

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

**Present:**

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

**CRIMINAL APPEAL NO.22 OF 2012**

*(From the judgment and order dated 26.01.2012 passed by the High Court Division in Death Reference No.45 of 2006, with Criminal Appeal Nos.2710 of 2007, 3037 of 2006 and Jail Appeal No.470 of 2007)*

Md. Humayun, son of Motaleb : .....Appellant

**-Versus-**

The State : .....Respondent

For the appellant : Mr. Md. Khurshid Alam Khan,  
Advocate, instructed by Mrs.  
Shirin Afroz, Advocate-on-Record.

For the respondent : Mr. Biswajit Debnath, Deputy  
Attorney General.

**Date of hearing and judgment : The 3<sup>rd</sup> day of March, 2021.**

**JUDGMENT**

**Obaidul Hassan, J.** This criminal appeal have arisen out of the judgment and order dated 26.01.2012 passed by the High Court Division in Death Reference No.45 of 2006 heard with Criminal Appeal No.2710 of 2007, Criminal Appeal No.3037 of 2006 and Jail Appeal No.470 of 2007 affirming the judgment and order of conviction and sentence dated 21.05.2006 passed by the learned Additional Sessions Judge, 1<sup>st</sup> Court, Narayanganj (hereinafter referred to as the trial Court) in Sessions Case No.777 of 2005 convicting the absconding convict Jasim and the present appellant Md. Humayun under Sections 302/34 of the Penal Code, 1860 and sentencing them to death by hanging and to pay a fine of

Tk.50,000.00 each and convicting the accused Mohan and Monir under Sections 302/34 of the Penal Code, 1860 and sentencing them to suffer imprisonment for life and also to pay a fine of Tk.30,000.00 each, in default to suffer rigorous imprisonment for 1(one) year more and further acquitted accused Aminul Haque, Abdur Rahman, Md. Asad and Alauddin. Death Reference No.45 of 2006, Criminal Appeal No.2710 of 2007, Criminal Appeal No.3037 of 2006 and Jail Appeal No.470 of 2007 were heard together and disposed of by the single judgment.

The prosecution case, in brief, is that on 28.03.2004 at about 10:00 am informant's husband was shot dead on the way to court to file hajira in a case and after his assassination, the named three assailants came to her house and indiscriminately made gunshots and injured her nephew and on the advancement of the local people, they left the place firing blank shots. Prior to the alleged occurrence, there were some suspicious movements of some other accused. The motive was inferred to have been a dispute out of a work of Navana Company. On the basis of said First Information Report (shortly, the FIR) Siddhirganj Police Station Case No.32 dated 29.03.2004 under Sections 341/448/326/307/302/109/506 (II)/34 of the Penal Code, 1860 was started against 05 FIR named accused including the present appellant.

Police took up the case for investigation. During investigation, the Investigating Officer collected the materials on

record, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and after investigation the Investigating Officers submitted charge sheet being charge sheet No.170 dated 01.06.2005 against the appellant under Sections 341/448/326/307/302/109/506(II)/34 of the Penal Code, 1860.

After submission of charge sheet, the case record was sent to the Court of Sessions Judge, Narayanganj and the same was registered as Sessions Case No.777 of 2005.

Thereafter, the learned Sessions Judge, Narayanganj took cognizance against the accused persons including the appellant under sections 341/448/326/307/302/109/506 (II)/34 of the Penal Code, 1860.

During trial the charge has been framed by the learned Sessions Judge, Narayanganj against the accused persons including the appellant under Sections 341/448/326/307/302/109/506(II)/34 of the Penal Code, 1860. The said charge was read over to the accused persons to which they pleaded not guilty and claimed to be innocent and prayed for trial as per the provisions of law.

On 22.02.2006 the case was transferred to the Court of Additional Sessions Judge, 1<sup>st</sup> Court, Narayanganj.

During trial, the prosecution examined 23 witnesses and they were cross-examined by the defence, but the defence examined none.

On the closure of the evidence of the prosecution, the accused persons Md. Humayun and Monir were examined under Section 342 of the Code of Criminal Procedure, 1898 (hereinafter the Code of Criminal Procedure) to which they pleaded innocence informing the trial court that they would not adduce any evidence on their behalf. The accused persons Jasim and Mohan being absconding they could not be examined under Section 342 of the Code of Criminal Procedure.

After hearing the prosecution, considering the materials on record the trial court convicted the condemned Jasim (absconding) and the present appellant Md. Humayun under Sections 302/34 of the Penal Code, 1860 and sentenced them to death by hanging and to pay a fine of Tk.50,000.00 each and convicted the accused Mohan and Monir under Sections 302/34 of the Penal Code, 1860 and sentenced them to suffer imprisonment for life and also to pay a fine of Tk.30,000.00 each, in default to suffer rigorous imprisonment for 1(one) year more arising out of Special Case No.21 of 2008 in Sessions Case No.777 of 2005 arising out of G.R. No.324/2004 corresponding to Siddhirganj P.S. Case No.32(3)2004 by the judgment and order of conviction and sentence dated 21.05.2006.

