

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain,

Chief Justice

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

CRIMINAL APPEAL NO.56 OF 2012 WITH CRIMINAL APPEAL NOS.60-63 OF 2012 & CRIMINAL APPEAL NOS.55, 57-59 OF 2012 & JAIL PETITION NO.29 OF 2013.

(From the judgment and order dated 19.10.2008 and 20.10.2008 passed by the High Court Division in Death Reference No.176 of 2004 with Criminal Appeal Nos.19 of 2005, 4752 of 2004, 4773 of 2004, 112 of 2005, 141 of 2005, 378 of 2005 and Jail Appeal Nos.294 of 2006, 1338 of 2004.)

The State : Appellant.
(In all the appeals)

Md. Mobarak and others : Petitioners
(In J.P.No.29/2013)

=Versus=

Md. Jamal @ Karati Jamal : Respondent.
(In CrI.A.No.56/2012)

Mubarak : Respondent.
(In CrI.A.No.60/2012)

Abu Rashed alias Kazi Abu Rashed : Respondent.
(In CrI.A.No.61/2012)

Md. Belal : Respondent.
(In CrI.A.No.62/2012)

Mohammad Baktiar @ Naniya : Respondent.
(In CrI.A.No.63/2012)

Md. Mobarak and others : Respondent.
(In CrI.A.No.55/2012)

Abul Kalam Chowdhury : Respondent.
(In CrI.A.No.57/2012)

Hazi Imam Uddin @ Mujib : Respondent.
(In CrI.A.No.58/2012)

Md. Jamal @ Karati Jamal : Respondent.
(In CrI.A.No.59/2012)

The State : Respondent.
(In J.P.No.29/2013)

For the Appellant : Mr. Biswajit Debnath, Deputy Attorney General
(In all the appeals) instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Petitioner : None appears.
(In J.P.No.29/2013)

For the Respondent : Mr. Ruhul Quddus, Advocate instructed by Ms.
(In CrI.A.No.56/2012) Shirin Afroz, Advocate-on-Record.

For the Respondent : Not represented.
(In CrI.A.No.60/2012)

For the Respondent : Mr. M. A. Sobhan, Advocate instructed by Mr. Nurul
(In CrI.A.No.61/2012) Islam Bhuiyan, Advocate-on-Record.

For the Respondent (In CrI.A.No.62/2012)	:	Mr. M. A. Sobhan, Advocate instructed by Ms. Shirin Afroz, Advocate-on-Record.
For the Respondent (In CrI.A.No.63/2012)	:	Mr. Mohammad Ashraf Ali, Advocate instructed by Mr. Ashrafuzzaman Khan, Advocate-on-Record.
For Respondent Nos.1,2 & 5 (In CrI.A.No.55/2012)	:	Mr. Fazlul Haque Khan Farid, Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
Respondent Nos.3 & 4 (In CrI.A.No.55/2012)	:	Not represented.
For the Respondent (In CrI.A.No.57/2012)	:	Mr. Ruhul Quddus, Advocate instructed by Ms. Shirin Afroz, Advocate-on-Record.
For the Respondent (In CrI.A.No.58/2012)	:	Mr. A.K.M. Faiz, Senior Advocate instructed by Ms. Shirin Afroz, Advocate-on-Record.
For the Respondent (In CrI.A.No.59/2012)	:	Not represented.
For the Respondent (In J.P.No.29/2013)	:	Mr. Biswajit Debnath, Deputy Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.

Date of hearing : 21.09.2021, 22.09.2021 and 29.09.2021.

Date of judgment : 26.10.2021.

J U D G M E N T

Hasan Foez Siddique, J: These Criminal Appeal Nos.55, 56, 57, 58, 59, 60, 61, 62 and 63 of 2012 and Jail Petition No.29 of 2013 have been preferred by the State against the judgment and order dated 19.10.2008 and 20.10.2008 passed by the High Court Division in Death Reference Nos.176 of 2004, Criminal Appeal Nos.19 of 2005, 4752 of 2004, 4773 of 2004, 112 of 2005, 141 of 2005, 378 of 2005 and Jail Appeal No.294 of 2006 and 1338 of 2004.

Earlier Divisional Druto Bichar Tribunal, Chattogram, by a judgment and order dated 18.12.2004, in Druto Bichar Case No.15 of 2004 convicted the accused persons, namely, 1.Md. Mubarak, 2.Osman, 3.Moinuddin @ Baraiya, 4.Imam Uddin @ Mujib 5.Md. Lokman under sections 302/34 of the Penal Code and sentenced each of them to death. The Tribunal also convicted the accused 1. Abul Kalam Chowdhury, 2. Shahjahan, 3.Bakhtiar, 4.Belal, 5.Shah Alom, 6. Rashed, 7.Jamal @ Karati Jamal and 8.Daulat

under section 302/34 of the Penal Code and sentenced each of them to suffer imprisonment for life and to pay a fine of Tk.50,000/-, in default, to suffer 2(two) years imprisonment more.

