

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 Obaidul Hassan

CRIMINAL APPEAL NOS.69 OF 2013 AND 70 OF 2013 AND CRIMINAL APPEAL NO.64 OF 2013

(From the judgment and order dated 21.01.2013, 22.01.2013, 23.01.2013 passed by the High Court Division in Death Reference No. 25 of 2007 with Criminal Appeal No. 2529 of 2007, Criminal Appeal No. 4263 of 2007, Criminal Appeal No. 2018 of 2007, Criminal Appeal No. 1913 of 2007, Criminal Appeal No. 2244 of 2011 and Jail Appeal Nos. 274-275 of 2007.)

Mujib Ali

Appellant

(In CrI. A. No. 69 of 2013)

Lachu Miah alias Kamal Ahmed

Appellant

(In CrI. A. No. 70 of 2013)

Abdul Bari

Appellant

(In CrI. A. No. 64 of 2013)

=Versus=

The State

Respondent

(In all the appeals)

For the Appellant
(In CrI. A. No. 69 of 2013)

: Mr. S.M. Shajahan, Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Appellant
(In CrI. A. No. 70 of 2013)

: Mr. Md. Nozrul Islam Chowdhury, Senior Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Appellant
(In CrI. A. No. 64 of 2013)

: Mr. Nikhil Kumar Saha, Senior Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Respondent
(In CrI. A. No. 69 of 2013)

: Mr. Md. Shamsul Alam, Advocate-on-Record

For the Respondent
(In CrI. A. No. 70 of 2013)

: Mrs. Shirin Afroz, Advocate-on-Record.

For the Respondent
(In CrI. A. No. 64 of 2013)

: Not represented

Date of hearing and judgment : **17.11.2021**

J U D G M E N T

Hasan Foez Siddique, J: Appellants Mujib Ali, Lachu Miah @ Kamal

Ahmed and Abdul Bari were convicted under sections 302/148/447/109 and 34 of the Penal Code in Sessions Case No. 169 of 2004 arising out of

Biswanath Police Station Case No. 7 dated 09.08.2003 and corresponding to G.R. Case No. 87 of 2003. Of them, Mujib Ali and Lachu Miah @ Kamal Ahmed were sentenced to death. They were also sentenced to suffer rigorous imprisonment for 2(two) years under section 148 and also sentenced to suffer rigorous imprisonment for 10(ten) years and to pay fine of tk. 1000/-, in default, to suffer rigorous imprisonment for one month more under section 460 of the Penal Code. Appellant Abdul Bari was sentenced to suffer imprisonment for life and to pay fine of tk. 1000, in default, to suffer rigorous imprisonment for 2 months more with other co-convicts. He was also sentenced to suffer rigorous imprisonment for 3 months under section 447 of the Penal Code.

The trial Court transmitted the case records in the High Court Division for confirmation of sentence of death awarded to appellants Mujib Ali and Lachu Miah @ Kamal Ahmed which was registered as Death Reference No. 25 of 2007. Mujib Ali and some other co-convicts preferred Criminal Appeal No. 2529 of 2007. Lachu Miah @ Kamal Ahmed preferred Criminal Appeal No. 4263 of 2007 and Abdul Bari and 3 others preferred Criminal Appeal No. 2018 of 2007 in the High Court Division. Mujib Ali also preferred Jail Appeal No. 275 of 2007. The High Court Division, by the impugned judgment and order, accepted the Death Reference No. 25 of 2007 and dismissed Criminal Appeal No. 4263 of 2007, 2529 of 2007 (in part) and 2018 of 2007, thereby, upheld the judgment and order of conviction and sentence awarded by the trial Court in respect of the appellants Mujib Ali, Lachu Miah @ Kamal Ahmed and Abdul Bari. Against which the Mujib Ali preferred Criminal Appeal No. 69 of 2013, Lachu Miah @ Kamal Ahmed preferred Criminal Appeal No. 70

of 2013 and Abdul Bari preferred Criminal Appeal No. 64 of 2013 upon getting leave.

