

District: Hobigonj.

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)**

Present:

Mr Justice Md Atoar Rahman

And

Mr Justice Md Ali Reza

Death Reference No 12 of 2018

The state

-Versus-

Ramij Ali and others

----- condemned

Mr MD Rezaul Karim, DAG with

Ms Farhana Afroze Runa,

Mr Mohammad Abdul Aziz Masud and

Mr Md Shamim Khan, AAGs

----- for the state

Mr Muhammad Abdul Halim Kafi,

advocate with

Mr Md Jahangir Hussain

Mr Md Selim Hossen

Mr M Liton Ahmed,

Mr Syed Sayedul Haque Sumon, advocates

---- For the condemned-prisoners

Mr Md Hafijur Rahman Khan, Advocate

..State Defence Lawyer, for the two absconding condemned

With

Criminal Appeal No 4053 of 2018

Romij Ali and five others

-Versus-

The state

With

Jail Appeal No 47 of 2018

Ramiz Ali

----- condemned-prisoner-appellant

-Versus-

The state

----- respondent

With

Jail Appeal No 48 of 2018

Tarique Ullah

----- condemned-prisoner-appellant

-Versus-

The state

----- respondent

With

Jail Appeal No 50 of 2018

Bacchu Miah

----- condemned-prisoner-appellant

-Versus-

The state

----- respondent

With

Jail Appeal No 51 of 2018

Yousuf Ullah

----- condemned-prisoner-appellant

-Versus-

The state

----- respondent

With

Jail Appeal No 53 of 2018

Nosim Ullah

----- condemned-prisoner-appellant

-Versus-

The state

----- respondent

With

Jail Appeal No 88 of 2018

A Hannan

----- condemned-prisoner-appellant

-Versus-

The state

----- respondent

Mr M Liton Ahmed, advocate with

Mr Syed Sayedul Haque Sumon, advocate

---for the condemned-prisoner-appellants

Mr MD Rezaul Karim, DAG with
Ms Farhana Afroze Runa,
Mr Mohammad Abdul Aziz Masud and
Mr Md Shamim Khan, AAGs
----- for the state

Criminal Appeal No 4937 of 2018
A Monnan and another
----- condemned-prisoner-appellants
-Versus-
The state
----- respondent

With

Jail Appeal No 49 of 2018
A Monnan
----- condemned-prisoner-appellant
-Versus-
The state
----- respondent

With

Jail Appeal No 52 of 2018
A Motalib
----- condemned-prisoner-appellant
-Versus-
The state
----- respondent

Mr Mohammad Abdul Halim Kafi,
advocate with
Mr Md Jahangir Hussain and
Mr Md Selim Hossen advocates
--- for the condemned-prisoner-appellant
Mr MD Rezaul Karim, DAG with
Ms Farhana Afroze Runa,
Mr Mohammad Abdul Aziz Masud and
Mr Md Shamim Khan, AAGs
---- for the state-respondent

**Heard on 08.05.2024, 16.05.2024,
23.05.2024, 30.05.2024 and 06.06.2024**
Judgment delivered on 04.07.2024

Md Atoar Rahman, J:

The Criminal Appeal No 4053 of 2018 at the instance of the condemned-prisoners Ramij Ali, Torik Ullah, Bachchu Miah, Yousuf Ali, Nosim Ullah and A Hannan and the Criminal Appeal No 4937 of 2018 at the instance of the condemned-prisoners A Monnan and A Motlib and also the Jail Appeals No 47 of 2018, 48 of 2018, 50 of 2018, 51 of 2018, 53 of 2018, 88 of 2018, 49 of 2018 & 52 of 2018 at their instance respectively are directed against the judgment and order of convictions and sentences dated 31.01.2018 passed by the learned Additional Sessions Judge, Habigonj in Sessions Case No 45 of 2004, arising out of Baniachong Police Station Case No 21(10)2001, corresponding to GR Case No 634 of 2001. By the impugned judgment and order the learned trial judge convicted the condemned-prisoners-appellants and two others namely A Rahman and A Salam (absconding) under sections 143, 341, 302/34 of the Penal Code and sentenced each of them to death under section 302 of the Penal Code. The learned trial judge also made a reference being Death Reference No 12 of 2018 to the High Court Division under section 374 of the Code of Criminal Procedure, 1898 (hereinafter called 'the Code') for confirmation of the death

sentences imposed upon the condemned-appellants and two others.

All the appeals and the death reference have been heard together and are disposed of by this common judgment.

The prosecution versions of the case, in short, are that on 28.10.2001 ten ducks of the informant were stolen by the condemned A Rahman, A Monnan and A Hannan which was brought to notice of the local member Abdul Hekim and others by the father of the informant the deceased Abdur Razzak @ Nivorsa (hereinafter called the deceased); that they assured that on the following day a *shalis* would be held in this respect; that on 29.10.2001 at about 5:30 pm the informant and the deceased together were going to perform *magrib* prayer to the *masjid* of own village from their own house; that while they reached to the southern side of the house of the villager Tamasha Miah on the bank of the river Moragonga out of previous enmity the accused persons namely (1) Sharafat Ullah, (2) Ramij Ali (3) Tarik Ullah (4) A Rahman (5) A Monnan, son of A Sobhan, (6) Bachhu Miah (7) A Salam, (8) Yousuf Ullah, (9) Abdul Motlib, (10) A Hannan, (11) Nosim Ullah, (12) Ayub Ali, (13) Jalal Uddin,

