

Present:

**Mr. Justice Borhanuddin
and
Mr. Justice K. M. Kamrul Kader**

CRIMINAL APPEAL NO. 8289 OF 2010

With

CRIMINAL APPEAL NO. 7865 OF 2010

Md. Nurul Amin Sekander @ Kajal Fakir & others
(In Crl. Appeal No.8289 of 2010)

Md. Khaibar Ali Khandakar alias Dolar and others
... Appellants

(In Crl. Appeal No.7865 of 2010)

-Vs.

The State ... Respondent

Mr. Md. Ruhul Amin Bhuiyan,
Advocate, with

Mr. Adilur Rahman Khan and

Mr. Md. Asaduzzaman, Advocates

... For the Convict-Appellants

(In Crl. Appeal No. 8289 of 2010)

Mr. Rafiqul Islam Miah, Advocate,
with

Mr. S. M. Jahangir Alam, Advocate

... For the Convict-Appellants

(In Crl. Appeal No.7865 of 2010)

Mr. Md. Salim, D.A.G with

Mr. Md. Aminur Rahman Chowdhury, A.A.G

... For the State

**Heard on 30.01.14, 13.02.14,
06.03.14, 30.04.2014 and Judgment
on 08.05.2014**

K. M. Kamrul Kader, J.

These two appeals being Criminal Appeal
No. 8289 of 2010 and Criminal Appeal No. 7865
of 2010 are taken up together for hearing and

disposed of by a single judgment. Amongst these two appeals, one is preferred at the instance of convict-appellants Md. Nurul Amin Sekander alias Kajal Fakir, Md. Mithu, Md. Saikat Hossain alias Bidduit, and Khondaker Md. Joglul Huda alias Kajal and another one is preferred at the instance of convict-appellants Md. Khaibar Ali Khandakar alias Dolar, Md. Liton Ali Khandakar and Md. Mahabubur Rahman @ Mahabubur against the judgment and order dated 24.11.2010 passed by the learned Additional Sessions Judge, Court No. 3, Bogra, in Session Case No. 66 of 2008 arising out of Shibgonj P.S. Case No. 20 dated 16.7.2007 corresponding to G.R. Case No. 191 of 2007 (Shib) convicting the appellants under sections 302/34 of the Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Tk. 30,000/- each, in default to suffer rigorous imprisonment for 02 (two) years more.

Prosecution case, in short, is that one Md. Hezarat Ali as Informant lodged a First Information Report on 16.7.2007 with Shibgonj Police Station, alleging, *inter alia*, that the informant's younger brother namely Md. Sharafat Ali, who is resided at his in-law's house and had a shop namely M/S. Asgar Traders, Kichak Bazar, Shibgonj, Bogra. Informant with his other brothers including the deceased Md. Sarafat Ali used to run the shop. On 15.7.2007 at about 10.00 p.m. victim Md. Sharafat Ali after closing the shop started towards his in-laws house situated at Kalki by riding on a motor cycle and other brothers of victim went to Bahadurpur at their residence and the Informant stayed at the said shop. Thereafter, at about 4.30 a.m. on 16.7.2007 victim's wife made a call over mobile phone to the informant and asked him whereabouts of victim Md. Sharafat and he replied that Md. Sarafat left for Kalki at about 10.00 p.m. on that night. Thereafter,

they began to search and at one stage Sarafat's wife found the dead body of victim with injuries lying in the paddy field of one Mosharaf Hossain. Informant suspects that due to business rivalry or family dispute, some unknown persons killed Sarafat and took away his motor cycle, mobile phone and money. Thereafter, Informant lodged an FIR with Shibgonj Police Station and the Officer-in-Charge recorded the same as Shibgonj Police Station case No. 20 dated 16.07.2007, corresponding to G. R. No.191 of 2007, under section 302/34/379 of the Penal Code.

Police took up investigation of the case and prepared inquest report and sent the dead body to the morgue.

Sub-Inspector Md. Abdur Razzaque as Investigating Officer investigated the case. During investigation he visited the place of occurrence, prepared a sketch map with separate index and examined the witnesses under Section 161 of the Code of Criminal

Procedure. He sent the witnesses to the Court for recording their statement under Section 164 of the Code of Criminal Procedure. After completion of the investigation, the investigating officer finding prima facie case against these appellants submitted charge sheet being No. 46 dated 10.02.2008, under Sections 302/34/379 of the Penal Code.

Thereafter, the case record was transmitted to the Court of learned Sessions Judge, Bogra, for trial and the same was registered as Session Case No. 66 of 2008, where cognizance was taken against the accused persons. Subsequently, the case record was further transferred to the learned Additional Sessions Judge, 3rd Court, Bogra for trial.

At the commencement of the trial the learned Additional Sessions Judge framed charge under sections 302/34 of the Penal Code, against these appellants, it was read over to them, to which they pleaded not guilty and claimed to be tried.

During trial prosecution examined as many as 12 (twelve) witnesses to prove their case and the defence examined none.

The defence case as it appears from the trend of cross-examination that the appellants are innocent and they have been entangled in the case out of previous enmity. Their further case is that the alleged date and place of occurrence is not correct, neither they were present at the place of occurrence nor the place of occurrence is the residence of Md. Nurul Amin Sekander alias Kajal Fakir and nor they called the victim and took away him and caused his death. The convict-appellants have been falsely implicated in the instant case out of previous enmity.

After conclusion of taking evidence, the appellants were examined under Section 342 of the Code of Criminal Procedure to which they pleaded not guilty and refused to adduce any evidence for their defence. After conclusion of the trial, learned Additional Sessions

Judge, 3rd Court, Bogra, by his judgment and order dated 24.11.2010 convicted these appellants as aforesaid.

Having aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 24.11.2010, the convict-appellants preferred these two Appeals being criminal Appeal No. 8289 of 2010 and Criminal Appeal No. 7865 of 2010 before this court.

Mr. Md. Ruhul Amin Bhuiyan with Mr. Adilur Rahman Khan and Mr. Md. Asaduzzaman the learned advocates appearing on behalf of the convict-appellants in Criminal Appeal No. 8289 of 2010 submits at the very outset that in passing the impugned judgment and order the learned Additional Sessions Judge, seriously failed to consider that the prosecution totally failed to prove their case by adducing reliable oral and documentary evidence. The learned Additional Sessions Judge, also failed to consider the defence case, which more probable that the appellants were falsely

implicated in the instant case. He further submits that all of the prosecution witnesses are near relations and they failed to corroborate each other on material points. He also submits that there is no eye witness of the alleged incident but the learned Additional Sessions Judge, relying upon interested witnesses convicted these appellants. There are no independent and disinterested witnesses in this case to prove the prosecution case and there is no explanation from the side of the prosecution as to why their non-production of any witnesses from surrounding area, as if, they would have been examined, will not support the prosecution case. As such, the convict-appellants are entitled to get benefit of doubt under section 114(g) of the Evidence Act.