Prosecution case, in short, was that on 09.08.2003 at about 3.00/3.30 a.m. informant Md. Fatik Miah Chowdhury (P.W.1) and members of his family were sleeping in their dwelling house at village-Nobhagi, under Police Station-Biswanath, District-Sylhet. Upon hearing the sound of presence of some people inside the bedroom of Hosne Ara Lovely, P.W.2 Md. Masud Miah Chowdhury woke up from sleep and saw the electric light in the room switched on and also saw four persons namely, Mujib, Sohrab, Ustar and Lechu being armed with deadly weapons. Accused Mujib made a query to Lovely as to the whereabouts of her husband and in case of her failure to disclose his whereabouts, they would finish her. But Lovely refused to disclose the whereabouts of her husband to accused Mujib. At this, accused Mujib dealt a dagger blow on the head of victim Lovely, as a result, she fell down on her bed. He lifted her from the bed once again and wanted to know the whereabouts of her husband and when she refused to disclose the same, he again dealt a dagger blow on her head in consequence of which she fell down and started writhing in pain on the bed. At that point of time, Aklima Begum, a baby aged about one year and a half, who was beside Lovely on the bed started crying and at this, the accused Lechu took her away from the room by holding her throat and thereafter, all the accused left the place of occurrence. After the departure of the accused, P.W. 2 Md. Masud Miah Chowdhury raised hue and cry and on hearing the same, his paternal uncles, namely Md. Manjur Miah Chowdhury and Md. Farid Miah Chowdhury along with their spouses and others went to the place of occurrence and he (P.W.2) narrated the

occurrence to them. Md. Manjur Miah Chowdhury told that he woke up from sleep on hearing the sound of outcry of child and wanted to open the door; but it was closed from outside and then he wanted to come out through the window while taking a 'bendah' in his hand and then the accused Abul Hossain, Sohrab and Shamshad dealt blows on the 'bendah'. On hearing an outcry from Md. Manjur Miah Chowdhury, Md. Farid Miah Chowdhury woke up from sleep and opened the door. However, the informant-party could recognise all the accused namely, Mujib, Sohrab, Ustar, Lechu, Shamshad, Selim, Bari, Aftab Ali, Abdul Matin, Amir Ali, Amir Hossain and Abul Hossain by electric lights. The husband of Lovely, namely, Md. Fatik Miah Chowdhury (P.W.1) went to the place of occurrence room from the drawing room of the house and the P.W. 2 Md. Masud Miah Chowdhury and his paternal uncles narrated the occurrence to him (P.W.1). Subsequently, the informant looked for the whereabouts of Aklima and at one stage, they found her dead body floating in the pond behind their house.

The police, lifted the dead body of Aklima from the pond and held inquests of the dead bodies of the deceased Lovely and Aklima and sent the same to the morgue of Sylhet Osmany Medical College Hospital for holding autopsy. Thereafter, informant Md. Fatik Miah Chowdhury (P.W.1) lodged an FIR, with Biswanath Police Station against the accused persons.

After conclusion of investigation, the Investigating Officer submitted charge sheet being No. 86 dated 24.11.2003 against all the accused persons for commission of offence punishable under sections 302/34 of the Penal Code.

At the commencement of the trial of the case, the trial court charged all the accused persons under various sections of the Penal Code including sections 302/34 of the Penal Code. The charge was read over and explained to the accused presents who pleaded not guilty and claimed to be tried. The defence case as it transpires from the trend of cross-examination of the prosecution witnesses was that two paternal uncles of P.W. 2, Md. Masud Miah Chowdhury, namely Shahed Miah Chowdhury and Khaled Miah Chowdhury used to send money from abroad to the bank account of Lovely maintained with Sonali Bank, Kamal Bazar Branch, Biswanath, Sylhet and there were disputes with regard to that money between Lovely and other paternal uncles of the said P.W.2 as a result of which those paternal uncles of P.W. 2 killed Lovely and her baby Aklima.

Mr. Nozrul Islam Chowdhury, learned Senior Advocate appeared for the appellant Mujib Ali in Criminal Appeal No. 69 of 2013. Mr. S.M. Shahjahan, learned Advocate appeared for appellant Lachu Miah @ Kamal Ahmed in Criminal Appeal No. 70 of 2013 and Mr. Nikhil Kumar Saha, learned Senior Advocate appeared on behalf of the appellant Abdul Bari in Criminal Appeal No. 64 of 2013.