The trial Court referred the matter under Section 374 of the Code of Criminal Procedure to the High Court Division for confirmation of death of the aforesaid accused and the said reference was registered as Death Reference No.45 of 2006.

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence dated 21.05.2006, the appellant preferred appeal being Criminal Appeal No.2710 of 2007 with Jail Appeal No.470 of 2007 before the High Court Division. The High Court Division admitted the appeal, called for the records of the case, issued usual notices and stayed the realization of fine.

The said criminal appeal was heard and disposed of by the High Court Division on 26.01.2012. The High Court Division accepted the Death Reference, dismissed the Criminal Appeal No.2710 of 2007 and Jail Appeal No.470 of 2007 and upheld the judgment and order of conviction and sentence passed by the trial Court.

Being aggrieved by and dissatisfied with the aforesaid judgment and order of the High Court Division, the appellant Md. Humayun had filed the Criminal Appeal No.22 of 2012 along with an application for stay before this Division.

Mr. Md. Khurshid Alam Khan, the learned advocate, appearing for the appellant, has taken us through the FIR, testimonies of the witnesses, the judgment and order passed by the trial court and the appellate Court (High Court Division), the postmortem report, connected materials on record and submits that the High Court Division committed serious error of law and committed illegality in upholding the conviction and sentence of the convict-appellant failing to consider that the convict-appellant

participated in the commission of the offence and, as such, the judgment and order passed by the High Court Division may kindly be set aside and the convict-appellant be acquitted from the charge leveled against him. He further submits that the High Court Division has failed to consider that the local witnesses such as PW 1 to PW 13, PWs 20 and 21 are not eyewitnesses of alleged murder of victim Abul Kashem and in upholding the order of conviction and sentence upon the convict-appellant, the High Court Division has failed to take into consideration the said facts and, as such, the judgment and order passed by the High Court Division is liable to be set aside. He also submits that the High Court Division did not take into consideration the deposition of PW 14, Abul Hashem and PW 15, Abul Basher properly, who were with the victim Abul Kashem. Their evidence was very much contradictory and, as such, the judgment and order passed by the High Court Division is liable to be set aside. He adds that the High Court Division did not take into consideration that the confessions made by Md. Humayun and Mohan recorded under Section 164 of the Code of Criminal Procedure was not recorded as per law, the same was not voluntary and true and, as such, the judgment and order passed by the High Court Division is liable to be set aside. He also adds that the High Court Division did not take into consideration that the place of occurrence was shifted and the case was not properly investigated and, as such, the judgment and order passed by the High Court

Division is liable to be set aside. He again submits that the High Court Division without considering the facts and circumstances of the case affirmed the judgment and order of conviction and sentence so far it relates to the appellant and, as such, the judgment and order passed by the High Court Division is liable to be set aside.

In reply, Mr. Biswajit Debnath, the learned Deputy Attorney General, appearing for the respondent, made his submission supporting the judgment and order passed by the High Court Division and prays for dismissal of the appeal.

Heard the learned advocates appearing on behalf of both the parties and examined the FIR, the testimonies of the witnesses, inquest report, postmortem examination report, judgment and order of conviction and sentence passed by the trial Court, judgment and order of affirmation of conviction and sentence passed by the High Court Division in appeal and the connected materials on record.

Now, to ascertain whether the prosecution has been able to prove the charge against the appellant Md. Humayun, let us examine and analyse the depositions of the witnesses produced by the prosecution.

PW 1, the informant Rezia Begum @ Rezia deposed that on 28.03.2004 at 9:00/9:30 am in the morning her husband, the deceased Abul Kashem started for the court by a baby taxi taking Bashar and Hashem with him. On their way to the court in front of

*"Seema Dying Mill"* at Jalkuri, the accused-persons namely, Hashem, Jasim and Arjun came by a motorcycle, blocked his baby taxi and shot him. The accused-persons Humayun, Jasim shot her husband touching their arms on his head and as a result, he died on the spot. Bashar was hit and got injured under his right shoulder by a gunshot fired by the accused-persons. After that occurrence, the accused-persons came to their residence at about 10:00/10:30 am and the accused Jasim and Humayun shot Sorol, her nephew. At that time, the accused Arjun was sitting on the motorcycle with arms. The accused Humayun abused Sorol in filthy language saying that they killed Kashem and they would also kill him. At the alarm of Sorol when the local people came running, the accused-persons Humayun, Arjun and Jasim made good their escape opening fire. After the accused persons decamped, Abul Bashar came in injured condition and gave message that the accused persons shot Chairman Abul Kashem in front of Seema Dying. She went there and saw that the dead body of her husband Abul Kashem was lying there in bleeding condition. After some time police came and held inquest on the dead body and took away the same for autopsy and that after autopsy she buried the dead body of her husband. Before her husband's going to the court Mohan and Alam came to her and asked 2/3 times as to when her husband would go to the Court. Afterwards, when her husband started for the Court Mohan talked with somebody over mobile phone



