

Present:

Mr. Justice Afzal Hossain Ahmed

And

Mr. Justice Md. Emdadul Haque Azad

DEATH REFERENCE NO.104 OF 2005

The State ... Petitioner

Vs.

Dr. Md. Nurul Islam.....Condemned prisoner.

Mr. Md. Jahangir Alam , Deputy Attorney-General,

with

Mr. Md. Ensanuddin Sheikh, and

Mr. Md. Nurul Islam Matubbor,

Assistant Attorneys-General.

..... For the State.

Mr. Amirul Islam with

Ms. Eva Quashem and

Mst. Nasrin Sultana.

.... For Condemned prisoner.

WITH

CRIMINAL APPEAL NO. 2953 OF 2005

Dr. Md. Nurul Islam and others. ...convict - appellants.

Vs.

The State.....Respondent

Mr. Amirul Islam with

Ms. Eva Quashem and

Mst. Nasrin Sultana.

..... For the convict-appellants.

Above named Attorneys-General are also for the respondent

AND

JAIL APPEAL NO. 791 OF 2005

Dr. Md. Nurul Islam.

.... Condemned prisoner-appellant.

Vs.

The StateRespondent.

Heard on the 9th- 12th, 16th- 20th, 23rd, October, and 20th to 22nd November, 2011.

&

Judgment on the 23rd and 28th November,2011.

AFZAL HOSSAIN AHMED,J:

This Death Reference has been made under Section 374 of the Code of Criminal Procedure by the learned Additional Sessions Judge, 1st Court, Naogaon for confirmation of the sentence of death dated 10.7.2005 imposed upon the Condemned prisoner Dr. Md. Nurul Islam in Sessions Case No. 17 of 1995 arising out of Badalgachchi Police Station Case No. 1 dated 3.6.1994 corresponding to G.R.Case No. 158 of 1994 (Badal) . The condemned prisoner filed Jail Appeal being No. 791 of 2005. Besides, the above named condemned prisoner Dr. Md. Nurul Islam alongwith 17 other convicts except convict Gobra , has also filed a separate Criminal Case being No. 2953 of 2005.

The Death Reference, Jail Appeal as well as the Criminal Appeal have been heard together and are disposed of by this judgment.

The prosecution case, in short, is as follows:-

On 03.06.1994 at 20.15 hours one Abul Hasnat Chowdhury son of late Shamsul Alam Chowdhury of village- Keshail, Police Station- Badalgachchi,

District Naogaon lodged an Ejahar with Badalgachchi Police Station, District Naogaon alleging that the Shymahar Dighi situated in plot No. 105 appertaining to C.S. Khatian No. 4 measuring 8.83 acres of land of mouza Shyamahar is their self acquired property which they have been possessing for a petty long time. On 03.06.1994 at about 10 hours in the morning when his brother Togor was getting ready for going to Badalgachchi came to learn that accused Dr. Md. Nurul Islam along with 14 others named in the F.I.R. and 15/20 unknown persons being armed with guns and deadly weapons like Farsha, Teta, rod, lathi etc. unlawfully trespassed into the said Dighi and started planting banana plants on the western side of the Dighi and releasing fries in that Dighi. Then his brother Hashem Reza Chowdhury @ Togor (since deceased) alongwith Rezaul son of Nasiruddin of village- Boali. Mujibur Rahman son of Inser Ali, Babu, son of Ismail Hossain, Ashraf, son of Abul Hossain Sarder, Abul Kalam Azad son of late Jabbor Sarder and 10/12 others came to the bank of that Dighi and asked the aforesaid accused persons to refrain from planting banana plants and releasing fries in the Dighi when the accused persons disregarded their protest and started making altercations with them and at one stage accused Dr. Md. Nurul Islam with his gun, with intent to kill Hashem Reza Chowdhury @ Togor, opened fire on him and upon receiving the gun shot injuries he dropped down on the ground. When Rezaul came to rescue Togor accused Yakub Ali, by a Teta, inflicted blow on his right leg causing severe injury and when Mujibur came forward the accused Sabuj, by a iron rod, dealt a blow on his head causing severe injury. Other accused persons being armed with lathi and other weapons inflicted assaults on others who accompanied the deceased. Accused Ashraf was also holding a gun with him at that time. Then Togor was taken to Naogaon hospital by ambulance when the Medical Officer on duty declared him dead. Accused Dr. Nurul Islam along with the aforesaid co-accused persons by forming an unlawful assembly and other deadly weapon trespassed into the said Dighi in furtherance of their common intention of all to kill Togor and after implementing their aforesaid common object by killing Togor all of them left the place of occurrence quickly. It is mentioned in the F.I.R. that the informant having heard of the occurrence from injured Rezaul he came to the Police Station along with Delwar Hossain and lodged this ejahar.