(14) Nur Islam, (15) A Rouf, (16) A Barik (17) A Rashid, (18) A Nur, (19) Siraj Ali, (20) Osim Ullah, (21) Rafique Ullah, (22) Khorshed Ali, (23) A Hamid, son of A Nur, (24) A Hamid, son of A Sobhan, (25) A Haque, (26) A Monnan, son of Ohab Ullah and (27) A Sobhan and other 10/12 persons equipped with *dao*, *ramdao* and *kiris* preventing their motion surrounded them; that the accused Osim Ullah (subsequently died) gave order stating, “*shalar betader janee maira fala*”; that soon after the order the condemned Ramij Ali dealt a *ramdao* blow on the left hand of the deceased, the accused Sarafat Ullah (subsequently died) dealt a *ramdao* blow on the left side of his back, the condemned A Rahman dealt a *ramdao* blow on his left thigh, the condemned Tarik Ullah dealt a *ramdao* blow on his left knee, the accused A Monnan dealt a *dao* blow on the below of his knee; that being seriously injured while the deceased fell to the ground the condemned A Salam dealt a *dao* blow on the front part of his left ankle, the condemned Bachhu Miah dealt a *dao* blow on the back of his left ankle, the condemned Yousuf Ullah dealt a *ramdao* blow on his left ankle, the condemned A Motlib dealt a *dao* blow on his ankle, the condemned A Hannan dealt a *kiris* blow on his

right elbow and the condemned Nosim Ullah dealt a *ramdao* blow under the right part of his waist; that then the seriously injured deceased and the informant raised hue and cry and upon hearing such hue and cry while local people came forward the accused/condemned fled away; that at the place of occurrence the deceased succumbed to his injuries.

Having been informed sub-inspector Arun Kumar Chanda of Baniachong Police Station along with his accompanying forces rushed to the place of occurrence and after holding inquest over the dead body of the deceased sent the same to the Sadar Hospital Morgue, Habigonj for autopsy.

In the meantime son of the deceased Md Harun Miah (PW 1) on the same day ie on 29.10.2001 lodged first information report (hereinafter called the FIR) (Ext 1) with the Baniachong Police Station under sections 143/341/302/114/34 of the Penal Code against the condemned and other accused persons namely (1) Sharafat Ullah, (2) Ramij Ali (3) Tarik Ullah (4) A Rahman (5) A Monnan, son of A Sobhan, (6) Bachhu Miah (7) A Salam, (8) Yousuf Ullah, (9) Abdul Motlib, (10) A Hannan, (11) Nosim Ullah, (12) Ayub Ali, (13) Jalal Uddin, (14) Nur Islam, (15) A Rouf, (16) A Barik (17) A

Rashid, (18) A Nur, (19) Siraj Ali, (20) Osim Ullah, (21) Rafique Ullah, (22) Khorshed Ali, (23) A Hamid, son of A Nur, (24) A Hamid, son of A Sobhan, (25) A Haque, (26) A Monnan, son of Ohab Ullah and (27) A Sobhan and on the basis of the same Baniachong Police Station Case No 21(10)2001 was started against them.

Sub-inspectors Arun Kumar Chanda and Feroj Khan of Baniachong Police Station successively investigated into the case who during investigation visiting the place of occurrence prepared a sketch map along with a separate index, seized *alamots* by preparing seizure list, examining the witnesses recorded their statements under section 161 of the Code and collected the autopsy report. On completion of the investigation the investigating officers having found a *prima-facie* case under sections 143/341/302/114/34 of the Penal Code against all the FIR named accused persons submitted police reports recommending their trial.

Eventually the condemned and others were put on trial before the learned Additional Sessions Judge, Habigonj who at the commencement of the trial on 07.10.2004 framed charges against all of them under sections 143/314/302/34 of the Penal

Code. The charges were read over and explained to the accused/condemned, present in the dock, namely (1) Sharafat Ullah, (2) Ramij Ali (3) Tarik Ullah (4) A Rahman (5) A Monnan, son of A Sobhan, (6) Bachhu Miah (7) A Salam, (8) Abdul Motlib, (9) A Hannan, (10) Ayub Ali, (11) Nur Islam, (12) A Rouf, (13) A Barik (14) A Rashid, (15) Osim Ullah, (16) Rafique Ullah, (17) A Hamid, son of A Sobhan, (18) A Haque, and (19) A Sobhan; but they pleaded not guilty thereto and claimed to be tried as per law. It is to be noted that at the commencement of the trial as the accused/condemned namely Rafij Ullah, A Haque, A Sobhan, Bacchu Miah, A Salam, A Hannan, A Rouf & A Hamid were found fugitive Mr Liakat Hossain Chowdhury and Mr Nurul Amin Talukdar learned advocates of the local bar, were successively appointed as state defence lawyers to defend them.

At the trial the prosecution in order to prove its case examined as many as twelve witnesses, out of twenty-five cited witnesses in the police report, who have been cross-examined by the defence. But the defence adduced none.

On closure of the prosecution evidence the accused, persons present on the dock, were examined under the

provisions of section 342 of the Code and during such examinations they pleaded not guilty again and denied to adduce any evidence as well as any document in their defence.

The defence versions of the case, as it appears from the trend of the cross-examinations of the prosecution witnesses, are that the occurrence did not take place as alleged by the prosecution, the accused/condemned were not involved with the alleged occurrence, they were innocent and they have falsely been implicated with the case out of previous animosity.

After conclusion of the trial learned trial judge came to the finding that the prosecution brought the charges home against the condemned-prisoner-appellants and the co-condemned A Rahman and A Salam and accordingly, she convicted and sentenced them and acquitted the other co-accused persons by the impugned judgment and order as aforesaid.

Being aggrieved by and dissatisfied with the impugned judgment and order, the condemned-prisoners Ramij Ali, Torik Ullah, Bachchu Miah, Yousuf Ali, Nosim Ullah and A Hannan have preferred the criminal appeals and jail appeals as

stated above. As already observed the learned trial judge has also made the statutory reference to the High Court Division for confirmation of the death sentences imposed upon them.

The only point for determination in the appeals and the death reference is whether the impugned judgment and order is sustainable in law.