standing on the road. She lodged the FIR with Siddhirganj Police Station on the following day narrating this occurrence. This witness proved the FIR as Exhibit-1 and her signature thereon as Exhibit-1/1. This witness further deposed that after lodging the FIR, she came to know that the accused persons namely, Rahman Sardar, Alauddin, Monir, Asad, Aminul Haque, Jafar provided fund and arms for killing her husband and in a pre-planned way by giving assistance they got her husband killed.

During cross-examination, this witness stated that she was the first wife of Kashem chairman. She being physically and mentally ill after the burial of the dead body of her husband, the delay in lodging the FIR was caused. She did not mention the name of the accused Monir in the FIR. Her husband did not have any case with the accused persons. This witness denied the suggestions that due to political reason her husband was killed and the accused persons did not kill her husband and she implicated the accused persons falsely in this case.

PW 2, Parul deposed that the occurrence took place on 28.03.2004 at 10:30 am in the morning, while she was cooking. At that time gunshots were being fired targeting the room of Sorol. At the sound of firing, she came out of her house and saw that the accused Arjun was sitting on a Honda and that the accused persons Humayun and Jasim were firing gunshots targeting the house of Sorol. She raised alarm saying that Sorol was being killed. Hearing

her alarm when people came, the accused persons namely, Humayun, Jasim and Arjun left the place by a Honda opening gunshots. Then she went to the room of Sorol and saw that gunshot hit his right leg. In the meantime, Hashem came running and said that Kashem chairman was killed in front of Seema Dying situated at Jalkuri. Then they went to the place of occurrence and saw that the police lifted the dead body of Kashem in bleeding injured condition in a van and also saw police was writing something on a paper. At that place, people were telling that the accused persons Humayun, Jasim and Arjun shot Kashem. Police went to their house (PW 2's house) and seized the tin used in fence which was hit by gunshot under a seizure list and gave the same to her custody. This witness proved the seizure list as Exhibit-2 and her signature thereon as Exhibit-2/1, the deed of custody as Exhibit-3 and her signature thereon as Exhibit-3/1.

During cross-examination this witness stated that Sorol was the nephew of Kashem chairman. The investigating officer examined her on the day following the date of occurrence.

PW 3, Nurunnahar @ Nur Nahar stated in her deposition that the occurrence took place on 28.03.2004 at about 10:00/10:30 am. At that time she was taking her breakfast. She heard the sound of firing. Then she saw her nieces Taslima and Parul to raise alarm saying that Jasim, Humayun and arjun were shooting Sorol, her nephew. They also asked her to come out. She came out to see that

Jasim was chasing one Rahman with arms in hand. At that time, they saw Arjun was sitting on a motorcycle with an arms in his hand. Humayun shot Sorol. Hearing her alarm and cry the accused persons Jasim, Humayun and Arjun left the place by a motorcycle firing gun shots. Then they saw that Sorol received bullet injury on his leg. Then Hashem and Bashar came running and told that Humayun, Jasim shot Kashem to death in front of Seema Dying. They saw that police kept the dead body of Kashem on a van. Police seized tin-fence hit by bullet. She attested the seizure list as a witness. This witness proved her signature on the seizure list as Exhibit-2/2.

During cross-examination, this witness stated that the name of her father was Nur Ali. This witness denied the defence suggestions that she did not see the occurrence or that she deposed falsely.

PW 4, Rehana Akter deposed that the occurrence took place on 28.03.2004 at about 9:00/9:30 am. At that time she was watching television. Then she saw through the window that Mohan and Monir were walking on the road taking mobile phone in their hands. Then a ring came to the mobile phone. Receiving the phone Mohan told that it was not the proper time as yet. Sometimes after hearing the sound of gunshots, she came out of her house and saw that Jasim was chasing one Rahman with arms in his hand. She saw that Humayun was shooting in the room of Sorol. At that time Arjun was sitting on a motorcycle. Sorol was hit on the leg. In the

meantime, news came to the effect that Jasim, Humayun and Arjun killed Kashem. This witness identified the accused persons Mohan and Monir in the dock.

During cross-examination, this witness stated that at 9:00 am she was watching television. She made statement to police. This witness denied the defence suggestion that she did not see any mobile phone or that she deposed falsely.