Upon lodging the ejahar the present case has been started. After investigation Police submitted charge sheet against 22 accused persons including the appellants and ultimately charge was framed under section 302/149 of the Penal Code against 21 accused persons.

During trial before the learned Additional Sessions Judge the prosecution examined as many as 23 witnesses including 9 eye witnesses of the occurrence and also laid material evidence to show that the occurrence took place as alleged.

On the contrary, the defence examined none as witness for them. The defence version as to the incident as suggested to the prosecution witnesses was that the accused persons, on the alleged date and time of occurrence, did never go to the alleged Shyamahar Dighi for planting banana plants and releasing fries in that Dighi and also did never commit any occurrence as alleged by the prosecution and that the informant, with a view to get rid of the murder of Togor and also with intent to deprive the accused Dr. Nurul Islam from the right and possession of the Shyamahar Dighi hatched up this case on false allegations and that the accused persons were quite innocent.

The learned Additional Sessions Judge having considered the facts, circumstances and evidence on record vide impugned judgment and order convicted 19 accused including the condemned prisoner Dr.Md. Nurul Islam and 17 other appellants and another non-appealing convict Gobra and sentenced the condemned prisoner Dr.Md. Nurul Islam to death and to pay a fine of Tk.10,000/- and the rest 18 accused to imprisonment for life and to pay a fine of Tk.10,000/- each, in default, to suffer rigorous imprisonment for one year more each.

Being aggrieved by that judgment and order of conviction and sentence all the aforesaid convicts other than convict, Gobra have preferred the aforesaid Criminal Appeal.

Mr. Amirul Islam, the learned Advocate, with Ms. Eva Quasem and Mst. Sultana Nasrin, appearing for the condemned prisoner-appellant and other-appellants submits that the prosecution could not prove it's case beyond all reasonable doubts by adducing sufficient reliable evidence and independent witnesses. Mr. Islam has further submitted that the prosecution

withheld some important witnesses with a view to suppress the fact and that it has hatched up this case on some false and baseless allegations and that in the circumstances the impugned judgment and order of conviction and sentence is not sustainable in law and all the appellants including the condemned prisoner are liable to be acquitted of the charge levelled against them. Mr. Amirul Islam, lastly, entreats that the condemned prisoner Dr.Md. Nurul Islam has been in the condemned cell for more than 6 years and, more so, he is an old man aged about 80 years and if the Hon'ble Court is pleased to uphold the conviction and sentence, in consideration of the above facts, his sentence may be commuted to imprisonment for life instead of death .

Mr. Jahangir Alam, the learned Deputy Attorney-General with Mr. Md. Ensanuddin Sheikh and Mr. Md. Nurul Islam Matobbur, the learned Assistant Attornys-General, appearing for the State submits that the prosecution by adducing sufficient reliable evidence has been able to prove beyond reasonable doubt that at the alleged time and place of occurrence all the accused persons under the leadership of the condemned prisoner Dr.Md. Nurul Islam, in furtherance of their common object of all to kill Togor and take forcible possession of the Shyamahar Dighi, forming an unlawful assembly armed with fire arms and other deadly weapons of offence trespassed into the alleged Shyamahar Dighi and started planting banana plants on the bank of that Dighi and releasing fries in the Dighi and when the deceased Togor, along with his companions, came there and raised protest for their doing so, the accused persons started making altercations and, at one stage, the condemned prisoner Dr.Md. Nurul Islam with his gun shot at him on the northern bank of the Dighi causing severe injuries on his person which resulted in his death. The learned Deputy Attorney General further submits that amongst the P.Ws. the prosecution has examined as many as 10 P.Ws. who have fully corroborated the prosecution case in toto which has also been supported by inquest report, post mortem report as well as the ballistic report and the learned Additional Sessions Judge, considering all the aspects of the matter as well as the evidence on record, passed the impugned judgment and order of conviction and sentence and there is no reason to interfere with the same and that the Death Reference should be confirmed and the Appeal as well as the Jail Appeal be dismissed.

