at the hands of the accused Abdur Rahman was an irregular and uneven lacerated injury as found by the P.W. 7 Dr. Md. Emdadur Rahman during autopsy and since as per the medical evidence on record, the deceased Ismail did not receive any penetrating injury in view of the fact that a Chinese axe is a sharp-cutting weapon, the prosecution case is necessarily doubtful.

17. Mr. Sheikh Muhammed Serajul Islam also contends that the P.W. 4 Md. Sirajul Islam has testified that the accused Asadul dealt a fala blow on his left ear; but the P.W. 12 Dr. Md. Gaziul Haque did not find any injury on the left ear of the P.W. 4 and by that reason, the story of sustaining any injury by the P.W. 4 Md. Sirajul Islam at the hands of the accused-appellant Asadul does not inspire any confidence at all.

18. Mr. Sheikh Muhammed Serajul Islam further contends that the inquest-report dated 03.01.2000 (Exhibit-7), it is admitted, does not indicate the name of any accused and this is unnatural in that the ejahar was undeniably lodged with the concerned Police Station on 25.12.1999 and that being so, the case appears to be shrouded in mystery.

19. Mr. Sheikh Muhammed Serajul Islam next contends that the P.W. 10 Md. Abdur Rahman is the inquest-holding officer and it is in his cross-examination that he could not know the names of the terrorists who killed Ismail and it is undisputed that the P.W. 3 Mozammel and P.W. 11 Md. Emdadul Haque were witnesses to the inquest-report (Exhibit-7) and this being the position, it does not stand to reason and logic as to why they failed to divulge the actual occurrence to the P.W. 10 Md. Abdur Rahman at the time of holding of the inquest on the deceased Ismail and this state of affairs is a pointer to the fishy character of the prosecution story.

20. Mr. Moudud Ahmed, another learned Advocate appearing for the condemned-appellant Abdur Rahman, argues that all the alleged eye-witnesses to the occurrence, namely,

the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam being inter-related are interested and partisan witnesses and in view of the facts and circumstances of the case, it seems that the ocular evidence of those prosecution witnesses is tainted with blemish and suspicion and a man of ordinary prudence will be reluctant to attach any credence to their testimony; but the learned trial Judge erroneously relied upon the direct evidence of the P.W. 1 to P.W.6 without caring a fig for the attending circumstances of the case and thereby illegally convicted and sentenced the appellant Abdur Rahman.

21. Mr. Moudud Ahmed further argues that it is ex-facie clear from the prosecution evidence on record that the first incident of burning of the haystack at the place of occurrence at the relevant time by the accused Faruk and Ferdous was not proved at all in view of the statement made by the P.W. 9 Md. Riaz Uddin in his cross-examination that not a single witness narrated that incident to him nor did he find any alams of fire during investigation of the case and viewed from this standpoint, the prosecution case is suspect.

22. Mr. Moudud Ahmed next argues that according to the prosecution version of the case, the alleged occurrence of killing of Ismail took place on 24.12.1999 at 6:00 A.M. at his courtyard and it is in the evidence of some of the alleged eye-witnesses that in winter, the sun did not rise at 6:00A.M. meaning thereby that at the alleged time of the occurrence, it was dark and no means of recognition were disclosed by any of the alleged eye-witnesses and the non-disclosure of means of recognition of the accused by them renders the prosecution story suspicious.

23. Mr. Moudud Ahmed also argues that it is clear from the cross-examination of the P.W. 6 Md. Saiful Islam and P.W. 9 Md. Riaz Uddin that the victim Ismail was done to death by some unknown terrorists; but this dimension of the case was not taken into account by the learned trial Judge causing grave prejudice to the accused-party.

24. Mr. Md. Shamsur Rahman, learned Advocate appearing on behalf of the appellants of Criminal Appeal No. 4324 of 2009, contends that it is the definite assertion of the prosecution that the accused Bhola dealt ram dao blows on the back of the head, left elbow and left wrist of the informant Ishak Ali and the accused Maznu assaulted the P.W. 2 Md. Aminul Islam with a lathi and the accused Faruk landed a Chinese axe blow on the head of Abdur Rashid (P.W.5) and the accused Shutka dealt lathi blows on the right ear of the P.W. 6 Md. Saiful Islam; but no medical evidence is forthcoming on record in support of the above injuries and in the absence of any medical evidence in that regard, the claim of the prosecution falls to the ground.

25. Mr. Md. Shamsur Rahman further contends that the local Chairman Towhidul Islam was not examined on the side of the prosecution, though his evidence appears to be material to the nexus between the alleged first incident of burning of the haystack at 2:00A.M. and the alleged subsequent incident of assault on the informant-party by the accused-party at 6:00A.M. on 24.12.1999 and the non-examination of the Chairman Towhidul Islam undoubtedly throws some doubt about the veracity of the prosecution story.

26. Mr. Md. Shamsur Rahman next contends that although the other accused, namely, Bakul, Zano, Sirajul, Shahidul, Anisur, Mukul, Jamal, Abul, Abdur Rahim, Ferdous, Faruk and Delwar were acquitted of the charge levelled against them under Sections 302/34 of the Penal Code by the learned trial Judge, he did not assign any reason as to why he convicted

and sentenced the appellants of the Criminal Appeal No. 4324 of 2009 standing on the same footing with the acquitted accused and as such it seems that the learned trial Judge arbitrarily convicted and sentenced the appellants of the Criminal Appeal No. 4324 of 2009 by the impugned judgment.

27. Mr. Md. Shamsur Rahman further contends that it is in the cross-examination of the P.W. 9 Md. Riaz Uddin that the prosecution witnesses concerned did not state the names of the appellants of the Criminal Appeal No. 4324 of 2009 to him at the time of their examination under Section 161 of the Code of Criminal Procedure and in such view of the matter, it leaves no room for doubt that the implication of those appellants in the commission of the alleged offence is clearly an afterthought.

28. Mr. Md. Hatem Ali, learned Advocate appearing on behalf of the appellant in Jail Appeal No. 452 of 2009, submits that regard being had to the attending circumstances of the case, the lower Court should have acquitted the Jail appellant Md. Abdul Mazid of the charge levelled against him.

29. Mr. Md. Khabir Uddin Buhian, learned Advocate appearing on behalf of the appellant in Jail Appeal No. 453 of 2009, submits that the Jail appellant Abdur Rahman has been falsely implicated in the case and this false implication gets support from the cross-examination of the Investigating Officer Md. Riaz Uddin (P.W. 9) and as such the appellant Abdur Rahman should be acquitted of the charge brought against him.

30. In support of the above submissions, the defence mainly relies upon the decisions in the cases of Babor Ali Mollah and others.....Vs... The State, 44 DLR(AD)11; Sk. Shamsur Rahman @ Shamsu ...Vs....The State, 10BLD (AD) 251 and Abdur Rashid and another...Vs...The State, 6BLC (HCD) 225.

31. Per contra, Mr. Md. Khurshedul Alam, learned Deputy Attorney-General appearing on behalf of the State-respondent and in support of the Death Reference, contends that the 6(six) star prosecution witnesses, namely, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam proved the prosecution case beyond all reasonable doubt and as such the learned trial Judge did not commit any illegality in convicting and sentencing the appellants by the impugned judgment.