PW 5, Anwara stated in her deposition that the occurrence took place on 28.03.2004 at about 10:00/10:30 am. Hearing sound of gunshots she came out and saw that Sorol was hit at his leg. Then she saw that the accused persons Mohan and Monir were trying to flee away. She went to the room of Sorol and saw that he was hit by bullet on his leg and that she also saw holes on the tin fencing. On her query many people told that accused persons namely, Humayun and Jasim shot Sorol. Thereafter, Hashem and Bashar came with the information that the accused persons Jasim, Arjun and Humayun shot Kashem chairman to death beside Seema Dying. She saw the dead body of Kashem. This witness identified the accused persons in the dock.

In her cross-examination, this witness stated that the accused Mohan was fleeing away crossing her house. This witness denied the suggestion that she did not see the occurrence or that she deposed falsely.

PW 6, Nasir uddin Dewan stated in his deposition that the occurrence took place on 28.03.2004 at 10:00/10:30 am. At that time, he was taking his breakfast. Hearing hue and cry to the effect that Kashem chairman was shot to death, he came out and saw the dead body of Kashem lying in the beel. He heard that while Kashem chairman was coming with a baby taxi, three persons stopped it and shot him. The defence did not cross-examine this witness.

PW 7, Fatema deposed that the occurrence took place on 28.03.2004 at about 9:00 am. At 9:00 am the accused persons Monir and Mohan were smoking cigarette sitting in her shop. At that time Kashem came back from the pond after taking bath. Then the accused persons Monir and Mohan were talking over mobile phone with somebody. Thereafter, when Kashem started for the town, the accused persons Mohan and Monir again talked over mobile phone with somebody. Thereafter, two persons came running and went to the house of Kashem stating that Humayun, Arjun and Jasim shot Kashem to death. Then the accused persons Humayun, Arjun and Jasim came with the motorcycle and shot Sorol. At that time, Arjun was sitting on a Honda with a pistol in his hand. Sorol was shot at his leg. At 10:30 am she saw the dead body of Kashem and she also saw Bullet injury in the head of Kashem. The dead body of Kashem was still lying in front of Jalkuri Seema Dying. This witness identified the accused persons Mohan and Monir in the dock.

During cross-examination, this witness stated that she did not know the name of the father of the accused Monir. On the date of occurrence, she went to the house of Monir. The house of Mohan was situated at Dakshin Kadamtoli. This witness denied the defence suggestion that she deposed falsely.

PW 8, Amena in her deposition stated that two years back at 9:00/9:30 am she saw three persons to run away. Out of them one fell down to the ground. Forthwith she heard sound of 3/4 gunshots. Three persons went away by a Honda with a pistol in their hands. She went to the person who fell down on the earth. The people of the locality told that the said injured person was Kashem chairman who was shot on the head. The defence declined to cross-examine this witness.

PW 9, Kulsum stated in her deposition that two years back at 10:00/10:30 am she heard the sound of 3/4 gunshots. At the call of Amena, she went to her and saw a person was lying down on the ground being hit by bullet and also saw two persons to run away. The bullet hit person was lying down in front of Seema Dyeing Mill. Subsequently, she heard that the name of the injured person was Kashem. The defence declined to cross-examine this witness.

PW 10, Yasmin was tendered. During cross-examination, she stated that she saw two persons to run away and that one person to fall down on the ground being hit by bullet.

PW 11, Shamima was tendered. The defence declined to cross-examine her.

PW 12, Abdur Rahman stated in his deposition that the occurrence took place on 28.03.2004 at about 10:00/10:30 am Kashem was his neighbour. At the time of occurrence while he was seeing the games of children, he heard the sound of firing. Then he saw that the accused persons Humayun and Jasim were shooting at the house of Sorol. Another accused was then sitting on a Honda. Seeing them, the accused Humayun targeted his arms towards him. Then the accused Jasim told him not to kill him. Then he fled away running. The accused persons Humayun Jasim and Arjun went away by a Honda. Thereafter, they (the witnesses) went to the house of Sorol and saw that he was hit by bullet at his left leg. At that time, Bashar and Hashem came and gave information to the effect that Kashem was shot to death by the accused persons Humayun, Jasim and Arjun in front of Seema Dying.

During his cross-examination, this witness stated that he worked for  $2/2\frac{1}{2}$  hours beside the house of Kashem. The accused Jasim always used to roam with the dacoit Bijoy. This witness denied the defence suggestion that he deposed falsely.

PW 13, Arifa in her deposition stated that the occurrence took place about two years back at 10:00/10:30 am. At that time she was working in her home. Hearing sound of firing, she came out and saw two persons were running to and fro. She went to the road to

hear that the accused persons Humayun and Jasim shoot Sorol. She further heard that the accused persons Humayun, Jasim and Arjun shot Kashem to death in front of Seema Dying. This witness identified the accused persons Mohan and Monir in the dock.

In her cross-examination this witness stated that she made statement to the Investigating Officer.