Against the said judgment and order of the Tribunal, the above mentioned Criminal Appeals and Jail Appeals were preferred and the Tribunal sent the case record to the High Court Division for confirmation of sentence of death which was registered as Death Reference No.176 of 2004. The High Court Division, by the impugned judgment and order, acquitted all the accused persons including the respondents of these appeals. Then, the State preferred Criminal Appeal No.55 of 2012 against the respondents 1.Md. Mubarak, 2.Md. Osman, 3.Moinuddin @ Baraiya, 4.Imamuddin @ Mujib and 5.Md. Lokman. The State also preferred Criminal Appeal No.56 of 2012 against the respondent Md. Jamal @ Karati Jamal, Criminal Appeal No. 57 of 2012 against the respondent Abul Kalam Chowdhury, Criminal Appeal No. 58 of 2012 against Hazi Imamuddin @ Mujib, Criminal Appeal No. 59 of 2012 against the respondent Md. Jamal @ Kerati Jamal, Criminal Appeal No. 60 of 2012 against Md. Mubarak, Criminal Appeal No. 61 of 2012 against Abu Rashed @ Kazi Abu Rashed, Criminal Appeal No.62 of 2012 against Md. Belal and Criminal Appeal No. 63 of 2012 against Md. Bakhtiar @ Nainya.

Since all the aforesaid appeals have been preferred against the same judgment and order of the High Court Division, we have heard all these appeals analogously and they are being disposed of by this common judgment and order.

The prosecution case as appeared from the evidence of P.W.1 Kazi Mofjol Ahmed (the informant) was that at about 11-11.30 a.m. on

26.05.2003, A. Kalam Chairman, Mujib, Daulatuddin, Jamal, Mohiuddin, Mubarak, Bakhtiar, Selim @ Ali Akbar, Abul Hyet, Abul Kashem, Jabbar, Lokman, Shah Alam, Nasir, Fazlul Karim, A. Hossain, Osman, Belal, Shekandar and Shajahan, assaulting his brothers, namely, Abul Kashem, Hazi Abul Boshor and Badsha Alam by gunshots and kirich blows, killed them. On the date of occurrence, when victim Abul Kashem was drinking tea in the shop of one A. Halim of village Charia, accused Osman, Jamal, Lokman, Mubarak, Mujib, Daulat, Rashed and others shot him with firearms. Receiving bullet injuries, he fell down on the ground. At that time, accused Shajahan, Belal, Jamal and Kamal assaulted him inflicting kirich blows and, thereafter, left the scene firing shots and went towards the west. At the relevant time other two brothers of the informant, namely, Badsha and Boshor were working in their shop situated beside the Halda Project. Hearing sound of firings, they rushed to the shop of Abdul Halim. When they reached near the brick field of Ismail Chairman, accused Osman, Mujib, Moinuddin, Lokman and Rashed shot them and accused Shahjahan, Jamal, Belal, Sekandar, Abul Kalam, Nurul Alam, Shah Alam and Bakhtiar indiscriminately assaulted them with sharp cutting weapons and left the place towards west. P.W.1 Mofjol lodged First Information Report with Hathazari Police Station (exhibit-1). On the basis of said F.I.R., the Investigating Officer started investigation of the case.

In course of investigation, police arrested accused Md. Mubarak who made a confessional statement recorded under section 164 of the Code of Criminal Procedure before the Magistrate. Police also recovered arms and ammunitions used for killing the victims from the eastern side of a khal near Asoptoli hill and prepared a seizure list (exhibit-2). Police recovered 8

pieces of fire arms and 27 pieces of ammunitions (material exhibit-I and II series).

The Investigating Officer, upon completing investigation, submitted charge sheet against 22 accused persons including the respondents. The case was ultimately tried by the Divisional Druto Bichar Tribunal, Chattogram who framed charges against the respondents and others for committing offence punishable under sections 302/34 of the Penal Code.

The prosecution examined 10 witnesses out of 17 listed in the charge sheet. From the trend of cross-examination of the P.Ws, it appears that the defence case was of innocence and that they were implicated in the case falsely out of previous enmity.

