

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

PRESENT:

Mr. Justice Md. Nuruzzaman  
Mr. Justice Obaidul Hassan  
Mr. Justice Borhanuddin  
Mr. Justice M. Enayetur Rahim  
Ms. Justice Krishna Debnath

**CRIMINAL APPEAL NO.58 of 2014.**

(From the judgment and order dated 20.05.2010 passed by the High Court Division in Death Reference No.132 of 2005 with Criminal Appeal No.3979 of 2005 and Jail Appeal No.897 of 2005.)

Ariful Islam Shimul. : .....Appellant.

-Versus-

The State. : .....Respondent.

**For the Appellant.** : Mr. Munsurul Haque Chowdhury,  
Senior Advocate, instructed by  
Mr. Sadhan Kumar Banik, Advocate-  
on-Record.

**For the Respondent.** : Mr. Bashir Ahmed, Deputy Attorney  
General, instructed by Mrs.  
Shirin Afroz, Advocate-on-Record.

**Date of Hearing** : 26.01.2022

**Date of Judgment** : The 26<sup>th</sup> January, 2022.

**J U D G M E N T**

**Borhanuddin, J:** Delay of 1439 days in filing this criminal appeal is hereby condoned.

This criminal appeal is directed against the judgment and order dated 20.05.2010 passed by the High Court Division in Criminal Appeal No.3979 of 2005 with Death Reference No.132 of 2005 and Jail Appeal No.897 of 2005 arising out of Druto Bichar Tribunal Case No.03 of 2005 corresponding to

Motijheel Police Station Case No.139 dated 23.04.1999 and G.R. Case No.261 of 1999.

The prosecution case, in short, is that on 19.04.1999 at about 11.30 a.m. the appellant Md. Rabiullah @ Khokon apprehended Abdullahel Baki @ Idul, while Idul and his accomplices were snatching pedestrians and brought him to Gopibag Bazar from 2<sup>nd</sup> Lane of R.K. Mission Road; Subsequently, set him free while Idul promised that he would not commit such offence in future; Thereafter, on 23.04.1999 Friday at about 12.45 p.m. the informant alongwith his son Md. Rabiullah @ Khokon, nephew Pipon and Tapan, younger brother Md. Ismail went to Gopibagh Bazar Jame Mosque for performing Juma prayer and after Juma prayer all of them went to Gopibag Bazar Ponchayet graveyard for Ziarat; On their way back to home when they reached near the house of one Rahim at R.K. Mission Road the accused persons namely Asif, Idul, Shimul, Joba, Tota alongwith other 10 to 15 unknown persons attacked them with deadly weapons; accused Asif shot with his fire arm on the left side of Khokon's face, Idul dealt a heavy blow with a chapati on the neck of Khokon and Khokon fell down

on the ground, accused Shimul dealt a blow beneath the forehead of Khokon with the fire arm, accused Joba and Tota dealt chapati blows at different parts of Khokon's body causing serious blood injuries, accused Shimul opened fire to kill Tapan and Pipon and Tapan received a bullet injury in his leg, Pipon ran away; other accuseds created a reign of terror in the locality by firing gun shots and blasting bombs indiscriminately and then fled away from the spot; Khokon was taken to Dhaka Medical College Hospital where the duty doctor declared him dead. Younger brother Md. Ismail went to the home of informant and told him regarding the incident which he saw at the place of occurrence; After sometime nephew Pipon came in the house of informant and described vividly the incident. F.I.R. was lodged by the informant on 23.04.1999 at 20.45 hours. Accordingly, Motijheel Police Station Case No.139 dated 23.04.1999 has been registered.

After investigation, police submitted charge sheet on 31.05.2001 against 5(five) accused persons including the appellant under sections 147/148/149/326/307/302 of the Penal Code. Thereafter, the case was sent for trial to the

Metropolitan Sessions Court, Dhaka from where it was transferred to the 3<sup>rd</sup> Court of Additional Metropolitan Sessions Judge. Learned Additional Metropolitan Sessions Judge framed charge against the accuseds under sections 147/148/149/326/307/302/34 of the Penal Code and the charge was read over and explained to the accuseds present on the dock of the Court to which they pleaded not guilty and claimed to be tried.