PW 14, Abul Hashem stated in his deposition that the occurrence took place on 28.03.2004. On that date at about 9:00/9:30 am he along with Abul Kashem, Abul Bashar started for the court by a baby taxi. When they came in front of Seema Dying at Jalkuri, the accused persons namely, Jasim, Humayun and Arjun stopped their baby taxi. Arjun was sitting on the honda. The accused persons Jasim and Humayun kept shooting with the pistols in their hands. They each had two pistols. Then he along with Abul Kashem ran towards the north. Being hit by bullet, Kashem fell down to the ground. He went to the house of Kashem running. Bashar was making scuffle with Arjun. Kashem being hit by bullet fell down to the ground. Bashar kept calling him requesting to take him. Before they went to the house of Kashem, the accused persons Jasim, Humayun and Arjun went to the house of Kashem and shot Sorol, the nephew of Kashem. Subsequently, they came back to the place of occurrence taking people with them. Police held inquest on the dead body of Kashem and found a husk of bullet and seized blood-smearred soil. He attested the inquest report and the seizure list.



This witness proved the inquest report as Exhibit-6, his signature thereon as Exhibit-6/1, the seizure list as Exhibit-7 and his signature thereon as Exhibit-7/1 and identified the front portion of a bullet, a pair of leather sandal and a packet of blood-smearred soil as material Exhibit- I, II series and III respectively.

During cross-examination, this witness stated that being hit by bullet Kashem fell down to the ground. The accused persons Jasim and Humayun both shot Kashem to death. He could not say as to whose gunshot hit Kashem. This witness denied the defence-suggestion that he deposed falsely.

PW 15, Abul Bashir stated in his deposition stated that on 28.03.2004 at 9:00/9:30 am he along with Hashem and Kashem started for Narayanganj Court by baby taxi through the Jalkuri road. When they came in front of Jalkuri Seema Dying, the accused persons Humayun, Jasim and Arjun came to them by a Honda and brought out arms. Each accused had two arms. When they started firing Kashem, Hashem started to run towards a beel. He raised alarm. Being hit by bullet, Kashem fell down to the ground. Hashem kept running. He caught hold of Arjun. Subsequently, the accused Jasim caught hold of him. Jasim raised alarms saying that Bashir had caught him. Then the accused Humayun shot him which hit him on the right side of his belly under the shoulder. When he was running towards Jalkuri beel, the accused persons fired more gunshots targeting him. After going to the middle portion of the

beel, he fell down and raising his head he saw that the accused persons Humayun, Jasim and Arjun were shooting Kashem touching his head with arms. Then he kept calling Hashem and went towards the house of Kashem. Hashem took him to a house. Thereafter, in injured condition, he went to the house of Kashem where he saw many people. He heard that the accused persons Humayun, Jasim and Arjun went to the house of Kashem and shot Sorol and fled away. Then he told the people that these accused persons also shot Kashem. He was under treatment in the hospital for one week. After coming back from the Medical College Hospital, he heard from the wife of Kashem that Zafar, Rahman Sardar, Alauddin and Al-Amin supplied arms and money to the accused persons Huyamun, Jasim and Arjun and that the accused persons Mohan, Alam and Monir gave message through their mobile phones in respect of their movements. This witness identified the accused persons Mohan and Monir in the dock.

In his cross-examination, this witness stated that he narrated the occurrence to the wife of Kashem. He also narrated the occurrence to the investigating officer. The three accused persons had 6 arms in total. At first the accused Humayun shot Kashem which hit him at the leg. This witness denied the defence-suggestion that he deposed falsely.

PW 16, Dr. Md. Shahjahan Miah deposed that on 28.03.2004 he was attached to Narayanganj General Hospital as the R.M.O. On

that date as per identification of constable No.859, Nurul Huq, he held postmortem examination on the dead body of the deceased Abul Kashem. During postmortem examination he found the following injuries on his person:

- i. Entry right temporal area of scalp. Exit left temporal area of the scalp.
- ii. Left cheek entry area.
- iii. Middle of the scalp exit area.
- iv. Back of thigh just above right knee entry.
- v. Abvarassi right chest below clavicle left upper chest, left upper arm.

In his opinion death was due to shock and hemorrhage resulting from gunshot injuries which were ante-mortem and homicidal in nature. This witness proved the postmortem examination report as Exhibit-9 and his signature thereon as Exhibit-9/1.

In his cross-examination this witness stated that there being no column of injury he did not mention the age of the injuries in the post-mortem examination report. As per medical jurisprudence, they used to mention the injuries inflicted by gun pistol or revolver as an injury.

PW 17, A.S.I. Sree Gouranga Chandra Sarkar stated in his deposition that the occurrence took place on 28.03.2004. On 29.03.2004 as per instruction of the Officer-in-Charge, he recorded the case on receipt of the FIR and filled up the FIR form. This witness proved the FIR form as Exhibit-8 and his signature thereon

as Exhibit-8/1. This witness further stated that as per the instruction of the Officer-in-Charge, S.I. Zahid Hossain took over the charge of investigation of the case.

