

THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Hasan Foez Siddique, *Chief Justice*
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Ms. Justice Krishna Debnath

CRIMINAL APPEALS NO.58-61 of 2019

(From the judgment and order dated 09.05.2019 passed by this Division in Criminal Review Petitions No.68, 73,74 and 89 of 2017 corresponding to judgment and order dated 10.09.2014 in Criminal Appeals No.31-33 and 35 of 2013)

Shamsu Habib alias Biddut <u>Appellant</u> (In CrI. A. No.58 of 2019)
Sarfarazuddin alias Karzon <u>Appellant</u> (In CrI. A. No.59 of 2019)
Md. Manik Ahmed Khan <u>Appellant</u> (In CrI. A. No.60 of 2019)
Abu Raihan alias Rana <u>Appellant</u> (In CrI. A. No.61 of 2019)

-Versus-

The State <u>Respondent</u> (In all the appeals)
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For the appellant : Mr. A.J. Mohammad Ali, senior Advocate with
(In CrI.A. Nos.58-59 of 2019) Mr. Saifuddin Ahmed, Advocate, instructed by Mr. Shamsul Alam, Advocate-on-Record & Mr. Md. Taufique Hossain, Advocate-on-Record.

For the appellant : Mr. S.M. Shahjahan, senior Advocate,
(In CrI. A. No.60 of 2019) instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.

For the appellant : Mr. Chowdhury Md. Zahangir, Advocate-on-Record.
(In CrI. A. No.61 of 2019)

For the respondent : Mr. Sk. Md. Morshed, Additional Attorney
(In all the appeals) General with Mr. Sayem Md. Murad, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.

Date of hearing : The 17th day of August, 2022.
and judgment

JUDGMENT

Obaidul Hassan, J. These criminal appeals are being disposed of by this common judgment as all the cases involve common questions of law and fact as well as arise out of a single judgment.

These criminal appeals arise out of the Criminal Review Petitions No.68, 73, 74 and 89 of 2017 corresponding to Criminal Appeals No.31-33 and 35 of 2013 respectively preferred against the judgment and order dated 9th and 10th November, 2010 passed by the High Court Division in Criminal Appeals No.3025 of 2007 analogously heard with Criminal Appeals No.3066, 3158, 3159, 3252, 3442, 3465 of 2007 allowing the Criminal Appeals No.3025 of 2007, thereby acquitting the accused Tajuddin Ahmed @ Titu and dismissing the remaining Appeals with modification and altering the conviction under Sections 302/34 of the Penal Code to Sections 302/109 of the Penal Code, maintaining the conviction under Section 201 of the Penal Code and upholding the judgment and order dated 21.06.2007 passed by the learned Additional Metropolitan Sessions Judge, 3rd Court, Dhaka in Metropolitan Sessions Case No.3783 of 1999 arising out of G.R. No.210 of 1997 corresponding to cantonment Police Station Case No.84(1) 1997, convicting the accused-appellants under Sections 302/34/201 of the Penal Code and sentenced to imprisonment for life and to pay a fine of Tk.50,000.00 each, in default to suffer a rigorous imprisonment for 5(five) years and also sentenced to suffer a rigorous imprisonment for 3(three) years and to pay a fine of Tk.1,000.00, in default to suffer a rigorous imprisonment for 6(six) months under Section 201 of the Penal Code.

That the prosecution case, in a nutshell, is that on 27.01.1997 at about 4:00 p.m., the informant accompanied by his relative A. Halim

returned to his residence at the then Mohakhali now DOHS, Dhaka from his office by the car driven by his driver Md. Mokbul. After a while accused Biddut of the adjacent house came to the informant's house and called his younger brother victim Reefat to have *Iftar*. Victim Reefat did not come back home in the night and he started searching for the victim at many places but could not trace out the whereabouts of the victim. On the next day in the morning driver Mokbul Hossain came to his house and informed him that three young men on a sky-blue colour Honda Civic Car told him that a dead body was lying beside the rail line behind Jahad Hotel. Getting such information at about 8:00 a.m., the informant along with driver Mokbul Hossain and others rushed to the place of occurrence and found the dead body of the victim with injury on the head along with other injuries. Brain came out from the head, other injuries were found on the various parts of his body. After giving information the police came to the place of occurrence at about 9:00/9:30 a.m. and held inquest of the dead body of the victim. Thereafter, the dead body of the victim was sent to the morgue of Dhaka Medical College and Hospital for holding post-mortem examination. The informant suspected that the accused Biddut, Rasel, Manik, Ranjan, Shuva, Afzal, Karzon, Titu, Roman, Rana and Selim Khan might have killed the victim. Thereafter, the informant filed *Ejahaar* with Cantonment Police Station.

The investigating officer, after holding investigation, submitted charge sheet against the accused-appellants and others under Sections 364/302/34 of the Penal Code.

The case was ultimately tried by the learned Metropolitan Additional Sessions Judge, 3rd Court, Dhaka, who framed charges against the accused-appellants and others under Sections 201/302/34 of the Penal Code.

To substantiate the case, the prosecution examined as many as 11(eleven) witnesses while one defence witness was examined on behalf of the accused-appellant Karzon.

The defence case as it appears from the trend of cross-examination was that the convict-appellants were innocent and were falsely implicated in this case and the alleged occurrence did not take place on the day, time, place and in the manner as alleged by the prosecution. The victim was murdered by some unknown miscreants at the behest of the members of his family due to family feud.

The trial Court after considering the evidence and materials on record found the convict-appellants guilty and convicted the convict-appellants under Sections 302/34 of the Penal Code sentencing each of the appellant to suffer imprisonment for life and to pay a fine of Tk.50,000.00 each, in default, to suffer rigorous imprisonment for 5(five) years more. The accused persons were also found guilty under Section 201 of the Penal Code and each of them were sentenced to suffer rigorous imprisonment for a period of 3(three) years and also

to pay a fine of Tk.1,000.00 each, in default, to suffer imprisonment for 6(six) months more.

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence passed by the trial Court, the accused persons preferred Criminal Appeals No.3025, 3066, 3158, 3159, 3252, 3442 and 3445 of 2007 in the High Court Division. Upon hearing the appeals, a division Bench of the High Court Division, allowed the Criminal Appeal No.3025 of 2007 and acquitted accused Tajuddin @ Titu while dismissed the appeals of the other appellants altering their conviction from one under Sections 302/34 of the Penal Code to one under Sections 302/109 of the Penal Code.

Being disgruntled with the said judgment and order dated 09.11.2010 and 10.11.2010 passed by the High Court Division, the convict-appellants preferred Criminal Petitions for Leave to Appeal where leave was granted. Thereafter, the convict-appellants filed Criminal Appeals No.31, 32, 33 and 35 of 2013 before this Division. Those appeals were heard by three judges Bench of this Division. On 10.09.2014 majority judgment was delivered by Mr. Justice Surendra Kumar Sinha, who dismissed the appeals preferred by the present appellants. On the other hand, Mr. Justice Md. Abdul Wahhab Miah, acquitted the appellants upon allowing all the appeals.

Consequent thereupon the convict-appellants filed the Criminal Review Petitions No.68, 73, 74 and 89 of 2017. Upon hearing the

aforesaid Criminal Review Petitions leave was granted by this Division on 09.05.2019 and hence these appeals.

It is noted that leave was granted to consider two points (I) Whether there is error apparent on the face of record in assessment of evidence of prosecution witnesses, particularly, P.Ws.1, 2, 3 and 8, so far the same relates to non-disclosure of evidence implicating the accused after long period of 11 months without any cogent reasons which is hit by Section 157 of the Evidence Act and which has resulted in illegality and miscarriage of justice and for ends of justice review is necessary for rendering complete justice; and (II) Whether there is error apparent on the face of record for non-consideration that the star witness of the case is P.W.8 claiming to be eye witness who surfaced on 22.12.1997 only during investigation of P.W.11 and long after the occurrence and throughout the period of investigation by earlier Investigation Officers, P.W.8 remained silent and his evidence is shaky, doubtful and unreliable and as such there is necessity for review for the ends of justice.

Mr. A.J. Mohammad Ali, senior Advocate along with Mr. Saifuddin Ahmed, Advocate appeared on behalf of the appellants in Criminal Appeals No.58, 59 of 2019 while Mr. S.M. Shahajahan, senior Advocate with Mr. Harun-or-Rashid, Advocate, appeared on behalf of the appellant in Criminal Appeal No.60 of 2019 and Mr. Chowdhury Md. Zahangir, Advocate-on-Record appeared on behalf of the appellant in Criminal Appeal No.61 of 2019. All the learned Counsels appearing for the

convict-appellants have taken us through the FIR, the Inquest Report, the Postmortem Report, the Charge Sheet, testimonies of the witnesses, the judgments and orders passed by the trial Court, the High Court Division and this Division, connected materials on record. The respective Counsel on behalf of each appellant at one echo vehemently contends that there was error apparent on the face of the record in the assessment of evidence of P.Ws.1,2,3 and 8 so far the same relates to non-disclosure of evidence implicating the accused-appellants after long period without any cogent reasons which is hit by Section 157 of the Evidence Act and has resulted in illegality and miscarriage of justice, but this Division most erroneously upheld the conviction awarded by the trial Court as well as the High Court Division. The learned Counsels on behalf of the appellants argue next that the star witness as claimed by the prosecution is P.W.8, who surfaced on 22.12.1997 only during investigation by the fourth Investigation Officer of the case P.W.11, long after the occurrence while P.W.8 remained mysteriously silent throughout the whole investigation period by earlier three Investigation Officers, which makes the evidence of P.W.8 very doubtful, but the trial Court as well as the High Court Division without considering the said aspect convicted the appellants and this Division most erroneously upheld the judgment and order of conviction and sentence given by the High Court Division. The learned Counsels submit further that all the prosecution witnesses

are interested and procured one while the neutral witnesses of the place of occurrence had not been examined by the prosecution, but this Division as well as the High Court Division and the trial Court ignoring the said flaws of the prosecution wrongfully maintained the conviction of the appellants. The learned Counsels submit next that this Division failed to consider that the judgment and order of conviction is based on surmise and conjecture and not on legal evidence and, as such, the impugned judgment and order of conviction and sentence is liable to be set aside. The learned Counsel submits further that conviction and sentence of life imprisonment of the convicts-appellants is based on misreading and non-reading of the evidence and committed illegality in passing the impugned judgments as it failed to consider that the judgment and order of conviction has been passed by the trial Court without applying its judicial mind as the case was not proved by the prosecution witnesses beyond reasonable doubt and, as such, the impugned judgment and order is liable to be set aside. The learned Counsels for the appellants by reference to the case of Abu Taher Chowdhury Vs. The State reported in 42 DLR(AD)(1990)253 submit next that in the matter of assessment of evidence trial Court's view is given great weight and when its findings is accepted as correct on re-assessment of the appellate Court, then the Appellate Division does not like to interfere. But when in accepting the evidence it is found that established principles of assessment of evidence have not been

followed, then the appellate Court's finding cannot claim sanctity. The learned Counsels on behalf of the appellants, in fine, refer the case of Rupa Ashok Hurra vs. Ashok Hurra and another, reported in AIR 2002 SC 1771 and contend that a Curative Petition may be filed after a review plea against the final conviction is dismissed, which is meant for to ensure there is no miscarriage of justice and to prevent abuse of process and in doing so the Appellate Division is authorized to interfere with its own judgment.