32. Mr. Md. Khurshedul Alam also contends that although the star prosecution witnesses, that is to say, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam are inter-related and interested witnesses; yet the fact remains that their evidence is truthful and as they did not resort to any falsehood, the lower Court did not commit any illegality in relying on their evidence.

33. Mr. Md. Khurshedul Alam also contends that in furtherance of common intention of all the accused, Ismail was done to death by the accused Abdur Rahman and since all the accused shared the common intention of Abdur Rahman, they can not get off scot-free in this gruesome murder case and the learned trial Judge lawfully convicted and sentenced the appellants by the impugned judgment.

34. Mr. Md. Khurshedul Alam also contends that the appellant Abdul Mazid being a literate person was capable of understanding the deposition of the prosecution witnesses and since no objection was raised by the defence against the alleged slipshod manner of his examination under Section 342 of the Code of Criminal Procedure, the irregularly, if any, is curable by Section 537 of the Code of Criminal Procedure.

35. Mr. Md. Khurshedul Alam next contends that the investigation of the case was not carried out properly by the P.W. 9 Md. Riaz Uddin and by that reason, the ocular evidence of the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam can not be thrown overboard and the Court below was perfectly justified in recording of the order of conviction and sentence against the appellants.

36. In order to buttress up the above contentions, Mr. Md. Khurshedul Alam has drawn our attention to the decisions in the cases of Yogeshwar GopeVs.... The State, 58 DLR (AD) 73; The State represented by the Solicitor, Ministry of Law & Justice, Government of Bangladesh...Vs....Montu @ Nazrul Haque & others, 44 DLR(AD)287 and Mostafa (Md)....Vs....The State, 1 BLC(HCD)82.

37. In view of the submissions of the learned Advocates Mr. Md. Golam Rabbani, Mr. Sheikh Muhammad Serajul Islam, Mr. Moudud Ahmed, Mr. Md. Shamsur Rahman, Mr. Md. Hatem Ali and Mr. Md. Khabir Uddin Bhuiyan and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Khurshedul Alam, we are to review the entire evidence on record in order to arrive at a correct decision in this case.

38. Anyway, the prosecution has examined 12(twelve) witnesses in all on its side. But the defence has examined none.

39. The informant Md. Ishak Ali has examined himself as P.W. 1 in the case. He deposes that on 24.12.1999 at 2:00A.M., the accused Ferdous and Faruk set fire to the haystack at their courtyard and the villagers came forward and extinguished the fire and subsequently they (informant-party) went to the house of the Chairman at Adamdighi.

40. The P.W. 1 Md. Ishak Ali further deposes that while they were returning from the house of the Chairman, the accused Abdul Mazid, Maznu, Anisur, Mukul, Bakul, Faruk, son of Anisur, Jamal, Abul, Sirajul, Zano, Rahim, Abdur Rahman, Asadul, Ferdous, Faruk, Shutka, Delwar, Bhola and Shahidul encircled them on 24.12.1999 at 6:00 A.M. and Abdul Mazid ordered the co-accused to beat up the informant-party and at this, the accused Abdur Rahman dealt a Chinese axe blow on the head of his father, namely, Ismail in consequence of which Ismail fell down on the ground in bleeding condition and the accused Abdul Mazid landed a Chinese axe blow on the head of Mozammel and the accused Bakul dealt a knife blow on the left eye of the witness Moslem and the accused Maznu assaulted the witness Aminul with a lathi and the accused Zano landed knife blows on the right elbow of the witness Lutfor and on the back of the witness Alamgir and the accused Asadul dealt fala blows on the left forehead and left ear of the witness Sirajul and the accused Sirajul struck the chest of the witness Jalal with a lathi and the accused Faruk landed a Chinese axe blow on the head of the witness Rashid and the accused Shutka dealt a lathi blow on the right ear of the witness Saiful and the accused Shahidul dealt lathi blows on the left wrist of the witness Azizar and the accused Bhola dealt ram dao blows on the right side of his (P.W. 1) occipital

region, left elbow and left wrist and thereafter the accused damaged the doors and windows of his house and at their outcry, the villagers came forward and the accused fled away.

41. The P.W. 1 Md. Ishak Ali further deposes that they whisked away the injured witnesses to Adamdighi Health Complex and since the condition of his father Md. Ismail and Mozammel was critical, they were brought to Naogaon Sadar Hospital and Naogaon Sadar Hospital Authority referred them to Rajshahi Medical College Hospital and on 03.01.2000, Ismail died there.

42. The P.W. 1 Md. Ishak Ali also deposes that on 25.12.1999, he lodged an ejahar with the concerned Police Station (Exhibit-1) and on 04.01.2000, the Investigating Officer seized a torn vest, a piece of blood-stained panjabi and a kiriz as per seizure-list (Exhibit-2) and he signed the seizure-list as a witness.

43. In his cross-examination, the P.W. 1 Md. Ishak Ali states:

“ঘটনার সময় বেলা উঠে উঠে ভাব। আমার পিতা আঘাত প্রাপ্ত হইয়া মাটিতে পড়ে। মাটিতে রক্ত ঝড়ে প্রায় 1/1¹/₂ গজ জায়গায়। চাইনিজ কুড়াল দিয়া জানালায় আঘাত করে এবং আলমারী ভাংগে।”

44. In his cross-examination, the P.W. 1 Md. Ishak Ali further states that they showed the Investigating Officer the blood-stained earth and a broken steel almirah, but the Investigating Officer did not seize the blood-stained earth.

45. In his cross-examination, the P.W. 1 Md. Ishak Ali further states that Md. Emdadul Haque (P.W. 11) knew as to how the occurrence took place and his father purchased 0.03 acres of land and disputes arose with regard to that land; but the parties had been at loggerheads with each other from before.

46. In his cross-examination, the P.W. 1 Md. Ishak Ali also states:

“BpjjfNZ @dLj দিবার জন্য আমাদের বিরুদ্ধে মামলা করে। তাহারা মিথ্যা মামলা করে। তাহাদের মামলা আগের, I jjmju discharged হয়। ইহার বিরুদ্ধে revision quz”

47. In his cross-examination, the P.W. 1 Md. Ishak Ali denies a defence suggestion that he has filed the case falsely as per the directive of the Chairman Towhidul Islam.

48. The P.W. 2 is Md. Aminul Islam. He testifies that on 24.12.1999 at 2:00A.M., the accused Ferdous and Faruk caused the first incident of burning of the haystack at the courtyard of Ismail and there was a hue and cry and the villagers put out the fire and Ismail and his sons went to the house of the Chairman at Adamdighi.