Subsequently, the case was again transferred to the Druto Bichar Tribunal for trial and disposal pursuant to notification dated 27.12.2004 published in the Bangladesh Gazette, wherein the case was registered as Druto Bichar Tribunal Case No.03 of 2005.

During trial, prosecution examined 11 witnesses who were cross examined by the accused. After closure of the prosecution evidence, two accused who were present during the trial namely Abdullahel Baki alias Idul and Jabed alias Joba were examined under section 342 of Cr.P.C. wherein both the accused reiterated their innocence and declined to adduce any witness.

The defence case, as it appears from the trend of cross-examination of the prosecution witnesses, in short, is that the deceased of the case was a drug trafficker and also a top terror. He might have been killed by other drug traffickers due to internal conflict over drug trafficking. The accuseds are innocent and falsely implicated in this case.

After concluding the trial, learned Judge of the Tribunal found accused Abdullahel Baki @ Idul and Ariful Islam Shimul (absconding) and Mamunur Rashid @ Mamun as guilty under sections 302/34 of the Penal Code and sentenced each of them death penalty but acquitted two other accuseds having found not guilty.

The Druto Bichar Tribunal sent a reference being Death Reference No.132 of 2005 under section 374 of Code of Criminal Procedure before the High Court Division for confirmation of sentence.

The convict Abdullahel Baki @ Idul filed Criminal Appeal No.3979 of 2005 and Jail Appeal No.897 of 2005 which were heard analogously with Death Reference No.132

of 2005 by the High Court Division and disposed of vide judgment dated 20.05.2010 allowing the death reference in part confirming the death sentence of the accused petitioner Ariful Islam @ Shimul and accused Mamunur Rashid @ Mamun, the sentence of another condemned prisoner Abdullahel Baki @ Idul has been modified to rigorous imprisonment for 10(ten) years with a fine of Tk.5,000/- in default, to suffer simple imprisonment for another 3(three) months more.

Against the sentence passed by the High Court Division the condemned appellant Ariful Islam @ Shimul preferred instant criminal appeal.

Mr. Munsurul Haque Chowdhury, learned senior Advocate appearing for the appellant submits that the informant as P.W.1 contradicted contents of the F.I.R and as such the prosecution failed to prove its case. He also submits that there are inconsistencies in the statement of prosecution witnesses which shaken the prosecution case. He further submits that the statement under section 161 of the P.W.5 has been recorded by the investigation officer after about

1(one) year and such delay prejudice the prosecution case. He submits that all the prosecution witnesses are closely related and as such cannot be considered as credible witness. He finally submits that the prosecution failed to produce any witness from the place of occurrence and thus failed to prove its case.

On the other hand, Mr. Bashir Ahmed learned Deputy Attorney General appearing for the state submits that 3(three) different police officers investigated the case for cogent reasons and in such circumstances the delay in examining P.W.5 under section 161 of the Code of Criminal Procedure did not prejudice the prosecution case. He also submits that the witnesses are related to each other or to the deceased cannot be a ground for disbelieving the witnesses. By referring the case of *Darya Singh vs the State of Punjab*, learned Deputy Attorney General submits that the independent witnesses are generally reluctant to give evidence because they are afraid that giving evidence might expose them to serious risk and as such inability of the prosecution to bring independent witness to the Court

cannot be a ground to disbelieve the evidence adduce entirely.

Heard learned Advocate for the condemned-appellant and the learned Deputy Attorney General for the respondent. In view of the submissions made by the learned Advocate for the appellant, we feel to discuss the evidence adduced by the prosecution.