He next submits that all the prosecution witnesses are near relations of the informant but their belated disclosure that the deceased

Sarafat Ali was last seen with the company of appellants and his (deceased) body was carried by four persons, which makes the prosecution case shaky and doubtful. He further submits that the Investigating Officer examined the prosecution witnesses under Section 161 of the Cr.P.C. after a considerable lapse of time, which casts serious doubt on the prosecution story, because it allowed the prosecution witnesses with ample opportunity for concoction and embellishment of the prosecution story. The prosecution side seriously failed to produce any neutral and independent witnesses in support of their case. He further submits that in the instant case, there is nothing in the FIR about the place of occurrence, where the dead body of deceased Sarafat was found on 16.7.2007. He further submits that the investigating officer also failed to prepare a proper sketch map of the place of occurrence. Learned Additional Sessions Judge, passed the impugned judgment

and order of conviction and sentence on the basis of the deposition of prosecution witnesses PW-3, Md. Refazuddin, PW-8 Korban Ali, PW-9 Mofazzal Hossain and PW-10, Manager, Sonali Bank and their statements are vague and contradictory. The prosecution failed to prove their case by producing any independent, disinterested witnesses from neighbouring area, as such; convicting the appellants relying on depositions of these witnesses is unsafe and liable to be set aside.

Mr. Md. Ruhul Amin Bhuiyan, learned Advocate for the appellants submits that as per FIR, Inquest Report, statements under sections 161 and 164 of the Code of Criminal Procedure, Charge Sheet and the deposition of the prosecution witnesses and without any eye witness of the alleged occurrence the learned Additional Sessions Judge, himself conflicted with these evidence as well as with the circumstantial evidence that the victim Sarafat was called and taken away to the

residence of accused Sekander alias Kajol Fakir. Thereafter, the dead body of deceased was found on a vacant field on 16.07.2007. In the instant case, there is no legal or circumstantial evidence that the deceased Sarafat Ali was last seen with the company of appellants and the prosecution has seriously failed to prove any link between these appellants and the murder by adducing any reliable evidence. He further submits that the statement of PW-9 Md. Mofazzal Hossain, who is a chance witness, his evidence is not sustainable in law as legal evidence. The deposition of P.W-9 Md. Mofazzal Hossain relating to the time of occurrence does not tally with the deposition of the prosecution witnesses No. 7 and 12 as well as with the Inquest Report. The learned Additional Sessions Judge most illegally and unlawfully convicted and sentenced the appellants and the same is liable to be set aside. The learned advocate for the appellants in support of his

submission referred to the cases of **Abu Taher Chowdhury and others Vs. State reported in 11 BLD (AD) 2, Moin Ullah and others Vs. The State, reported in 40 DLR 443, Mst. Sairan Vs. State, reported in 22 DLR (AD) 35, Mastain Mollah and others Vs. The State, reported in 11 BLD (AD) 552, Anisur Rahman and others vs. The State, reported in BCR 987(AD) 157, Ibrahim Mollah and others Vs. The State, reported in 40 DLR (AD) (1988) 216, The State Vs. Md. Shafiqul Islam alias Rafique, 43 DLR (AD) (1991), 92; and The State vs. Khasru @ Syed Mostafa Hossain and another, reported in 43 DLR (AD) 182.**

Mr. Rafiqul Islam Miah, learned Senior counsel on behalf of the convict-appellants of Criminal Appeal No. 7865 of 2010 submits that there is no legal evidence against these convict-appellants, the testimony of the prosecution witnesses are seriously contradictory; it is not proved that the convict-appellants were present at the place

of occurrence. As such, their testimony cannot be relied upon. He also submits that the evidence has no sufficient substance to convict these Appellants on the charge of murder. He further submits that it is admitted fact, there are enmity between the victim and the appellants and in the instant case there is no reliable corroborative evidence to convict the appellants. He further submits that there is no evidence to relate these appellants that they develop common intention to participate in killing of the victim. The conviction of all appellants under section 302/34 of the Penal Code is not sustainable in law. In the FIR, Charge sheet and other materials on record shows that there is no such allegation against the accused-persons in causing murder of the deceased or any pre-plan to kill the deceased on the alleged date and time of occurrence as there is no material evidence against these appellants that they had any pre-arranged plan to murder the

victim, Sarafat Ali. As such, there is no common intention on the part of these convict-appellants and they are entitled to get benefit of doubt. He further submits that the appellants are innocent and conviction on the basis of mere suspicion cannot be sustained and he prays for allowing the appeal and set aside the judgment and order of conviction passed by the learned Additional Sessions Judge, 3rd court, Bogra. To substantiate his submission learned Advocate for the appellants placed reliance in the cases of **Afsar Ali Moral Vs. the State, reported in 29 DLR (SC) 269 and Abdul Gafur Vs. State reported in 12 BLD (AD) 90.**

Mr. Md. Salim, learned Deputy Attorney General with Mr. Aminur Rahman Chowdhury, learned Assistant Attorney General appearing for the state having taken us through the judgment and order, FIR, charge sheet, depositions of the prosecution witnesses and other materials on record make

his submission supporting the conviction and sentence and opposing the appeals. He submits that all facts have been proved by the cogent, credible and reliable evidence of the prosecution witnesses. He also submits that the learned Additional Sessions Judge rightly found the accused appellants guilty under section 302/34 of the Penal Code. So the judgment and order of conviction and sentence do not call for any interference from this court. He further submits that the prosecution proved their case beyond reasonable doubt. There is no contradiction in their statements on any material point. The evidence of P.Ws. 1, 3, 4, 5 and 6 are material witnesses though they are close relatives of the victim Sarafat but cannot be considered as an interested witness. The term (interestedness) was postulates that witness must have some direct interest in having the accused somehow or other connected for some enemies or some other reason. There is no reason that the testimony

of P.Ws. 1, 3, 4, 5 and 6 can be discarded or liable to be flung to the wind simply because they happened to be close relative of the victim Sarafat. The learned Additional Sessions Judge rightly and correctly put reliance on the testimony of the P.Ws. 1, 3, 4, 5 and 6 and convicted and sentenced these appellants as aforesaid. There is no illegality or irregularity in the said judgment and order of conviction and sentence, the prosecution witnesses corroborated with each other on material points and the judgment and order of conviction and sentence should be upheld by this Court. He further submits that allegations against these accused appellants under section 302 read with section 34 of the Penal Code has been well proved by the prosecution as the chain of circumstantial evidence connects the convict appellants in killing of the victim Sarafat Ali and thereby appellants have committed offence under section 302 read with section 34 of the Penal

Code. As there is no break in the chain of causation and chain or circumstances connecting these appellants with the killing of the victim Sarafat Ali and as circumstantial evidence is more cogent than the evidence of eye witness, the learned Judge after perusing the materials on record rightly convicted these appellants and as such, these 2 appeals preferred by these appellants should be dismissed. The learned Deputy Attorney General in support of his submission referred to the cases of ***Billal vs State, reported in 52 DLR (AD) (2000) 143; State vs Giasuddin, reported in 51 DLR (AD) (1999) 103; State vs Moslem reported in 55 DLR (2003) 116.***

Before entering into the merit of these appeals, let us now scrutiny the evidence of the prosecution witnesses one after another.