At the outset Mr M Liton Ahmed, learned advocate, along with Mr Syed Sayedul Haque Sumon, learned advocate, appearing on behalf of the condemned-prisoner-appellants Ramij Ali, Torik Ullah, Bachchu Miah, Yousuf Ali, Nosim Ullah and A Hannan in the Criminal Appeal No 4053 of 2018 and in their respective jail appeals submits that the learned trial judge was manifestly wrong in convicting and sentencing the appellants to death without properly weighing and sifting the evidence on record and the same has occasioned failure of justice to the appellants and, as such, the impugned judgment and order of convictions and sentences is not maintainable in law.

In support of his submissions the learned advocate contends that as per the FIR story, after finishing of the attack the informant and his injured father raised hue and cry and

upon hearing such hue and cry the witnesses and others while came forward the accused/condemned fled away. As per the FIR versions it was not possible to hear the order of killing allegedly given by the accused Osim Ullah and see the attacks done by the condemned-appellants and others. But all the local witnesses namely PW 2 Kasum Ali, PW 3 Md Rafique Miah, PW 4 Md Somuj Ali, PW 5 Md Mozammel Haque @ Mamun, PW 6 Md Farid Miah, PW 10 Kabir Miah, PW 11 Shamsheer Ali and PW 12 Md Nunu Miah testified that upon hearing hue and cry they from their own houses rushed to the place of occurrence and saw that the accused persons and some others surrounded the informant and his father and heard the order of killing and thereafter saw the operation of killing which is impossible and unbelievable evidence, because, after finishing the attack having several injuries the injured deceased and the informant raised hue and cry. But the learned trial judge could not apply her judicial mind in sifting the evidence of the local witnesses and failed to come at a correct decision.

Mr Liton Ahmed further submits that admittedly all the local witnesses examined namely PWs 2, 3, 4, 5, 6, 10, 11 and 12 are the relatives of the informant (PW 1) and they belong to

same group. Moreover, there has been longstanding enmity between the informant party and the accused party and various criminal cases were/are pending between both the parties and, as such, the above witnesses are highly interested and biased. But except evidence of the above local witnesses there is no corroborative evidence of any impartial witness. He referring to the case of *Abdul Mannan and others Vs state, 44 DLR (AD) 60* submits that in a case where bitter enmity is admitted between the parties it is required as rule of prudence that there should be some such corroboration of the evidence of the interested witnesses that may inspire confidence in the mind of the court. But the learned trial judge without any legal evidence most arbitrarily convicted the appellants and others and indiscriminately sentenced all of them to death. As such, according to him, the convictions and sentences imposed by the impugned judgment and order cannot be sustained in law and accordingly, the criminal appeals and the jail appeals are deserved to be allowed and the death reference is liable to be rejected.

Mr Muhammad Abdul Halim Kafi, learned advocate, along with Mr Md Jahangir Hossain and Mr Md Selim

Hossain, learned advocates, appearing on behalf of the condemned-appellants A Monna and A Motlib in the Criminal Appeal No 4937 of 2018 and in their respective jail appeals adopts the submissions made above by Mr M Liton Ahmed, the learned advocate. In addition he submits that two accused persons named A Monnan were charged. In the FIR it has been stated that the accused A Monnan dealt a *dao* blow on the below of the deceased's ankle. The informant and most of the witnesses in support of the FIR stated that the accused A Monnan dealt a *dao* blow on the below of the deceased's knee. Among the two accused having same name which A Monnan hit on the below of the knee of the deceased, is not clear. But without any basis the learned trial judge convicted and sentenced to death the condemned-prisoner A Monnan and acquitted another A Monnan which is completely perverse and, as such, is not sustainable in law. He further submits that although it has been alleged, the accused A Monnan dealt a *dao* blow on the below of the deceased's knee and the condemned A Motlib dealt a *dao* blow on his ankle, but it is neither in the FIR nor in the testimony of the witnesses clarified right or left knee and right or left ankle of the

deceased. He finally contends that actually the case is of no evidence and the learned trial judge most arbitrarily convicted and sentenced the appellants, as such, he prays for allowing the appeals and rejecting the death reference by this court.

Mr Md Hafijur Rahman Khan, learned advocate appearing on behalf of the absconding condemned namely A Rahman and A Salam appointed by the government, adopts the submissions made above by Mr M Liton Ahmed and Mr Muhammad Abdul Halim Kafi learned advocates of the condemned-appellants.

On the other hand, Mr MD Rezaul Karim, the learned Deputy Attorney General, along with Ms Farhana Afroze Runa, Mr Mohammad Abdul Aziz Masud and Mr Md Shamim Khan, learned Assistant Attorney Generals, appearing on behalf of the state opposing the criminal appeals and jail appeals and supporting the death reference and the reasons assigned in the impugned judgment by the learned trial judge takes us through the impugned judgment, the FIR, police report, inquest report, autopsy report and evidence on the record. He then submits that in the facts and circumstances of the case the trial court upon proper appreciation of the

evidence of the prosecution witnesses has found the condemned-prisoners and two co-condemned guilty of the offences under sections 143/341/302/34 of the Penal Code and rightly and perfectly convicted and sentenced them.

In support of his contentions the learned Deputy Attorney General submits that the prosecution witnesses have successfully proved beyond all reasonable doubt the chain of circumstances from beginning to end of the occurrence. The ocular evidence of nine prosecution witnesses is corroborative and natural which cannot be disbelieved on the ground of relationship and animosity and the convictions and sentences imposed upon the condemned by the impugned judgment and order are based on sufficient legal evidence that cannot be interfered with by this court. With these submissions he prays for acceptance of the reference and dismissal of the criminal appeals and the jail appeals.

We have heard the above submissions placed by the learned Advocates for the condemned-prisoner-appellants and the learned Advocate for the absconding condemned and counter submissions of the learned Deputy Attorney General. With a view to arriving at a correct decision, we are to advert

to and scrutinize the relevant evidence and attending circumstances by way of juxtaposing both the prosecution and defence versions of the case.