The Tribunal on recording the evidence of P.Ws and examining the accused persons present on dock under section 342 of the Code of Criminal Procedure and hearing the submissions made by the parties convicted and sentenced the respondents and others as mentioned earlier by its judgment and order dated 18.12.2004. Against which, the respondents preferred above mentioned Criminal Appeals and Jail Appeals and the Tribunal sent the case record in the High Court Division for confirmation of sentence of death. The High Court Division by the impugned judgment and order rejected the death reference and allowed the criminal appeals and jail appeals and acquitted all the respondents and others from the charge. Thus, the State has preferred the abovementioned appeals in this Division against the judgment and order of acquittal.

Mr. Biswajit Debnath, learned Deputy Attorney General appearing on behalf of the State in all the appeals, submits that the P.Ws.2,3,4,5,6 and 7 are the eye witnesses of the occurrence and they specifically mentioning the

names of the respondents stated that they had killed three unfortunate victims in their presence, the High Court Division upon misreading and misappraising the testimonies of those eye witnesses erroneously acquitted the respondents which has caused total failure of justice. He further submits that the P.Ws.2,3,4,5,6 and 7 categorically deposed that they saw the occurrence of killing the victims by the accused respondents and the prosecution has been able to prove its case against the respondents beyond all shadow of doubt, the High Court Division, without considering the relevant portion of the evidence as to the date, time and manner of occurrence most illegally acquitted all the respondents.

Mr. Fazlul Haque Khan Farid, learned Counsel appearing on behalf of the respondents in Criminal Appeal Nos.55, 56, 59 and 60 of 2012, submits that the respondents of these appeals were implicated in the case falsely and the High Court Division upon proper appreciation of the evidence on record rightly drew conclusion that the prosecution had failed to prove its case against the respondents in all those appeals, thereby, rightly acquitted them. He submits that the confessional statement of accused Md. Mubarak was extracted by the Investigating Agency upon exerting undue force and that such confessional statement was not true and voluntarily made and the same was not recorded following the provisions of section 164 and 364 of the Code of Criminal Procedure.

Mr. M.A. Sobhan, learned Counsel appearing for the respondents in Criminal Appeal Nos.61 and 62 of 2012, submits that the accused Rashed and Belal were implicated in the case falsely, the High Court Division upon proper appreciation of the evidence on record rightly acquitted them.

Mr. M. Ashraf Ali, learned Counsel appearing for the respondent Md. Bakhtiar @ Naniya of Criminal Appeal No.63 of 2012, submits that the injured witness P.W.5 did not disclose the name of this respondent. Similarly, P.W.2 in his testimony did not disclose the name of Bakhtiar. He submits that in his confessional statement Md. Mubarak also did not state that Bakhtiar was involved in the instant case, in such view of the matter, respondent Md. Bakhtiar is entitled to get benefit of doubt.

Mr. Ruhul Quddus, learned Counsel on behalf of the respondent in Criminal Appeal No.57 of 2012, submits that the respondent Abul Kalam Chowdhury was Chairman of the local Union Parishad and he had been implicated in the case falsely. He submits that there were vital contradictions and discrepancies in the evidence adduced by the prosecution as to the presence of Abul Kalam Chowdhury at the time of occurrence. He further submits that the High Court Division upon proper appreciation of the evidence acquitted this respondent.

Mr. A.K.M. Foez, learned Senior Counsel appearing for Hazi Imamuddin @ Mujib in Criminal Appeal No.58 of 2012, submits that the star witness of this case namely, Nurul Alam (P.W.5), who was an injured witness, in his testimony did not mention the name of Mujib and that he was implicated in the case falsely, the High Court Division rightly acquitted respondent Mujib.

In this case out of 10 prosecution witnesses, P.W.1 is the informant of the case. He was not an eye witness of the occurrence. In his evidence, he stated the prosecution case as mentioned earlier. In his cross-examination he stated that he is a school teacher. Upon getting information, he rushed to the

place of occurrence and hearing the facts from other witnesses lodged the First Information Report.

P.W.2 Ahmed Hossain in his testimony stated that at about 11 a.m. on 26.05.2003 when his son and he were working in the field, he found accused persons coming out from the dwelling huts of Md. Osman and Abul Hossain advancing towards north. Crossing this witness, they reached at nearby road. He saw arms in the hands of Md. Osman, Jamal, Mujib, Lokman, Md. Mubarak, Moinuddin, Nasir, Daulat and Rashed. He also saw kiriches in the hands of accused A. Kalam, Shahjahan, Jabbar, A. Hayet, A. Kashem, Belal, Abul Hossain and Shah Alam. This witness asked them where they were going, then accused Mujib and Osman cautioned him not to raise any voice. Those accused persons rushed towards the shop of Halim and, this witness, heard the sound of firings. Thereafter, the accused persons moved towards the west. They shot the victims Badsha Alam and Boshor near the brick field of Ismail Chairman, and assaulted them inflicting kirich blows and thereafter, left towards west. This witness stated that he saw the occurrence. Few days before the occurrence, victim Kashem and others confining one Alamgir handed over him to the police which formed enmity between the parties. In his cross examination, he stated that he would not be able to mention the numbers of plot and khatian where they were working. He further stated that he told the Investigating Officer that some of the accused persons wore "borkha" and some of them wore "mask". He denied the defence suggestion that he had deposed falsely. P.W.3 Md. Motaleb in his testimony stated that on 26.05.2003 he went to the brick field of Ismail for catching fish. Sometimes thereafter, he heard the sound of firings and saw that some persons were going towards west. He heard that victim Abul