PW-1, Md. Hazrat Ali is the informant and brother of the deceased, Sarafat Ali, deposed that the incident took place on 15.7.2007 after 10.00 p.m. at any time. He also deposed

that on the alleged night of occurrence at about 10.00 p.m. victim Md. Sharafat Ali after closing the shop started for his in-laws house situated at Kalki He also testified that ঔ শরুর বাড়িতে যাবার পথে পীর পুকুরে মাদ্রাসা তেতুল গাছ এর নিচে আসামী কাজল সহ অপরিচিত একজন শরাফত এর মটর সাইকেলে ওঠে। কুদ্দুস নামে একজন শরাফতকে তেতুল গাছের নিচে বাসায় যাবে কিনা জিজ্ঞাসা করিলে কাজল সহ আরও একজন আছে ওদের সাথে বাসায় যাবে মর্মে বলে। নুরুল আমিন সেকান্দরের বাড়িতে মটর সাইকেল দাঁড়ায়। কোরবান আলীর সাথে দেখা হলে শরাফত বাসায় যাবে কিনা জিজ্ঞাসা করিলে সেকান্দর ফকির বলে যে, শরাফত পরে বাসায় যাবে। আমার ছোট ফারুক এর সাথে শরাফতের মোবাইল ফোনে কথা হয়। তখন শরাফত উত্তর দেয় যে, শরাফত সেকান্দরের বাসায় গল্প করিতেছে। সেকান্দরের বাড়িতে আসামী খয়বর, মাহাবুব, লিটন, নুরুল আমিন, সেকান্দর, বিদ্যুৎ, মিঠু, কাজল, আশরাফুল, উজ্জল, কামরুল, ইকবাল, নবাব আলী এরা উপস্থিত আছে মর্মে ভাইকে জানায় ঔ । He also deposed that wife of the deceased disclosed to him that accused Nurul Amin took chanda (subscription) of an amount of Taka 40,000/- from Sarafat, which was deposited in his Sonali Bank Account and he further demanded an amount of Taka 3(three) lacs as subscription, otherwise he could not run his business in this area. He also deposed that accused appellants threatened the victim and

deceased Sarafat told them that Sekendar may kill him one day. He also deposed that on 07.07.2007 there was an altercation took place amongst Khaibor, Liton and Mahabub with deceased Sarafat. They also threatened him. He also deposed that at about 4.30 a.m. victim's wife made a phone call to the informant and asked him whereabouts of victim Sharafat and he replied that Sarafat left for in-law's house at about 10.00 p.m. on that night, in reply she told that he did not return home. Thereafter, she began to search and at one stage she found the dead body of the victim Sarafat with injury marks lying in a vacant (paddy) field. Informant went to the place of occurrence. Thereafter, he went to the Police Station and lodged this F.I.R, which marked as Exhibit-1 and his signature on it marked as Exhibit-1/1 and the local police prepared an inquest report, which marked as exhibit-2 and his signature on it marked as exhibit-2/1.

Police also seized some wearing apparels which marked as Material Exhibit-I

During cross-examination, this witness admitted that the name of victim Sarafat's shop was Asgor Traders, after death of Sarafat it was renamed as Mondal Traders and the trade license is in his name. He also admitted that he did not disclose any name to the police. After investigation, Police implicated these persons as accused. He also admitted that he was not present at the time of giving subscription of an amount of Tk. 40,000/-. He also admitted that he did not say anything to other persons. He denied the suggestion that his brother was killed due to his family dispute.

PW-2, Md. Abul Kashem who is a chef, in his deposition deposed that the date of occurrence is on 15.7.2007 and on that date he was called by the accused Sekander alias Kajol Fakir and he went to his house at about 7.30 p.m. for cooking. He also deposed that *ওঁআমার রান্নার*

শেষ পর্যায়ে শরাফত, কাজল ফকির এবং অচেনা একজন লোক সেকান্দর ফকিরের বাড়িতে মটর সাইকেলে প্রবেশ করত। He also deposed that while he severed diner on the dining table, at that time Liton, Mahbub, Uzzal, Iqbal, Ashraful, Sekander, Biddut, Kajol Fakir and Mithu was present in that room. Thereafter, he left the house at about 11.30 p.m. on that night. Next date he came to know that Sarafat died on that night and he suspect that they killed Sarafat. He also deposed that he disclose the incident to the Police after 5/6 months of the alleged date of occurrence. He also indentified the accused persons on dock.

During cross-examination, this witness admitted that he is the owner of Al-Madina Hotel. He also admitted that Hazrat Ali paid rent of this Hotel, but he is the owner of the hotel. He denied the suggestion that his father is a night-guard of Asgar Traders. He also denied the suggestion that he is an employee of the Asgor Traders. He denied the suggestion that he deposed falsely.

PW-3, Md. Refaz Uddin in his deposition stated that the date of occurrence is 15.7.2007 at night. This witness also deposed that on 07.07.2007 there was an altercation took place amongst Khaibor, Liton and Mahabub with Sarafat's brother Faruque relating to demolition of a karnish of their building. As Liton tried to demolish the karnish of their building, at that time, Faruque assaulted him, then Khaibor and his son Liton and Mahbub threatened Faruque and stated that: ৩৭ দিনের মধ্যে তোমার হাতে পায়ের রগ কেটে দুনিয়া থেকে বিদায় করিয়া দিব তোমার ভাইদের নিয়া বিল্ডিং থাকতে দিব না। ৮ দিনের মাথায় শরাফতকে খুন করা হয়।

During cross-examination, this witness denied the suggestion that the prosecution witness Muffazal is not his nephew. However, he admitted that victim Sarafat's brother namely Sahadat is his son-in-law. He also admitted that prosecution witness Quddus is his son. He also admitted that Asgor Ali and Kaibor Ali are step brother. He presumed that

deceased Sarafat Ali may be killed by Kaibor Ali and others.

PW-4, Most. Shirin Akhter Safia who is wife of the victim Sarafat Ali, deposed that the time of occurrence is after 10.00 p.m. at any time on 15.7.2007. She deposed that there are 12 accused persons. She also deposed that 11/12 days before the incident of murder her husband received one phone call and after end of call her husband said that he cannot run his business anymore because Sakander demanded an amount of Taka 3(three) lac as *chanda* (subscription) and before this incident, he gave an amount of Taka 40,000/- to Sekendar as subscription. Thereafter, she finds a Bank receipt of the said amount, through this receipt deceased deposited the said amount to Sekendar's account as subscription and she handover the receipt to the police for inquiry. She also deposed that Nobab Ali also threatened deceased Sarafat due to land dispute. This witness also deposed that on

07.07.2007 there was an altercation took place with Khaibor relating to demolition of a karnish of their building, they also threatened the deceased Sarafat that they will kill Sarafat within 7 days and on 7th day he was killed. On recall this witness indentified the deposit receipt of Sonali Bank which marked as exhibit-3 and her signature on it marked as exhibit-3/1.