It has already been stated that the prosecution in order to prove its case examined as many as twelve witnesses. Of them PW 1 Harun Miah is a son of the deceased and the informant of the case, PW 2 Kasum Ali, PW 3 Md Rafique Miah, PW 4 Md Somuj Ali, PW 5 Md Mozammel Haque @ Mamun, PW 6 Md Farid Miah, PW 10 Kabir Miah, PW 11 Shamsher Ali and PW 12 Md Nunu Miah are the locals and PW 7 constable Md Abdul Mannan, PW 8 Dr ATMA Rakib Chowdhury and PW 9 inspector Md Akbar Hossain are the officials and formal witnesses.

PW 1 informant Harun Miah in his examination-in-chief stated that on 28.10.2001 his ten ducks were stolen by the condemned A Rahman, A Monnan and A Hanna which was brought to notice of the local member Abdul Hekim and others by his father. Among them Osim Ullah assured that on the following day a *shalis* would be held in this respect. On 29.10.2001 at about 5:30 pm his father, the deceased, and he together were going to Bagjur *masjid* for performing *magrib*

prayer from their own house. While they reached to the southern side of the house of Tamasha Miah on the bank of the river Moragonga out of previous animosity the accused persons namely Sharafat Ullah, Ramij Ali, Tarik Ullah, A Rahman, Monnan, Bachhu Miah, A Salam, Yousuf Ullah, Abdul Motlib, A Hannan, Nosim Ullah, Ayub Ali, Jalal Uddin, Nur Islam, A Rouf, A Barik, A Rashid, A Nur, Siraj Ali, Osim Ullah, Rafique Ullah, Khorshed Ali, A Hamid, A Haque, A Monnan, and A Sobhan and other 10/12 unknown persons equipped with *dao*, *ramdao* and *kiris* surrounded them. Then he and his father raised hue and cry. Accused (?) gave order stating, “*shalar betader janee maira felao.*” Having been ordered the accused Ramij Ullah dealt a *ramdao* blow on the left hand of his father. The accused Sarafat dealt a *ramdao* blow on the left side of his father’s back. The accused A Rahman dealt a *ramdao* blow on his father’s left thigh. The accused Tarik Ullah dealt a *ramdao* blow on his father’s left knee. The accused A Monnan dealt a *dao* blow on the below of the left knee of his father. Then while his father fell down on the ground the accused A Salam dealt a *dao* blow on the front part of his left ankle. The accused Bachhu Miah dealt a

dao blow on the back of his father's left ankle. The accused Yousuf Ullah dealt a *ramdao* blow on the left ankle of his father. The accused A Motlib dealt a *dao* blow on the left ankle of his father. The accused A Hannan dealt a *kiris* blow on the right elbow of his father and the accused Nosim Ullah dealt a *ramdao* blow under the right part of his father's waist. They raised hue and cry and upon hearing such hue and cry while local people namely Kasum Ali, Rafique Miah, Nuru Miah, Mamun Miah, Somuj Miah and Farid Miah and others came forward the accused persons fled away. Thereafter they (PW 1 and local people who came forward) found the father of the informant injured and dead at the spot. Afterwards upon hearing about the occurrence police from Baniachong Police Station rushed to the place of occurrence and he informed about the occurrence to the police officer orally which was reduced to writing by him (police officer) and was read over to him (PW 1) and he put his signature thereto. He proved the FIR (Ext 1) and his signature therein (Ext 1/1). He also stated that in his presence police officer collected bloodstained soil and prepared seizure list in this respect and he signed therein.

He proved the seizure list (Ext 2) and his signature thereto (Ext 2/2).

During cross-examination he testified that police reduced to writing the FIR which he had told to him. Rafique, Nuru and Mamun were present there. He further stated that witnesses Rafique Miah, Kashem Ali, Somuj Ali, Mamun, Arju Miah, Kabir, and Somsher Ali are his cousins (*chachato bhai*), Edu Mia, Ali Miah and Madhu Miah are his siblings, Abdul Kuddus, Farid and Akbar are his uncles (*chacha*). He does not know about the case No 1913 of 1982 & GR No 85 of 2004, but he knew about the case No 301 of 2002 wherein he himself along with his brothers Edu, Modhu and Ali Mia were the accused. Tamasha Miah's house is 100/150 cubits away from the place of occurrence. The houses of Razzak Miah, Ahad, Fazal, Thanda Miah, A Rasid, Ful Miah, Abdul, Homuz, Abu Miah, Angur Ali, Sundar Ali, Surat Ali, Safor Ali, Feroj Miah and Shaheb are beside to the Tamasha Miah's house. His (PW 1) house is situated 400 cubits away from the place of occurrence. They started for *masjid* from the house at 5:25 pm for performing *magrib* prayer. He does not know the name of the imam of the *masjid*. From which direction the

accused persons came he cannot say. The occurrence took place for ten minutes. He running around at the place of occurrence raised hue and cry and on hearing such hue and cry 20/25 persons rushed there and he cannot say their names. He was not injured and did not touch his father at the place of occurrence. The inquest over the dead body was held with *hajak* light. The dead body was sent to the morgue in the following morning. 28/29 persons encircled them and the encircling area was 10/12 cubits long.