On the other hand, Mr. Biswajit Debnath, learned Deputy Attorney General appeared for the respondent in all appeals.

Mr. Chowdhury submits that the High Court Division was totally wrong in its view that the appellant Mujib Ali, Lachu Miah, Sohrab and Ustar entering into the place of occurrence room at dead of night at about 3.00/3.30 a.m. on 09.08.2003 opened the door but from the evidence of P.W. 2 it is clear that the inmates of the house went to sleep after closing all the doors and windows of that room. He submits that in absence of any

alamat of breaking any door or window naturally a legitimate question arises as to how the assailants entered into the room which is a building and well protected. He submits that the recognition of the assailants by P.W.2 with the help of electric bulb, though P.W. 2 said that they made it off when they went to sleep, is highly doubtful. So the appellants are entitled to be acquitted.

Mr. S.M. Shahjahan, learned Counsel in his submission, narrating the identical facts as made by Mr. Nozrul Islam Chowdhury, adds that the assailants, at the night of occurrence, searched informant Fatik Mia Chowdhury, who was sleeping in another room of the said building, and, failing to trace him, killed his wife and daughter is an unbelievable story. He, lastly, submits that in view of the facts and circumstances of the case the sentence awarded by the Courts below is too severe.

Mr. Nikhil Kumar Saha, learned Senior Counsel, appearing in Criminal Appeal No. 64 of 2013 for appellant Abdul Bari, submits that the star witness of the case is P.W. 2 Md. Masud Mia Chowdhury who did not say that he had been able to identify the appellant Abdul Bari at the place of occurrence. He adds that other accused persons in an identical circumstances had been acquitted by the High Court Division so the appellant Abdul Bari is entitled to get an order of acquittal.

In this case, prosecution examined 23 witnesses out of 31 witnesses cited in the charge sheet. Of them, P.W.1 Md. Fatik Mia Chowdhury is the informant of the case and he was not eye witness of the occurrence. In his testimony he narrated the prosecution case but after recording his examination-in-chief he died, consequently, the defence failed to cross-examine him. P.W. 2 Masud Mia Chowdhury is star witness of the case,

who was, at the relevant time, sleeping in the P.O. room along with his mother and sister. In his testimony, he stated that at about 9.00 a.m. hearing sound inside the room, he woke up from sleep and found four accused persons armed with 'dao' and 'dagger' etc. inside the room who were Mujib, Shohrab, Ostar and Lechu. He identified them with the help of electric light. He saw appellant Mujib inflicting 'dagger' blow on the head of his mother who fell down on the bed. Mujib asked the victim about the father of this witness who did not disclose the whereabouts of P.W. 1. Then Mujib inflicted another 'dagger' blow on the head of his mother, victim Hosne Ara Begum. At that time, victim Aklima Begum, younger sister of this witness, started crying. Then accused Lachu Miah caught holding her throat, went outside the P.O. room. P.W. 3 Md. Farid Mia Chowdhury, in his testimony, stated that hearing outcry he woke up from sleep and opened their back door. He identified the accused Mujib, Abdul Bari, Shohrab who were outside the house. P.W. 4 Md. Monjur Mia Chowdhury, another brother of P.W. 1, in this testimony, stated that hearing the outcry he woke up from sleep and saw accused Lechu Miah, caught holding throat of Aklima Begum, going out side their dwelling hut. He identified them with the help of electric light. He also identified accused Mujib Ali, Lechu Miah and Abdul Bari and some other accused persons. P.W.5 Kulsuma Begum wife of P.W.4 Md. Monjur Mia Chowdhury, in her testimony, stated that she saw Lachu Mia, caught holding the throat of Aklima Begum, was going out side the hut and other accused persons were standing there.