In his cross-examination, this witness stated that the occurrence took place on 28.03.2004 at 10:00 am. On the day following the date of occurrence, the FIR was lodged. The names of the accused persons Aminur Rahman, Asad and Alauddin were not there in the FIR.

PW 18, Constable Md. Nurul Huq stated in his deposition that on 28.03.2004, he was attached to Siddhirganj Police Station. On that day at 10:45 am he accompanied by S.I. Ahmed went to the place of occurrence in front of Seema Dying and saw the dead body of chairman Kashem beside the road. S.I. Ahmed held inquest on the dead body of the deceased and sent the dead body to the morgue through a chalan. He took the dead body to the hospital. This witness proved the chalan dated 28.03.2004 as Exhibit-10 and his signature thereon as Exhibit-10/1. This witness identified a green-white check lungi, off white Panjabi, a white sando genji and a printed cap which he handed over to the investigating officer. This witness was not cross-examined on behalf of the defence.

PW 19, S.I. Ahmed Ali deposed that on 28.03.2004, he was attached to Siddhirganj Police Station. On that date through wireless message he got information that in Jalkuri area a person Abul Kashem by name was shot to death by some terrorist and that the

dead body was lying there. As per instruction of the duty officer, he went to the place of occurrence and held inquest on the dead body in presence of witnesses beside the northern side of the road of Seema Dying. After holding inquest, he sent the dead body to the morgue, General Hospital Narayanganj through constable No.859 Md. Nurul Haq. This witness proved his signature on the challan as Exhibit-10/2. This witness proved his signature on the inquest report as Exhibit 6/2. This witness further deposed that he seized a pair of chocolate colour sandal, a portion of a cartridge and some blood-stained soil in presence of the witnesses under a seizure list. This witness proved the seizure list as Exhibit-7 and his signature thereon as Exhibit-7/1 and identified the seized alamots.

In his cross-examination, this witness stated that the people present at the time of holding inquest told that the some terrorist persons shot Kashem to death.

PW 20, Sorol deposed that the occurrence took place on 28.03.2004 at about 9:30/9:45 am. At that time he was sleeping in his house. His wife went to the pond to wash clothes keeping the door under lock. Hearing alarm and sound of firing, he woke up and saw that bullet hit blew his right knee and it was bleeding profusely. Then he raised alarm and at that time he had heard sound from outside the house to the effect that "*we have already killed Kashem, you come out and we shall kill you as well.*" The accused persons Humayun, Jasim and Arjun were making the

utterances. Then when people came towards their house the aforesaid accused persons went away. Many people came, broke the lock of the door and brought him out. While he was being taken to the Medical College Hospital in injured condition, Hashem came running in bleeding and injured condition and said that the accused persons Humayun, Jasim and Arjun shot Kashem chairman in front of Seema Dying. He was first taken to Medistar Hospital and from there he was taken to Mohakhali Hospital. After treatment he came to his house and came to know that behind killing of Kashem, Mohan, Monir, Alauddin, Rahman Sardar, Amirul and Zafar were involved. He made statement to police.

In his cross-examination this witness stated that he handed over his injury certificate to the investigating officer.

PW 21, Kala Babul stated in his deposition that the occurrence took place on 28.03.2004 at 9:00/9:30 am. Then he was going to the market taking fish with him. On his way, he saw Mohan was talking over mobile phone in front of Moonlight Hall. After coming back from the market, he did not see Mohan at that place. After coming back to his residence he heard that the accused persons Humayun, Jasim shot Kashem to death in front of Jalkuri Dying Mill. This witness identified the accused Mohan in the dock.

During cross-examination, this witness stated that Mohan was standing alone in front of Moonlight Cinema Hall. He did not know as to whether the accused persons Jasim and Hashem had enmity

with Kashem. He heard from Mujibor, Sorol and others that the accused persons Jasim, Humayun shot Kashem to death. This witness denied the suggestion that he deposed falsely.

PW 22, Md. Faridul Islam Majumdar, Magistrate, 1<sup>st</sup> Class deposed that on 30.10.2004 he was attached to Narayanganj District Collectorate as a Magistrate, 1<sup>st</sup> class. On that date, he recorded the confessional statement of the accused Md. Humayun which he made voluntarily. Before recording the statement, he told him about the consequence of making confessional statement and that he gave him sufficient time for speculation. This witness proved the confessional statement of the accused Humayun as Exhibit-11 and his signature thereon as Exhibit-11/1. This witness also deposed that in the same way he recorded the confessional statement of the accused Mohan under Section 164 of the Code of Criminal Procedure, which he made voluntarily. This witness proved the confessional statement of the accused Mohan as Exhibit-12 and his signature thereon as Exhibit-12/1. This witness deposed that the accused persons put their signatures in their respective confessional statements. He gave certificate to the effect that the confessional statements of the accused persons appeared to him to be true and voluntary.