He denied the suggestions that he and his father were not going to *masjid*, while they reached to the southern side of the house of Tamasa Miah on the bank of the river the accused persons equipped with local arms did not surround them, any accused did not give order stating, “*shalar betader janee maira felao*”, the condemned Ramij Ullah did not deal a *ramdao* blow on the left hand of his father, the accused Sarafat did not deal *ramdao* blow on the left side of his father’s back, the condemned A Rahman did not deal *ramdao* blow on his father’s left thigh, the condemned Tarik Ullah did not deal *ramdao* blow on his father’s left knee, the condemned A Monnan did not deal *dao* blow on the below of the knee of his

father, the condemned A Salam did not deal *dao* blow on the front part of his left ankle, the condemned Bachhu Miah did not deal *dao* blow on the back of his father's left ankle, the condemned Yousuf Ullah did not deal *ramdao* blow on the left ankle of his father, the condemned A Motlib did not deal *dao* blow on the left ankle of his father, the condemned A Hannan did not deal a *kiris* blow on the right elbow of his father, the condemned Nosim Ullah did not deal a *ramdao* blow under the right part of the waist of the deceased. He also denied that the accused persons did not surround them, nor killed his father, nor occurrence took place as alleged, nor the accused persons were falsely implicated with the case out of previous enmity nor he gave false evidence.

The other local witnesses examined namely PW 2 Kasum Ali, PW 3 Md Rafique Miah, PW 4 Md Somuj Ali, PW 5 Md Mozammel Haque @ Mamun, PW 6 Md Farid Miah, PW10 Kabir Miah, PW 11 Shamsher Ali and PW 12 Md Nunu Miah more or less supporting the prosecution case in their examination-in-chief stated that on 29.10.2001 at about 5:30 pm from their own houses upon hearing hue and cry they went to the southern side of the house of villager

Tamasha Miah on the bank of the river Moragonga and saw that the accused persons namely Sharafat Ullah, Ramij Ali, Tarik Ullah, A Rahman, A Monnan, Bachhu Miah, A Salam, Yousuf Ullah, Abdul Motlib, A Hannan, Nosim Ullah, Ayub Ali, Jalal Uddin, Nur Islam, A Rouf, A Barik, A Rashid, A Nur, Siraj Ali, Osim Ullah, Rafique Ullah, Khorshed Ali, A Hamid, A Hamid, son of A sobhan, A Haque, A Monnan and A Sobhan and some others surrounded the informant Md Harun Miah and his father the deceased. Then the accused Osim Ullah gave order stating, “*shalar betader janee maira felao.*” Soon after the order the accused Ramij Ullah dealt a *ramdao* blow on the left hand of the deceased. The accused Sarafat dealt a *ramdao* blow on the left side of his back. The accused A Rahman dealt a *ramdao* blow on his left thigh. The accused Tarik Ullah dealt a *ramdao* blow on the below of his left knee. The accused A Monnan dealt a *dao* blow on the below of his knee. Then while he fell down on the ground the accused A Salam dealt a *dao* blow on the front part of his left ankle. The accused Bachhu Miah dealt a *dao* blow on the back of his left ankle. The accused Yousuf Ullah dealt a *ramdao* blow on his left ankle. The accused A Motlib dealt another

dao blow on his left ankle. The accused A Hannan dealt a *kiris* blow on his right elbow and the accused Nosim Ullah dealt a *ramdao* blow under his right part of waist. At the place of occurrence father of the informant succumbed to his injuries. While local people came forward the accused persons fled away.

Besides, the PW 5 Md Mozammel Haque @ Mamun and PW 6 Md Farid Miah in their examination-in-chief stated that the occurrence took place on 29.10.2001 at about 12:30 pm. The PW 6 also stated that in his presence inquest over the dead body of the deceased was held by police officer and in the inquest report (Ext 3) he put his signature (Ext 3/1). PW 10 Kabir Miah in his chief stated that the accused Osim Ullah gave order stating, "*bandir putre prane mere felo.*" PW 11 stated that in his presence inquest over the dead body of the deceased was held and in the inquest report (Ext 3) he put his signature (Ext 3/2).

During cross-examination the PW 2 Kasum Ali stated that the informant is his uncle. He was an accused in the GR Cases No 1913 of 1982 and 1291 of 1965 filed by the accused Sharafat and Tarik Ullah respectively. The place of occurrence

is 130 cubits to the eastern side from his house. Upon hearing hue and cry at first he rushed to the place of occurrence and thereafter 50/60 local people went there. Surrounding area was 10/12 cubits and the occurrence continued for 5/6 minutes. The accused persons fled away towards the North direction. He denied the suggestions that the occurrence did not take place as stated by him, he did not see the occurrence and he gave false evidence due to animosity.

PW 3 Md Rafique Miah in his cross-examination stated that the informant is his cousin. He was an accused in the GR Cases No 85 of 2004 and 1251 of 1995 filed by the accused Sharafat and Tarik Ullah respectively. Distance of his house from the place of occurrence is 400 cubits. During the occurrence he was standing 20 cubits away by the place of occurrence. The occurrence took place for 10 minutes. The accused persons fled away towards the North direction. He denied the suggestions that the occurrence did not take place as stated by him, he did not see the occurrence and he gave false evidence due to animosity.

PW 4 Md Somuj Ali in his cross-examination stated, the informant is his cousin. Distance of his house from the

place of occurrence is 400 cubits. The surrounding circle was 10/12 cubits. He did not see the accused persons but saw the place of occurrence. The occurrence took place for 10 minutes and during the occurrence 100/150 local people rushed to the place of occurrence. The accused persons fled away towards the North direction. He denied the suggestions that the occurrence did not take place as stated by him, the accused persons were falsely implicated in the case and he gave false evidence due to animosity.

PW 5 Md Mozammel Haque @ Mamun during cross-examination stated, the informant is his cousin. Distance of his house from the place of occurrence is 400 cubits. The surrounding circle was 12 cubits. The occurrence took place for 8/10 minutes and during the occurrence he resisted the accused persons but they did not attack him. The accused persons dealt *ramdao/dao/kiris* blows consecutively and after the occurrence they fled away towards the East direction. He denied the suggestions that the occurrence did not take place as stated by him, the accused persons did not commit the occurrence, he did not see anything and he gave false evidence due to animosity.