During cross-examination, this witness admitted that they resided at her father-in-law's house. She also stated that the dead body of her husband was recovered at the middle of village Kalki and Daria. This witness admitted that the Bank receipt dated 2.8.2003 is a photocopy, she did not know where about the original copy. She admitted that after 1½/2 months of the alleged date of occurrence, she submitted this receipt to the police. She denied that on 21.7.2007 she gave any statement to the police. She admitted that she made her first statement to the police

after 1½ month of the date of occurrence, at that time she mentioned the name of 12 (twelve) accused-persons. She also deposed that she made allegation against Khaibor, Mahbub, Liton to the police after 1½/02 months of the incident. He also deposed that some unknown persons were threatened the victim Sarafat Ali over cell phone and these numbers were kept on the record but police did not find these numbers, these are kept by Hazarat, Ashraf Ali, Shahadat Hossain, and Faruque Islam but they did not give these numbers. She admitted that she did not disclose or made allegation to the police relating to demand of *Chanda* (subscription) by unknown persons. She also admitted that there was land dispute between her husband and Nawab Ali, he threatened her husband on several occasions. This witness denied the suggestion that she tried to save the original culprits.

PW-5, Md. Ashraf Ali, brother of the victim deposed that the date of occurrence is

on 15.7.2007 at any time after 10.00 p.m. This witness deposed that after closing the shop his three brothers and father went their house and victim Sarafat went to his in-law's house situated at Kalki by riding a motorcycle. In the early morning his sister-in-law made a phone call and said that Sarafat did not come back home; They tried to find out whereabouts of the victim and at one stage he came to know that the dead body of the victim Sarafat lying in the vacant (paddy) field of one koli situated in middle of two villages namely kalki and Daria. He went to the place of occurrence and saw there are several injury marks on the dead body of his brother. This witness also deposed that on 07.07.2007, an altercation took place amongst Khaibor, Liton and Mahabub with Sarafat's brother Faruque relating to demolition of a karnish of their building. He also deposed that there was a land dispute amongst Nowab Ali, Ashraf, Ujjal, Iqbal with Sarafat family. He also deposed

that his brother gave an amount of Taka 40,000/- to Sekendar as subscription and he demanded more money. He deposed that 12 accused persons in connivance with each other killed his brother Sarafat. This witness also deposed that police prepared inquest report at the place of occurrence and he put his signature on it, which marked as Exhibit-2/2 and he also put his signature on the seizure list, which marked as Exhibit-3/2. He identified the accused persons on the dock.

During cross-examination he admitted that there was a land dispute with Ashraf, Ujjal relating to land in situated in Gunja Mouja, Kalki but he could not disclose the plot number of the said land. This witness cannot disclose when and what manner accused demanded chanda or subscription to his deceased brother. He denied the defense suggestion that his brother started business of rods and cements in the year of 2007. He also deposed that he do not know that Sekendar constructed

his house in 2001. He also admitted that he does not know when and how the accused Sekander demanded subscription to his deceased brother. He denied defence suggestion that he deposed falsely in this case.

PW-6, Md. Faruque Hossain who is another brother of deceased, deposed that On 15.7.2007 at about 9.00 p.m. after closing the shop, his two brothers and his father went to their house situated at Bahadurpur and his another brother Hazrat Ali stayed in the shop. His brother deceased Sarafat started for his in-law's house situated at Kalki by riding a motorcycle. On that night at about 10.30 p.m. Sarafat made a phone call and asked him where they are and in reply he said we are in the house, at that time he (Sarafat) said that *ওঁসে আসামী নুরুল আমিন সেকান্দরের বাড়িতে গিয়াছে। নুরুল আমিন কি কথা বলার জন্য শরাফতকে ডাকিয়া নিয়াছে। সেখানে বিদ্যুৎ, মিঠু, কাজল, কামরুল, আশরাফুল, উজ্জল, খয়বার চাচা, মাহাবুব, লিটন, নবাব আলী মামা আছে* ö Thereafter, on the following morning he came to know through mobile phone that his brother victim Sarafat

did not return home. On getting that information they search for him here and there and came to know through a phone call that Sarafat was killed and his dead body was lying at a vacant field in the middle of two villages namely Kalki and Daria. They went to the place of occurrence and saw the dead body of his brother Sarafat with several injury marks on different part of his body. He also deposed that the accused Nurul Amin Sekendar took an amount of Taka 40.000/- as *chanda* (subscription) from his brother and he further demanded an amount of Taka 03 (three) lacs as *chanda*. He also deposed that there was a land dispute between accused Nawab Ali and his family. He also deposed that an altercation took place with Khaibor, Liton and Mahabub relating to demolition of a karnish of their building situated at kichok Bazar. He also deposed that there was a dispute regarding building at the Kicak Bazar. They also threatened the deceased Sarafat that they will

take action within 7 days and on 7th day he was killed.

He identified his signature in the seizure list, which marked as Exhibit-3/2 and the bank deposit receipt dated 2.8.2003 which marked as exhibit-4 and 4/1.

During cross-examination he admitted that মোবাইল ফোনে শরাফতের সাথে আমার কথা হওয়ার বিষয় অন্য কেহ দেখে নাই শুনে নাই। এই কথা বলার কথা অন্য কেহ জানে না। পরে বলেন অন্য কেহ জানা কিনা জানি না। এর আগেও ভাই শরাফত বাহিরে গিয়া আমাকে ফোন করিয়া কোথায় আছে জানায়। ভাই ইতোপূর্বে কোথায় কবে আমাকে ফোনে জানায় তাহা স্মরণে নাই। প্রত্যেক বারেই আমি ভাইকে জিজ্ঞাসা করিতাম তোমার সাথে কে কে আছে, ইতোপূর্বে এইরূপ ফোনে ভাইর ওহখানে কে কে ছিল সে নামগুলি স্মরণে নাই। আমার ভাইর নিখোঁজ হওয়ার সংবাদ প্রথম শুনার পর আমার স্মরণে এসেছিল যে, মটর সাইকেলে বাহির হওয়া, মোবাইলে আমার সাথে কথা বলা, আসামীদের সেখানে উপস্থিত থাকা, চাঁদার জন্য ৩ লক্ষ টাকা দাবী করা বিল্ডিং নিয়া গোলমাল হওয়ার বিষয় স্মরণে আসিয়াছিল। He also deposed that ০ লাশ প্রাপ্তির পরবর্তীতে ঐ সকল বিষয় বাড়ির লোকদের বা গ্রামের লোকদের নিকট বলি কিনা স্মরণে নাই। পুলিশের কাছে বলেছিলাম। অন্য কাউকে বলি পুলিশকে বলার পর ০। He also admitted that Police recorded his statement on 4.9.2007. During cross-examination he admitted that ০ পুলিশকে আমি আরও বলি যে সেকান্দ রর সা থ আমার ভাইর কোন লেন দন নাই ০।

PW-7, Dr. Kamal Osman, Medical Officer, in his testimony testified that he held autopsy on the dead body of the deceased Sarafat on 16.7.2007 brought and identified by Constable No. 1272 Anisur Rahman and found the following injuries:-

- 1) One stab wound on the middle of the left sternocleidomastoideus muscle $1\frac{1}{2}$ " x trachea deep.
- 2) One stab wound on the abdomen 2'' above umbilicus and $\frac{1}{2}$ right lateral to middle it was abdominal cavity deep.
- 3) One stab wound on the lower chest 5'' above right anterior superior iliac in the chest cavity deep.
- 4) One stab wound 1'' left of the left antecubital fossa measuring 1.5 x bone deep.
- 5) One stab wound on the left forearm $1\frac{1}{2}$ below elbow joint on vertical aspect measuring $1\frac{1}{2}$ x bone deep.