P.W.1 is the informant and deceased's father. In his deposition he reiterated the statement made in the F.I.R. He is not an eye witness though he deposed that being informed he came to the place of occurrence and saw that the accuseds were fleeing from the place of occurrence by firing gun shots and blasting bombs. He also deposed that many people came to the place of occurrence and thereafter he alongwith others taken injured Khokon to the Dhaka Medical College Hospital. In his cross examination he stated that আমার ছেলেকে আমি ঘটনাস্থলে যাইয়া দেখি নাই। আমি ঘটনাস্থলে যাওয়ার পূর্বেই তাকে মেডিকলে নিয়া যায়। He also admitted in his cross examination that deceased Khokon was an accused of the Aslam murder case.

P.W.2 Md. Habib Hossain is an inhabitant of the locality. He is not an eye witness. He went to the Dhaka Medical College morgue one day after the occurrence. He is a witness of the inquest report.

P.W.3 Md. Ismail is the elder brother of informant. He is an eye witness and was present in the place of occurrence. He went to the house of the informant and informed the incident to him.

P.W.4 is the full brother of the informant. He is not an eye witness. He is a witness of the inquest report. In his cross examination he stated that police investigated him on the day when he went to bring the dead body of the deceased Khokon from hospital.

P.W.5 is the nephew of the informant who was present at the time of occurrence. He narrated the events happened when he alongwith others were coming from the graveyard. He deposed that accused Asif and Rabiullah fired gunshot aiming Khokon and other accuseds also started firing pointing deceased Khokon. He deposed that accuseds also shot him. He deposed that:

”আমি যখন গুলি খাইয়া রাস্তায় পড়িয়া থাকি তখন দেখি আসামী শিমুল, মামুন ও আসিফ যখমি রবিউল্লাহ খোকনকে শোয়া অবস্থায় টানিয়া গোপীবাগ দ্বিতীয় লেনে নিয়া যায় এবং সেখানে আসামী শিমুল জখমি রবিউল্লাহ খোকনের বুকের উপর বসিয়া গলায় ছুরি দিয়া পোচাইতে থাকে।”

In his cross examination he denied the suggestion that he did not see the occurrence. He also stated that being injured by gunshot he did not see what happened in front of the house of Rahim.

P.W.6 Md. Ariful Islam Pipon deposed that he was also accompanied Chan Mia and others on 23.04.1999 to perform Juma prayer in the Gopibagh Mosque and also went to the graveyard for Ziarat, on the way back from graveyard, the accuseds attacked them in front of the house of Rahim. He deposed that:

”আসামী আসিফ নিহত খোকনকে উদ্দেশ্য করিয়া গুলি করে এবং ঐ গুলি তপনের পায়ে লাগে। ঐ সময় ভিকটিম নিহত খোকন দৌড় দেয়। তখন ইদুল তার হাত থাকা চাপাতি দিয়া খোকনের ঘাড়ে কোপ দেয়। উক্ত কোপ খাইয়া খোকন পড়িয়া গেলে আসামী আসিফ তাকে পুনরায় গুলি করে। অন্যান্য আসামীরা খোকনকে এলোপাথারী কোপাইতে থাকে।”

Prosecution declared this witness as hostile.

P.W.7 A.S.I. Md. Jahangir Alam, prepared the inquest report. He is a formal witness.

P.W.8 Doctor Md. Fazlul Karim conducted the post mortem examination of the deceased Khokon. During post mortem examination he found various wounds on the different parts of the deceased's body including one cut throat wound measuring 6" x 1  $\frac{1}{2}$ " bone (cervical vertebra No.3 was found sharp cut) on left side of the neck above the thyroid cartilage extending from anterior midline to just below angle of the mandible of left side. On dissection the doctor found, amongst others, Larynx oesophagea vessels of left side of the neck, 3<sup>rd</sup> cervical vertebra were found sharp cutting. In his cross examination he stated that:

"ঘাড়ের দুইটি অংশ ঘাড়ের সামনের দিক এবং পিছনের দিক। ঘাড়ের সামনের দিকে thyroid cartilage দুই দিকে muscles এবং বিভিন্ন ভেসেলস আছে। ৪ নং জখমের মাধ্যমে এই অংশ সমূহই ক্ষতিগ্রস্ত হয়েছে।"

P.W.9, 10 and 11 are the investigating officers who investigated the matter one after another due to ailment and transfer of the earlier investigating officer.