During cross-examination PW 6 Md Farid Miah stated that he was an accused in a murder case filed by the accused A Nur and the accused Sharafat Ali was a witness thereto. He was also an accused in another criminal case filed by A Shaid, brother of the accused persons namely A Rouf and A Monnan. Distance of his house from the place of occurrence is 500 cubits. The surrounding place was 12 x 5 cubits and during the occurrence he was standing 3/4 cubits away from the place of occurrence. The occurrence continued for 10 minutes after his reaching at the place of occurrence and upon hearing hue and cry 10/15 local people rushed there. The accused persons fled away towards northern direction. Immediately after the occurrence he started for the police station which is 14 kilometers away from the place of occurrence and reached thereto at 10:00 pm and he orally lodged first information report to a police officer. Being informed police rushed to place of occurrence at about 11:00 pm and held inquest over the dead body. On the date of occurrence he once went to the place of occurrence and stayed for 40 minutes. He denied the suggestions that the occurrence did not take place as stated by

him, he did not see the occurrence and he gave false evidence due to animosity.

PW 10 Kabir Miah in his cross-examination testified that he is a cousin of the informant. Distance of his house from the place of occurrence is 300/400 cubits. The surrounding circle was 7/8 cubits and during the occurrence he was standing 10/15 cubits away from the circle. The occurrence took place for 2/3 minutes and he stayed there for 3/4 minutes. He reaching the place of occurrence found many people present there and he along with them tried to resist the accused persons, but failed. He denied the suggestions that the occurrence did not take place as stated by him, he did not see the occurrence and he gave false evidence due to animosity.

During cross-examination PW 11 Shamsheer Ali stated that the informant is his cousin. Distance of his house from the place of occurrence is 200/250 cubits. The occurrence continued for 10/15 minutes. The investigating officer did not examine him. He denied the suggestions that the occurrence did not take place as stated by him, he did not see the occurrence and he gave false evidence due to animosity.

PW 12 Md Nunu Miah in his cross-examination testified that he is an uncle of the informant. His house is situated 300 cubits northern direction from the place of occurrence. Before the occurrence of the murder he rushed to the place of occurrence and having reached he saw the witnesses Harun, Rafique, Somuj, Mamun, Shomsher, Kasem and many others who tried to resist the accused persons, but they were not attacked by the accused persons as they (witnesses) fled away from the place of occurrence. He denied the suggestions that the occurrence did not take place as stated by him, he did not see the occurrence and he gave false evidence due to animosity.

PW 8 Dr ATMA Rakib Chawdhury testified that he was posted at the Habigonj Sadar Hospital and on 30.10.2001 held autopsy over the dead body of Abdur Razzaque @ Niborsha identified by constable A Mannan and found following injuries:

- (1) "Incised wound left hand with cutting 4 fingers except thumb 4"x2"x bone.
- (2) Incised wound left leg lower 1/3 x2"x1"x muscle depth.
- (3) Incised wound sole of left foot 4"x1"x bone.

(4) Incised wound left lower thigh 4"x2"x bone (femur upper tibia fibula)

(5) Incised wound left gluteal region 6"x1"x muscle depth.

(6) Incised wound left scapular region 3"x2"x muscle depth.

(7) Incised wound back of left leg 3"x1/2"x muscle depth.

(8) Incised wound middle 1/3 of right thigh 4"x2"x bone.

(9) Incised wound right elbow 1"x1/2"x skin depth.

On dissection- Clotted blood present under wounds."

He opined that the death was due to shock and hemorrhage, resulting from the above noted injuries which were ante mortem and homicidal in nature.

He proved the autopsy report (Ext 5) and his signature (Ext 5/1) thereto.

In cross-examination PW 8 stated that age of the injuries was not written since there was no column. There was no injury on the palm of the hand and ankle in his report. If any dissimilarity is found between the inquest report and the autopsy report medical board is formed. He denied the suggestions that he did not hold autopsy properly and he gave imaginary report.

PW 7 constable A Mannan carried the dead body of the deceased to the Habigonj Sadar Hospital Morgue and PW 9 inspector Md Akbar is the recording officer of the case.

These all are the evidence, adduced by the prosecution in order to prove its case.

The post mortem examination over the dead body of the deceased was held by PW 8 Dr ATMA Rakib Chawdhury at the Habigonj Sadar Hospital Morgue on 30.10.2001 who proved his autopsy report as Ext 5. After the occurrence on 29.10.2001 at about 11:00 pm inquest over the dead body of the deceased and report in this respect (Ext 3) purported to have been held and prepared by Arun Kumar Chanda, sub-inspector, Baniachang Police Station at the place of occurrence in presence of PW 6 Farid Miah Member, PW 11 Shamsher Ali and others. On examination of the record it appears that the maker of the inquest report Mr Arun Kumar Chanda could not be examined during the trial due to his death. But the inquest report (Ext 3) has been proved by the two of its witnesses namely PW 6 Farid Miah Member and PW 11 Shamsher Ali. On comparing the autopsy report (Ext 5) and inquest report (Ext 3) dissimilarity is found as to the

injuries of the dead body. In the autopsy report 9 injuries are found whereas in the inquest report 11 injuries are found.

Be that as it may, having considered the autopsy report, inquest report and the facts and circumstances of the case without elaborate discussions it can safely be said that the killing of the deceased falls under the purview of murder as defined in section 300 of the Penal Code. Now the question is whether the condemned-prisoners and two co-condemned can be manacled for this murder.