Per contra, Mr. Sk. Md. Morshed, Additional Attorney General along with Mr. Sayem Md. Murad, Assistant Attorney General, appearing for the State-respondent in all the appeals, vehemently oppose the submissions produced by the learned Counsels for the appellants. The learned Counsel for the respondents put forth their submissions supporting the judgment and order passed by this Division with majority as well as the High Court Division and the trial Court. The learned Counsels contend that upon proper assessment of the evidence the trial Court convicted the appellants and the High Court Division also on proper scrutiny upheld the conviction of the appellants, thereafter this Division by majority on perusal of the record dismissed the appeals upholding their conviction and this Division at the present stage cannot reopen the case ignoring the finality of judgment delivered earlier by this Division. The learned Counsels for the respondents lastly prayed for dismissal of the appeals.

Now, to ascertain whether the prosecution has been able to prove the charge against the convict-appellants let us examine and analyze the depositions of the witnesses adduced by the prosecution.

P.W.1, Md. Ismail Hossain, is the informant as well as brother of the deceased stated in his deposition that on 27.01.1997 at 4:30 p.m. accompanied by his relative Md. A. Halim and driver Mokbul got back home from his office and after some time, accused Biddut of the adjacent house came to his residence and called his younger brother Reefat and took him away for Iftar. As the deceased did not come back home at night he searched for him and made phone call to house of Biddut, but did not know the whereabouts of the deceased. In the following morning at 8:00 a.m. his driver Mokbul came to his house and informed that three young men riding on a Honda Civic car told him that the dead body of the victim Reefat was lying by the side of the railway line behind the Jahad Hotel. The informant went to the said spot along with his driver and found the dead body of his younger brother with several injuries on various part of the victim and his brain from the head got exposed. At that time the informant made a phone call to the Cantonment Police Station and also informed the matter to the Deputy Commissioner of Police (North), DMP. Later on, the police came to the spot and prepared the inquest report on his identification of the dead body and the dead boy was sent to the morgue. On 27.01.1997, the accused Biddut, Russel, Manik and Ranjan talked with the deceased over phone and a few days

back, the deceased had an altercation with the accused Biddut and the victim was beaten. The victim had intimacy with Biddut, Russel and Manik and they used to wander together and it was suspected that Biddut, Russel, Manik, Ranjan, Shuvo, Afzal, Karjon, Titu, Roman and Rana might have killed the victim. Subsequently he lodged the FIR. This witness identified the FIR and his signature thereon as Exhibits-1 and 1/1. She identified accused Russel, Manik, Roman, Biddut, Rana, Titu and Karjon on the dock.

During cross-examination he stated that his FIR was typed in a computer by one Kalam at his office at about 12:00 p.m. He informed the Duty Officer of Cantonment Police Station about his brother's death at about 8:30 a.m. on the basis of which police came to the spot and stayed there until 11:00 a.m. Gulshan Thana police prepared the inquest report. He came home with some police officials from the spot and informed his parents about the matter. The *Daroga* of Gulshan Police station arrested the accused Manik. The investigating officer examined his brother AK Azad and his wife, his parents and other members of his family. He did not inform GRP Police Station about the dead body. The dead body was found beside the railway line which is 50 yards away from the Jahad Hotel. He talked with his parents, brothers and sisters before lodging the FIR. The police arrested Selim Khan. The victim was a student of first year in Bachelor Degree and he was 24/25 years old. He did not register any G.D. when the victim was not found. He searched for the victim

firstly in the house of Biddut then in the house of accused Russel and thereafter in the house of his relative Mojid Mollah. He identified the wearing apparels including shoes of the victim which were found with the dead body and marked as material exhibits.

P.W.2, Md. Kafil Uddin, a local business man stated in his examination-in-chief that on 27.01.1997 at 4:30/5:00 p.m. he went to the Jahad Hotel to buy *Iftar* items and met there the victim Reefat. On his query to the victim as to where he was going to, he replied that he came there to attend an *Iftar* party which was arranged by his friends. At that time the victim introduced him with his accompanying friends Biddut, Manik, Titu and others. On 29.01.1997 after going to his garments office, he heard that Reefat's dead body was found beside the railway line. This witness identified the aforesaid accused on the dock.

In cross-examination, he stated that his house and office are at the same place very near to the Jahad Hotel and he used to purchase *Iftar* items from that hotel very often. The owner of Modern Garments was AK Azad, who is brother of the victim and was a tenant under him. The deceased used to show him respect as if he was his elder brother. Jahad Hotel is about 100 yards away from his house and he always perform fasting in the Ramadan. This witness denied the suggestion that Jahad Hotel remained closed in the month of Ramadan.

P.W.3, Mahfuz Hossain stated in his deposition that on 26.01.1997 at 4:00 p.m. he went to Mohakhali DOHS where he saw accused Biddut, Roman and others while Biddut invited him to attend an *Iftar* party at Jahad hotel, Mohakhali. On 27.01.1997 in the afternoon, he accordingly went to Jahad Hotel and met accused Roman, Biddut, Manik, Selim, Karjon and victim Reefat and after some time, accused Rana joined them and all of them went to the roof top of the hotel. Just before *Iftar*, the hotel boy served their *Iftar* and they had *Iftar* and many of them drank Phensedyl. While they were gossiping, two unknown persons came to Roman and Biddut with some bottles of foreign made wine and beer and many of them drank those. After a while, Selim invited them to go to his house for gossiping which was vacant as his mother and sister-in-law went to Brahmanbaria. Accordingly, they went to Selim's house and heard songs from deck set and at one stage Roman became excited and asked Reefat as to why he used to interact with his sister, then Reefat told him to ask his sister as to why she used to interact with him. Biddut being excited punched and kicked Reefat. However, the quarrel was stopped at the intervention of the remaining others and After some time, accused Roman, Biddut, and two unknown persons went out and the rest continued their gossiping. After a while, Roman, Biddut and the two unknown persons came back. At about 10:00 p.m. he left the Selim's house for his home. On the following day i.e. 28.01.1997 at about 9:00 a.m., he heard that a dead body was

lying beside the railway line behind the Jahad Hotel and went there and recognized the dead body of Reefat. He identified accused Biddut, Roman, Manik, Selim and Karjon on the dock.

In cross-examination, he stated that he was a student of Nakhal Para Hossain Ali High School and Tejgaon College. Mr. Yakub Ali was the Headmaster of the School while Mr. Tofail Ahmed was the Principal of the College. He went to New DOHS at 4:00 p.m. to play football and met Biddut and Roman in the play ground. At about 4:10 p.m. he entered the Jahad Hotel, which was situated in front of the Mohakhali Bus Stand. He met the accused persons at the gate of the hotel. He went to that hotel on 27.01.1997 for the first time and stayed in the down stair of the hotel until *Iftar*. The hotel was five storied and eight persons including him went to the roof. His paternal house was at Keraniganj while he was born in Dhaka. He used to reside at 279/2, East Nakhal Para and he did not reside elsewhere. He went to the office of the CID on call by the police. Accused Selim Khan was not known to him before attending the *Iftar* party. He knew P.W.1 Ismail and he saw the police and relatives of the deceased at the time of inspecting the dead body but he did not talk to them out of fear. He told the informant about the occurrence after five months of the incident, he further told that he was senior to the accused persons. This witness denied the suggestion that he neither attended the *Iftar* party, nor the alleged *lftar* party was held at all and he deposed falsely.

P.W.4, A. Hakim, Police Constable deposed that on 28.01.1997 he accompanied S.I. Md. Afsar Uddin from Gulshan Police Station at the time of visiting the place of occurrence and after preparation of the inquest report, he carried the dead body of Md. Nurul Islam to the morgue where the doctor received the dead body of the victim. This witness proved the *Chalan* and his signature therein as Exhibits-2 and 2/1 respectively.

In cross-examination he stated that the place where the dead body was found was under Gulshan Police Station.

P.W.5, Dr. Tejendra Chandra Das deposed that he held post-mortem examination over the dead body of the deceased Md. Nurul Islam and found 1) incised wound (sharp cutting) 2" x bone deep up to brain on right from parietal area; 2) one lacerated wound in the middle of right leg, 3) one lacerated wound on right foot 1/2" x 1/2" and 4) one lacerated wound on right leg 1/2" x 1/2" .

On dissection, he found, 1) Hematoma under the scalp right to parietal area, 2) Fracture of right parietal and right side of frontal bone, 3) Liquid blood present above and the below the meninges and within brain, 4) Brain lacerated at the side of injury on scalp, 5) Right lung injured and 6) Clotted and liquid and liquid blood present within chest cavity on right side. In his opinion, death was due to hemorrhage and shock as a result of above mentioned injuries which were ante-mortem and homicidal in nature. This witness identified

the post-mortem report, and his signature thereon as Exhibits-3, 3/1 respectively.

In his cross-examination this witness stated that in the postmortem report he did not mention the age of injuries.

P.W.6, Md. Raja Ali, deposed that he was Sub-Inspector of CID, Dhaka on 15.04.1997. On the request of Investigating Officer, A. Hai, he seized a deck set, 28 audio cassettes and a sound box from the house of accused Selim. This witness proved the seizure list and his signature thereon as Exhibits-6 and 6/1 respectively. He identified the seized articles as material Exhibits-XIII, XIV and XV.

In his cross-examination he denied the suggestion that he did not seize the said articles from the house of accused Selim.