P.W.9, the first investigating officer, deposed that he recorded statement of Ariful Islam Pipon on 25.04.1999 and also deposed that Pipon did not mention regarding

house of Rahim in his statement. In his cross examination he stated that during investigation he arrested accused Abdullahel Baki @ Idul who did not confess during remand.

P.W.10, the 2<sup>nd</sup> investigating officer, deposed that during investigation he recorded statement of the witness Nazmul Huda @ Tapan under section 161 of the Cr.P.C. In his cross examination he stated that Nazmul Huda @ Tapan did not mention about Rickshaw and also did not mention about 2<sup>nd</sup> lane.

P.W.11, the 3<sup>rd</sup> investigating officer, deposed that during investigation he recorded the statement of witness Atiqur Rahman and Md. Habib Hossain under section 161 of the Cr.P.C. He also deposed that after investigation he submitted charge sheet on 31.05.2001. He denied the suggestion in his cross examination that he did not perused the statement of the witnesses under section 161 of the Cr.P.C. and submit false charge sheet.

On perusal of the deposition of the witnesses it is found that there are minor discrepancies in the statement of the witnesses but those minor discrepancies do not

affect the core of the prosecution case and cannot be the ground to disbelieve the evidence adduced by the prosecution. In the case of Yogesh Singh vs Mahabeer Singh and others, reported in (2017) 11SCC 194, Indian Supreme Court observed that:

*"It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same transpires confidence in the mind of the Court. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore minor contradictions, inconsistencies or insignificant embellishment do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence."*

Learned Advocate for the appellant argued that the prosecution witnesses are relations and as such interested witnesses. He also argued that prosecution failed to adduce independent witnesses, even from the locality where occurrence take place.

In the case referred above i.e. the case of Yogesh Singh vs Mahabeer Singh and others, the Indian Supreme Court also observed that:

*"Survey of the judicial pronouncements of this Court on the point of testimony of interested/inimical witnesses leads to the inescapable conclusion that the evidence of a closely related witness is required to be carefully scrutinized and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon."*

Regarding lack of independent witnesses the Indian Supreme Court in the above cited case observed that:

*"It is well known that in the villages where murders are committed as a result of factions existing in the village or in consequence of family feuds, independent villagers are generally reluctant to give evidence because they are afraid that giving evidence might invite the wrath of the assailants and might expose them to very serious risks."*

As such the submissions of the learned Advocate that the prosecution failed to prove its case because of

inability to bring independent witnesses do not merit consideration. Submission of the learned Advocate for the appellant regarding delay of 1(one) year in recording the statements of witness no.5 by the investigating officer cannot be a ground to discard the evidence. In the instant case as many as 3(three) different Police Officers investigated the case for cogent reason and it is apparent that the change of investigating officers contributed to the delay in examining the witness. Under such circumstances, any delay in examining the witness under section 161 of the Cr.P.C. will not prejudice the prosecution case.

However, from the facts and circumstances discussed above it is found that the trial Court was correct in its decision convicting the appellant and subsequently the High Court Division found the conviction and sentence of the appellant was rightly awarded and we also give our opinion that the appellant was rightly found guilty by both the Courts below but we think that justice would be met if the sentence of death is commuted into imprisonment for life as the appellant is in pang of death since

pronouncement of the trial Court and subsequent affirmation by the High Court Division and as such the sentence of death is commuted into imprisonment for life with a fine of Tk. Tk.10,000/-, in default, to suffer rigorous imprisonment for 3(three) months more. The appellant will get the benefit of section 35A of the Code of Criminal Procedure.

The concerned Jail Authority is directed to shift the appellant from condemned cell to general ward forthwith.

Accordingly, the criminal appeal is dismissed with modification of sentence.

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