49. The P.W. 2 Md. Aminul Islam also testifies that on 24.12.1999 at 6:00A.M., he came out of his house and saw an assemblage of 30/35 people including the accused Abdul Mazid, Maznu, Bakul, Mukul, Faruk, Jamal, Abul, Sirajul, Zano, Rahim, Abdur Rahman, Asadul, Ferdous, Faruk, Shutka, Delwar, Shahidul, Bhola and others and the accused Abdul Mazid told the co-accused to assault the informant-party and at this, the accused Abdur Rahman landed a Chinese axe blow on the head of Ismail and the accused Abdul Mazid landed a Chinese axe blow on the head of Mozam and the accused Bakul dealt a knife blow on the left eye of Moslem and the accused Zano dealt knife blows on the right hand of Lutfor and the back of Alamgir and the accused Maznu struck his (P.W. 2) chest with a lathi and the accused Bhola dealt a ram dao blow on the occipital region of Ishak and the accused Faruk

dealt a Chinese axe blow on the head of Rashid and the accused Asadul dealt a fala blow on the left ear of Sirajul and the accused Shutka struck the right ear of Saiful with a lathi and the accused Shahidul struck the left hand of Azizar with a lathi and the accused Sirajul assaulted Jalal with a lathi and thereafter the accused damaged the doors and windows of the house of Ismail and went away.

50. The P.W. 2 Md. Aminul Islam next testifies that the injured were brought to Adamdighi Hospital and ultimately Ismail and Mozammel were referred to Rajshahi Medical College Hospital and while Ismail was under treatment there, he died on 03.01.2000.

51. In his cross-examination, the P.W. 2 Md. Aminul Islam states:

“ঘটনার সময় বেলা উঠে নাই। আমি পায়খানা হইতে বাহির হইয়া ঘটনা দেখি। Bôj Aacô i jm Lôluj eçM eçZ”

52. In his cross-examination, the P.W. 2 Md. Aminul Islam admits that Ismail is his maternal uncle as a neighbour and the distance between his house and that of Ismail is about 500/600 feet and he did not see the setting of the haystack on fire.

53. In his cross-examination, the P.W. 2 Md. Aminul Islam states that Ismail purchased land to the extent of 0.03 acres from Shahadat and disputes arose out of the purchase of the land.

54. The P.W. 3 is Mozammel. He states in his evidence that about three years back in the month of Ramadan at 2:00A.M., the accused Faruk and Ferdous set fire to the haystack of Ismail as he learnt from Ishak (P.W. 1) and the fire was doused.

55. The P.W. 3 Mozammel also states in his evidence that Ismail and his sons went to the Chairman at Adamdighi and they came back at about 6:00A.M. and he (P.W.3) came out of his house at that time and heard an outcry from the courtyard of Ismail and saw that the accused Abdul Mazid, Maznu, Mukul, Bakul, Faruk, Jamal, Abul, Sirajul, Rahim, Zano, Abdur Rahman, Asadul, Ferdous, Faruk son of Jalil, Shutka, Delwar, Shahidul and others had encircled the informant-party and the accused Abdul Mazid ordered the accused Abdur Rahman to catch hold and then Abdur Rahman dealt a Chinese axe blow on the head of Ismail and Abdul Mazid dealt a blow on his head and he lost his senses and regained the same at Rajshahi on the following day at about 4:30 P.M. and he was treated by the doctor and ultimately he was discharged.

56. The P.W. 3 Mozammel further states in his evidence that after 4(four) days, he found the informant Ishak at Adamdighi Bus Stand and saw a bandage over his head and Ishak told him that the accused Bhola struck him with a ram dao and the accused Bakul dealt a knife blow on the eye of Moslem and the accused Maznu struck the chest of Aminul with a lathi and the accused Faruk landed a Chinese axe blow on the head of Rashid and Alamgir, Lutfor, Saiful, Sirajul and Jalal were also injured.

57. In his cross-examination, the P.W. 3 Mozammel clearly admits that he did not see the act of setting fire to the haystack.

58. In his cross-examination, the P.W. 3 Mozammel denies a defence suggestion that he has deposed falsely on being tutored.

59. The P.W. 4 is Md. Sirajul Islam. He claims in his evidence that about 3 (three) years back in the month of Ramadan at about 2:00A.M. he woke up from sleep on hearing a hue and cry and then came to the courtyard of Ismail and all of them doused the fire which was set by the accused Ferdous and Faruk as he heard and Ismail told that they would approach the Chairman Towhidul Islam and thereafter he (P.W. 4) left the spot.

60. The P.W. 4 Md. Sirajul Islam also claims in his evidence that he again heard an outcry at 6:00 A.M. and came out and saw Ismail and his sons were engaged in altercations with the accused-party and the accused Abdul Mazid ordered to finish the informant-party off and then Abdur Rahman landed a Chinese axe blow on the head of Ismail and the accused Abdul Mazid dealt a Chinese axe blow on the head of Mozammel and the accused Bakul dealt a knife blow on the left eye of Moslem and the accused Maznu struck the chest of Aminul with a lathi and the accused Zano dealt knife blows on Lutfor and Alamgir and the accused Asadul dealt a fala blow on his (P.W. 4) left ear and the accused Sirajul struck the chest of Jalal with a lathi and the accused Faruk landed a Chinese axe blow on the head of Rashid and the accused Shutka struck the right ear of Saiful with a lathi and the accused Shahidul struck the left wrist of Azizar with a lathi and the accused Bhola dealt a ram dao blow on the occipital region of Ishak and at the sight of the people, the accused fled away

61. The P.W. 4 Md. Sirajul Islam next claims in his evidence that they (injured persons) were admitted to the Hospital and the injured Mozammel and Ismail were taken to Naogaon from Adamdighi Health Complex and ultimately those two persons were shifted to Rajshahi and while he was under treatment in Rajshahi, Ismail died.

62. In his cross-examination, the P.W. 4 Md. Sirajul Islam categorically admits:

“দ্বিতীয় ঘটনার সময় বেলা উঠে নাই।”

63. In his cross-examination, the P.W. 4 Md. Sirajul Islam states that he does not remember as to who held a Chinese axe in his hand and at the time of the assault, about 30/40 people came to the spot; but he can not tell their names.

64. In his cross-examination, the P.W. 4 Md. Sirajul Islam further states that he took his ‘Sehri’ at about 4:00/4:30 A.M. on his return from the place of occurrence and he did not see any blood-stained earth at the courtyard of Ishak.

65. The P.W. 5 is Md. Abdur Rashid. He gives out in his evidence that on 24.12.1999 at 2:00 A.M., the accused Ferdous and Faruk set ablaze the haystack at their courtyard and the villagers came forward and doused the fire and they (P.W. 5 and others) went to the house of the Chairman at Adamdighi and while they were returning from the house of the Chairman, the accused-party being variously armed lay in ambush near the courtyard and encircled them.

66. The P.W. 5 Md. Abdur Rashid further gives out in his evidence that at the directive of the accused Abdul Mazid, the accused Abdur Rahman landed a Chinese axe blow on the head of Ismail and the accused Abdul Mazid inflicted a Chinese axe blow on the head of Mozammel and the accused Bakul dealt a knife blow on the left eye of Moslem and the accused Maznu assaulted the face of Aminul with a lathi and the accused Zano dealt knife blows on Lutfor and Alamgir and the accused Asadul dealt a fala blow on the left ear of Sirajul and the accused Sirajul struck the chest of Jalal with a lathi and the accused Faruk dealt a Chinese axe blow on his (P.W. 5) head and the accused Shutka struck the right ear of

Saiful with a lathi and the accused Shahidul struck the left wrist of Azizar with a lathi and the accused Bhola dealt a ram dao blow on the parietal region of Ishak and thereafter the accused entered their house by breaking open its doors and windows and at their outcry, the villagers came forward, but the accused fled away.