P.W.7, SI Md. Afsar Uddin, deposed that while he was employed in Gulshan Police Station at the relevant time acting on Gulshan Police Station G.D. No. 041 dated 28.01.1997 he went to the railway line adjacent to the office of Continental Courier Services Ltd., Mohakhali on 28.01.1997 and found a dead body and held the inquest over the dead body of the victim was identified by his brother Ismail Hossain and prepared inquest report. He seized the wearing apparels such as full pant, walking shoes etc. from the dead body and sent the dead body by Constable A. Hakim under *Chalan* to morgue for postmortem examination. He visited the place where dead body was found and prepared sketch map and index. This witness proved the sketch map and his signatures therein as Exhibits-

7 and 7/1 respectively. He also seized a photograph and identity card of the deceased, blood stained cloth and polythene paper and two keys as *Alamats*. He proved the seizure list of those articles and his signature there as Exhibits-8 and 8/1 respectively. He also proved seizure list of wearing apparels as Exhibit-9. He went to the house of the informant and from there arrested accused Manik as produced by the informant.

In his cross-examination, he stated that he went to the place of occurrence on taking the charge of investigation on the basis of the G.D. No.2041 dated 28.01.1997. He did not find the copy of G.D. in his case diary. The Duty Officer recorded the G.D, but subsequently this witness deviating from his earlier statement stated that he himself recorded the G.D. as per wireless message. On being shown him a photocopy of G.D. by the defence side and perusing the same he stated that the contents of the G.D. was to the effect that Ismail Hossain, brother of the deceased disclosed that on the previous day some young men abducted his younger brother Nurul Islam from his residence of New Cantonment DOHS and killed him. Ismail Hossain did not disclose the names of any accused to him. On 28.01.1997 at 1:00 p.m. he went to the house of the informant, who informed him that he would lodge his FIR with Cantonment Police Station. He took accused Manik to the Cantonment Police Station and the place where he found the dead body was within the jurisdiction of Gulshan Police Station. It was not understood as to why he took the arrested person

to the Cantonment Police Station where the place of occurrence was really under the jurisdiction of the Gulshan Police Station.

P.W.8, Md. Ablus Sattar, deposed that he had a betel nut and cigarette shop near the Mohakhali Bus Stand. On 27.01.1997 at 4/4:10 p.m. while he was in his shop, he saw Selim Khan, Biddut, the victim Reefat, Titu, Roman, Rusel, Manik, Karjon, Rana and others to enter in the Jahad Hotel and after *Iftar* at about 7:00 p.m. they came out of the hotel and purchased two packets of Benson Cigarette from his shop and he saw them to go to the nearby house of Selim Khan. After shut down of his shop, he slept in Jahad Hotel at 10:10 p.m. and woke up at 3:00 a.m. to take his *Sahri* i.e. meal for starting fast and went towards the railway line to respond to the call of nature. At that time, he saw accused Biddut, Selim Khan, Roman, Russel, Rana, Karjon and others to carry a person towards the south and dump him to the east of the railway line. On the following morning people assembled by the side of the rail line and he also went there and recognized the dead body of the victim. This witness identified the accused persons on the dock whom he saw except Rana.

In his cross-examination, he stated that Atique and Jahangir were managers of the Jahad Hotel at the time of occurrence. Hotel Arman was on the south of Jahad Hotel and Selim Khan's house was on the south of Hotel Arman. There were 5/6 shops between the house of Selim Khan and Jahad Hotel. Jahad Hotel used to shut down at 10/10:30 p.m. and the front gate of Jahad Hotel used to be locked.

The railway gate is visible from Jahad Hotel and his residence was at Siddique Bazar which is 4/5 kilometers away from Jahad Hotel. Police came to his house at Siddique Bazar and took him to Malibagh Police Office and at that time they were accompanied by the informant Ismail Hossain. He did his Matriculation in 1963 and he came to Dhaka in 1995. He started his betel shop in 1996; His eldest son carried on business in Chittagong and his three other sons were students. He had five *Bighas* of land and he carried on his betel shop until August, 1997. He used to sleep in the Jahad Hotel with the staff of the hotel and the hotel was situated in a four storied building. He observed fasting on 27.01.1997 and had *Iftar* at his shop. He disclosed the incident to the hotel boy Dulal 1/1½ months after the incident. He did not know where Dulal resided at that time. He heard that there was a tin-shed on the roof top of the hotel and the hotel was about ½ kilometer away from the Mohalkhali Bus Stand.

P.W.9, SI Kazi Haniful Islam, one of the investigating officers, deposed that on 28.01.1997, ASI Nasirul Islam recorded Cantonment Police Station Case No.84 dated 28.01.1997 on the basis of written *Ejahaar* of Ismail Hossain and filled up FIR form. This witness identified the FIR form and the signature of ASI Nasirul Islam as Exhibits-10 and 10/1 respectively. He took up the charge of investigation, visited the places of occurrence and prepared sketch maps and indexes of the same, recorded the statements of witnesses, arrested the accused and handed over the case diary to the DB Police.

He proved the sketch map and index of the first place of occurrence and his signature thereon as Exhibits-11 and 11/1 respectively and also identified the sketch map and index of the second place of occurrence and his signature thereon as Exhibits-12 and 12/1 respectively.

In his cross-examination he stated that on 28.01.1997 he took up the charge of investigation and visited the place of occurrence. Prior to his investigation, S.I. Afsar Uddin of Gulshan Police Station went to the place of occurrence on the basis of G.D. No.2041 dated 28.01.1997 which was not kept in the case diary and on 28.01.1997 he received the inquest report during investigation and on that day DC (North) of Police and AC (North) of Police, came to the place of occurrence. He failed to identify the persons who had thrown the dead body. He did not go to the place of occurrence before lodging of the FIR. The informant informed the Cantonment Police Station and DC(North), Police about the matter and at 9:00 a.m. police came there.

P.W.10, Yousuf Ali, one of the witnesses of inquest report deposed that on 28.01.1997 at 9:00 a.m. police prepared inquest report of the dead body of the victim and he signed on the report. He identified said report as Exhibit-5.

During his cross-examination he stated that he was the administrative officer of Shamim Fashion Ltd. and Ismail Saheb was a director of Shamim Fashion Ltd.

P.W.11, Md. Abdul Hai, Police Inspector, CID, Dhaka, the last Investigation Officer deposed that on 15.03.1997, he took over the charge of investigation, perused the case diary, visited the place of occurrence and recorded the statements of some witnesses and after completion of the investigation submitted charge sheet against the accused persons.

In his cross-examination he stated that the dead body was found within the territory of Cantonment Police Station and not of Gulshan Police Station. He denied the suggestion that the dead body was found within the territory of Gulshan Police Station and that the investigation was started by Gulshan Police Station as the dead body was found within its territory. He also denied the suggestion that the victim led a reckless life and there was a family feud over the business of the informant's family and the death was due to such family feud. The accused Selim Khan agreed to give confessional statement under Section 164 of the Code of Criminal Procedure before the learned Magistrate. On perusing the Case Diary he stated in cross-examination that the investigation was interfered by an Ex-Minister and Advocate.

These all are the evidence produced by the prosecution to prove the charge against the accused persons.

Admittedly, there is no eye witness as to the alleged commission of murder of the victim Reefat and the prosecution case revolves on the basis of circumstantial evidence taking into

consideration of the testimonies of P.Ws.1,2,3 and 8. It is the established principle of law that in fixing the liability of the accused on the basis of circumstantial evidence, the prosecution has to establish unequivocally the chain of circumstances leading to the complicity of the accused in the commission of offence.

The prosecution story initiates with the fact of calling of the victim by accused Shamsu Habib Biddut to have *Iftar*. At this juncture, we need to examine to what extent the fact as to the inviting of the victim by accused Biddut is trustworthy. Let us examine the testimony of P.W.1. P.W.1 stated in his deposition that on 27.01.1997 at about 4:30 p.m. being accompanied with his relative Md. Halim came back to his residence from his office at New DOHS, Mohakhali by his car driven by his driver Moqbul Hossain. Just after a little while, his neighbour Biddut came to his residence and sought his permission to invite the victim to an *Iftar* party. The victim did not come back home in the night and he searched for him at many places. P.W.1 made phone call to the residence of Biddut, but he could not know the whereabouts of the victim.

In the FIR P.W.1, the informant clearly stated that on 27.01.1997 just immediate before *Iftar* accused Shamsu Habib Biddut took the deceased to join an *Iftar* party to be held on that evening after taking permission from him and at that time Md. Halim and Md. Moqbul Hossain were present with him. Thus, it is evident that on going to the *Iftar* party at the invitation of accused Biddut the victim went out

of the his residence on 27.01.1997 in presence of Md. Halim and Md. Moqbul Hossain, but the victim did not come back to his house on that night and he was missing.

According to the FIR the next sequence of facts is that on the next day morning at 8 o'clock the informant's driver Md. Moqbul Hossain came and informed the informant that three young men coming by a sky coloured Honda Civic Car told him (the driver) that the dead body of the victim was lying by the side of the rail line behind Jahad Hotel. Having been learned the said news the informant along with Md. Moqbul Hossain went to the railway track behind Jahad Hotel and saw the dead body of the victim with brain injury, his brain was coming out from the head. The victim had several bodily injuries. P.W.1 informed the police station and also the Deputy Commissioner of Police(North) about the matter and the police came to the spot at about 9/9:30 a.m. and prepared the list of *Alamots*. The informant identified the dead body and it was sent to the morgue for post mortem. The informant as P.W.1 also reiterated the above facts in support of FIR. From the above, it is apparent that as per prosecution version driver Moqbul Hossain was present both at the time of calling out of the victim by the accused Biddut from his residence for *Iftar* party as well as said Moqbul Hossain provided the news to the informant about lying the dead body of the victim by the railway track behind Jahad Hotel while Md. Halim was present only on 27.01.1997 when accused Biddut came to take the victim to the

Iftar party. More importantly, said Moqbul Hossain also accompanied the informant towards the railway track to find the dead body of victim. Therefore, it is evident that Md. Halim and driver Moqbul Hossain were the most important and vital witness as to the facts leading to calling of the victim for *Iftar*.

P.W.1 stated in his cross-examination that he used to have meeting with driver Moqbul Hossain and his relative Md. Halim and driver Moqbul Hossain was doing job under him at that time. Thus, Md. Halim and driver Moqbul Hossain were in contact with the informant and they were loyal to him. P.W.1 also asserted that police examined Moqbul Hossain.