The real question that calls for determination in this case is, whether the impugned judgment and order of conviction and sentence is sustainable in law.

The prosecution, with a view to bring home the charge to the accused persons, examined as many as 23 witnesses of whom P.,Ws. 2,3,4,5,6,7,9 and 10 are claimed to be eye witnesses .

P.W.1 Md. Abul Hasnat Chowdhury, is the brother of the deceased Hashem Reza Chowdhury @ Togor and informant of this case. He having heard of the occurrence from witness Rezaul (P.W.2) lodged the ejarah of this case.. He has stated that on 03.06.1994 at about 10 in the morning accused Dr. Md. Nurul Islam, alongwith other accused persons named in the F.I.R. armed with fire arms and other weapons of offence forming an unlawful assembly trespassed into the Shyamahar Dighi belonging to him and his deceased brother in furtherance for their common object of all to kill Hashem Reza Chowdhury @ Togor and thereby take forceful possession of that Dighi and started planting banana plants on the bank of that Dighi and releasing fries in the Dighi and when Hashem Reza Chowdhury @ Togor raised protest there was altercations and at one stage Dr. Md. Nurul Islam opened fire from his gun on Hashem Reza Chowdhury @ Togor from a distance of 15/20 cubits and on sustaining gun shot injuries Hashem Reza Chowdhury @ Togor holding his chest and face dropped down coming some cubits back and lost his sense and succumbed to the gun shot injuries. He has further stated that when witness Rezaul came to rescue Hashem Reza Chowdhury @ Togor accused Yakub inflicted Teta blow on his right Thigh and when witness Mujibur (P.W.7) came to save witness Rezaul accused Sabuj inflicted blow by a rod on his (P.W.7) head whereupon he fell down on the ground and that being attracted by the alarm raised by witnesses Aminul (P.W.3), Abul Kalam (P.W.5) and Ashraf @ Md. Ashraful (P.W.10) seeking help people of the vicinity started coming to the place of occurrence when accused Dr. Md. Nurul Islam, with a view to disperse the people, triggered a blank fire and left the place of occurrence. He has further stated that at the time of occurrence accused Dr. Md. Nurul Islam was holding a double barrel gun and accused Ashraf a single barrel gun.

P.W.2 Md. Rejaul Haque is an eye-witness to the occurrence and also a victim. He has corroborated the statement made by the informant P.W.1 on all material particulars regarding time, place and manner of the alleged occurrence.

P.W. 3 Md. Aminul Islam, P.W. 4 Md. Rustom Ali, P.W. 5 Md. Abul Kalam, P.W.6 Md. Faruke Hossain , P.W.7 Md. Mujibur Rahman, P.W.8 Md. Mozammel Haque and P.W.10 Md. Ashraful claimed themselves to be eye-witnesses of the occurrence. Their statements, together with that of P.W.2, are corroborative to each other as well as to those of P.W.1 on all material particulars regarding time, place and manner of the alleged occurrence. P.W.9 Md. Babu Hossain rushed to the place of occurrence immediately after the occurrence. His testimony is also consistent with those of the above mentioned P.Ws. regarding time, place and manner of the occurrence as alleged by the prosecution. The aforesaid witnesses have stated corroborating each other that at the time of the alleged occurrence accused Dr. Md. Nurul Islam was holding a double barrel gun and accused Ashraful a single barrel gun in their respective hands while amongst other members of the unlawful assembly accused Yakub was holding a Teta by which he inflicted blow on the right thigh of witness Rezaul (P.W.2), accused Sabuj was holding an iron rod by which he dealt blow on the head of witness Mujibur (P.W.7) causing severe injury, accused Nurul Alam and accused Nuruzzaman were holding iron rods in their hands, accused Moazzem, accused Bachchu, Aynal and Akbar were holding Farsha in their hands, accused Abul was holding a Hashua in his hand and other accused persons were also holding Farsha in their hands. All the aforesaid eye-witnesses have also stated corroborating each other that when Hashem Reza Chowdhury @ Togor came to the place of occurrence and raised protest for planting banana plants and releasing fries in the Dighi there was altercations between Dr. Md. Nurul Islam and Hashem Reza Chowdhury @ Togor and at one stage, from a distance of about 15/20 cubits, Dr. Md. Nurul Islam shot at Hashem Reza Chowdhury @ Togor on the chest and atonce Hashem Reza Chowdhury @ Togor dropped down there coming 3/4 cubits back and the gun shot injuries resulted in his death.