67. The P.W. 5 Md. Abdur Rashid next gives out in his evidence that the villagers whisked away the injured to Adamdighi Hospital for treatment and the injured Ismail and Mozammel were brought to Nagoaon Sadar Hospital for better treatment and ultimately they were referred to Rajshahi Medical College Hospital for advanced treatment and on 03.01.2000, Ismail died there.

68. In his cross-examination, the P.W. 5 Md. Abdur Rashid unmistakably states:

“B...e ৗL m;N;ju ৗVI f;C e;Cz N;h;pf ৗ চিৎকারে বাড়ীর বাহিরে আসি, আগুন জ্বা; ৗC;M, N;h;pf B...e নিভাচ্ছিল, আমি নি; িচ্ছিলাম।”

69. In his cross-examination, the P.W.5 Md. Abdur Rashid also states:

“শাহাদতের কাছ থেকে আমরা খলিয়ান নেই, শাহাদত তার বাবা জহিরের কাছ থেকে f;uz S;ql j;ara গেলে তার ৗটা মেয়ে m;wge, B' ৗ;|;j J ৗরিদা (সকলে বিবাহিতা)। লুৎফনের স্বামী BLL;jR, ফরিদার স্বামী জালাল ও আজ্জুয়ারার বিয়ে আঃ মজিদের সাথে হয়। এরাও ঐ জমির অংশ পেয়েছে। খলিয়ানের জমিটা ওদের বসত h;sfl Awnz”

70. In his cross-examination, the P.W.5 Md. Abdur Rashid next states that at the time of the occurrence, the day was a bit clear and he did not state to the Investigating Officer that the accused had damaged the doors and windows of their house.

71. In his cross-examination, the P.W.5 Md. Abdur Rashid further states that the name of the Chairman is Towhidul Islam and Towhidul Islam and Anisur were candidates for the post of the Chairman and the accused supported Anisur in the election.

72. In his cross-examination, the P.W.5 Md. Abdur Rashid also states that Anisur lodged a case prior to their case and this is why, the police came to the hospital; but the police did not arrest them because they were under treatment.

73. In his cross-examination, the P.W.5 Md. Abdur Rashid also states that it is not possible to say who of the accused assaulted whom and in what manner during the occurrence.

74. The P.W. 6 is Md. Saiful Islam. He asserts in his evidence that on 24.12.1999, the accused Ferdous and Faruk set ablaze the haystack at their courtyard and the people extinguished the fire and they (P.W. 6 and others) went to the house of the Chairman at Adamdighi Bazaar in order to inform him of the incident and while they were on their way back to their house, the accused-party being variously armed lay in ambush at the courtyard and encircled them.

75. The P.W. 6 Md. Saiful Islam further asserts in his evidence that as per the order of the accused Abdul Mazid, the accused Abdur Rahman dealt a Chinese axe blow on the head of Ismail and the accused Abdul Mazid landed a Chinese axe blow on the head of Mozammel and the accused Bakul dealt a knife blow on the left eye of Moslem and the accused Maznu struck the chest of Aminul with a lathi and the accused Zano dealt knife blows on the right

elbow of Lutfor and the back of Alamgir and the accused Asadul dealt a fala blow on the left forehead of Sirajul and the accused Sirajul struck the chest of Jalal with a lathi and the accused Faruk landed a Chinese axe blow on the head of Abdur Rashid and the accused Shutka struck his (P.W. 6) right ear with a lathi and the accused Shahidul struck the left wrist of Azizar with a lathi and the accused Bhola dealt a ram dao blow on the head of Ishak and thereafter the accused-party entered their house and damaged its doors and windows and when the villagers came forward on hearing their (P.W. 6 and others) outcry, the accused made good their escape.

76. The P.W. 6 Md. Saiful Islam further asserts in his evidence that the villagers whisked away the injured to Adamdighi Hospital and as the condition of Ismail and Mozammel was critical, they were sent to Naogaon Sadar Hospital and eventually both of them were referred to Rajshahi Medical College Hospital for advanced treatment and Ismail died there on 03.01.2000.

77. In his cross-examination, the P.W. 6 Md. Saiful Islam clearly states that he did not narrate the occurrence to anybody and the accused Abdur Rahman is a retired primary school teacher.

78. In his cross-examination, the P.W. 6 Md. Saiful Islam also states:

“আসামীদের খড়ের পাল; ও আমাদের খড়ের পালার ঝাঁ ফাঁ ফাঁ Bp j f Bè# lq j e J
আমাদের বাড়ী পাশাপাশি। আসামীদের বাড়ী ঘর উঠান পাশাপাশি।”

79. In his cross-examination, the P.W. 6 Md. Saiful Islam also states that the occurrence of assault continued for about half an hour and during that time, many people came to the place of occurrence and saw the occurrence and out of them, there were around ten non-partisan and neutral persons who attempted to save them (informant-party) from the assault of the accused-party and all of them are alive and the names of those ten neutral persons were disclosed to the police.

80. In his cross-examination, the P.W. 6 Md. Saiful Islam next states that the neutral persons also witnessed the act of damage of their house, but they did not offer any resistance.

81. In his cross-examination, the P.W. 6 Md. Saiful Islam admits:

“সত্য যে প্রথমে যে অভিযোগ হইয়াছিল, Eq;তে
বলা হয়েছে যে, সম্বাসী যুবকদের হাতে
Cp j ;Cm j ;b;u SMj f f; quz”

82. In his cross-examination, the P.W. 6 Md. Saiful Islam further admits that he is an accused in a case initiated by the present accused-party beforehand and that case is in respect of damage of the houses of the accused-party and the place and time of occurrence of that case are separate.

83. The P.W. 7 is Dr. Md. Emdadur Rahman. He deposes that on 03.01.2000, he held an autopsy on the deceased Ismail Hossain on being identified by Constable No. 609 Md. Shakib Hossain and found the following injury thereon:

“1. One stitched up semi-healed up wound over left parieto-temporal region ē 22 stitches and 6” in length. On detailed dissection, left parietal, temporal & frontal bones were found fractured. Subdural haematoma

(clotted blood) detected inside. Margins of the wound were found irregular & uneven.”

84. The P.W. 7 Dr. Md. Emdadur Rahman also deposes that in his opinion, the death of Ismail Hossain was due to shock and intra-cranial haemorrhage following the above-mentioned injury which was homicidal in nature.

85. In his cross-examination, the P.W. 7 Dr. Md. Emdadur Rahman states that the injury found on the deceased Ismail Hossain was lacerated, irregular and uneven and it was caused by a blunt weapon and the deceased had signs of a cardiac ailment.

86. The P.W. 8 is Md. Abdul Kadir. The long and the short of his testimony is that on 25.12.1999, he was on duty as Officer-in-Charge of Adamdighi Police Station, Bogra and on that date, on receipt of a written ejahar from the informant Md. Ishak Ali, he registered the instant case by filling in the prescribed form of the First Information Report and he endorsed the case to Sub-Inspector Md. Riaz Uddin for investigation.

87. The P.W. 9 is Md. Riaz Uddin. He testifies that on 25.12.1999, the Officer-in-Charge of Adamdighi Police Station Md. Abdul Kadir registered the case and endorsed the same to him for investigation and having taken up investigation of the case, he visited the place of occurrence, made a sketch-map thereof along with a separate index, examined witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure.