6) One stab wound on the left forearm, on dorsal aspect 3'' above wrist 1 ½ X bone deep.

7) One stab wound right arm on the vertical aspect ½'' above right cubital fossa measuring 1 ½'' x bone deep.

8) One stab wound on the right wrist on the ventral aspect measuring 1 ½ x 2 ½ bone deep.

9) One cut injury on left of the right thumb index bone deep. On detailed dissection profuse blood in the injury and muscle vessels and bone were cut.

In his opinion death was due to shock following hemorrhage which was ante-mortem and homicidal in nature.

Post mortem report was marked as exhibit-5 and his signature on it marked as exhibit-5/1.

This witness also opined that: মৃত্যুর সাথে সাথে ১/২ মিনিটের মধ্যে ক্ষতস্থান হইতে রক্ত স্রবণ বন্ধ হইয়া যায়। মৃত্যুর পরে যদি দেখা যায় যে, ক্ষতস্থান হইতে রক্ত ঝরিতেছে তাহা হইলে বুঝা যাইবে কয়েক মিনিট পূর্বে সে মারা গিয়াছে।

PW-8, Md. Korban Ali, a business man, in his deposition deposed that on the alleged night of occurrence while he was returning home from Kichak bazaar by riding van, he saw victim Sarafat standing with his motorcycle surrounded by 10/12 persons at the courtyard of Sekander Fakir and out of 10/12 persons he identified Sekander, Mithu, Biddiut, Kamrul, Kajol, Nawab, Khaibor, Liton, and Mahbub. At that time, he asked the victim Sarafat whether or not he will go home, in reply sekendar said that: *ওঁতুই চলিয়া যা শরাফতের সাথে আরও আলাপ আছে*। He also deposed that on the following day he went to the Shibgonj bazaar and on his returning home he came to know that the victim Sarafat was killed and he went to the place of occurrence to see the dead body but in the mean time, police took the dead body. He suspected that these accused-persons had killed Sarafat. He made statement before the Magistrate under Section 164 Cr.P.C. He identified the accused-persons on the dock.

During cross-examination he admitted that he usually returned home at 8.00.p.m. from his shop. He also deposed that: *ওঁগামের আমার ভাইর ভ্যানে করিয়া পরে বলে ঐ অচেনা একটা ভ্যানে করিয়া রওয়ানা দেই।* This witness could not disclose name of the van driver. During cross-examination he admitted that his brother-in-law Asraf is elder brother of the Informant.

PW-9, Md. Mofazzal Hossain deposed that the alleged occurrence took place on 15.7.2007, on that night he went to house of one Taku situated at Kantara village and he was returning to home at about 12.00 p.m. This witness also deposed that: *ওঁ মাছ কেনাবেচার আলোচনা শেষ করিয়া বাড়ি ফেরার পথে রাত অনুমান ১২টার সময়ে কানতারা হইতে চিলোইল রাস্তায় দিয়া আসার সময়ে বিদ্যুৎ, মিঠু, কাজল আরও একজনকে লাশ নিয়া শরাফতের লাশ হাত পা বেধেঁ নিয়া যাইতে দেখি। ওঁরা আমাকে প্রাণ নাশের হুমকি দিলে অন্য রাস্তা দিয়া আমি আমার বাড়িতে চলিয়া যাই। এই কথাগুলি আমি ম্যাজিস্ট্রেট সাহেব এর কাছে বলেছিলাম। ম্যাজিস্ট্রেট সাহেব আমার বক্তব্য লিখে নেয় এবং লেখার পর আমার সই নেয়।* He identified three accused-persons on dock.

During his cross-examination he admitted that PW-3 is his maternal uncle. He also

admitted that ঐ আমি টর্চ লাইটের আলোতে ঘটনা দেখি বা মিঠু বিদ্যুৎ শরাফতকে চিনতে পারার কথা ম্যাজিস্ট্রেট এর কাছে বলি নাই। আদালতে জবানবন্দিতে টর্চ লাইটের আলোতে আসামীদের চিনতে পারার কথা বলি নাই পরে বলেছি। পরবর্তীতে টর্চ লাইটের আলোতে চিনতে পারার কথা বলি। বাদী পক্ষের ইঙ্গিতে বলি। পুলিশ আমার কাছে টর্চ লাইট চায় নাই বা দেই নাই। He further stated that: ঐ আমি পাতাই ধুলাঝাড়া স্কুলে সহকারী পদে চাকুরী করি। মঞ্জু চেয়ারম্যান সাহেব আমাকে চাকুরী দেয় উনি ম্যানেজিং কমিটির সভাপতি ছিল ঐ।

PW-10, Md. Aminur Rahman, Manager of Sonali Bank Branch, in his deposition deposed that the investigating officer of this case went to his branch of Sonali Bank and seized some documents. He also deposed that an amount of Tk. 40,000/- was deposited in the account being No. 3678 of the accused Sekander and deposit slip dated 02.8.2003 was submitted to the court on 2.8.2007.

During cross-examination he admitted he does not know whether or not the voucher is correct one and money was deposited in the accused's account.

PW-11, A. H. M. Mahmudur Rahman, Senior Judicial Magistrate is the formal witness in

his deposition deposed that he recorded statements under section 164 of the Code of Criminal Procedure of the witnesses Korban Ali Mondal, Md. Mofazzal Hossain and Abdul Kuddus Mondal, which are marked as Exhibit-6 (series).

During cross-examination he admitted that witness Md. Mofazzal Hossain stated that the place of occurrence is a paddy field at the middle of two villages namely Kantara and Chiloell, he did not mention any road.

PW-12, Abdur Razzaque, Sub-Inspector of police, deposed that during after investigation, he visited the place of occurrence, prepared the sketch map with separate index, map marked as Exhibit-7 and his signature on it is Exhibit-7/1 and index marked as Exhibit-8 and his signature on it marked as Exhibit-8/1. He prepared inquest report in front of the witnesses and his signature on it marked as Exhibit 2/2. He sent the dead body to the hospital for post mortem.

He prepared seizure list in front of the witnesses and his signature on it marked as Exhibit 3/3 (on 4.9.2007) He prepared another seizure list on 16.9.2007 in front of the witnesses and his signature on it marked as Exhibit-4/2. He also deposed that he recorded statements of 17(seventeen) witnesses under section 161 of the Code of Criminal Procedure and he sent three witnesses to the Magistrate for recording their statement under section 164 of the Code of Criminal Procedure, after conclusion of investigation he submitted charge sheet No.46 dated 10.02.2008 against 12 accused persons under sections 302/34/379 of the Penal Code. He identified the material exhibits in the court, which marked as Exhibit I.