Kashem had been killed in the tea stall. Hearing the sound of firings, the victims Boshor and Badsha went to the brick field. This witness saw arms in the hands of Osman, Jamal, Mujib, Shah Alam, Mubarak, Moinuddin, Daulat and Rashed. Accused Kalam inflicted kirich blows to victim Boshor. Shahjahan also inflicted kirich blows on Boshor. Accused Jabbar, Abul Hossain, Sekandar, Nasir, Baktiar @ Naniya, Selim, Kashem, Belal and Nurul Alam assaulted the victims Boshor and Badsha. Thereafter, the accused persons left the place towards the west. He further stated that he informed the facts of killing of the victims to the local police station. In cross-examination, he stated that he informed the police that three persons had been killed at the place of occurrence. Chairman Abu Taleb went to the place of occurrence at about 1 p.m. In cross-examination, he stated to the Investigating Officer that the accused persons wore "borkha" at the time of occurrence. He further stated that the informant is his cousin by village courtesy. He denied the defence suggestion that on the date and time of occurrence, he did not go to catch fish and he had deposed falsely. P.W.4 Ahmed Hossain in his evidence stated that at about 11.00-11.30 a.m. on 26.05.2003 he was cultivating his land. At that time, he heard the sound of firings from the east. Keeping cultivation aside, he stood up and found that the people present in the tea stall of Abdul Halim were running away. He also saw, 2/3-5 minutes thereafter, that 16/17 persons coming from the shop of Abdul Halim were moving towards west. At that time Boshor and Badsha were standing near the brick field. This witness saw arms in the hands of accused Osman, Mujib, Mainuddin, Jamaluddin, Nasir, Mubarak, Daulat, Rashed and Lokman and they shot the victims Badsha and Boshor. He also saw accused Kamal, Shahjahan, Jabbar, Baktiar, Salim, A. Kashem, A.

Hayet and Shah Alam inflicted kirich blows on victims Boshor and Badsha. In cross-examination, he denied the defence suggestion that the statements made by him are not true. He further stated that earlier accused Baktiar had been living in Middle East. It is not true that Baktiar was not present at the place of occurrence.

P.W.5 Nurul Alam in his testimony stated that, at about 11.00-11.30 a.m. on 26.05.2003, he entered into the tea stall of Abdul Halim. He found 15/16 persons armed with deadly weapons entering into the tea stall and some of them armed with Kirich etc. were waiting outside tea stall. They started firing targeting victim Kashem. Out of those persons, he had been able to identify accused Baitta Moinuddin, Osman, Lokman, Karati Jamal, Mubarak and some others. This witness himself also received bullet injuries and became senseless. In his cross-examination, he stated that it was not true that at the instance of Chairman Abu Taleb he had deposed falsely.

P.W.6 A. Barek in his testimony stated that at about 11.00-11.30 a.m. on 26.05.2003 he was breaking bricks beside the brick field of Ismail Chairman. He heard the sound of firings coming from Abdul Halim's tea stall. Thereafter, the miscreants moved towards the west. At that time victims Badhsa and Boshor were moving towards the east. This witness found accused Osman, Jamal, Mubarak, Baitta Moinuddin, Mujib, Lokman, Daulat, Rashed, Nasir and others armed with deadly weapons at the place of occurrence. He also saw accused Abul Kalam, Jamal, Jabbar, Selim, Naniya, Shah Alam, Abul Hayet, A. Kashem, A. Hossen, Shekandar and Belal armed with kirich etc. They shot victims Boshor and Badsha. They also assaulted them inflicting kirich blows. After the occurrence, accused A. Hossen and Shekandar left for their house and other accused persons went towards the

hill. In cross-examination, he stated that it was not true that he did not see the occurrence.