88. The P.W. 9 Md. Riaz Uddin also testifies that while the injured Ismail Hossain was under treatment at Rajahahi Medical College Hospital, he died there and Assistant Sub-Inspector Abdur Rahman held an inquest on the dead body of Ismail Hossain and during investigation, he (P.W.9) seized alamats as per seizure-list and procured a copy of the autopsy-report of the deceased Ismail Hossain and having found a prima facie case, he submitted charge-sheet no. 30 dated 30.02.2000 against the accused under Sections 148/ 149/ 448/ 323/324/326/307/ 435/302/34/427/114 of the Penal Code.

89. In his cross-examination, the P.W. 9 Md. Riaz Uddin states:

“সুরতহাল রিপোর্টে যে কাহিনী এসেছে তা তদন্তে যথার্থই প্রমাণ হয়েছে। সুরতহাল রিপোর্টের কাহিনী সঠিক বলে প্রমাণিত হয়েছে।”

90. In his cross-examination, the P.W. 9 Md. Riaz Uddin further states:

“24|12|1999 CW তারিখে ভোর ৬.০০ ০০Lju Stj Sji pWH²j¹
 ৯jmj;লে সম্ব্রাসী যুবক দ্বারা মাথায় আঘাতের পর অসুস্থ হয়ে
 স্থানীয়ভাবে পরে নগুগাঁ হাসপাতালে J I;Sn;qf ৯ডিকেল কলেজে
 ভর্তি হয়ে মারা যায়।”

91. In his cross-examination, the P.W. 9 Md. Riaz Uddin next states that he submitted charge-sheets in both the cases and the informant-party and their relations and witnesses of this case were the accused-party of the other case arising out of an incident that took place on 24.12.1999 at 5:00 A.M.

92. In his cross-examination, the P.W. 9 Md. Riaz Uddin admits that he did not find any alamats of fire, damage and blood-stain during investigation of the case and no witness stated to him about the story of burning of the haystack.

93. In his cross-examination, the P.W. 9 Md. Riaz Uddin further states that the P.W. 3 Mozammel did not tell him about the implication of the accused Rahim, Maznu, Mukul, Bakul, Zano, Asadul, Ferdous, Faruk, Shutka, Delwar, Bhola and Shahidul in the commission of the offence at the time of his examination under Section 161 of the Code of Criminal Procedure.

94. In his cross-examination, the P.W. 9 Md. Riaz Uddin next states that the P.W. 4 Md. Sirajul Islam did not state to him under Section 161 of the Code of Criminal Procedure that the accused Asadul assaulted him (P.W. 4) or that the accused Sirajul assaulted Jalal or that the accused Faruk assaulted Rashid or that the accused Shutka assaulted Saiful or that the accused Shahidul assaulted Azizar or that the accused Bhola assaulted the informant Md. Ishak Ali.

95. In his cross-examination, the P.W. 9 Md. Riaz Uddin denies defence suggestions that he diverted the investigation of the case to the wrong course on being influenced by the enemies of the accused-party and the Union Parishad Chairman or that he submitted the charge-sheet against the accused-party falsely.

96. The P.W. 10 is Md. Abdur Rahman. He states in his evidence that on 03.01.2000, he was on duty at Rajpara Police Station, Rajshahi and on that day, Unnatural Death Case No. 04 dated 03.01.2000 was endorsed to him for investigation and he along with the accompanying force rushed to the morgue of Rajshahi Medical College Hospital and as per identification of the son of the deceased Ismail, that is to say, Emdadul, he held an inquest on the dead body and during inquest, he found the following injury:

“জিবিএল গুলি হি হি 4” ফলজিএ মডি 21/22 এ
 পিএমসি কেএ কএমজি (Rmz)”

97. The P.W. 10 Md. Abdur Rahman further states in his evidence that after holding of the inquest on the deceased Ismail, he made an inquest-report (Exhibit-7) and took the signatures of the witnesses thereon and it transpired that Ismail had died as a result of the assault perpetrated on him by the terrorists because of land disputes.

98. In his cross-examination, the P.W. 10 Md. Abdur Rahman states that he could not know the names of the terrorists.

99. The P.W. 11 is Md. Emdadul Haque. He deposes that his father Ismail died at Rajshahi Medical College Hospital in injured condition and according to his identification, the police held an inquest on the dead boy of his father as per inquest-report and he along with Mokbul, Sekandar and Mozam (P.W. 3) signed the same as witnesses.

100. In his cross-examination, the P.W. 11 Md. Emdadul Haque states:

“স্বরতহাল প্রতিবেদন দারোগা পাঠ করিয়া শুনাইলে পর আমরা তাহাতে
 পিএলসি এজি এপিএপিএপি ফিএনজি”

101. The P.W. 12 is Dr. Md. Gaziul Haque. He testifies that on 24.12.1999, he was on duty at Adamdighi Health Complex and on that day, he examined one Lutfur Rahman, son of Farez and after examination, he granted a certificate in his favour and on that day, he also examined Sirajul and found the following injuries on his person:

- “1. Bruise (Scratch), 4 cm length, left cheek in front of left tragus, simple injury caused by a sharp weapon.
2. Swelling (2.5cm X 2.5cm), left side of the forehead, simple injury caused by a blunt weapon.”

102. In his cross-examination, the P.W. 12 Dr. Md. Gaziul Haque admits that he did not find any injury on the ear of Sirajul.

103. Out of 12(twelve) prosecution witnesses, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam are alleged eye-witnesses to the occurrence and in that view of the matter, they are star prosecution witnesses. Besides, in the facts and circumstances of the case, the evidence of the P.W. 7 Dr. Md. Emdadur Rahman, P.W. 9 Md. Riaz Uddin and P.W. 11 Md. Emdadul Haque appears to be very vital. Anyway, admittedly the P.W. 1 to P.W. 6 being inter-related are partisan and interested witnesses. So we must record our findings upon the trustworthiness or otherwise of the evidence of those prosecution witnesses.

104. In the case of Nowabul Alam and others.....Vs... The State reported in 15BLD(AD)54, it was held in paragraph 17:

“17. The principle that is to be followed is that the evidence of persons falling in the category of interested, interrelated and partisan witnesses, must be closely and critically scrutinized. They should not be accepted on their face value. Their evidence can not be rejected outright simply because they are interested witnesses for that will result in a failure of justice, but their evidence is liable to be scrutinized with more care and caution than is necessary in the case of disinterested and unrelated witnesses. An interested witness is one who has a motive for falsely implicating an accused person and that is the reason why his evidence is initially suspect. His evidence has to cross the hurdle of critical appreciation. As his evidence can not be thrown out mechanically because of his interestedness, so his evidence can not be accepted mechanically without a critical examination.”

105. In the case of Ali AhmedVs....The State reported in 14 DLR(SC) 81, Mr. Hamoodur Rahman, J. (as his Lordship then was) observed:

“Prudence, of course, requires that the evidence of an interested witness should be scrutinized with care and conviction should not be based upon such evidence alone unless the Court can place implicit reliance thereon.”