Out of the rest witnesses, P.W.6 Most. Ayesha Begum wife of P.W.3, in her testimony stated that she heard about the facts from the other witnesses. P.W.8 Md. Monsur Mia Chowdhury son of P.W.1 was sleeping

in the P.O. room and he saw his mother dead. He further stated that P.W.2 told him that he had been able to identify the accused Mujib, Shohrab, Ostar and Lachu Miah. P.W.9 Rubi Begum another daughter of P.W.1 and victim Hosne Ara Begum in her testimony stated that subsequent after the occurrence P.W.2 Md. Masud Mia Chowdhury told her that he had been able to identify Mujib Ali, Shohrab, Lachu Mia and Ostar. P.W. 10 Sundari Bibi Chowdhury mother of P.W.1, in her testimony stated that hearing hue and cry, he woke up from sleep. She heard from P.W.1 that Mujib Ali, Ostar, Lachu Mia and Shohrab had killed the victim. Accused Lachu Mia taking the victim Aklima Begum went out of P.O. room. P.Ws.11 and 12 cons. Md. Abdul Mannan and cons. Md. Ali Hossain accompanied the dead body of the victim while those were shifted to M.A.G. Osmani Medical College Hospital for holding autopsy. They proved chalan exts.4 and 5. P.W.13 Md. Rojob Ali was the then Chairman of local Union Parishad who heard about the occurrence from P.W.1 and went to the place of occurrence. P.W.14 Md. Monowar Ali Chowdhury and P.W.19 Md. Shafique Mia were witnesses of inquest of the dead body of the victim. P.W.15 Md. Mujibur Rahman is the Magistrate who recorded the confessional statement of accused Abdul Matin, Abul Hossian and Aftab Ali. P.W.16 Shoyeb Ahmed Khan another Magistrate recorded the statement of the witness Thakur Ali. P.W.17 Thakur Ali in his testimony stated that the Magistrate P.W.16 recorded his statement under section 164 of the Code of Criminal Procedure. P.W.18 Md. Aklas Hossain was tendered by the prosecution. P.W.20 Dr. M.A. Shahid, Assistant Professor of M.A.G. Osmani Medical College Hospital. In his testimony, he stated

that he held autopsy of the victim Hosne Ara Begum Lovely and found following injuries on her person:

“1. One incised wound on right side of the head measuring 2"x ½"x bone depth.

2. One incised wound on the right side of the forehead with clotted blood measuring 2½"x½"x bone depth.

On discussion clotted blood in between scalp and skull bone right parietal bone and right frontal bone were fractured. Lung were congested. Other viscera were stated above. On dissection of the uterus one male matured dead foetus was found.”

He opined that the death of Hosne Ara Begum Lovely was caused due to haemorrhage shock as a result of above mentioned injuries caused by cutting weapons which was ante-mortem and homicidal in nature.

He also held the autopsy of the dead body of victim Aklima Begum and found following injuries on her person:-

“Multiple bruise on the neck both right and left side with scratch abrasion on the face neck with variable size and shape.”

He opined that the death of Aklima Begum was caused due to asphyxia as a result of throatling which was ante-mortem and homicidal in nature.

P.W.21 Md. Monjurul Morshed was the Investigating Officer of the case. P.W.22 Jalal Ahmed produced the alams in the Court for consideration. P.W.23 Mobasher Ali Mirza proved the General Diary No. 297 dated 09.08.2003. Police lodged the said G.D. and went the place of occurrence.

Out of the witnesses as mentioned above, it appears that P.W.2 Md. Masud Mia Chowdhury, was inside the room at the relevant time and woke up from sleep finding the presence of men inside the room. He identified them who were appellants Mujib Ali and Lechu Mia and co-accused Shohrab and Ostar. This star witness did not disclose the name of appellant Abdul Bari saying that he was also present inside the room. Subsequent after the occurrence, he disclosed the aforesaid incident to P.Ws. 3, 4, 5 and others witnesses. Section 134 of the Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any case. Conviction can be recorded on the basis of the statement of a single eyewitness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. Where there are no such exceptional reasons operating it becomes the duty of the court to convict, if it is satisfied that testimony of a single witness is entirely reliable. In this case, P.W.2 is most reliable and natural witness. Who is a natural witness cannot be regarded as an interested witness. In this case, it further appears that P.Ws. 3, 4 and 5 saw appellant Lechu Mia going outside the homestead holding throat of victim Aklima Begum whose dead body was recovered from a pond on the next day. We do not find anything to disbelieve the testimony of P.W.2, 3, 4 and 5 so far the same relates to accused Mujib Mia and Lachu Miah. We do not find any contradiction and discrepancy in the testimonies of P.W.2 which were substantially corroborated by the P.Ws. 3, 4 and 5 in their testimonies. These witnesses saw the appellant Lechu Miah pressing throat of victim Aklima Begum going outside their dwelling hut. The learned Courts below have not