From the record it appears that 4(four) Investigation Officers firstly, S.I. Md. Afsaruddin of Gulshan Police Station (P.W.7); secondly, S.I. Kazi Haniful Islam of Cantonment Police Station (P.W.9); thirdly, Humayun Kabir, Assistant Commissioner of Police, DB and fourthly, Md. Abdul Hai, Inspector of Police, CID (P.W.11). Out of the 4(four) Investigation Officers, the prosecution did not examine the third Investigation Officer Humayun Kabir, AC(DB) though he was one of the charge sheeted witness. It further appears that S.I. Afsaruddin (P.W.7) investigated the case only for two days, i.e. 28.01.1997 and 29.01.1997 on the basis of G.D. No.2041 dated 28.01.1997 and after lodging the FIR with Cantonment Police Station, the investigation was taken up by the second Investigation Officer, S.I. Kazi Haniful Islam (P.W.9) of Cantonment Police Station. S.I.

Afsaruddin (P.W.7) did not examine any one and also did not record the statements of any witness under Section 161 of the Code of Criminal Procedure. Thereafter, S.I. Kazi Haniful Islam (P.W.9) investigated the case from 28.01.1999 to 04.02.1999, i.e. only for 7(seven) days. Subsequently, on the application of the informant, the investigation of the case was handed over to AC(DB), Humayun Kabir and the said fact was admitted by Inspector Md. Abdul Hai (P.W.11) in his cross-examination. Again, in his cross-examination S.I. Kazi Haniful Islam (P.W.9) stated that the informant produced Md. Moqbul Hossain before him while Md. Halim was also present at that time, but he (P.W.9) did not examine Md. Halim. P.W.11 has also stated in his cross-examination that AC(DB), Humayun Kabir examined driver Md. Moqbul Hossain on 17.02.1997 and recorded his statement. P.W.11 stated in cross-examination that S.I. Haniful Islam (P.W.9) recorded the statements of Md. Moqbul Hossain on 28.01.1997. Thus, it appears that driver Moqbul Hossain was examined by two Investigation Officers i.e. S.I. Kazi Haniful Islam (P.W.9) and AC(DB), Humayun Kabir. P.W.11 denied the defence suggestion that Moqbul Hossain and Md. Halim did not say that they did not know about the occurrence. P.W.11 also admitted in his cross-examination that he did not examine Md. Halim and driver-Md. Moqbul Hossain. Subsequently, P.W.11 stated in his cross-examination that previous Investigation Officer, Humayun Kabir, examined Md. Halim and driver Md. Moqbul Hossain, but they told

him that they knew nothing about the occurrence. Therefore, when admittedly P.W.11 did not examine and record the statements of Md. Moqbul Hossain and Md. Halim how he could say that AC(DB) Humayun Kabir told him that they knew nothing about the occurrence rather it was only AC(DB), Humayun Kabir, who could state to the said effect. But he was not examined although he was one of charge sheeted witnesses. Had he been examined by the prosecution the defence could cross-examine him and find out the truth. Notwithstanding anything Md. Moqbul Hossain and Md. Halim were the most natural and competent witness to depose as to the fact of calling for the deceased by accused Biddut, but they were neither cited in the charge sheet as witnesses nor examined in the court. The prosecution also failed to give any explanation whatsoever for non-citing them in the Charge Sheet as witnesses and for their non-examination in Court as well.

It further divulges from the deposition of P.W.1 that driver Moqbul Hossain was arrested by the police for interrogation and he was also sent to jail. P.W.11 stated in his cross-examination that although Moqbul Hossain named in the FIR as witness, he was subsequently arrested as accused. But astonishingly, though Moqbul Hossain was arrested, but the informant neither in the FIR nor in his deposition or any of the prosecution witnesses has uttered a single word or has given the slightest hints as to the involvement of driver Moqbul Hossain at any stage in any manner whatsoever with the so-

called chain of circumstances as sought to be established by the prosecution. To us the incident of arrest of Moqbul was nothing, but to frighten him so that he could not give the genuine statement and depose in the case truly or to keep him out of the scene as a witness. In this regard, the suggestions given to P.Ws.1 and 11 by the defence can very well be recalled. P.W.1 was given suggestion to the effect that he got driver Moqbul Hossain arrested as he did not agree to depose falsely as per his tutoring and that he told Moqbul Hossain that he would no longer retain him as his driver if he did not agree to give statement as tutored by him. P.W.1 was given further suggestion as to the fact that since Moqbul Hossain and Md. Halim did not agree to depose falsely, they were not cited in the case as witnesses. But P.W.1 denied all the aforesaid suggestions. P.W.11 was also given suggestion to the effect that driver Moqbul Hossain told the Investigation Officer that he gave false statement on the tutoring of the informant to him in fear of loosing job. P.W.11 was given a further suggestion that Moqbul Hossain and Md. Halim were vital witnesses, but they were not mentioned as witnesses in the charge sheet. Had they been made witnesses the allegation made against the accused would have been proved to be false. P.W.11 denied all those suggestions. On the other hand, P.W.11 stated in his deposition that he did not make those persons as witnesses since during investigation under the supervision of the higher authority those persons were not considered vital witnesses. But the aforesaid reason

for non-inclusion of Moqbul Hossain and Md. Halim as witnesses seems to be not plausible inasmuch as said Moqbul Hossain and Md. Halim were present at the time of calling out of the victim by accused Biddut for *Iftar* party as per FIR and the deposition of the informant as P.W.1.

P.W.1 stated in his cross-examination that his parents were alive, they were five brothers including the deceased and four sisters and they lived together along with parents. P.W.1 further stated that during investigation, the Investigation Officer examined his elder brother, A.K. Azad, his wife and other members of his family, but except himself, none of his family members had been cited as a witness in the case. P.W.11 also stated in his cross-examination that the deceased was bachelor and his main guardian was his father. If the version of P.W.1 that accused Biddut called for the deceased on 27.01.1997 after 4:30 p.m. to have *Iftar* and then he did not return in the night was true, it was natural that he (P.W.1) would disclose the said fact to the other family members of his family, particularly, the parents of the victim and in that case they all would have looked for the deceased. It is also more interesting that as per the testimony of P.W.1, he only looked for the deceased and telephoned at different places when the deceased allegedly did not return home in the night. When the parents were alive and their son did not return home in the night, they would have been very much anxious to look for their son. Therefore, the parents of the deceased and the other family members

of the deceased also appear to be very natural and reliable witnesses to depose as to the fact of calling out of the deceased from his residence by accused Biddut.

It has come to our notice that P.W.11 stated in his deposition that although the parents of the deceased were examined, but their statements were not recorded. It is beyond our perception that when the parents were examined by P.W.11, why their statements were not recorded and for what reason and on what logic they were not cited in the charge sheet as witnesses and examined in the case as witnesses and this facts also clearly gives rise to an adverse presumption regarding the prosecution case within the meaning of illustration (g) of Section 114 of the Evidence Act that had the parents and other members of the family been examined, they would not have supported the prosecution case.

It is undisputed that according to Section 134 of the Evidence Act no particular number of witnesses shall in any case be required for the proof of any fact. But it depends upon the facts and circumstances of each particular case. In the facts and circumstances of the instant case as discussed above, it was incumbent upon the prosecution to examine the parents and the other members of the family of the victim, in view of the fact that FIR named witnesses driver Moqbul Hossain and Md. Halim were neither cited in the charge sheet as witnesses nor examined by the prosecution in the case in the way it creates a serious doubt about the testimony of

P.W.1 that accused Biddut called for the deceased on 27.01.1997 after 4:30 p.m. to have *Iftar* and he did not come back home in the night. In the foregoing circumstances, it is pertinent to refer to the deposition of P.W.1 to whom suggestion was given by the defence to the effect that the victim was unmanageable which P.W.1 denied. P.W.1 also denied the suggestion that the deceased was killed over their family business dispute. But the trial Court and the High Court Division did not at all consider the evidence of the P.W.1 and the suggestions given to him as discussed above.

On the other hand, P.W.11 categorically stated in his cross-examination that although it was mentioned in the FIR that accused Biddut called the victim for *Iftar*, but during investigation he (P.W.11) did not find the truth of that matter. The relevant portion of the deposition of P.W.11 is extracted below:

“এজাহার দৃষ্টে দেখা যায় আসামী সামসু হাবিব মৃত রিফাতকে ডেকে নিয়ে যায় উল্লেখ আছে।
আমার তদন্ত কালে আমি পাই নাই আসামী সামসু হাবিব মৃত রিফাতকে ডেকে নিয়ে যায়।”

The High Court Division failed to consider the legal consequence of non-examination of driver Moqbul Hossain and relative Md. Halim and other members of the deceased's family including his parents. The trial Court as well as the appellate Court committed serious error of law without considering the above aspect, hence the findings of the appellate Court cannot be said to be immune from interference on plea of concurrent findings of facts.

In presence of witnesses namely Moqbul Hossain, Md. Halim, the parents and other family members of the victim while he was invited by accused Biddut for having *Iftar* at Jahad hotel and non-return of the victim in the night and in view of the availability of those persons the testimony of P.W.1 needs some sorts of corroboration since the accused being charged with the commission of an offence of murder, while there is no eye witness and the entire prosecution case rests on circumstantial evidence. Moreover, P.W.1 being the informant is an interested witness, but the High Court Division failed to consider the matter in accepting P.W.1 as competent, natural and reliable witness.

In the aforesaid backdrop, the first link of the chain of circumstances of the prosecution case stated by P.W.1 that accused-Shamsu, Habib, Biddut called the victim on 27.01.1997 at 4:30 p.m. becomes absolutely questionable, therefore, the first link of the chain of circumstances falls through.

At this juncture, we may advert to the other link of the chain of circumstances as deposed by the prosecution witnesses i.e. P.Ws.2, 3 and 8. The record shows that P.W.2 was examined in Court on 26.01.2002 and on that date he was aged about 40 years i.e. on the date of occurrence on 27.01.1997, P.W.2 was aged about 35 years, whereas the age of the deceased was about 24 years as mentioned in the post mortem report and the accused are allegedly the friends of the deceased. P.W.2 in his examination-in-chief stated that he has

housing business and his office is on the west of Mohakhali and on 27.01.1997 at about 4:30 to 5:00 p.m., he went to Jahad Hotel at Mohakhali Bus Stand to buy *Iftar*. At that time, he met the victim there while the victim greeted him *Salam* and on being asked where he was going, the victim replied that his friends invited him to have *Iftar* at that place and the victim got introduced him with Biddut, Manik, Titu and others as his friends.