P.W.7, Md. Kobbat Mia, in his testimony, stated that at about 11.00-11.30 a.m. on 26.05.2003 he, taking his cattle-herd, was going towards the east side of the place of occurrence. He heard the sound of gunshots coming from the tea stall of Abdul Halim. He saw that after firing, the miscreants moved towards the brick field of Ismail Chairman and shot victims Badhsa and Boshor indiscriminately. He also saw accused Osman, Jamal, Mubarak, Lokman, Nasir, Rashed, Daulat, Mujib, Moinuddin, Abul Kalam, Jabbar, Shajahan, Shekandar, A. Hossen, Belal, Abul Hayet, Selim, Naniya @ Bakhtiar, Kasem, Shah Alam and others who shot the victims. This witness further stated that police held inquest of the dead body of Boshor, Badsha and Abul Kalam. He proved inquest reports exhibits-3,4,5 and his signatures exhibits-3(1), 4(1) and 5(1). On 01.06.2003, police recovered arms at the instance of the accused Mubarak in front of him. After recovery of arms, the police prepared a seizure list (Exhibit-2) and he put his signature on it (Exhibit-2/1). Police also seized the bloodstained wearing apparels of accused Rashed upon preparing a seizure list (exhibit-6) and he gave his signature on it which was marked as exhibit-6(1). In his cross-examination, he stated that he did not see the occurrence committed in the tea stall of Abdul Halim. He denied defence suggestion that he did not see the occurrence.

P.W.8 Dr. Md. Fazle Rabbi held post-mortem examination of the dead bodies of all the victims. At about 9.30 a.m. on 27.05.2003, he held autopsy of the dead body of the victim Abul Boshor and found the following injuries on his persons:-

- I. One heavy sharp incised wound 4" X 1" bone depth right frontoparietal.
- II. One heavy sharp incised wound 4" X 2" X bone depth Rt & Lt occipital.
- III. One sharp incised wound Lt. side of Rt arm 3" X 2" X 1".
- IV. Heavy sharp incised wound left palm of hand (Defense wound) 3" X 1" X 1½".
- V. Heavy sharp incised wound left forearm 3" X 1" X ½".
- VI. Left radio ulna fracture.
- VII. Heavy sharp incised wound left forearm 3" X 2" X 2" deep.
- VIII. 1½" diameter lacerated wound with burn mark (Fire arm) left thigh 1½" X 2".

He opined that the death of victim Abul Boshor was caused due to head injury. Haemorrhage and shock due to combined effect of fire arms injuries and above mentioned injuries which were ante-mortem and homicidal in nature. He proved the post mortem report of victim Abul Boshor which was marked as exhibit-7 and his signature on it [exhibit-7(1)].

He also held post-mortem of victim Abul Kashem and found following injuries on his person:-

- I. One sharp incised wound 1" X $\frac{1}{8}$ " X $\frac{1}{8}$ ", One inch lateral from left eye brow.
- II. Laceration of left ear.
- III. Entry wound of fire arm 1" X 1", 1" right from left shoulder. Defense wound Lt. Index, Middle, Ring finger.
- IV. Exit wound 2" X 2", 2" below left shoulder.
- V. Entry wound lateral side of left abdomen 2" X 3", 4" above Lt. Ant. Sup. Iliac spine.
- VI. Multiple pellet injury 1" X 3" left forearm.
- VII. Incised wound rt. forearm 2" X 1" X ½"
- VIII. One sharp incised wound rt leg above tibia 1" X $\frac{1}{8}$ " X $\frac{1}{8}$ ".

He opined that death of victim Abul Kashem was caused due to hypovolemic shock done to haemorrhage as a result of above mentioned injuries (Fire Arm + Wounds) which were anti-mortem and homicidal in nature. He proved the post-mortem report which was marked as exhibit-8 and his signature on it [exhibit 8(1)].

He also held the autopsy of victim Badsha Alam and found the following injuries on his person:-

- I. One sharp incised wound back of neck 1½" X 1" X ¼".
- II. One sharp incised wound Lt. side of Rt. Arm 2" X 1" X ½".
- III. One sharp incised wound left leg 1½" X ½".
- IV. One fire arm injury entry wound 2" X 1" X chest depth. One inch rt. from left nipple.
- V. Exit wound 2" X 2" right chest 4" below right nipple.
- VI. Sharp incised wound right leg 1½" X ½" X ¼".

He opined that death of victim Badsha Alam was caused due to haemorrhage and shock due to chest and abdominal organ injuries as a result of combined effect of firearm injuries and physical assault which were ante-mortem and homicidal in nature. He proved the post-mortem report (exhibit-9) and his signature on it [exhibit-9(1)].

P.W.9 A.K.M. Nurun Nabi Kabir, Magistrate First Class, stated in his testimony that he recorded the confessional statement of accused Md. Mubarak under Section 164 of the Code of Criminal Procedure. He proved the said confessional statement (exhibit-10) and his signatures on it [exhibit-10(1-5)]. In cross-examination, he stated that it is not true that confessional statement made by accused Md. Mubarak was not voluntarily made and the same was not true.