committed any error in believing testimonies of P.Ws. 2, 3, 4 and 5. The post mortem report also supported the testimonies of these witnesses. Out of the three confessing accused Abdul Matin (absconded after getting bail) in his confessional statement recorded under section 164 of the Code of Criminal Procedure has stated, “আমার নাম মতিন। গত ৮/৮/০৩ শুক্রবার দিবাগত রাত ৩ টার সময় মুজিব, লেচু, সোহরাব, ওস্তার, আমার ঘরের পিছনের দরজা দিয়ে আমাকে ডাকে। আমি জিজ্ঞাসা করলাম কোথায় যাব তারা বলল ফটিক চৌধুরীর বাড়ি যাব। আমি গেলাম। সেখানে গিয়ে আরও লোক দেখি মোট ১২ জন। আবুল, আমির, মজিব, সোহরাব, উস্তার, বারী, সমশেদ, লেচু, আমির, আফতাব, সেলিম, আমির আলি ও আমি। মজিব, সোহরাব, লেচু ও উস্তার ফটিক মিয়ার ঘরের পিছনের দরজা ভেঙে ঘরে ঢুকে। মজিদের স্ত্রীকে মজিব ছেদ মারছে। পরের দিন সকালে মাথার ডান সাইডে কোপ দেখি বেটি কোপে মারা যায়। আমরা ৮ জন ঘরের বাইরে ছিলাম। লেচু ফটিকের মেয়েকে গলা টিপে মেরে পুকুরে নিয়ে ফেলে দেয়। এরপর আমরা যার যার বাড়ি চলে আসি।”

The aforesaid conclusion of the courts below has received an assurance to the guilt of the appellants Mujib Mia and Leachu Mia, from the confessional statement of co-accused Matin as quoted above. In such view of the matter, the learned Courts below rightly convicted the appellants Mujib Ali and Lachu Miah @ Kamal Ahmed.

So far the appellant Abdul Bari is concerned, we have already found that the P.W.2 Md. Masud Mia Chowdhury, in his testimony, did not disclose his name stating that along with other accused person Abdul Bari was inside the room at the time of assaulting the victim. On the other hand, P.Ws. 3 and 4 consistently stated that they saw the appellant Lachu Miah going outside the dwelling hut caught holding the throat of victim Aklima Begum. In such view of the matter, Abdul Bari is entitled to get benefit of doubt.

It appears from the facts and circumstances of the case that the accused persons went to the place of occurrence with an object to kill P.W.1 and entering into the place of occurrence room they asked the victim Lovely about his whereabouts and not getting the target they assaulted the victim Hosne Ara Begum Lovely who succumbed to injuries. At one stage appellant Lachu Miah @ Kamal Ahmed pressing the throat of victim Aklima Begum went outside the dwelling hut. Her dead body was recovered from a nearby pond. Coming to the facts of the case, it is proved that appellants Mujib Ali and Lachu Miah had killed victim Hosne Ara Begom Lovely and her 1½ year daughter Aklima Begom which were highly gravely. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to them by the trial Court and confirmed by the High Court Division. It is difficult to hold that it was pre-planned, calculated, cold-blooded murder of the victims. Moreover, they are in death cell about 14(fourteen) years. In such circumstances, their sentence may be commuted from death to imprisonment for life.

Considering the aforesaid facts and circumstances of the case, the Criminal Appeal No. 69 and 70 of 2013 are dismissed. However, the sentence of appellants Mujib Ali and Lachu Miah @ Kamal Ahmed is commuted from death to one of imprisonment for life and to pay a fine of tk. 50,000/- each, in default, to suffer rigorous imprisonment for one year more. They shall get benefit of Section 35A of the Code of Criminal Procedure. Criminal Appeal No. 64 of 2013 of appellant Abdul Bari is allowed. Appellant Abdul Bari is acquitted of the charge. He may be released from the custody if not wanted in connection with any other case.

The concerned Jail authority is directed to shift the appellants Mujib Ali and Lachu Miah @ Kamal Ahmed to the normal jail from the condemned cell forthwith for serving out their rest sentence.

C.J.

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The 17th November, 2021
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