Now, if we consider the evidence of P.W.2 along with the statements made in the FIR and the deposition of P.W.1, the presence of P.W.2 at 4:30/5:00 p.m. for buying *Iftari* from Jahad Hotel becomes absolutely doubtful. But in the FIR, the informant categorically stated that he started his journey from his office at Mohakhali towards his residence at 4:30 p.m. and accused Biddut called for his brother just before the *Iftar*. Thus, had the accused Biddut called for the victim just before *Iftar* then the chance of meeting of P.W.2 with the victim at 4:30/5:00 p.m. at Jahad Hotel was improbable. On the other hand, P.W.1 deviating from the FIR story stated in his examination-in-chief that on 27.01.1997, at about 4:30 p.m., he along with his relative Md. Halim came back to his residence by his car driven by Moqbul Hossain from his head office at New DOHS, Mohakhali for *Iftar* and just after a while, accused Biddut, who was his neighbour came to his residence and called for his younger brother, Reefat to have *Iftar*. Thus, the time for calling of the victim by accused Biddut must be around 4:35 or 4:40 or may be 5:00 p.m. But if the testimony of P.W.2

is to be believed that he went to buy *Iftar* at Jahad Hotel at Mohakhali Bus Stand, inevitably, he must have gone there much earlier, because after buying *Iftar* he must go to his residence. In this regard, we may refer to the testimony of P.W.2 wherein he stated that he used to take *Iftar* at his residence and there are four members in his residence. So, the fact that the meeting of P.W.2 with the victim at 4:30-5:00 p.m. at Jahad Hotel, while he went there to buy *Iftar*, creates a serious doubt. Whereas, from the FIR and the testimony of P.W.1, it is clear that the victim was called for by the accused Biddut only, so the fact as regards of introduction of Manik, Titu along with Biddut and other friends to P.W.2 by the victim becomes also doubtful. Moreover, because of the age difference between the P.W.2 and the accused persons and he having a family, it does not seem to be usual that before *Iftar* time, the victim got introduced his friends to P.W.2.

Again, as per the prosecution version, *Iftar* party was arranged at Jahad Hotel on 27.01.1997. P.W.3 has stated in his examination-in-chief that on 26.01.1997 at 4:00 p.m., when he had gone near Mohakhali DOHS and met Biddut, Roman and others, while Biddut invited him to have *Iftar* at Jahad hotel, at Mohakhali to be held on the next day and accordingly he went there on 27.01.1997 in the evening. If the said deposition is believed to be true then the accused Biddut was not supposed to go to the residence of the victim to call for the deceased in any case after 4:30 p.m. to invite him to have *Iftar* at a hotel at Mohakhali Bus Stand and then to meet P.W.2 there.

Thus, it is unreasonable that the victim happened to meet P.W.2 at Jahad Hotel at Mohakhali Bus Stand when he allegedly went there for buying *Iftar*. Therefore, P.W.2 does not appear to be a natural and competent witness to depose that he saw the victim with the accused Biddut, Manik, Titu and others on 27.01.1997 at 4:30/5:00 p.m. at Jahad Hotel when he had gone there to buy *Iftar* to show the second link of the chain of circumstances to connect the accused with the killing of the deceased.

Moreover, P.W.2 cannot be considered as disinterested witness and natural witness due to the fact that he had intimacy with P.W.1. P.W.2 stated in his cross-examination that he knew the informant since 1972. He also stated that the informant and his elder brother were his tenants. P.W.2 further stated that the elder brother of the deceased is A.K. Azad, who hired a building on the west side of his house for his garment factory namely Modern Garments. He regularly went to his residence and office.

Let us examine to what extent the testimony of P.W.2 regarding the fact that he saw the victim with accused Biddut, Manik and Titu on 29.01.1997 at 4:30-5:00 p.m. at Jahad Hotel is trustworthy to connect them and the other accused as a second link of the chain of circumstances leading to the killing of the deceased. P.W.2 stated in his deposition to the effect that when he went to his office of garments factory on 29.01.1997 he heard the dead body of victim was found by the side of the railway line. Despite that he did not disclose

the fact of seeing the deceased with the accused Biddut, Manik and Titu and also the fact that the victim told him that his (victim) friends invited him to have *Iftar* at Jahad hotel until he was examined by the Investigation Officer on 17.08.1997 and no explanation whatsoever had also been given for non-disclosure of the said facts which he knew for so long, though he (P.W.2) admitted that he knew Cantonment Police Station, but he did not go to the police station to tell about the occurrence although the victim respected him like elder brother.

From the deposition of prosecution witnesses it is apparent that police examined P.W.2, after 7/8 months, subsequent to the death of the victim. Then said the Police called him at CID office after 8/9 months of the occurrence and during this period the police officer neither called him nor examined him. P.W.11, the charge sheet submitting Investigation Officer, stated in his deposition that he recorded the statements of P.W.2 on 17.08.1997, i.e. after long 7 (seven) months of the date of occurrence. In view of the aforesaid circumstances is it believable that a man, who was respected by the deceased like elder brother and who had intimacy with the informant and his elder brother A.K. Azad and there was relationship as landlord and tenant would remain silent or could remain silent for such a long period from disclosing the incident to anybody had he seen the deceased with accused Biddut, Manik and Titu at Jahad Hotel? It is also absolutely against common course of natural events,

human conduct that a man so known, so close would maintain silence and would not disclose the fact of seeing the deceased in the company of the accused. It is also unbelievable for the further reason that P.W.2 stated in his deposition that he used to go to his office regularly after knowing the fact that the dead body of the victim was found. It is not the case of the prosecution or the P.W.2 that he was threatened by the accused not to disclose the fact of seeing the victim with the accused persons at Jahad Hotel or that he was afraid of disclosing the said fact out of fear of his life. In the facts and circumstances discussed above, the disclosure of fact by the P.W.2 to the Investigation Officer at such a belated stage without any explanation whatsoever has impeached the credibility of his testimony within the meaning of Section 155 of the Evidence Act. But the High Court Division totally failed to consider this apparent factual and legal aspect of the case and found the conduct of P.W.2 in not going to Cantonment Police Station at all unusual in view of the prevailing law and order situation, particularly, in Dhaka. In holding so, this Division as well the High Court Division totally failed to consider Section 114 of the Evidence Act.

In the light of the discussion made above and for the reasons stated hereinbefore the delay in examining the P.W.2 for long after 7/8 months was fatal and made his testimony doubtful within the meaning of Section 157 of the Evidence Act.

P.W.2 cannot also be believed to be a truthful witness because of his antecedence. This P.W.2 in cross-examination admitted that he knew Muktijoddhaa Commander, Malek, who was killed and he was an accused of that case, but was on bail. Nazimuddin is his elder uncle and his granddaughter Sabina Yeasmin was killed and in that murder case, he along with his father were made accused, but he was acquitted from that case. P.W.2 was given suggestion as to the fact that one of his paternal cousins, Munshi used to deal in Dollar business and he was killed. Although he denied the suggestion replying that after the death of Munshi a suicidal case was filed and in that case police arrested him, but final report was submitted in that case. From the judgment of the High Court Division, it appears that it did not consider the above antecedents of P.W.2 in accepting him as a trustworthy witness. It is true that P.W.2 was not found guilty in two cases and he is on bail in murder case. But his very involvement in so many criminal cases as an accused necessarily casts stigma on his character which hinges on his credibility as a truthful witness. On account of the foregoing reasons, P.W.2 appears to be hired, procured, managed and an untruthful witness and it is unsafe to put reliance on his testimonies. In view of the foregoing discussion, the second link of the chain of circumstances connecting the accused with the killing of the deceased falls through.

P.W.3, Mahafuz Hossain, has been considered as a vital witness by the Courts below in establishing the third link of the chain of

circumstances to connect all the accused with the killing of the victim at the residence of Selim Khan. It is pertinent to examine whether P.W.3 is a natural and competent witness. In the deposition sheet as well as charge sheet, the address of the P.W.3 has been mentioned as Village-Rajerkanda Bazar, Police Station-Keraniganj. But in the charge sheet his present address has been mentioned as 179/1 Shewrapara, Police Station-Mirpur. This P.W. in his cross-examination stated that his original house was at Keraniganj, but he did not reside there and he was born in Dhaka. He stated further that the house where he lived was his own, but soon after while deposing P.W.3 stated that the said house belonged to his father and it was at Nakhalpara, Tejgaon. Then again he said in his deposition that their house was at 279/2 East Nakhalpara and except this house at Nakhalpara, he did not live anywhere in Dhaka and that house was under Police Station-Tejgaon and it was 1(one) kilometer away from the Tejgaon Police Station. He stated further that he knew Shewrapara and he had gone there to give reminder to the debtors for the dues owing to their factory. Then said that he had gone to a house, then again said that he had gone to 179/1 Shewrapara, but he could not remember the name of the owner of the house. P.W.11, the last Investigation Officer also stated in his cross-examination that he mentioned the address of P.W.3 as 179/1 Shewrapara. It is unbelievable that P.W.11, who took the charge of the investigation of the case on 15.03.1997 and examined P.W.3 on 17.08.1997 and

submitted charge sheet on 07.01.1998, i.e. after more than 9 (nine) months, did not verify the present address of P.W.3 while submitting charge sheet. It is illogical that the Investigation Officer would mention the address of P.W.3 as 179/1 Shewrapara although he lived at 279/2 East Nakhalpara. In this regard, it is pertinent to mention that suggestion was given to the P.W.3 on behalf of the defence to the effect that he (P.W.3) was not Mahfuz Hossain Khan which he denied as being not a fact. On further cross-examination P.W.3 stated that he had no identity card at that time to show that he was Mahfuz Hossain Khan. Thus, a reasonable hypothesis can be drawn that P.W.3, in reality, was not Mahfuz Khan of 179/1 Shewrapara as mentioned in the charge sheet. Thus, from the evidence of P.W.3 and P.W.11 as discussed above, it makes a clear doubt as to whether P.W.3 Mahfuz Khan as examined in Court as P.W.3 was at all Mahfuz Khan of 179/1 Shewrapara and therefore, he appears to be a dubious man and a man, not natural and competent to depose the fact of going to Jahad Hotel on invitation by accused Biddut to have *Iftar* there and then gossiping at the residence of Selim Khan until 10:00 p.m. and seeing there all the accused with the accused to apply the theory of last seen. Moreover, P.Ws.2 and 8 although mentioned the name of the accused present in the so-called *Iftar* party at Jahad hotel, did not at all say the name of the P.W.3 which casts a serious doubt as to the presence of P.W.3 at Jahad Hotel and at the residence of Selim Khan to depose about the fact of the occurrence.