As per the FIR, on 28.10.2001 ten ducks of the informant were stolen by the condemned A Rahman, A Monnan and A Hanna which was brought to notice of the local member Abdul Hekim and others by the father of the informant, the deceased, who assured that on the following day a *shalis* would be held in this respect. On 29.10.2001 at about 5:30 pm the informant and the deceased together were going to *masjid* from their own house for saying *magrib* prayer. While they reached to the southern side of the house of Tamasha Miah on the bank of the river Moraganga out of previous animosity the accused persons namely (1) Sharafat Ullah, (2) Ramij Ali (3) Tarik Ullah (4) A Rahman (5) A

Monnan, son of A Sobhan, (6) Bachhu Miah (7) A Salam, (8) Yousuf Ullah, (9) Abdul Motlib, (10) A Hannan, (11) Nosim Ullah, (12) Ayub Ali, (13) Jalal Uddin, (14) Nur Islam, (15) A Rouf, (16) A Barik (17) A Rashid, (18) A Nur, (19) Siraj Ali, (20) Osim Ullah, (21) Rafique Ullah, (22) Khorshed Ali, (23) A Hamid, son of A Nur, (24) A Hamid, son of A Sobhan, (25) A Haque, (26) A Monnan, son of Ohab Ullah and (27) A Sobhan and other 10/12 persons equipped with dao, ramdao and kiris obstructing their motion surrounded them. Then the accused Osim Ullah (subsequently died) gave order to kill them and having been so ordered the condemned Ramij Ali dealt a *ramdao* blow on the left hand of the deceased, the accused Sarafat Ullah (subsequently dead) dealt a *ramdao* blow on the left side of his back, the condemned A Rahman dealt a *ramdao* blow on his left thigh, the condemned Tarik Ullah dealt a *ramdao* blow on his left knee, the condemned A Monnan dealt a *dao* blow on the below of his knee. Being seriously injured while the deceased fell on the ground the condemned A Salam dealt a *dao* blow on the front part of his left ankle, condemned Bachhu Miah dealt a *dao* blow on the back of his left ankle, the condemned Yousuf Ullah dealt a

ramdao blow on his left ankle, the condemned A Motlib dealt a *dao* blow on his ankle, the condemned A Hannan dealt a *kiris* blow on his right elbow and the condemned Nosim Ullah dealt a *ramdao* blow under the right part of his waist. Then the informant and his injured father (deceased) raised hue and cry and upon hearing such hue and cry while local people namely Kasum Ali, Rafique Miah, Somuj Miah, Modhu Miah, Ali Miah, Mamun Miah, Ashob Ullah, Abdul Hekim, Nunu Miah, Zahur Ali, Akbar Hossain, Abdul Kuddus, Kabir Miah and Farid Member and others came forward the accused persons fled away and at the place of occurrence the deceased succumbed to his injuries.

As per the above FIR story before starting or before finishing of the dealing blows with *ramdao*, *dao* and *kiris* by the accused/condemned no hue and cry was made by anybody and after finishing of such attack the informant and his injured father for the first time raised hue and cry and upon hearing such hue and cry the witnesses and others while came forward the accused/condemned fled away. But the informant (PW 1) during his examination-in-chief departed from the FIR story in respect of time and number of raising hue and cry. In chief he

stated that having been obstructed and surrounded, they raised hue and cry and after finishing the occurrence they again raised hue and cry and upon hearing such hue and cry the witnesses and others came forward and then the accused/condemned fled away. Thus, it appears that raising of hue and cry before dealing blows with *ramdao/dao/kiris* to the deceased as stated during examination-in-chief is nothing but subsequent embellishment by the informant.

The specific prosecution case is that the informant and the deceased together were going to say *magrib* prayer and while they reached to the place of occurrence the accused/condemned obstructed and surrounded them. Thereafter the accused Osim Ullah gave order to kill them stating “*shalar betader janee maira felao*” or “*bandir putre prane mere felo*” (as stated by PW 10) and having been ordered the accused/condemned consecutively dealt several *dao/ramdao/kiris* blows on the different parts of the body of the deceased. But surprisingly the informant was untouched although he was inside the surrounding circle made by a large number of accused/condemned which is unbelievable. If the accused/condemned surrounded both the deceased and

informant and order was given to kill both of them, why the informant was not attacked by any of the accused/condemned. Moreover, being present at the place of occurrence he did not try to save his father nor he touched his injured father even after the occurrence, which is improbable. Thus, the circumstances suggest that during the alleged occurrence the informant was not present at the place of occurrence.

It is also stated in the FIR that upon hearing hue and cry local people namely Kasum Ali, Rafique Miah, Somuj Miah, Modhu Miah, Ali Miah, Mamun Miah, Ashob Ullah, Abdul Hekim, Nunu Miah, Zahur Ali, Akbar Hossain, Abdul Kuddus, Kabir Miah and Farid Member and others came forward at the place of occurrence. In his chief the informant (PW 1) testified that upon hearing hue and cry the witnesses Kasum Ali, Rafique Miah, Somuj Miah, Mamun Miah, Nunu Miah, Farid Member and others came forward. However, among them Kasum Ali (PW 2), Md Rafique Miah (PW 3), Md Somuj Ali (PW 4), Md Mozammel Haque @ Mamun (PW 5) Md Farid Miah (PW 6), Kabir Miah (PW 10), Shamsher Ali (PW 11) and Md Nunu Miah (PW 12) were examined by the prosecution. It has already been mentioned that all of them

more or less supporting the prosecution case in their examination-in-chief stated that upon hearing hue and cry they from their own houses rushed to the place of occurrence and saw that the FIR named 27 accused persons and some others surrounded the informant and his father, the deceased, and heard that the accused Osim Ullah gave order to kill them and having been ordered accused persons namely Ramij Ullah, Sarafat, A Rahman, Tarik Ullah and A Monnan consecutively dealt several blows with *ramdao/dao* on the different parts of the body of the deceased. Then while the victim fell down on the ground the accused persons namely A Salam, Bachhu Miah, Yousuf Ullah, A Motlib, A Hannan and Nosim Ullah also consecutively dealt several blows with *ramdao/dao/kiris* on his body and ultimately at the place of occurrence he succumbed to his injuries. This story as stated by the above witnesses is not probable and believable at all. Because, we have already seen that as per the FIR after finishing of the attack the informant and his injured father raised hue and cry and upon hearing such hue and cry the above witnesses and others rushed to the place of occurrence. Moreso, as per the testimony of the informant (PW 1) after finishing of the