P.W. 12 Dr. S.A.Faruk who held Post Mortem Examination on the dead body of the deceased, found multiple small rounded penetrating injuries

of confused lacerated type discretely present over face, neck, anterior chest wall, anterior aspect both arms, anterior abdominal wall, anterior aspects of both thighs with blackening of skin around all wounds.

On dissection he found injuries to under line soft tissues muscle of the vessel injury to both lungs , liver, small and large gut with massive collection of ante mortem clotted blood and blood found in the thoracic abdominal cavity, pleura injured, both lungs injured, opeum injured. Seven pillets were collected from the wounds which were handed over to the escorting constable.

He opined that the death was due to shock and haemorrhage as a result of the injuries stated above which were ante mortem and homicidal in nature caused by fire arms. He exhibited the Post Mortem Report of the deceased marked as Ext.4 and his signature as Ext.4 (1) .

P.W. 13 Mir Shamsul Islam in the father-in-law of the deceased Hashem Reza Chowdhury @ Togor. The inquest of the dead body of deceased Hashem Reza Chowdhury @ Togor was held in his presence. He also found several marks of gun shot injuries on the chest, face and head of the deceased. The inquest report has been marked as Ext. 5. He has exhibited his signature therein as Ext. 5(1). His testimony is consistent with those of the foregoing witnesses on material particulars regarding manner of the occurrence.

P.W.14 Md. Elias is a witness to the seizure list marked as Ext.6. He has stated that Police seized some blood stained wearing apparels of the deceased and a Teta and a Farsha in his presence vide the aforesaid Seizure List and he has identified the same as material Ext. IV-VII. He has exhibited his signature therein as Ext. 6(1).

P.W. 15 is a witness of the seizure list marked as Ext. 3 whereby Police seized two empty caps of cartridges (one black and one red) in his presence which he exhibited as material Ext. III. During cross –examination he has stated that those two empty caps of cartridges were seized from the northern bank of the Shyamahar Dighi in his presence .

P.W. 16 Md. Sohrab Ali, Inspector of Police is a ballistic expert. In connection with the Badalgachchi Police Station Case No. 1 dated 3.6.1994 one 12 bore double barrel gun being No. 60601 and one single barrel 12 bore gun being No. 136748 and one black empty cap of 12 bore cartridge on which Roll Well was written and another empty cap of 12 bore cartridge of red color on which Eley was written and 7 pillets were sent to him for examination and on examination he found that 6 pillets out of 7 were of the cartridges fired from the right barrel of the aforesaid double barrel gun bearing No. 60601. He has also stated that both the aforesaid 12 bore guns were found active and the marks of recent fire was found under the barrels of both the guns.

During cross-examination by defence no suggestion was put to him that the aforesaid 6 pillets out of 7 pillets found in the dead body of Hashem Reza Chowdhury @ Togor did not belong to the cartridges said to have been fired from the right barrel of the double barrel gun bearing No.60601 . He has exhibited his ballistic report as Ext.6 (Ka) and his signature therein as Ext. 6(ka)(1) .

P.W. 17 A.S.I. Hemanto Kumar Roy, is a formal witness in respect of a G.D.E. bearing No. 537 dated 16.6.1994 lodged by the informant against accused Abu Sayeed son of the condemned prisoner Dr. Md. Nurul Islam .