During cross-examination he admitted that in the accused name column of the FIR, it was written as unknown person. During cross-examination he also admitted that: উজ্জল, ইকবাল, কাজল, সেকান্দর, মিঠু, বিদ্যুৎ, কামরুল, আশরাফুল এদের সাথে শরাফতের পারিবারিক

ব্যবসায়িক দন্ধ ছিল মর্মে তদন্তে তথ্য পাওয়া যায় নাই। He also admitted that: ৩ সুরতহাল করার সময়ে গলার বাম পার্শ্বে রক্ত ঝরিতোছিল মর্মে পাই এবং সুরতহালে উল্লেখ করি। মানুষ মারা যাওয়ার সাথে সাথেই বা অল্পক্ষণের মধ্যে রক্তপাত বন্ধ হয় কিনা জানি না। তখন বৃষ্টি হচ্ছিল ৩। He denied the suggestion that he did not interrogate any witnesses. He also denied that: ৩থানায় এজাহার হওয়ার পর ৪৮ দিন কোন আসামীর নাম প্রকাশ পায় নাই সত্য নয়। He also admitted that: উজ্জল, জাফর, কাজল, মিঠু এই ৮ জনের নাম ১ম ৪৮ দিনের মধ্যে সম্পূর্ণতা পাওয়া যায় নাই সত্য। This witness also admitted that he examined Asgor on 16.7.2007. He also admitted that Zahidul, Sirajul and Shirin Akhter did not disclose the name of 08 (eight) accused-persons.

These are the deposition of the prosecution witnesses.

We have gone through the First Information Report, Inquest Report, Charge Sheet, deposition of the Witnesses, impugned judgment and order, grounds taken in the petition of two appeals and other materials on record and given our anxious consideration to the submissions advanced by the learned Advocates for both the sides. We find that

these appellants were convicted and sentenced on the basis of the evidence adduced by the PW-2, Md. Abul Kashem, PW-4, Most. Shirin Akhter Safia PW-6, Md. Faruque Hossain, PW-8, Md. Korban Ali, PW-9, Md. Mofazzal Hossain and PW-10, Md. Aminur Rahman and circumstantial evidence. Learned Advocates appearing for the Appellants argued that all the prosecution witnesses are near relatives of the informant and their belated disclosure that deceased Sarafat Ali was last seen with the company of appellants and deceased body was carried by four accused persons, which makes the prosecution case shaky and doubtful.

First question rose by learned Advocates for the Appellants that whether or not all the prosecution witnesses are near relatives of the informant and judgment and order of conviction and sentence passed by the trial court against these appellants on the basis of the evidence of interested, inter-related and partisan witnesses is sustainable in law. The

evidence of interested, inter-related and partisan witnesses must be closely scrutinized before it is accepted. We find support of this contention in the case of **Nawabul Alam and ors. Vs. The State, 15 BLD (AD) page 61** wherein it is held:

"The principle that is to be followed is that the evidence of persons falling in the category of interested, interrelated and partisan witnesses, must be closely and critically scrutinized. They should not be accepted on their face value. Their evidence cannot be rejected outright simply because they are interested witnesses for that will result in a failure of justice, but their evidence is liable to be scrutinized with more care and caution than is necessary in the case of disinterested and unrelated witnesses. An interested witness is one who has a motive for falsely implication an accused person and

that is the reason why his evidence is initially suspect. His evidence has to cross the hurdle of critical appreciation. As his evidence cannot be thrown out mechanically because of his interestedness, so his evidence cannot be accepted mechanically without a critical examination. As Hamoodur Rahman, J. (as his Lordship then was) observed in the case of *Ali Ahmed vs. State* (14 DLR (SC) 81):

"Prudence, of course, requires that the evidence of an interested witness should be scrutinized with care and conviction should not be based upon such evidence alone unless the Court can place implicit reliance thereon"
(Para -10).

.....The rule that, the evidence of interested witnesses requires corroboration is not an inflexible one it is a rule of caution rather than an

ordinary rule of appreciation of evidence. The Supreme Court of Pakistan spelt out the rule in the case of Nazir Vs. The State, 14 DLR (SC) 159, as follows:

".....we had no intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely, implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it cannot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order,

therefore, to be satisfied that no innocent persons are being implicated alongwith the guilty the Court will in the case of an ordinary interested witness look for some circumstances that gives sufficient support to his statement so as to create that degree of probability which can be made the basis of conviction. That is what is meant by saying that the statement of an interested witness ordinarily needs corroboration.

.....The High court Division was obviously in the wrong in holding that no corroboration was necessary in this case. It failed to scrutinize the evidence of interested eye- witnesses and totally ignored the fact that the evidence of P.Ws. 3-5 having so many infirmities is by itself insufficient and unsafe to sustain any conviction on a capital charge and requires corroboration by

either circumstantial or ocular corroborative evidence.”

Second question rose by learned Advocates for the Appellants that whether or not belated statements of prosecution witnesses makes the prosecution case shaky and doubtful. We have perused the evidence on record wherefrom it transpires that PW-1, Md. Hazrat Ali, who is elder brother of the deceased-Sarafat and the informant of this case in his deposition made allegations against these appellants, though he did not disclose names of the accused-persons in the FIR or the statement made under section 161 of the Code of Criminal Procedure. PW-2, Md. Abul Kashem who is an employee of the victim's family stated that he went to the house of Sekander Fakir as a chef and cooked therein. In his deposition deposed that he saw the victim Sarafat alongwith Kajol Fakir and an unknown person entered into the resident of Kajol Fakir by riding a motorcycle. Thereafter, he served diner on the dining

table, at that time he saw Khaibor, Liton, Mahbub, Uzzal, Iqbal, Ashraful, Sekander, Biddut, Kajol Fakir, Mithu, Loba, Quamrul and four unknown persons were present in that room and he left the house at about 11.30 p.m. on that night. During cross-examination this witness admitted that he did not disclose this occurrence to any one, though there was ample opportunity to disclose the incident, however he made statement under section 161 of the Code of Criminal Procedure on 7.2.2008, after 6 months 20 days of the fateful day of murder. PW-3, Md. Refazuddin who is father-in-law of one of the brother of deceased, deposed that the accused-persons might have been killed the victim. He also deposed that: "খয়বার এবং তার পুত্র লিটন ও মাহবুব শরাফতকে লক্ষ্য করিয়া বলে যে, ৭ দিনের মধ্য তোমার হাত পায়ের রগ কেটে দুনিয়া থেকে বিদায় করিয়া দিব তোমার ভাইদের নিয়া বিল্ডিং থাকতে দিব না। ৮ দিনের মাথায় শরাফতকে খুন করা হয়।" But he failed to disclose the incident to any one though there was ample opportunity to disclose that incident much earlier. However, he made statement under

section 161 of the Code of Criminal Procedure on 28.7.2007, after 12 days of the alleged incident of murder. PW-4, Mst. Shirin Akhter alias Safia is wife of the victim Sarafat, in her deposition she deposed that the accused Sekander Fakir demanded subscription to her husband and there was enmity with the accused Nawab Ali and Haider Ali with victim's family. However, in her cross-examination she stated that she did not make any statement to the police within one and half months of the occurrence though she made earlier statement under Section 161 of the Code of Criminal Procedure on 21.7.2007, in which, she did not disclose names of the appellants. PW-5, Md. Ashraf Ali who is brother of the deceased Sarafat did not disclose names of the convict-appellants when he found the dead body of the deceased Sarafat Ali on the field. PW-6, Md. Faruque Hossain who is another brother of the deceased, in his deposition deposed that the deceased Sarafat, made a call through his cell