However, even if it is conceded that P.W.3 is Mahfuz Hossain as stated in the charge sheet, it is prudent to peruse whether his testimony is trustworthy to establish the 3rd link of the chain of circumstances to connect the accused with the killing of the deceased applying the last seen theory. P.W.3 in his examination-in-chief stated that on 26.01.1997, at 4:00 p.m. he went near Mohakhali, DOHS where he met Biddut, Roman and others. Biddut invited him to *Iftar* at Jahad Hotel, Mohakhali and accordingly, he, on 27.01.1997, in the evening, went there. In the hotel, he saw Roman, Biddut, Manik, Selim, Razan and Reefat i.e. the victim and shortly thereafter Rana joined them. At the time of *Iftar*, all went to the roof of Jahad Hotel. The hotel boy served *Iftar* and all of them took *Iftar*. Some of them consumed phensidyl during *Iftar* except Manik, Roman and the P.W.3. After gossiping for about one hour, two unknown persons came to Roman and Biddut with the bottle of foreign liquor and 8/10 bottles of beer. Many of them consumed liquor and beer. Thereafter, accused Selim proposed to go to his house for gossiping as his mother, sister-in-law and others went to Brahmanbaria and his house was empty. Then all of them went to the house of Selim. They heard song from the deck-set at the residence of Selim. At one stage, Roman became agitated and asked the victim as to why he maintained love affairs with his (Roman's) sister. The deceased replied that he should ask his sister why she had love affairs with him. Biddut being agitated dealt a few fist blows and kicked on the victim. At the

intervention of all present there, the quarrel came to an end. Thereafter, Roman, Biddut and the said two unknown persons went out of the house and the others including the P.W.3 continued their gossiping. After a few while, Roman, Biddut and the two unknown persons came back to Selim's house. At about 10:00 p.m., he left the residence of Selim. On the next day, i.e. 28.01.1997, at about 9:00 a.m., he came to know from the people that a dead body was lying by the side of rail line behind Jahad Hotel. Subsequently, he went near the rail line to see the dead body and recognized the dead body of the victim. This witness identified Biddut, Roman, Manik, Selim and Karzon on the dock.

In cross-examination, this P.W. stated that he served at JA Trading, a C & F enterprise and he joined the present office on 20.10.2002. In 1997, he was in the spoon factory of his brother at Nakhalpara, then said he used to supervise it. He used to leave the factory at 4/5 p.m. and sometimes the factory remained operational at night, but he did not stay in the factory if the factory used to be operational up to 8/10 p.m. In 1997, he went near DOHS at 4:00 p.m. for playing in a play ground where many persons play football and he met Biddut and Roman at the field. There were many other boys in the field to play football, but he did not know their names. He was older to the accused by age. This P.W. stated that the accused did not study then said he did not know who were students and who were not. It appears that this P.W. deposed in Court on 20.10.2003. From

the testimony of this PW, it is evident that the accused were not his friends and, in fact, he had no acquaintance with them. Therefore, it is also not *prima facie* believable that P.W.3, who either lived at Shewrapara or at Nakhalpara would go DOHS to play football at Mohakhali and Biddut would invite him to *Iftar* party to be held at Jahad hotel and accordingly, he went there on 27.01.1997. It is also astonishing that though the accused were not known to his friends and were not known to him, he could name them categorically while deposing in Court after 6 (six) years of the occurrence.

The story told by P.W.3 that after *Iftar* they continued gossiping for about one hour and then accused Selim proposed to go to his residence for gossiping on the plea that his mother, sister-in-law and others had gone to Brahmanbaria and his house was empty where they heard song at the Deck set and he remained there till 10:00 p.m. also sounds absurd and inherently improbable. Because P.W.3 in his cross-examination categorically admitted that he did not know Selim Khan previously and he knew him for the first time on that date. This is unusual that a person with whom P.W.3 was introduced for the first time on the date of occurrence while allegedly having *Iftar* at Jahad hotel would go to his house and would gossip there till 10:00 p.m. in the month of Ramadan even after Biddut allegedly dealt fist and kicked the deceased. It is also not believable that after *Iftar*, the hotel authority would allow the accused gossiping for one hour.

P.W.3 stated in his deposition that the CID examined him 6/7 months after the occurrence. He saw the relatives of the deceased when they went to see his dead body, but he did not talk with them. At that time, he saw the police and after having seen the dead body, he went away to his residence. He did not tell anybody about the occurrence out of fear, then said he told about the occurrence to the relatives of the deceased on some occasions in between the period of date of occurrence till his going to the CID Office. He further stated that after 5(five) months of the occurrence, he himself told the incident to the informant at his garments factory at Rasulbag. Then said he did not tell about the occurrence to anybody else. He could not remember whether he told about the occurrence to the Investigation Officer while he narrated the same to the informant. He did not go to Cantonment Police Station and tell about the fact of seeing the dead body or as to the fact of his knowledge about the occurrence. Thus, P.W.3 did not disclose about the incident which he knew to police until his going to the CID office. Although, P.W.3 allegedly told about the incident to the informant (P.W.1) and his relatives on some occasions in between the period from the date of occurrence till his going to the CID Office and also to the informant at his garments at Rasulbag, but none of the witnesses except P.W.3 said so. The reason claimed for non-disclosure of the facts by P.W.3 was fear of death, but the said reason seems to be impracticable. P.W.3 did not at all say that he saw any weapon or arms with the accused at

the time of occurrence. It is also mention worthy that PC & PR of all accused are nil and none of the witnesses including the two Investigation Officers (P.Ws.9 and 11), who were examined in the case said a word that the accused were men of dangerous character or had bad reputation or they were in any way involved with any criminal activities not to speak of committing any heinous offence including murder. Therefore, P.W.3 had no reason to be afraid of the accused not to disclose to the police earlier what he knew about the occurrence.

Moreover, in the instant case, P.W.3 did not give any explanation whatsoever for his non-disclosure of the facts of the occurrence after so much delay to the police while he was examined on 17.08.1997. It is true that Section 157 of the Evidence Act stipulates that the statement of a fact by a witness should be made to the competent authority at or near the time when the fact to which the statement relates took place. What should be the span of time of making such statement by a witness is basically a question of fact and no hard and fast Rule can be laid down in that regard. It would vary from case to case and upon the peculiar circumstances of a particular case under which delay in recording the statement of a witness about the fact which he knew or knows might be caused. Mere delay in recording the statement of a witness by the investigation officer cannot be the sole ground to discard his evidence, if he withstands the test of cross-examination and thus appears to be a truthful

witness. In the facts and circumstances of the instant case, the belated disclosure of the facts by P.W.3 to the Investigation Officer after 7(seven) months was a serious infirmity striking at the credibility of the testimony of P.W.3. The disclosure of facts of the occurrence by the P.W.3 was fatal and it creates a doubt about the veracity of the testimony of P.W.3. Thus, the 3rd link of the chain of circumstances falls through. But unfortunately, the High Court Division failed to appreciate the facts and circumstances of the case and considering the evidence of P.W.3 as a whole as discussed above accepted his (P.W.3) testimony in its face value as a star witness to connect the accused with the killing of the deceased and this has occasioned a miscarriage of justice.

The last link of the chain of circumstances as found by the courts below is the testimony of P.W.8, Md. Abdus Sattar. From the deposition sheet, it appears that the age of the P.W.8 has been recorded as 55 years and P.W.8 was examined in court as witness on 26.06.2004, thus in 1997 he was 47 years of age. But P.W.8 in his cross-examination categorically stated that he passed Matriculation examination in 1963. If we take that he passed his matriculation examination at the age of 15 which is the minimum age to pass matriculation examination, then in 1997 his age was 49 years. Thus, recording of the age of the P.W. as 55 in 2004 was not correct.

P.W.8 further stated in his cross-examination that he came to Dhaka for the first time in January, 1995. He looked for the job, but

did not get any job and then started to run a betel nut shop, then said he started to run the betel-nut shop at the beginning of 1996. He has four sons and one daughter. His eldest son used to run a business at Chittagong while the remaining three sons were studying. He had five *Bighas* land. But it is difficult to believe how a man aged about 49 years and who passed his Matriculation examination in 1963 and owned five *Bighas* land while one of his sons was a businessman at Chittagong would come Dhaka in January, 1995 to look for a job and after remaining unemployed for one year, i.e. till January, 1996, would start a betel nut shop at Mohakhali Bus Stand. This story of P.W.8 is absurd one and also seems to be farcical. Again, the falsity become patent while P.W.8 stated in his cross-examination that after closing his betel nut shop, he used to sleep with the staffs of Jahad Hotel and that too on the table with the hotel boys. The absurdity of the testimony of P.W.8 goes further when he said in his cross-examination that while running betel nut shop, he had a rented house at Siddique Bazar, where he used to live alone, then said he started living at the rented house in last part of January, 1997. P.W.8 further stated in his cross-examination that at the time of deposition before the court he did not run the business of selling cigarettes and he also stated that he ran the betel nut shop upto August, 1997. Thus, it appears that P.W.8 deposed in a manner which is self-contradictory and dissimilar with his earlier statement. Again, both P.Ws.8 and 11 hailed from District-Jhalakathi. On consideration of the above

testimony of P.W.8, it is crystal clear that P.W.8 was procured and managed by P.W.11 in collaboration with the informant (P.W.1) just to depose in the case about the occurrence after 11 (eleven) months of the occurrence by concocting the story that he was a betel nut shop owner who had allegedly sold betel leaf and cigarettes in front of Jahad Hotel just to connect the accused with the killing of the deceased by concocting another story that he saw the accused throwing dead body of the victim.

In a criminal case before accepting the testimony of a witness a court must see whether a person, who comes to depose about the occurrence is natural and competent one to depose in the facts and circumstances of the case. But unfortunately, neither the trial Court nor the High Court Division paid their attention to that aspect. Both the trial Court and the High Court Division took for granted that the P.W.8 had a betel nut shop in front of Jahad Hotel and he could see the incident as stated in his deposition in Court. The trial Court and the High Court Division failed to consider that P.W.11 stated in his cross-examination that there was no evidence in support of the fact that P.W.8 used to run a shop in front of Jahad Hotel at Mohakhali. P.W.11 stated in his cross-examination in the following manner:

“উক্ত সাক্ষার মহাখালীতে জাহাদ হোটেলের সামনে দোকানদারী করিত সেই মর্মে কোন প্রমাণ নাই।”

The Courts below also did not take into notice the specific suggestion given to P.W.8 that he never went to Jahad Hotel or he never went to Mohakhali or he never sold betel leaf and cigarettes and that he looked like an industrialist than a betel nut shop owner. In view of the facts and circumstances discussed earlier, it is transparent that P.W.8 is not a natural and competent witness to depose about the occurrence rather he is a managed, tutored and procured witness.