106. In the case of Masalti... Vs... State of Uttar Pradesh, AIR1965 (SC) 202, the Indian Supreme Court spelt out:

“There is no doubt that when a Criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence, whether or not the evidence strikes the Court as genuine, whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, Criminal Courts have to deal with the evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would inevitably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan can not be accepted as correct.”

107. The rule that the evidence of interested witnesses requires corroboration is not an inflexible one. It is a rule of caution rather than an ordinary rule of appreciation of evidence. The Supreme Court of Pakistan explained the rule in the case of Nazir...Vs...The State, 14 DLR (SC) 159 as follows:

“.....we had not intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it can not be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated along with the guilty, the Court will in the case of an ordinary interested witness look for some circumstances that give sufficient support to his statement so as to create that degree of probability which can be made the basis of conviction. That is what is meant by saying that the statement of an interested witness ordinarily needs corroboration.”

108. Now let us see whether the evidence of the alleged eye-witnesses, namely, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam is worthy of credence or not.

109. It is the definite assertion on the part of the prosecution that the accused Faruk and Ferdous set fire to the haystack of the informant-party at their courtyard on 24.12.1999 at 2:00A.M. and thereafter on that date (24.12.1999) at 6:00 A.M., the accused-party caused the occurrence of assault upon the informant-party at the same spot resulting in the death of the victim Ismail at Rajshahi Medical College Hospital, Rajshahi on 03.01.2000. It is not understandable as to why the trial Court failed to charge the accused Faruk and Ferdous under Section 435 of the Penal Code, though the two incidents are interlinked. However, it will be convenient for us if we deal firstly with the alleged incident of burning of the haystack by fire by the accused Faruk and Ferdous. In this context, the evidence of the P.W. 9 Md. Riaz Uddin may be gone into. A reference to his evidence unerringly shows that he did not find any alams of burning of the haystack at the place of occurrence courtyard. Further, it is also in his evidence that not a single witness narrated to him the incident of burning of the haystack at the time of his examination under Section 161 of the Code of Criminal Procedure. Besides, it is in the relevant prosecution evidence that when the haystack was set ablaze by the accused Faruk and Ferdous, the villagers came forward and they along with the informant-party doused the fire. But curiously enough, not a single villager has turned up before the Court below to depose to that effect. As such, the alleged story of burning of the haystack by fire by the accused Faruk and Ferdous does not inspire any confidence in us.

110. It does not transpire from the evidence of the P.W. 1 Md. Ishak Ali and P.W. 2 Md. Aminul Islam that they have pinpointed the alleged place of assault (courtyard of the deceased Ismail) in their evidence. Precisely speaking, their evidence does not indicate that the occurrence of assault is at the courtyard of the deceased Ismail. Moreover, it is the definite claim of the prosecution that after the assault of the accused-party upon the informant-party, the accused-party smashed the doors and windows and other articles of the house of the deceased Ismail; but no alams thereof could be seized by the P.W. 9 Md. Riaz Uddin in that regard. So the question of vandalizing the house of the deceased Ismail immediately after the occurrence of assault is doubtful.

111. In the cross-examination of the P.W. 1 Md. Ishak Ali, we find that “সন্টার সময় বেলা উঠে উঠে ভাব” meaning thereby that the sun was about to rise and blood trickled down on the ground from the head-injury of his father Ismail and the earth to the extent of $1/1\frac{1}{2}$ feet got blood-stained; but stunningly enough, undeniably no blood-stained earth could be seized by the P.W. 9 Md. Riaz Uddin during investigation of the case. Again, in the cross-examination of the P.W. 2 Md. Aminul Islam, we find that at the time of the occurrence of assault on 24.12.1999 at 6:00 A.M., the sun did not rise and as such he could not eye-witness the occurrence properly. In the cross-examination of the P.W.4 Md. Sirajul Islam, he says that at the time of the occurrence on 24.12.1999 at 6:00 A.M., the sun did not rise and 30/40 people came to the spot; but no one of them has been examined by the prosecution in support of the prosecution version of the case raising reasonable doubt about the veracity of the prosecution story. It is also in the cross-examination of the P.W. 4 Md. Sirajul Islam that he did not see any blood-stained earth at the place of occurrence courtyard. A reference to the cross-examination of the P.W. 5 Md. Abdur Rashid manifests that at 6:00 A.M., the sky was a bit clear, but he concedes that it is not possible to say who of the accused assaulted whom during

the occurrence which lasted for about half an hour. What is most striking in this respect is that the P.W. 6 Md. Saiful Islam in his cross-examination has admitted that he did not narrate the occurrence to anybody presumably prior to his examination before the lower Court. This astounding and startling disclosure of the occurrence for the first time before the Court below after a number of years is very much contrary to normal human conduct.

112. In this country, December falls within winter. In this context, we can take judicial notice of the fact that in the later part of December, the sun rises at 6:40A.M. or thereabout. Given this scenario, it can be safely concluded that on 24.12.1999 at 6:00A.M., there was dark or at least partly dark for all practical purposes and in this view of the matter, the question of means of recognition of the accused by the alleged eye-witnesses comes up as argued by Mr. Moudud Ahmed. In the facts and circumstances of the case, we are at one with Mr. Moudud Ahmed on this point. It is an admitted fact that no means of recognition of the accused have been disclosed in the evidence on record. In the absence of disclosure of any means of recognition of the accused at the time of the alleged occurrence, the prosecution version of the case, as we see it, is bound to fail.

113. In addition, the P.W. 6 Md. Saiful Islam has unmistakably stated in his cross-examination that 10(ten) non-partisan and neutral persons eye-witnessed the occurrence of assault and they attempted to save the informant-party from the assault of the accused-party and they are still alive. But it is mysterious and inexplicable as to why the prosecution has failed to examine even a single non-partisan and neutral person to prove the occurrence of assault. As the alleged eye-witnesses, namely, the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W.4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam are partisan and interested witnesses, a duty is cast upon the prosecution to examine at least any one of those 10(ten) non-partisan and neutral persons. In the facts and circumstances of the case, it seems to us that the non-examination of any such non-partisan and neutral person in support of the prosecution version of the case is suspicious and mind-boggling.

114. The prosecution case is that on 24.12.1999 at 6:00A.M. during the occurrence of assault, the accused Abdur Rahman dealt a Chinese axe blow on the head of Ismail resulting in his eventual death at Rajshahi Medical College Hospital on 03.01.2000. Anyway, it is evident from the cross-examination of the P.W. 7 Dr. Md. Emdadur Rahman that the head-injury sustained by the deceased Ismail is an irregular and uneven lacerated injury caused by a blunt weapon and not a penetrating injury caused by a sharp-cutting weapon. It goes without saying that a Chinese axe is a sharp-cutting weapon and not a blunt weapon. The causing of the head-injury which has been found to be a lacerated one by a blunt weapon by the P.W. 7 Dr. Md. Emdadur Rahman runs counter to the prosecution version of the case rendering the same doubtful. In other words, the ocular evidence of the alleged eye-witnesses does not appear to be in accord with the medical evidence on record. This being the position, we feel constrained to take the ocular evidence of the P.W. 1 Md. Ishak Ali, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W. 4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam with a pinch of salt.