During cross-examination, this witness stated that before recording the confessional statement of accused Humayun, he made him understand that whether he made a confessional statement or

not he would not be taken on remand. This witness denied the defence-suggestion that the confessional statement of the accused Humayun was not recorded properly.

PW 23, the Investigating Officer of the case S.I. Md. Jahir Hossain deposed that on 29.03.2004 he was attached to Siddhirganj Police Station as an S.I. The case was endorsed to him for investigation and during investigation he visited the place of occurrence, drew sketch map thereof with index, recorded the statement of the witnesses under Section 161 of the Code of Criminal Procedure and arrested the accused persons Humayun, Mohan, Asad, Rahman Sardar. He seized the alamots of the case, gave some alamots to the custody of Parul Begum, collected the injury certificates of the victims Sorol and Abul Bashar, perused the post-mortem examination report of the deceased Abul Kashem and that after investigation prima facie case having been made out against the accused persons, he submitted charge sheet No.170 dated 01.06.2005 under Sections 341/448/326/307/302/109/506(II)/34 the Penal Code.

During cross-examination, this witness stated that excepting the three victims, he recorded the statements of all other witnesses. He could not arrest the accused persons Alauddin and Amirul. The name of the accused Mohan did not appear in the FIR. This witness denied the defence-suggestion that he did not take out the investigation properly or that he implicated the accused



falsely in this case or that the accused Mohan was not involved in the alleged occurrence or that he implicated the said accused falsely in this case.

So, these are the evidences adduced by the prosecution to substantiate its case. Now, we are to find out whether the impugned order of conviction is sustainable or not.

From the depositions of the witnesses it is evident that the appellant Md. Humayun shot Kashem to death. Of the 23 witnesses, PWs 14 and 15 were the eye witnesses, who were with the deceased Kashem at the time of occurrence, PWs 1-5,7,12-13 and 20-21 are the hearsay witnesses, who have heard about the killing of Kashem from Hashem and Bashar. PWs 10 and 11 were tendered. PW 16, Dr. Md. Shahjahan Miah held postmortem examination on the dead body of the deceased. PW 17, A.S.I. Sree Gouranga Chandra Sarkar filled up the FIR form and the case was started. PW 18, Constable Md. Nurul Huq took the dead body to morgue and S.I. Ahmed Ali held inquest on the dead body of the deceased Kashem. PW 22, Md. Faridul Islam Majumder is the Magistrate of 1<sup>st</sup> Class, who recorded the confessional statements of the appellant Md. Humayun and accused Mohan. PW 23, S.I. Md. Jahir Hossain is the Investigating Officer, who investigated the case and submitted charge sheet.

The eye witnesses i.e. PWs 14 and 15 in their deposition stated that on 28.03.2004 at 9:00/9:30 am he along with Hashem and Kashem started for Narayanganj Court by baby taxi through the

Jalkuri road. When they came in front of Jalkuri Seema Dying, the accused persons Humayun, Jasim and Arjun came to them by a honda and brought out arms. Each accused had two arms. When they started firing Kashem, Hashem started to run towards a beel. He raised alarm. The accused persons Jasim and Humayun kept shooting with the pistols in their hands. Being hit by bullet, Kashem fell down to the ground. As a result, Kashem died. During cross-examination, the defence failed to establish any contradictions/inconsistency between the depositions of these two eye witnesses. The hearsay witness i.e PWs 1-5,7,12-13 and 20-21 heard the incident of killing Kashem by the appellant from the eye witnesses- Hashem and Bashir. Mr. Khurshid Alam Khan, the learned advocate submitted that the local witnesses such as PWs 1-13, 20 and 21 were not eye witnesses. From the materials on record, it is found that among the local witnesses PWs 6,8-9 were not cross-examined by the defence. Though they stated that the appellant killed the deceased Kashem, but they did not mention the persons from whom they had heard the incident. But the other hearsay witnesses i.e. PWs 1-5,7,12-13 and 20-21 stated that they had heard the incident from Hashem and Bashir, who were eye witnesses. Section 60 of the Evidence Act, 1872 provides that, "*Oral evidence must, in all cases whatever, be direct; that is to say- if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;.....*"

The provision of this section provides that the hearsay evidence must be direct i.e. it must be the evidence of the witness, who had seen the occurrence and the evidence of the witness, who heard about the occurrence from the witness, who had seen it. In the instant case, the hearsay witnesses i.e. PWs 1-5,7,12-13 and 20-21 heard about the occurrence from Hashem and Bashar, who were present at the time of occurrence and they had seen the occurrence. The hearsay witnesses in a voice supported the eye witnesses and the defence could not establish any inconsistencies or discrepancies by cross-examining them.