The contents of the said confessional statement run as follows:

“ঘটনার পূর্ব হতে আমি আঃ জব্বারের কোষ্টার গাড়ীতে ডেইলী হিসাবে রঙের কাজ করতাম। গাড়ীর রঙের কাজ করতাম গনি মেম্বারের ব্রীক ফিল্ডের নিকট। সেখানে প্রায় দিন এসে চেয়ারম্যান কালাম, (ছেঁড়া) আঃ জব্বার, শাহজাহান কথাবার্তা শলাপরামর্শ করত। (ছেঁড়া) ঘটনার পূর্ব রাতে ব্রীক ফিল্ডে বেতনের জন্য বসা ছিল। আঃ জব্বার ও শাহজাহান সন্ধ্যায় এসে একশত টাকা বেতন দেয়। বেতন দেওয়ার পর আঃ জব্বার চলে যায়। পরে শাহজাহান বলে যে চল আমার বাড়ীতে যাই। তার বাড়ীতে নিয়া ভাত খাওয়ায়। পরে আমাকে ইসমাইল চেয়ারম্যানের ব্রীকফিল্ডে শাহজাহান আমাকে একটি কাজ আছে বলে নিয়ে যায়। সেখানে গিয়ে দেখি অস্ত্র শস্ত্র নিয়ে রাশেদ, আবুল কালাম চেয়ারম্যান, দৌলত, মুজিব, কেরানী জামাল, শাহ আলম, নাসির, মহিউদ্দিন, লোকমান, আঃ জব্বার, বখতিয়ার রহমান তখন রাত্র ৯.০০ টা। বন্দুক ৫টি, কিরিচ ২টি, ৩টি এলজি, ছোট ১টি চাকু তাদের কাছে ছিল। আমি বাড়ীতে আসার জন্য শাহজাহানকে অনুরোধ করি। সে তখন আমাকে বলে যে, শালা তোকে জানে মেরে ফেলবো। ইসমাইল চেয়ারম্যানের ব্রীক ফিল্ডে অপেক্ষা করে ওসমানের বাসায় নিয়ে যায়। সকলেই ওসমানের বাসায় ঘুমায়। শাহজাহান, আঃ জব্বার, কালাম চেয়ারম্যান, রাশেদ বলেছে এখন চল আনিসের চা দোকানের দিকে যাই। তখন সকাল ১১.০০ টা বাজে। চা দোকানে থাকা পূর্ব কালাম চেয়ারম্যান, রাশেদ, আঃ জব্বার, ও শাহজাহান বোরখা পড়ে। শাহ আলম, মহিউদ্দিন, দৌলত, মুজিব, জামালের মুখোশ পড়া ছিল। হালিমের দোকান ঐখানে কাশেমকে চা খাওয়া অবস্থায় পায়। রাশেদ, মহিউদ্দিন, জামাল গুলি করে। চেয়ারম্যান কালাম ও শাহজাহান কোপায়েছে এরপরে তারা পশ্চিম দিকে রওয়ানা হয়। আমি সব সময় তাদের সাথে ছিলাম। পশ্চিম দিকে রওয়ানা হওয়ার মুহূর্তে আবুল কাশেমের ভাই তাদের দোকান হতে বের হয়ে রাস্তা দিয়ে আসতে থাকে। আবুল বশর ও বাদশা কাশেমের আপন ভাই। আবুল বশর ও বাদশাকে পেয়ে রাশেদ ও মহিউদ্দিন ও দৌলত তাদেরকে গুলি করে। চেয়ারম্যান কালাম ও শাহজাহান তাদেরকে কোপায়। পরে পশ্চিম দিকে পাহাড়ে চলে যাই সবাই। আছাদ তলী পাহাড়ে গিয়ে খালে সকলেই বসি। অস্ত্র শস্ত্র গুলো চেয়ারম্যান জমা নেয়। ওসমান মাটি গর্ত করে, ফজল করিম কলার পাতা কেটে আনে। অস্ত্র, কিরিচ একত্রে করে চেয়ারম্যান। বন্দুক, অস্ত্রগুলো মাটিতে কলার পাতা দিয়ে ঢেকে রাখে এবং কিরিচ গুলো খালে পানির মধ্যে ফেলে দেয়। তখন বেলা ২.০০ টা বাজে। এরপর শাহজাহান আমাকে এক হাজার টাকা দিয়ে পালায়ে যেতে বলে। আমার সাথে নাসির যায়। নাসির চৌদ্দগ্রাম আমার নানার বাড়ীতে গিয়াছিল। সেখান হতে নাসির তার বোনের বাসায় টেলিফোন করে। নাসিরের নাম পেপারে না থাকায় সে বাড়ীতে চলে আসে। ঘটনার সময় আমরা তের জন ছিলাম। আমার ভাই মামলার বাদীর সাথে আলাপ করে আমাকে পুলিশের নিকট ধরিয়ে দিয়েছে। ঘটনার