Phone at about 10.30 a.m. and the victim informed him that: সে আসামী নুরুল আমিন সেকান্দরের বাড়িতে গিয়াছে। নুরুল আমিন কি কথা বলার জন্য শরাফতকে ডাকিয়া নিয়াছে। সেখান বিদ্যুৎ, মিঠু, কাজল, কামরুল, আশরাফুল, উজ্জল, খয়বার চাচা, মাহাবুব, লিটন, নবাব আলী মামা আছে। But he failed to disclose that information to the informant or the Police, when he found the dead body of the deceased Sarafat Ali on the field, he made statement under Section 161 of the Code of Criminal Procedure on 4.9.2007 after 1 month and 20 days of the alleged incident. PW-8, Md. Korban Ali who is brother-in-law of elder brother of the deceased in his deposition deposed that on the alleged night of occurrence at about 10.30 p.m. he saw the accused-persons and deceased at the courtyard of appellant Sekander Fakir's residence, as a close relative he failed to disclose the matter to the informant and others. PW-9 Md. Mofazzal Hossain in his deposition deposed that while he returning home through Kantara to Chiloill road at about 12.00 mid night, he saw accused Kajol, Mithu, Biddut and one

unknown person carrying the dead body of deceased Sarafat. P.W. Nos. 8 and 9 made their statements under Section 164 of the Code of Criminal Procedure on 5.11.2007, long after 3 months 20 days of the alleged occurrence. In the case of **Muslim Uddin and others Vs, The State, reported in BLD 1987 page 1**, our apex court held that examination of the witnesses under section 161 Cr.P.C. after a lapse of 34 days from the date occurrence, has rendered the testimony of witnesses unacceptable and the same was excluded from consideration and the witnesses were also disbelieved on that account. Similar view was taken in the case of **Bangladesh (State) vs. Paran Chandra Baroi reported in BCR 1986(AD) 225**, our apex court-held;

"long delay in examining the material witnesses naturally cast a doubt on the whole prosecution case."

In the case of **Moin Ullah & ors Vs The State, 40 DLR (1988), 447** this Division held that:

"...the prosecution witnesses have been examined under section 161 P.C. after a considerable lapse of time. Although the thana was within 3 miles away from the place of occurrence, the investigating officer came to the place of occurrence on 25th March 1975. He could have examined the witnesses on that very date. He allowed the witnesses a considerable long time, giving a long rope to the prosecution for concoction and embellishment of the prosecution story. The sheer negligence on the part of the Investigation Officer, who should have recorded the statements of the witnesses earlier, is strongly disapproved by us. However as we have found that the

prosecution has totally failed in proving their case as given in the F.I.R., it is needless to say anything relating to recording of statement under section 161 Cr.P.C. at a belated stage. It is suffice to say that recording of statement of witnesses after a long lapse of time positively cast serious doubt upon the prosecution story."

In the instant case, we find that the occurrence took place on 15.7.2007, at any time after 10 p.m. and dead body was recovered in the morning on 16.7.2007. F.I.R. was lodged at 10.05 a.m. on 16.7.2007. Police prepared inquest on the dead body of the victim at 10.45 a.m. on the same day and in the inquest P.W. Nos. 1 and 5, two brothers of the deceased, are witnesses. Police seized wearing apparels of the deceased Sarafat Ali and prepared a seizure list at about 12.05 p.m. on the same day and in the seizure list P.W. Nos.

1, 5 and 6, three brothers of the deceased, are witnesses. It appears from the record that none of the witnesses in the inquest report and seizure list or other persons present at the time of holding inquest told the I.O. that the accused persons were responsible for the occurrence and the learned D.A.G. appearing for the state could not controvert the submission of the learned Advocate for the accused appellants in this regards. The Investigation Officer has recorded the statements of prosecution witnesses after a long lapse of time, which gives undue opportunity to the prosecution to embellish their story.

Third question rose by learned Advocates for the Appellants that whether or not the statement of PW-9 Md. Mofazzal Hossain who is a chance witness, his evidence is sustainable in law as legal evidence. In the case of **The State vs Md. Shafiqul Islam 43 DLR (AD) 1991**, our apex court-held

"A person deposing before Court is termed as a chance witness when he is found to be at the place of occurrence by chance or coincidence at the time the offence was committed. The evidence of such a witness need not to be rejected outright, but it is to be weighed with caution and may be viewed with suspicion if the witnesses are partisan or inimically disposed towards the accused, or the reason given by the witness for his being present at the place of occurrence appears to be untrue."

In the instant case we find that PW-9, Md. Mofazzal Hossain, in his deposition deposed that he saw accused Mithu, Biddhut, Kajol and one unknown person carrying the dead body of Sarafat at about 12:00 midnight and he also made a statement under section 164 of the Code of Criminal Procedure on 05.11.2007 and he identified these accused persons in the dock. In his cross-examination he admitted

that he saw the accused-persons with torch light. He denied the suggestion that he made the statement as a supporter of one Monju Chairman who gave him job. During cross-examination, he admits that PW-3, Md. Refazuddin, is his maternal uncle and there are previous enmity between two rival group namely Sekander group and Monju Fakir group. His statement does not corroborate with the deposition of PW-7, Dr. Kamal Hossain, who is medical officer of the Shahid Ziaur Rahman Medical College Hospital, and conducted autopsy on the dead body of the deceased and prepared post-mortem report of the deceased and in his deposition deposed that "মৃত্যুর সাথে সাথে ১/২ মিনি টর মধ্য ক্ষতস্থান হই ত রক্ত ক্ষরণ বন্ধ হইয়া যায়। মৃত্যুর পর যদি দেখা যায় যে, ক্ষতস্থান হই ত রক্ত ঝরি ত ছ তাহা হই ল বুঝা যাই ব ক য়ক মিনিট পূর্ব সে মারা গিয়া ছ" । However, PW. 12 Abdur Razzaq, Sub-Inspector of Police, who prepared inquest report at about 10.45 a.m. on 16.7.2007, wherein he stated that: "মৃতের গলার বাম পাশে ধারালো অস্ত্রের অনুমান ১' আঘাতের চিহ্ন দেখা যায় এবং রক্ত ঝরিতেছে"। The deposition of PW-9 Md.