dealing blows with *ramdao/dao/kiris* he and his injured father while raised hue and cry the above witnesses rushed to the place of occurrence. Nevertheless, if for the sake of argument it is accepted that having been obstructed and surrounded before attacking by the accused persons the informant and his father raised hue and cry and upon hearing such hue and cry all the local PWs namely PWs 2, 3, 4, 5, 6, 10, 11 & 12 started running to reach to the place of occurrence, it was impossible for them (the witnesses) to hear the order of killing alleged to have been given by the accused Osim Ullah and see the dealing of *ramdao/dao/kiris* blows by the accused/condemned, since as per their evidence the distance of the place of occurrence from the house of the PW 2 is 130 cubits (1 cubit =18 inches), house of PW 3 is 400 cubits, house of PW 4 is 400 cubits, house of PW 5 is 400 cubits, house of PW 6 is 500 cubits, house of PW 10 is 300/400 cubits, house of PW 11 is 200/250 cubits and house of PW 12 is 300 cubits. If hearing hue and cry from their own houses they started for the place of occurrence, the order of killing and operation of killing could not be heard and seen by them and they could at best see the killers' fleeing away.

The testimony of the above local witnesses is, as if, having been obstructed and surrounded, the informant and his father raised hue and cry and thereafter the accused/condemned were waiting for reaching the witnesses and for hearing the order of killing and watching the operation of killing and while they found that the sufficient number of witnesses rushed to the place of occurrence or nearby the place of occurrence then the accused Osim Ullah gave order to kill them and the accused Sarafat Ullah and all the condemned dealt *ramdao/dao/kiris* blows on the body of the deceased consecutively, which would be nothing but a funny story.

Besides, if the FIR versions and evidence given by the informant are found to be correct that after finishing the strike on the body of the deceased the informant and the injured deceased raised hue and cry and upon hearing such hue and cry while the witnesses namely the PWs 2, 3, 4, 5, 6, 10, 11 & 12 and others rushed to the place of occurrence the accused persons fled away, the evidence in respect of hearing the alleged order of killing and see the attack by the accused persons given by these local witnesses must be untrue.

Apart from these it reveals from the testimony of the witnesses that all the local witnesses examined such as PWs 2, 3, 4, 5, 6, 10, 11 & 12 are relatives to the informant (PW 1). It is true the established principle of law is only because of relationship of the witnesses their evidence cannot be thrown away unless such evidence is found to be untrue or tainted with motive. Thus, testimony of the relative witnesses of the informant party should be sifted and assessed more cautiously and carefully. In the present case we have already found that the evidence given by all the local witnesses is found to be improbable and untrue.

Moreso, in the present case the above local witnesses are not only relatives of the informant, but admittedly there has been longstanding enmity between the informant party (including the witnesses examined) and the accused/condemned party and there were/are several criminal cases pending between them. In the case of *Abdul Mannan and others Vs state*, 44 DLR (AD) 60 their lordships were pleased to hold that in a case where bitter enmity is admitted between the parties it is required as rule of prudence that there should be some such corroboration of the evidence of the

interested witnesses which may inspire confidence in the mind of the court. The prosecution's version of the present case is that the occurrence took place at the open place immediate before *magrib* prayer and upon hearing hue and cry local people namely Kasum Ali, Rafique Miah, Somuj Miah, Modhu Miah, Ali Miah, Mamun Miah, Ashob Ullah, Abdul Hekim, Nunu Miah, Zahur Ali, Akbar Hossain, Abdul Kuddus, Kabir Miah and Farid Member and others rushed to the place of occurrence. But among them only those have been examined as PWs who are relatives to the informant and has animosity with the accused persons and none of the disinterested and non-related persons has been examined although there was scope to examine. As such, there is no corroborative evidence to the evidence of the PWs 1, 2, 3, 4, 5, 6, 10, 11 & 12 which may inspire confidence in the mind of the court. It is to be mentioned that except the testimony of these PWs there is no iota of evidence against the accused/condemned. Thus, there is no legal evidence in support of charges leveled against the condemned-appellants and two co-condemned.

In view of the discussions made above and considering the facts and circumstances of the case we are of the clear opinion that the convictions and sentences imposed upon the condemned-prisoners and two others by the impugned judgment and order are based on no legal evidence and the learned trial judge most arbitrarily and illegally convicted them and indiscriminately awarded sentences to death to all of them, although the cardinal principle of criminal justice is that the accused shall be presumed to be innocent, until and unless his guilt is proved beyond all shadow of reasonable doubt. Therefore, in the present case the impugned judgment and order suffers from legal infirmities, which calls for interference by this court.

In the result, the Criminal Appeals No 4053 of 2018 and 4937 of 2018 succeed and as such, they are allowed and the Death Reference No 12 of 2018 is hereby rejected. Accordingly, the Jail Appeals No 47 of 2018, 48 of 2018, 50 of 2018, 51 of 2018, 53 of 2018, 88 of 2018, 49 of 2018 & 52 of 2018 are disposed of.

The impugned judgment and order of convictions and sentences is hereby set-aside and the condemned-prisoner-

appellants Ramij Ali, Torik Ullah, Bachchu Miah, Yousuf Ali, Nosim Ullah, A Hannan, A Monna and A Motlib and the absconding co-condemned A Rahman and A Salam are acquitted from the charges framed against them.

Let the condemned-prisoner-appellants be set at liberty at once, if they are not wanted in connection with any other case(s) and the warrant of arrest, if issued against the absconding condemned (now acquitted), be recalled.

Let the lower court's record along with a copy of this judgment be sent to the Court of Additional Sessions Judge, Habigonj and another copy of this judgment be sent to the Jail Super, Habigonj for information and necessary actions at once.

Md Ali Reza, J:

I agree