P.W.8 stated in his examination-in-chief that at the time of occurrence, he was running a business of betel leaf, cigarettes in a shop by the side of Mohakhali Bus Stand. On 27.01.1997, at about 4/4:10 p.m., he saw Biddut, Reefat (the victim), Titu, Roman Rasel, Manik Karzon, Rana and others entering into Jahad Hotel and coming out of the hotel after *Iftar* at 7:00 p.m. The accused persons purchased two packets of Benson cigarettes from his shop and then entered into the house of Selim Khan. After selling goods at his shop at about 10/10:10 p.m., he went to sleep at Jahad Hotel at about 3 o'clock in the night, when he woke up to take *Sahri* and went by the side of the railway line to urinate, he saw accused Biddut, Selim Khan, Roman Rasel, Rana, Karzon and others taking a person by holding him to the south side and they threw away the man on the railway line. On the next day morning, when the people gathered by the side of the rail line, he also went there and could recognize the dead body as that of the victim.

From the above testimony of the P.W.8 it appears that though he deposed in the case after more than seven years, he vividly remembered the name of persons whom he allegedly saw on 27.01.1997 at 4/4:10 p.m. entering into Jahad Hotel and then coming out after *Iftar* and throwing the dead body of the victim, which shows the sharpness of his memory.

Now, let us see whether the same sharpness of his memory has been reflected in his other statements made during the deposition in the Court. He stated in his deposition that there were 2/3 betel nut shops around the place where he used to run the shop, but he did not know the names of the owners of those shops. He further stated that he could not remember the names of the owners and staffs of other hotel and establishment, namely, Lucky Hotel, Hotel Arman, Glass House, New Lucky Motors, rod cement shops and auto parts shops around Jahad Hotel. Though as per his claim he used to sleep at Jahad hotel with its staffs in the nights, he could not say the name of the owner of the hotel. Thus, when P.W.8 could not say the name of the fellow betel nut shop owners and the name of any shop owner or hotel owner or their employees around Jahad Hotel how could he remember and mention the names of so many accused whom he allegedly saw entering into Jahad Hotel, then coming out from there and then lastly throwing the dead body by the side of rail line which creates suspicion about his veracity. Therefore, P.W.8 is considered as a tutored witness who memorized the names of the accused to tell

their names to connect them with the killing of the victim in the manner as designed and chalked out by the Investigation Officer, P.W.11 along with the informant.

P.W.8 in his cross-examination, stated that the residence of Selim Khan was on the South of Hotel Arman, there were 5/6 shops in between Jahad Hotel and the residence of Selim Khan, and in between these shops, there are motor garage and shops of rod and cement. If the above facts were true, how P.W.8 could see all the accused to enter into the house of Selim Khan sitting from his shop, which was literally impractical. It is manifest that P.W.8 was procured by the prosecution for establishing the last link of chain of circumstances that the deceased was lastly seen in the company of the accused along with P.W.3 at the residence of Selim Khan.

Again, P.W.8 stated in his deposition that at about 3 o'clock in the night, when he woke up to take *Sahri* and went to urinate by the side of the rail line, he saw accused Biddut, Selim Khan, Roman, Rasel, Rana, Karzon and others taking a person by holding to the south and after going a while they threw the man on the east of the rail line. The aforesaid claim appears to be not trustworthy due to the following reasons:

- (i) P.W.8 in his cross-examination stated that he could not say where the hotel staffs used to defecate.
- (ii) Then said in the ground floor, there were six staffs who used to do their duty 24 hours although he could not say how many staffs were in the upper floors and on the

other hand, he could not say where they used to respond to their call of nature during day time.

- (iii) He claimed that after selling betel leaf, cigarettes in his betel nut shop, he used to sleep at Jahad hotel with the hotel boys, but he could not say where the hotel staffs used to respond to their call of nature.
- (iv) It is also unbelievable that in a hotel where so many people are employed, there will be no toilet for their use and if P.W.8 really used to stay in the hotel in the night with the hotel boys as claimed by him, he would not be allowed to use toilet used by the staffs and that at the dead of night, i.e. at 3 o'clock he would have to go by the side of the railway line to urinate.
- (v) P.W. 11, the Investigation Officer stated in his cross-examination stated that there was no evidence in support of the fact that P.W. 8 used to run shop in front of Jahad hotel at Mohakhali, and
- (vi) P.W. 8 admitted in his cross-examination that he did not tell the Investigation Officer about his sleeping in the hotel premise whereas P.W. 11, the Investigation Officer in his cross-examination categorically stated that P.W.8 used to sleep at hotel premise after selling betel leaf and cigarettes.

The High Court Division without considering those very inherent absurdities in the testimony of P.W.8 accepted his version as to his seeing the accused to throw a dead body by the side of the railway line. It is also suspicious why P.W.8 leaving aside the toilet of the hotel chose the railway line to urinate. In this context it is pertinent to consider the evidence of D.W.1, the Manager of the hotel to the effect

that the cook and the staffs used to live in the first floor of the hotel and they used the toilet in the first floor which is quite natural because the cook and the staffs, who work in the hotel are supposed to stay in the hotel and it is unusual that there would be no bathroom and toilet in the hotel for their use.

Further, D.W.1 categorically stated that there was no verandah in the hotel and except the boarders there was no arrangement for the outsiders to live in the hotel. Whereas P.W.11 stated in his cross-examination that P.W.8 used to sleep in verandah of Jahad Hotel after selling betel leaf and cigarettes. D.W.1 also stated that no betel leaf shop was put on the footpath in between the hotel and the footpath. He further stated that on 27.01.1997 no *Iftar* party was held in the hotel and there was no arrangement for *Iftar* in the hotel. This D.W. was disbelieved by the High Court Division on the ground that it was not believable that in a hotel, there would be no arrangement for *Iftar* where the boarders used to stay, although by cross-examining him, the prosecution could not curtail his veracity. He was disbelieved by the High Court Division on the further ground that accused Karzon is the younger brother of the owner of the hotel, which cannot be a reason to disbelieve D.W.1, when credibility of his testimony in examination-in-chief could not be impeached or shaken by the prosecution by cross-examining him. It is also very significant to state that no suggestion was given to D.W.1 that there was no bathroom or toilet in the hotel for the use of the staffs and P.W.8 also did not make

any positive assertion either in his examination-in-chief or in cross-examination that there was bathroom or toilet in the hotel.

Admittedly P.W.8 was examined by the last Investigation Officer, P.W.11 on 22.12.1997, after 11(eleven) months of the date of occurrence and 9(nine) months of his taking charge of the investigation of the case. No explanation whatsoever has been given either by the P.W.8 or by P.W.11 for such belated examination. While as per own admission of P.W.8, he ran his betel nut shop from the early part of January, 1996 till August, 1997, seven months after the alleged occurrence and during this period of long seven months, he did not tell anybody about the fact that he saw the accused taking a person and then throwing him by the side of the railway line. This P.W. in cross-examination has further stated that during this period, neither any uniformed police nor any civil dressed police either examined him or interrogated him. He further stated in his deposition that he told the fact of seeing the occurrence of throwing the dead body by the accused to Dulal, a boy of Jahad Hotel after 1/2 months of the occurrence. But although said Dulal was a vital witness he was not examined by the prosecution and no explanation whatsoever was given by the prosecution for his non-examination.

From the deposition of P.W.8 it is seen that nowhere in his deposition he stated that he did not go to Cantonment Police Station to tell about the occurrence out of fear of life or for any other reason.

P.W.8 has not given any explanation whatsoever for the belated disclosure of facts to P.W.11.

In the above mentioned circumstances, there arises an adverse presumption against the prosecution case as to the last link of the chain of circumstances in view of illustration (g) of Section 114 of the Evidence Act.

On summing up the chain of circumstances, the High Court Division relied upon the evidence of P.Ws.1, 2, 3 and 8 on their face value without considering their testimonies as a whole, particularly, in their cross-examination and considering the improbability and absurdity in their testimonies and the very acceptability of P.Ws.2, 3 and 8 as natural and competent witnesses. The High Court Division also failed to consider that P.W.1 being an interested and partisan witness his sole testimony as to the calling for the deceased by accused Biddut needed corroboration in the facts and circumstances of the case as pointed out and discussed hereinbefore. Such non-consideration occasioned serious miscarriage of justice in maintaining the order of conviction.

A criminal case is decided on the oral testimony of the witnesses adduced by the prosecution. Before accepting the testimony of a witness a Court of law must see whether a witness have at all the chance of seeing the occurrence directly, i.e. as eye witness or to know about the fact or facts leading or culminating to an occurrence, but in the instant case, both the Courts below did not

pay concentration to the aforesaid matters and as such a serious miscarriage of justice occurred in scrutinizing and sifting the testimony of the persecution witnesses to find a compact chain of circumstances to connect the accused with the killing of the victim.

Apart from the above, the testimony of P.W.1 regarding the calling of victim by accused Biddut on 27.01.1997 after 4:30 p.m. for *Iftar*, is contradictory with the deposition of P.W.7. P.W.7 stated in his deposition that the informant intimated the Duty Officer of Gulshan Police Station about the fact of death of his brother over telephone and on the basis of the said telephone message, G.D. was registered, subsequently P.W.7 came to the place of occurrence. It is to be noted that P.W.7 investigated the case for two days, i.e. 28.01.1997 and 29.01.1997, which is admitted by P.W.11 in his cross-examination. But P.W.1 falsely stated in the FIR that after seeing the dead body, he telephoned Cantonment Police Station and then the police came at 9:00 a.m. and he telephoned the Duty Officer of Cantonment Police Station about the death of his brother at 8:30 a.m. and the police came on the basis of the telephone call to the place of occurrence. In fact, the informant intimated the incident to Gulshan Police Station over telephone and on the basis of the said telephonic information G.D. No.2041 dated 28.01.1997 was registered and subsequently P.W.7 came to the place of occurrence and started investigation of the case. Thereafter, formal FIR was lodged by the informant with Cantonment Police Station on 28.01.1997 at 15:35 hours.

It appears that in the said G.D. the name of accused Biddut was not stated. From the testimony of P.W.7, it is crystal clear that when he as Duty Officer of Gulshan Police Station, asked the informant, he (P.W.1) stated that some youths kidnapped the deceased and killed him. If the FIR story that Biddut called the deceased just immediate before *Iftar* and the deceased having not returned back home in the night, the informant looked for him at all possible places and gave information to different places about the said fact, but the deceased was not found, is to be believed, then there was no earthly reason on the part of the informant not to disclose the said facts at least mentioning the name of Biddut as a suspect to the Duty Officer, when he was asked by the Duty Officer. This non-disclosure creates a serious doubt about the first part of the prosecution case and truthfulness of P.W.1 as a witness as well and thus it is fragile to link accused Biddut along with the other accused with the killing of the victim and if the first link of the chain of circumstances is missed or broken, the very foundation of the prosecution case falls through and the subsequent links of the chain of circumstances as discussed above, cannot be said to be compact. Therefore, it cannot be said that the prosecution proved the compact chain of circumstances incompatible with any hypothesis of innocence of the accused.