সময় আমার হাতে একটি ছোট সাদা বাটওয়ালা ছুরি শাহজাহান ধরিয়ে দেয় জোড়পূর্বক। আমি নিতে চাই নাই। হাটহাজারী থানায় আমাকে এনে রাত্র ৪.০০ টার সময় যেখানে অস্ত্র শস্ত্র লুকায়ে রাখে সেখানে নিয়ে যায়। আমি দেখায়ে দিয়েছি। সত্য কথা বলেছি। আমি ইচ্ছা করে আসামীদের সাথে যাই নাই আমাকে ভয়ভীতি দেখিয়ে নিয়েছে। আমি আর কিছু বলতে চাই না। এই আমার বক্তব্য।”

P.W.10, Md. Shajahan, Sub-Inspector of Police was the Investigating Officer of the case. In his testimony, he stated that on the basis of G.D. No.1455 dated 26.05.2003, he was on duty on that day. He got information about the occurrence through wireless message. He rushed to the place of occurrence and started investigation of the case. He prepared inquest of the dead bodies of the victims. He stated that after completing investigation, he submitted charge sheet against the respondents and others.

Those are the evidence, in a nutshell, of the prosecution witnesses.

While sitting in judgment over the acquittal it is required to seek an answer to the question whether the findings are palpably wrong, manifestly erroneous or demonstrably unsustainable. An order of acquittal can be set aside if the Appellate Court is satisfied that reasons in support of acquittal recorded are perverse, non existent, extraneous and order of acquittal palpably wrong or ill founded or demonstrably unsustainable. If the answers are found to be negative the order of acquittal is not to be disturbed. Conversely, if it is found that the order of acquittal cannot at all be sustained in view of the infirmities, the appraisal of the evidence is called for. The paramount consideration of the Court is to ensure that miscarriage of justice is to be prevented. It is the duty of the Court to scrutinize probative material by the weighty thought before upsetting order of acquittal. Generally, the order of acquittal shall not be interfered with because the presumption of

innocence of the accused is further strengthened by acquittal. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted for the purpose of ascertaining as to whether any of the accused committed any offence or not.

Here, State has preferred Criminal Appeal No.55 of 2012 against 1.Md. Mubarak, 2.Md. Osman, 3.Md. Moinuddin @ Baraiya, 4.Imam Uddin @ Mujib and 5. Md. Lokman. In their testimonies, P.W.2 Ahmed Hossain, P.W.3 Md. Motaleb, P.W.4 Ahammed Hossen, P.W.5 Nurul Alam, P.W.6 A. Barek and P.W.7 Md. Kobbat Mia stated that they saw the accused-respondents Md. Mubarak, Md. Osman, Md. Moinuddin @ Baraiya participated in the killing of victims Abul Kashem, Abul Boshor and Badhsa. Five of the above witnesses also testified that accused Imam Uddin @ Mujib and Lokman took part in the killings of the three victims. All the above accused persons killed the victims by the gunshots and also inflicting kirich blows. The post-mortem report exhibits-7,8 and 9 are consistent with the testimonies of those witnesses. Mr. Fazlul Haque Khan Farid and Mr. Ruhul Quddus in their submissions stated that there are contradictions and discrepancies in the evidence of all those witnesses but we have gone through the testimonies of those witnesses and did not find any material contradictions and discrepancies in the testimonies of those six witnesses. The High Court Division without proper appreciation of their evidence erroneously acquitted those 5 accused persons of the charge.

In both the Criminal Appeal Nos.56 and 59 of 2012 the respondent is Md. Jamal @ Karati Jamal. It appears from the testimonies of P.Ws.2,3,4,5,6 and 7 that they saw accused Md. Jamal @ Karati Jamal participating in the

occurrence of killing of the victims. We do not find any material contradictions and discrepancies in the testimonies of those prosecution witnesses, that is, PWs. 2, 3, 4, 5, 6 and 7 so as to disbelieve their evidence in respect of accused Jamal. We are of the view that the prosecution, examining those eye witnesses of the occurrence, has been able to prove the charge against this respondent, namely, Md. Jamal @ Karati Jamal beyond all shadow of doubt. In the confessional statement, Md. Mubarak stated the name of this accused mentioning that he participated in the offence of killing the victims.