In this case, apart from the oral evidence of the prosecution witnesses, there are the confessional statements of the present appellant Md. Humayun and accused Mohan. Since the appellant Md. Humayun preferred appeal, his confessional statement is relevant in the instant case and hence, his confessional statement is discussed thereof. The confessional statement of the appellant is as follows:

“আমার নাম মোঃ হুমায়ুন, পিতা আঃ মোতালেব। আমি পাভু এং সরলের সাথে ফেন্সিডিল ব্যবসা করতাম। ফেন্সিডিল ব্যবসা থেকে প্রতিদিন ৫০০ টাকা করে আঢ়ুল কাশেম নিয়া ঠাইত এং আমাদের ভবিষ্যতের জন্য প্রতিদিন ১০০০ টাকা করে তার নিকট জমা রাখা হইত। প্রায় ২/২ এংসর পরন্তু কাশেম এর নিকট টাকা জমা রাখা হয়। কাশেম আমাদেরকে পরে একটি প্রকার মিনিবাস কিনে দেয়ার কথা বলে। পরর্তীতে একটি মিনিবাস কিনে এং কাগজপত্র কাশেমের নামে করে। পরর্তীতে কাশেম এর নিকট কাগজ চাইলে সে বলে কাগজ পরে করে দিবে। তারপর থেকে কাশেমসহ তার লোকজন আমাকে মেরে ফেলার হুমকি দেয় এং আমার মা ঠাকাকেও মারধর করে।

এরপর ঘটনার দিন ২৮/০৩/২০০৪ ইং তারিখ সকাল ১০ টার দিকে জসিম, আলাউদ্দিন এর কাছ থেকে ৯ এম,এস ২ টি পিস্তল এং ১০ রাউন্ড গুলি নিয়া আসে।

রাস্তায় মোটাইল সহ ৩ জন পাহাড়া দিচ্ছিল। তাদের নাম আসাদ, মোহন ও মনির। তারা মোটাইল করলে আমি, জসিম ও অর্জুন অস্ত্র নিয়ে আমি এং জলকুড়ি সীমা ডাইং এর কাছে রাস্তার উপর পাই এং গুলি করে মেরে ফেলি। কাশেমসহ আরও ২ জন পেটী টেক্সিতে ছিল। ঐ ২ জন আরোহীর ১ জন গুলি খায়। কাশেমকে গুলি করার পর কাশেম এর ঠাড়িতে পাই এং কাশেম এর ভাগিনা সরলকে গুলি করি। গুলি করার পর আমরা হোল্ডা নিয়ে চলে পাই। সোনা মিয়া ঠাজারের জাফর নামের একজনের সাথে আলাপকালে জাফর আলাউদ্দিন এর সাথে ঠোগাঠোগ করার জন্য ঠলে। এং আলাউদ্দিন অস্ত্র দেয়। এই আমার জঠানঠন্দি।”

From the deposition of PW 22, Md. Faridul Islam Majumder, the confessional statement recording Magistrate, it appears that the appellant made the confessional statement voluntarily and it was not obtained by coercion or torture. During recording the confessional statement, the Magistrate followed the procedure instructed to be followed by the Supreme Court of Bangladesh. From the reading of confessional statement, it is found that the confessional statement was made voluntarily and it is true and it can well form the basis of conviction of the appellant. Moreover, the confessional statement of the appellant supports the evidence of the eye witnesses i.e. PWs 14 and 15. It is well settled that the confessional statement can be the sole basis of conviction if it is made voluntarily and it is true. In the instant case, the confessional statement of the appellant is voluntary and true as well as this confessional statement supports the depositions of eye witnesses, PWs 14 and 15.

From the testimonies of PWs, confessional statements made by the appellant and other materials on record, it is proved that the appellant shot Kashem to death.

In view of the facts and evidence discussed above, our considered opinion is that the prosecution has been able to prove beyond reasonable doubt that the appellant shot the deceased Abul Kashem to death and therefore, the conviction and sentence in respect of the appellant Md. Humayun cannot be said to be illegal.

From the materials on record, it is found that the appellant Md. Humayun has been in condemned cell for more than 14 (fourteen) years suffering the pangs of death. It was held in the case of *Nazrul Islam (Md) vs. State* reported in 66 DLR(AD)199 that, *"Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death."*

In view of the decision cited above as well as the circumstances of this case, we are of the view that justice would be

sufficiently met, if the sentence of death of the appellant Md. Humayun be commuted to one of imprisonment for life.

The criminal appeal is **dismissed with modification of sentence of death**. The sentence of death is commuted to the sentence of imprisonment for life.

The Jail Petition No.23 of 2012 filed by Md. Humayun is **disposed of** in the light of the judgment in Criminal Appeal No.22 of 2012.

C.J.

J.

J.