115. The prosecution evidence on record shows that virtually disputes arose between the informant-party and the accused-party after purchase of 0.03 acres of land forming a part of the courtyard of the deceased Ismail from one Shahdat by him. The P.W. 9 Md. Riaz Uddin has admitted in his cross-examination that there was another occurrence between the informant-party and the accused-party on 24.12.1999 at 5:00 A.M. and with regard to that

occurrence, the accused-party lodged a case against the informant-party and witnesses of this case. The case lodged by the accused-party against the informant-party of this case appears to be earlier in point of time. It is also in the cross-examination of the P.W. 9 Md. Riaz Uddin that he has submitted charge-sheets in both the cases.

116. It is in the cross-examination of the P.W. 9 Md. Riaz Uddin that the P.W. 3 Mozammel did not mention the names of the accused- appellants of Criminal Appeal No. 4324 of 2009 and others to him at the time of their examination under Section 161 of the Code of Criminal Procedure. The cross-examination of the P.W. 9 Md. Riaz Uddin also indicates that the P.W. 4 Md. Sirajul Islam did not mention the names of the some of the accused to him (P.W. 9) at the time of his examination under Section 161 of the said Code. In this respect, the decision in the case of Babar Ali Mollah and others.....Vs....The State reported in 44 DLR (AD) 11 may be referred to wherein their Lordships of the Appellate Division observed:

“Vital omissions in FIR and statements to the Investigation Officer make their substantive evidence unreliable.”

117. So the non-mentioning of the names of the accused-appellants of Criminal Appeal No. 4324 of 2009 by the P.W. 3 Mozammel and non-mentioning of the names of the some of the accused by the P.W. 4 Md. Sirajul Islam at the time of their examination under Section 161 of the Code of Criminal Procedure makes the prosecution case shaky. In this regard, we fully agree with the contention of the learned Advocate Mr. Md. Shamsur Rahman.

118. The claim of the prosecution is that on 24.12.1999 at 6:00 A.M., the occurrence of assault took place at the courtyard of the deceased Ismail and Ismail received the fatal head-injury during the occurrence and ultimately he succumbed thereto at Rajshahi Medical College Hospital on 03.01.2000. The P.W. 10 Md. Abdur Rahman held an inquest on the deceased Ismail in connection with Rajapara Unnatural Death Case No. 4 dated 03.01.2000. It is in his evidence as well as in the inquest-report that the death of Ismail was caused by some terrorists, though admittedly the ejahar was lodged with Adamdighi Police Station against the accused-party on 25.12.1999. There is no gainsaying the fact that the P.W. 3 Mozammel and P.W. 11 Md. Emdadul Haque are witnesses to the inquest-report and in their presence, the inquest was held on the deceased Ismail. Moreover, it is in the cross-examination of the P.W. 11 Md. Emdadul Haque that they signed the inquest-report after it was read over to them and that he has passed the SSC Examination. So it may be presumed that the P.W. 11 Md. Emdadul Haque is an educated man and that he knows what is what. As an educated man, he is not supposed to sign any piece of paper blindfold. On top of that, the P.W. 9 Md. Riaz Uddin has admitted in his cross-examination that the incident adverted to in the inquest-report has been found to be true during investigation of the case, albeit he has charge-sheeted the accused-party. We fail to understand as to why on the one hand, he has admitted that the incident adverted to in the inquest-report has been found to be true and on the other hand, he has charge-sheeted the accused-party. This stance of the Investigating Officer Md. Riaz Uddin (P.W. 9) appears to be self-contradictory, paradoxical and self-defeating.

119. A reference to the cross-examination of the P.W. 6 Md. Saiful Islam positively shows that he has admitted that initially it was stated that Ismail had sustained the head-injury at the hands of some terrorist youths. Had some terrorist youths really caused the death of Ismail, then those terrorist youths instead of the accused-party should have been brought to

justice. This dimension of the case was not properly unfolded by the P.W. 9 Md. Riaz Uddin during investigation of the case. It is not understandable as to why the P.W. 3 Mozammel being a professed eye-witness and the P.W. 11 Md. Emdadul Haque being fully aware of the occurrence failed to narrate the same to the P.W. 10 Md. Abdur Rahman at the time of holding of the inquest on the deceased Ismail. Such being the state of affairs, the causing of death of Ismail by some terrorist youths can not be ruled out altogether.

120. In the decision in the case of Abdur Rashid and another ... Vs... The State reported in 6BLC (HCD) 225 relied on by the defence, it was observed in paragraph 26:

“26. We have already found that the defence disputed the place of occurrence. It is surprising to find that no blood-stained earth was recovered, admittedly, from the place of occurrence and no explanation has also been offered. As such there is room for doubt as to the occurrence taking place at the place of occurrence shown by the prosecution. The benefit of doubt must go to the accused.”

121. Reverting to the case in hand, the Investigating Officer Md. Riaz Uddin (P.W. 9) has offered an explanation for non-seizure of the blood-stained earth. According to his deposition, he has not found any blood-stained earth at the alleged place of occurrence courtyard. So the claim of the prosecution that blood trickled down from the head-injury of Ismail to the ground and the earth got blood-stained to the extent of $1/1\frac{1}{2}$ feet falls through.

122. In the case of Sk. Shamsur Rahman @ Shamsu Vs... The State reported in 10 BLD (AD) 251 referred to by the defence, it has been held, inter alia, in paragraph 25 that this is a case where the prosecution must bear the responsibility for all its laches and lapses, be they by default or by design. In the present case before us, there are many laches and lapses as noticed above and those lapses may be by default or by design and the prosecution must bear the responsibility for all its laches and lapses as held in the decision reported in 10 BLD(AD) 251.

123. As to the contention of the learned Advocate Mr. Md. Golam Rabbani that the accused Abdul Mazid was prejudiced in his defence inasmuch as he was not examined under Section 342 in terms of the provisions laid down in Section 364 of the Code of Criminal Procedure, we find from the prescribed form for examination of an accused under Section 342 read with Section 364 of the said Code that the incriminating pieces of evidence were brought to his notice, but those were not spelt out with reference to the evidence of the prosecution witnesses concerned. However, paragraph 15 of the decision in the case of Mostafa (Md) Vs.... The State reported in 1BLC(HCD) 82 adverted to by the learned Deputy Attorney-General Mr. Md. Khurshedul Alam runs as follows:

“15. In the examination of the appellant under Section 342 of the Code of Criminal Procedure, summary of incriminating facts appearing in evidence against the appellant has not been mentioned but it is stated that he heard the witnesses deposing against him after stating the allegations made against him. In reply, he simply said that he was innocent. The appellant appears to be a literate person from the signature put by him in the form recording

his examination under Section 342 of the Code of Criminal Procedure and capable of understanding the deposition of prosecution witnesses adduced and recorded in Bengali in his presence. But no objection as to the same was taken in the trial Court by the defence that the appellant was prejudiced by such slipshod manner of examination. In our view, the same is a mere irregularity curable under Section 537 of the Code of Criminal Procedure and has not prejudiced the appellant in his defence. Reference may be made in this respect to the decision in the case of Abdul Wahab...Vs...Crown reported in 7DLR(FC) 87 in which case in similar circumstances such slipshod manner of examination of the accused under Section 342 of the Code of Criminal Procedure, though deprecated, held to be a mere irregularity curable under Section 537 of the Code of Criminal Procedure.”