Mofazzal Hossain relating to the time of occurrence does not tally with the deposition of the prosecution witnesses No. 7 and 12 as well as the Inquest Report.

Last question rose by learned Advocates for the Appellants that whether or not deceased Sarafat Ali was last seen with the company of appellants and a link between the appellants and the murder has been proved. P.W. Nos. 2, 6 and 8 in their depositions deposed that deceased Sarafat Ali was last seen with the company of appellants. PW-2 Md. Abul Kashem in his deposition deposed that he saw the victim Sarafat alongwith Kajol Fakir and an unknown person entered into the residence of Kajol Fakir by riding a motorcycle. Thereafter, he served diner on the dining table, at that time he saw Khaibor, Liton, Mahbub, Uzzal, Iqbal, Ashraful, Sekander, Biddut, Kajol Fakir, Mithu, Loba, Quamrul and four unknown persons were present in that room and he left the house at about

11.30 p.m. on that night. PW-6, Md. Faruque Hossain, in his deposition deposed that his brother victim Sarafat called him over cell phone at about 10:30 p.m. and told him that he was called by Nurul Amin Sekander and he went to his house. He further told him that Biddut, Mithu, Kajol Fakir Quamrul Ashraful, Uzzal Khaibor, Mahbub, Liton and Nobab Ali were also present at the house. PW-8, Md. Korban Ali in his deposition deposed that he saw the victim Sarafat along with 10 to 12 persons including Sekendar, Mithu, Biddut, Quamrul Kajol, Nobab Khaibor, Liton and Mahbub at the courtyard of the residence of Sekendar Fakir.

Now the question is who caused his death and whether the prosecution could prove that the convicts in furtherance of their common intention caused his death. There is no ocular evidence. None of the prosecution witnesses saw the death of the deceased. The trial Court convicted the accused persons mainly on the basis of circumstantial evidence and on the

testimony of PWs. 2, 6, 8 and 9. On perusal of the evidence on record, it appears that the examination of the testimonies of the witnesses would show that the learned Additional Sessions Judge passed his judgment merely on presumption rather than on fact or on evidence. The main fact which the learned Judge had taken into consideration for finding the accused persons guilty was the calling and taking away of the victim Sarafat to the residence of Sekendar Fakir by the appellants and he was last seen of their company.

As regard circumstantial evidence, principle has been set out in the case of ***State vs Arman Ali reported in 42 DLR (AD) 50*** wherein it is held that in a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstance themselves, have to be proved like any other fact beyond reasonable doubt. Unless the Court is careful there will always be a chance to come to a wrong conclusion

resulting in wrong conviction. The Court should always be watchful to see that suspicion and conjecture do not take the place of proof.

It is well settled law that last seen together is a weak type of circumstantial evidence on which to have a conviction, a link between the accuseds and the murder has to be proved. The facts of the present case are very much similar to the case of ***Shamsuddin Sarder vs State 11 DLR (SC) 365***, where Md. Munir CJ emphatically observed that "no body of men, unless their thinking faculty had been completely paralyzed, could have returned a verdict of guilty of murder in the present case." Further, calling and taking away of the victim Sarafat Ali by the accuseds and he was last seen of their company at about 10:30 p.m. on 15.7.2007 and twelve hours after, on the next day at about 10.30 a. m, his dead body was recovered. This is the circumstances in the present case can never be said to be

conclusive as to the guilt of the accused persons, In the case of **Abdul Aziz vs State 33 DLR 402**, it was held that the evidence of forcibly taking away the deceased by the accused at night followed by discovery of his dead body next morning was not enough for convicting the accused under section 302 of the Penal Code. In the case of **Hassen Ali vs State 38 DLR 235** it was held that merely because the two accused had called and taken away the victim the previous evening would be most unreasonable to think that none but those two accused persons abetted the murder which took place so many hours after taking away the victim. In the case of **Ismail Sarker vs State 33 DLR 320**, it was held that the fact that the deceased was lastly seen in the company of the accused at 10.00 p.m. and his dead body was recovered from the river next day at about noon is not sufficient to held that the accused in any way had hands in the murder. In the case of **Sanwar Hossain vs State 45 DLR**

489, it was held that even if it is believed that the accused called away the deceased from his house for going to a mela and some prosecution witnesses saw the deceased in the company of the accused up to 11.00 p.m. on the night of occurrence, when the dead body was recovered more than 11 hours after, in absence of any other direct or circumstantial evidence, cannot conclusively indicate that the accused had any complicity in the murder of the deceased. In the case of **Arman Ali vs State 1987 BCR 259**, it was held that no hypothesis which is incompatible with the innocence of the accused can be drawn from the fact that the accused called away the deceased. In the case of **State vs Khasru 43 DLR (AD) 182**, the deceased, a minor boy was called away by one accused and the deceased was seen in the company of two accused persons for the last time in the afternoon and next day at noon his dead body was recovered from the bank of the river. It was held that from

those facts no inevitable conclusion can be drawn that no one besides the accused persons murdered or abetted commission of murder of the deceased. In the case of ***Eradu vs State of Hyderabad, PLD 1956 (SC) (India) 286***, it is held that the fact of taking away of the deceased by the accused is not enough to come to a firm finding that the accused had committed the murder of the deceased. Similar view was taken in the case of ***State vs. Anwar 14. BLC (HCD) (2009) 819***.

In view of the principle of law enunciated in the above cited cases, we are of the view that in the instant case the alleged facts of calling and taking away the deceased Sarafat by these appellants to the residence of Sekendar and the deceased was lastly seen in their company are not incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the guilt of those accused persons.

We find substance in his submission of the learned advocates for the convict-appellants. We also find as a whole that the conviction and sentence is unsafe and the prosecution failed to prove this case beyond reasonable doubt. These appellants are entitled to get the benefit of doubt.

Accordingly, these appeals are allowed. The impugned judgment and order dated 24.11.2010 passed by the learned Additional Sessions Judge, Court No. 3, Bogra, in Session Case No. 66 of 2008 arising out of Shibgonj P.S. Case No. 20 dated 16.7.2007 corresponding to G.R. Case No. 191 of 2007 (Shib) convicting the appellants under sections 302/34 of the Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Tk. 30,000/- each in default to suffer rigorous imprisonment for 02 (two) years more, is hereby set aside.

Let the convict-appellants be acquitted of the charge levelled against them under

section 302/34 of the Penal Code. Let the appellants Md. Nurul Amin sakander @ Kajal Fakir, Md. Mithu, Md. Saikat Hossain @ Bidduit, Md.Khaibar Ali Khondakar @ Dolar, Md. Ziton Ali Khandakar, Md. Mahabnubur Rahman @ Mahabur be set at liberty forthwith if not wanted in connection with any other case.

Since the convict-appellant Khondaker Md. Joglul Huda alias Kajol is enlarged on bail by the Hon'ble Appellate Division so he may be discharged from his bail bond.

Communicate a copy of this judgment to the court concerned alongwith lower court record at once.

Borhanuddin, J.

I agree.