In Criminal Appeal No.57 of 2012 the respondent is Abul Kalam Chowdhury. From the testimonies of P.W.2 Ahmed Hossain, PW-3 Md. Motaleb, P.W.6 A. Bareq and P.W.7 Md. Kobbat Mia it appears that respondent Abul Kalam Chowdhury also participated in the occurrence of killing the victims Kashem, Boshor and Badsha. Accused Md. Mubarak in his confessional statement implicated Abul Kalam Chowdhury. The High Court Division without proper appreciation of the testimonies of P.Ws.2, 3, 6 and 7 and the statement of the accused Md. Mubarak recorded under section 164 of the Code of Criminal Procedure erroneously acquitted him of the charge.

In Criminal Appeal No.58 of 2012 the State impleaded Hazi Imam Uddin @ Mujib as respondent. Since in Crl.A.No.55 of 2012 we have considered the evidence adduced against Imam Uddin @ Mujib along with other respondents, it is not at all necessary to discuss this appeal again independently. So, this appeal should be disposed of.

In Criminal Appeal No.60 of 2012 respondent is Md. Mubarak. At the time of considering Criminal Appeal No.55 of 2012, we have discussed the evidence of P.Ws.2, 3, 4, 5, 6 and 7 who implicated Md. Mubarak stating that they saw Mubarak at the time of commission of offence along with other accused persons. Moreso, Mubarak himself made a confessional statement recorded under Section 164 of the Code of Criminal Procedure. In that confessional statement, Mubarak vividly described the place, time and manner of occurrence implicating himself with the said occurrence.

In Criminal Appeal No.61 of 2012 the respondent is Abu Rashed @ Kazi Abu Rashed. P.W.2 Ahmed Hossen, P.W.3 Md. Motaleb, P.W.4 Ahmed Hossain, P.W.6 .A. Barik and P.W.7 Md. Kobbat Mia in their testimonies stated that accused Rashed participated in the occurrence along with other accused persons. On perusal of the evidence of those 5 witnesses, we do not find any vital contradictions and discrepancies in the testimonies of all those witnesses. The High Court Division misread the testimonies of those 5 witnesses and acquitted Rashed of the charge. It appears from the confessional statement of the co-accused Mubarak that accused Rashed shot the victims from his firearm.

The concept of probability, and degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained institutions of the judge. While protection given by the criminal process to

the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice [State of U.P. vs. Krishna Gopal and others, (1988) 4 SCC 302]. Additionally, there was no discrepancy pointed out in the evidence of the eye witnesses. A miscarriage of justice which may arise from acquittal of guilty is no less than from the conviction of an innocent. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. The High Court Division wrongly observed that there were inconsistencies in prosecution evidence adduced by the prosecution. Therefore, the decision of the High Court Division in respect of the abovementioned accused persons is liable to be set aside.

In Criminal Appeal No.62 of 2012 the respondent is Md. Belal. On perusal of the evidence of P.Ws it appears that P.Ws. 4 and 5 who are the eye witnesses of the occurrence in their testimonies did not disclose the name of accused Belal. Since P.Ws.4 and 5 in their testimonies did not implicate the respondent Belal in the occurrence, we are of the view that Belal is entitled to get benefit of doubt.

In Criminal Appeal No.63 of 2012 respondent is Md. Bakhtiar @ Naniya. It appears that P.W.2 and P.W.5 in their testimonies did not implicate this witness in the occurrence. Co-accused Mubarak in his confessional statement did not mention the name of Md. Bakhtiar stating that he was present and participated in the commission of offence dated 26.05.2003. In such view of the matter, he is also entitled to get benefit of doubt.

In view of the discussions made above, we find substance in Criminal Appeal Nos.55, 56, 57, 58, 59, 60 and 61 of 2012. However, we do not find any substance in Criminal Appeal Nos.62 and 63 of 2012.

Accordingly, Criminal Appeal Nos.55, 56, 57 and 61 of 2012 are allowed. The judgment and order of the High Court Division in respect of accused Md. Jamal @ Karati Jamal, Md. Mubarak, Abu Rashed @ Kazi Abu Rashed, Md. Osman, Moinuddin @ Baraiya, Hazi Imam Uddin @ Mujib, Md. Lokman and Abul Kalam Chowdhury is set aside. They are sentenced to suffer imprisonment for life and to pay fine of Tk.50,000/- each, in default, to suffer rigorous imprisonment for 2(two) years more each. Criminal Appeal No.62 of 2012 in respect the accused Md. Belal and Criminal Appeal No.63 of 2012 in respect of accused Mohammad Bakhtiar @ Naniya are dismissed. They are released from the bail bond. Criminal Appeal Nos.58, 59 and 60 of 2012 are disposed of. Jail Petition No.29 of 2013 is also disposed of.

C.J.

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