P.Ws.3 and 8 in their cross-examination categorically stated that there are shops, houses and other business establishment around Jahad Hotel, but the Investigation Officer did not examine any one of

those houses, shops etc. Admittedly, none of the establishments around Jahad Hotel and around the place where the dead body was found and also of the residence of Selim Khan where the deceased was allegedly killed and from where the dead body was thrown by the side of railway line was mentioned as witness in the present case. P.W.11 admitted in his cross-examination that except hotel boy Dulal and Md. Kafiluddin (P.W.3), none was examined of the place of occurrence, although said Dulal was not made witness. P.W.11 further stated in his cross-examination that there were several betel nut shops in front of Jahad Hotel. Admittedly, none of the betel nut shop owners except P.W.8, was cited in the charge sheet as witness. P.W.7 in his examination-in-chief categorically stated that he saw the dead body of the deceased lying 8(eight) hands away on the east of the rail way line by the side of the Continental Courier Service Limited, Mohakhali, Dhaka, but none of the said courier service was also cited in the charge sheet as witness. P.W.11 also admitted that he did not examine any employee around the place of occurrence by the side of the railway line as indicted at mark 'Ka' in the index prepared on 28.01.1997 (Exhibit-12). The place marked as 'O' in the index (Exhibit-1) is Mohakhali Music Center, while the place marked as 'Uma' is a restaurant and the place marked as 'Jha' is Hotel Al-Noor, a residential Hotel. P.W.11 further admitted that the dead body of the deceased was lying behind Hotel Al-Noor, but he has not cited anyone of that hotel as witness. P.W.11 further stated that the place

where the dead body of the deceased found was eight hands away on the east of the railway line by the side of the office of the Continental Courier Service. He examined the security guard posted at New DOHS gate, but did not record his statement. He did not examine the night guard of the place where the dead body was found. There were many shops on the way where the dead body was found. In the night, people might sleep in those shops, then said those people used to walk along that road, but none was cited as witness in the charge sheet. P.W.11 although admitted in his cross-examination that he examined the Manager of the hotel, but the Manager was not cited as a witness in the case. From the foregoing discussion it is transparent that the investigation into the case was held in a perfunctory manner.

The High Court Division found fault with the investigation of the case. If there was any fault in the investigation of the case, the benefit of that fault must go in favour of the accused, but not to the prosecution. But the courts below gave the benefit of the fault in the investigation in favour of the prosecution instead of the defence. The High Court Division opined that due to the prevailing unhappy situation in the investigation, investigating officer had to be changed and it was really difficult for these helpless witnesses to come forward and depose in Court for want of security of their lives. The said observations of the High Court Division coupled with the fact that P.Ws.2, 3 and 8 were examined by P.W.11, the last Investigation Officer, only on 17.08.1997 and 20.12.1997 respectively, i.e. after long

7(seven) months and 11(eleven) months of the date of occurrence, though P.W.11 took up investigation of the case on 15.03.1997, clearly showed that the investigation was done in a perfunctory manner and P.Ws.2, 3 and 8 were procured, managed and hired just to show a compact chain of circumstances right from the calling for the deceased by accused Biddut. Therefore, no reliance can be placed upon their testimony to connect the accused with the killing.

It transpires from the record that the case was investigated by as many as four police officers, first by Md. Afsaruddin (P.W.7), S.I. of Gulshan Police Station, second by Kazi Haniful Islam (P.W.9), S.I. of Police of Cantonment Police Station; third by AC (DB), Humayun Kabir and fourth Md. Abdul Hai, of CID (P.W.11). It also appears from the record that the Investigation Officers of the present case were changed very frequently and third Investigation Officer, AC (DB), Humayun Kabir, started investigation of the case on 05.02.1997 and he investigated the case until 13.03.1997 and again he was changed on the application of the informant just on his fanciful wish as P.W.1 stated in his cross-examination to the effect that “ডিভির দারোগা সুষ্ঠুভাবে তদন্ত করছে না ভেবে তদন্তকারী কর্মকর্তা পরিবর্তনের দরখাস্ত করি (স্বগত উক্তি)।”

This statement patently indicates that it is the informant party who actually tried to maneuver with the investigation and did not allow the second and the third Investigation Officers to continue with their investigation, not the accused. In this regard, it is also necessary to state that suggestion was given from the defence to P.W.1 and

P.W.11 that when AC(DB), Humayun Kabir was about to unearth the facts of the case, he was changed. Neither in the charge sheet nor in his deposition P.W.11 stated a single word that during his investigation any accused or anyone else tried to influence or interfere with his investigation. He categorically stated in the following words:

“সেই সময় জনৈক মন্ত্রী এবং একজন এ্যাডভোকেট তদন্তকাজে বাঁধা প্রদান করে নাই।”

However, P.W. 11 stated in his cross-examination that AC(DB), Humayun Kabir made a note in his case diary which is extracted in the following:

“একজন এ্যাডভোকেট ও মুন্সী ফখরুল ইসলাম।প্রাক্তন মন্ত্রী জাতীয় পার্টি তাহার তদন্তে বাঁধা সৃষ্টির চেষ্টা করিয়াছেন। উক্ত এ্যাডভোকেটকে আমি খোঁজে বের করি নাই। উক্ত মুন্সী ফখরুল ইসলামের এর জবানবন্দী রেকর্ড করি নাই ও জিজ্ঞাসাবাদ করি নাই।”

But the prosecution did not examine AC(DB), Humayun Kabir, though he was cited as a witness in charge sheet. Thus, in the absence of examination of AC(DB), Humayun Kabir, no credence can be given to the said note of Humayun Kabir. From the above, it is clear that the accused had no hand in the so-called interference of the investigation into the case. The High Court Division has expressed a sort of insinuation by mentioning that accused Biddut is the son of seating Member of the Parliament, but there is no iota of evidence that he ever made any attempt to change the course of investigation or tried to tamper with the evidence. In this regard, it is necessary to state that P.W.11 has not given any explanation whatsoever in his

deposition or in the charge sheet as to why he could not examine P.Ws.2, 3 and 8 so long. It is also evident that although P.W.11 got charge of investigation of the case on 15.03.1997, he visited Jihad Hotel where the alleged *Iftar* party took place for the first time only on 25.11.1997 and this fortifies the fact that the investigation into the case was done in a perfunctory manner and those P.Ws. were cited in the charge sheet in a pre-arranged manner.

It further appears that the High Court Division gave much emphasis on the fact of seizure of a deck set and some audio cassettes with sound box from the house of accused Selim Khan to come to the finding that the deceased was lastly seen in the company of the accused at the house of Selim Khan where they heard song in the deck set without considering that in Dhaka city such deck set and audios are not something uncommon and would be available at many residences and that fact in no way could corroborate the testimony of P.W.3 that he along with the accused and the deceased heard song in the deck set at the house of accused Selim Khan. When the very presence of P.W.3 at the *Iftar* party and his going to the residence of Selim Khan was doubtful as discussed above, seizure of deck set and audios could not help the prosecution to establish the third link of the chain of circumstances to connect the accused with the killing and this error led to the erroneous decision in finding the accused guilty.

In view of discussions and the reasons mentioned above, we are constrained to hold that the prosecution has miserably failed to prove a compact chain of circumstances starting from the calling for the victim by accused Biddut after 4:30 p.m. until throwing of the dead body of the victim by the side of the railway line at 3:00 a.m. on 28.01.1997, to connect the accused persons with the killing of the victim and in every chain of circumstances, there was break in the link of the other chain and accordingly the prosecution failed to prove the charge brought against the accused persons either under Sections 302/34 or 302/109 of the Penal Code. Consequently, the accused persons are entitled to be acquitted of the charge brought against them.

It is already on the record that in the case in hand both the trial Court as well as the High Court Division maintained the conviction of the accused persons. Thereafter, this Division by majority decision upheld the conviction awarded by the High Court Division and upon grant of leave in the Review Petitions, the accused-appellants filed the instant appeals. Now a question arises that in appeal after grant of leave in Review Petitions by the appellants whether this Division can reverse the judgment and order of conviction upheld by this Division earlier.

It is established principle of law that a judgment of the apex Court is final on both questions of law and of fact. It is precedent for itself and for all the Courts subordinate to it and the finality of the

judgment cannot be impinged on. In the case in hand leave was granted in Review Petitions and thereafter criminal appeals were filed which are now under consideration in the instant judgment. As per provision of Article 105 of the Constitution of the People's Republic of Bangladesh and Order XXVI of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988 this Division is competent enough to reconsider or interfere with its earlier decision to prevent abuse of its process and to cure gross miscarriage of justice.

It has already been elaborately discussed in previous paragraphs how the prosecution miserably failed to prove its case. Due to the above stated facts, in our opinion, the conclusion reached by the Courts below as well as this Division by majority was not correct. On the basis of such scanty evidence, it should not have upheld the order of conviction of the appellants. The trial Court as well as the High Court Division and this Division by majority committed illegality misreading the evidence. In view of the reasons stated hereinabove, we are of the view that the judgment and order dated 10.09.2014 passed by this Division with majority view dismissing the appeals and thereby convicting the accused-appellants was not justified and, therefore, the same is reviewed and all the criminal appeals arose from the Criminal Review Petitions No.68, 73,74 and 89 of 2017 are **allowed**.

The appellants namely, Shamsu Habib alias Biddut, Son of Hafizuddin Ahmed, House No. 391, Lane-29, 4th Floor, New D.O.HS, Police Station-Cantonment, District-Dhaka; Sarfarazuddin alias Karzon, Son of late Dr. Nizamuddin Ahmed of Ka-19, Mohakhali, Police Station-Gulshan, District-Dhaka; Sarfarazuddin alias Karzon, Son of late Dr. Nizamuddin Ahmed of Ka-19, Mohakhali, Police Station-Gulshan, District-Dhaka and Abu Raihan alias Rana, Son of Md. Abdus Samad of Village-Shaildanga, Police Station-Satkhira, District-Satkhira, At present- G.P. Cha-148/A, Mohakhali School Road, Police Station-Gulshan, District-Dhaka are acquitted of the charge levelled against them and their conviction and sentence are set aside. Let them be set at liberty forthwith if not wanted in connection with any other case.

C.J.

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