124. Coming back to the instant case, assuming for the sake of argument that the accused-appellant Abdul Mazid was examined by the learned trial Judge in a slipshod and cavalier fashion, that is curable by Section 537 of the Code of Criminal Procedure and in this perspective, the question of suffering any prejudice by the accused-appellant Abdul Mazid in his defence can not be acceptable to us. So the contention of the learned Advocate Mr. Md. Golam Rabbani stands negated.

125. In the decision in the case of Yogeshwar Gope...Vs.....The State reported in 58 DLR(AD) 73 adverted to by learned Deputy Attorney-General Mr. Md. Khurshedul Alam, it has been held, amongst others, in paragraph 15 that only because of relationship, the witnesses' evidence can not be thrown away unless the evidence is found to be untrue or tainted with motive. There is no dispute about this 'ratio decidendi.' In the present case before us, we have already smelt a rat in the evidence of the star prosecution witnesses, namely, the P.W. 1 Md. Ishak, P.W. 2 Md. Aminul Islam, P.W. 3 Mozammel, P.W. 4 Md. Sirajul Islam, P.W. 5 Md. Abdur Rashid and P.W. 6 Md. Saiful Islam.

126. In the decision in the case of the State represented by the Solicitor, Ministry of Law & Justice, Government of Bangladesh...Vs...Montu alias Nazrul Haque & others reported in 44 DLR (AD) 287 relied on by the learned Deputy Attorney-General Mr. Md. Khurshedul Alam, it was held, *inter alia*, in paragraph 9:

“9. Section 34 lays down the principle of joint liability for doing a criminal act. The essence of the liability is to be found in the existence of common intention animating the accused persons to the doing of a criminal act in furtherance of the common intention of them all. “Common intention” of several persons is to be inferred from their conduct, manner of doing the act and the attending circumstances. If one has intention to do any act and others share this intention, their intention becomes “common intention” of them all. And if the act is done in furtherance of the common intention, then all who participated in the act are equally liable for

the result of the the
 act.....

”

127. It transpires from the impugned judgment that the learned trial Judge convicted and sentenced some of the accused under Sections 302/34 of the Penal Code and acquitted the remaining accused standing on the same footing with the convicts. Specifically speaking, the accused Bakul, Zano, Sirajul, Shahidul, Anisur, Mukul, Abul, Jamal, Abdur Rahim, Ferdous, Delwar and Faruk son of Anisur were acquitted of the charge brought against them under Sections 302/34 of the Penal Code. But no cogent reason was assigned by the learned trial Judge for conviction and sentence of the remaining accused under Sections 302/34 of the Penal Code. According to the finding of the Court below, had all the accused participated in the criminal act in furtherance of their common intention, then all of them should have been convicted under Sections 302/34 of the Penal Code. If it is found that the occurrence did not take place in furtherance of the common intention of all the accused, then the alleged criminal act of the accused Abdur Rahman should have been found to be an individual criminal act by the Court below. What we are driving at boils down to this: the learned trial Judge can not blow hot and cold in the same breath. So the convict-appellants did not have a fair deal before the lower Court.

128. With regard to the alleged assault upon the witnesses by the accused concerned, we would like to say that the alleged injuries sustained by the witnesses have not been supported by any medical evidence. Of course, the P.W. 12 Dr. Md. Gaziul Haque has deposed that he treated Lutfor Rahman and Sirajul. But it does not transpire from his testimony that what injuries he found on the person of the witness Lutfor Rahman. Furthermore, it is in the cross-examination of the P.W. 12 Dr. Md. Gaziul Haque that he did not find any injury on the ear of the witness Sirajul. Against this backdrop, we hold that the sustaining of the alleged injuries by the witnesses concerned at the hands of the accused-party does not carry any conviction.

129. In the facts and circumstances of the case, it seems that the Chairman of Adamdighi, namely, Towhidul Islam is a vital prosecution witness. It is the positive assertion of the prosecution that after the alleged burning of the haystack by fire by the accused Faruk and Ferdous, the informant-party rushed to the house of Towhidul Islam and when they were returning from that house at about 6:00A.M. on 24.12.1999, the alleged occurrence of assault took place wherein Ismail received the fatal head-injury. The withholding of the Chairman Towhidul Islam and the other alleged eye-witnesses to the occurrence, namely, Moslem, Lutfor, Alamgir, Jalal and Azizar have affected the prosecution case on merit. In this connection, the defence has rightly invoked Section 114- Illustration (g) of the Evidence Act, 1872.

130. The defence version of the case that the accused-appellants have been falsely implicated in the case out of enmity at the instance of the Chairman Towhidul Islam and the victim Ismail might have sustained the fatal head-injury at the hands of some terrorist youths resulting in his eventual death can not be brushed aside at all in the face of the evidence on record and attending facts and circumstances of the case. On this point, the decision in the case of Shamsul Huq @ Shamsul and others....Vs... The State reported in 38DLR (AD) 75 may be referred to. In that decision, it was held, amongst others, in paragraph 8:

“8.The defence case need not be proved by examining witnesses; if some indication in their favour is available from cross-examination of the prosecution witnesses, then this may be sufficient for their acquittal. The manner of the incident as alleged by the prosecution must be proved by the prosecution alone; that burden never shifts. If the manner of the incident is not proved, the prosecution must fail no matter the defence version of the case has not been proved either.”

131. From the foregoing discussions and in the facts and circumstances of the case, it is ex-facie clear that the defence version of the case has received some indication or support from the cross-examination of some of the prosecution witnesses as detailed above. Consequently, we are inclined to award the benefit of doubt to the accused-appellants.

132. It appears that the learned trial Judge failed to consider the evidence and attending circumstances of the case in their proper perspective and erroneously convicted and sentenced the appellants. According to us, the impugned judgment suffers from inherent infirmities. The learned trial Judge, it seems, did not scan the evidence of the alleged eye-witnesses and the Investigating Officer (P.W.9) and medical evidence on record with searching eyes. The finding of conviction arrived at by the Court below is struck down.

133. In view of what have been stated above and regard being had to the facts and circumstances of the case, we find merit in the appeals. The appeals, therefore, succeed.

134. Accordingly, the Criminal Appeal Nos. 4289 of 2009, 4322 of 2009, 4324 of 2009, 4358 of 2009 and the Jail Appeal Nos. 452 of 2009 and 453 of 200 are allowed and the Death Reference is rejected. The impugned judgment and order dated 22.06.2009 passed by the Additional Sessions Judge, 1st Court, Bogra in Sessions Case No. 14 of 2002 is hereby set aside and the accused-appellants stand acquitted of the charge levelled against them.

135. Let the convict-appellants, namely, (1) Abdul Mazid @ Khoka, (2) Abdur Rahman, (3) Md. Faruk @ Faruk, son of Abdul Jalil, (4) Asadul, (5) Md. Monjur Rahman @ Maznu, (6) Md. Bholu @ Bholu and (7) Md. Shutka be set at liberty at once, if not wanted in connection with any other case.

136. Let the appellant Asadul be discharged from his bail bond at once.

137. Let the lower Court records along with a copy of this judgment be transmitted immediately.