P.W. 18 Md. Altaf Hossain , Sub-Inspector of Police vide G.D.E No. 99 dated 3.6.1994 of Naogaon Police Station held inquest on the dead body of deceased Hashem Reza Chowdhury @ Togor. He prepared the Inquest Report which he exhibited as Ext. 5 and his signature therein as Ext. 5(1) . He sent the dead body to the morgue for Post Mortem Examination and also seized some wearing apparels put on the person of the deceased and pillets vide Exts. 8 and 9 dated 3.6.1994. He has exhibited his signatures therein as Ext. 8(1) and 9(1). He also obtained the Post Mortem Report of the deceased and sent it to the Badalgachchi Police Station. During cross-examination he has stated that on 8.6.1994 he seized a double barrel gun and two live cartridges from the rented house of the condemned prisoner Dr. Md. Nurul Islam and from his wife.

P.W. 19 Constable Md. Ashrafuzzaman is a formal witness who carried and escorted the dead body of the deceased Hashem Reza Chowdhury @ Togor to the Naogaon Hospital morgue.

P.W. 20 Dr. Md. Habib Newaz, Medical Officer of Naogaon Sadar Hospital, on 3.6.1994 at about 11-30 a.m., examined the injured P.W.7 Mujibur Rahman and found an incised looking cut injury over the back of the head caused by blunt weapon and the age of injury was within two hours. He examined another injured Rezaul (P.W.2) and found one penetrating injury above the knee joint caused by sharp cutting weapon and the age of the injury was within 2 hours. During cross-examination he has also stated that he examined accused Dr. Md. Nurul Islam on 3.6.1994 at about 11-30 A.M. in the morning and found one incised wound over the head about 5" X ½" with fracture of Occipital bone and found another lacerated injury over the right side of face below right eye and the age of the injuries were within two hours. He was sent to Rajshahi Medical College Hospital for proper management. At the same time he also examined accused Abu Sayeed son of accused Dr. Md. Nurul Islam, accused Md. Toslimuddin and accused Md. Ashraful Islam in the Hospital who also sustained multiple injuries on their persons.

P.W. 21 Md. Sohrab Ali, is the Investigating Officer of the case. He has exhibited the F.I.R. recorded as per statement of the informant Abul Hasnat Chowdhury marked as Ext.12 and Informant's signature in the F.I.R. as 12(1). He prepared the sketch map with index marked as Ext. 13 and 14 respectively, examined witnesses, sent the seized guns alongwith other concerned articles for ballistic examination and obtained the report. He stated that the accused persons on the alleged date of occurrence and at the alleged time illegally trespassed into the property in question (commonly known as Shyamahar Dighi) belonging to the informant party whereupon a "GONDOGOL" (violence) started between the parties and because of gun shot and attack of weapons by the accused upon the members of the informant party such an occurrence took place and having found veracity of the allegations he submitted charge sheet against the accused persons.

During cross-examination by defence, nothing could be elicited from this witness for the benefit of the defence. However, he has stated that he came to learn that Civil cases are pending in respect of the disputed

Shaymahar Dighi and none of the parties showed any paper in respect of thereof to him.

P.W. 22 S.I., M.A.Hamid ,on 3.6.1994, while performing the duty of the Charge Officer at Badalgachchi Police Station came to learn from others that over the possession of Shaymahar Dighi Hashem Reza Chowdhury @ Togor has been murdered whereupon he registered a G.D.E being No. 70 dated 3.6.1994 and proceeded towards the place of occurrence with companion forces. He instituted the instant case upon the oral statement of Abul Hasnat Chowdhury and filled up the ejahar form. He exhibited the ejahar as Ext.1 and his signature therein as Ext. 1(1). He prepared the sketch map with index of the place of occurrence and exhibited the same as Ext. 13 and 14 respectively and seized 2 banana plants, blood stained earth, two empty caps of cartridges (one red and one black) by preparing 2 separate seizure lists and other alamats vide Ext. 2 and 4. He also seized one single barrel “Sekandar”gun being No. 136748 and 5 live cartridges from the house of accused Ashraf by preparing the seizure list marked as Ext. 9(ka) . During cross-examination he has stated that during investigation he came to know that the disputed Shaymahar Dighi had been in possession of the deceased Togor and also came to know that cases are pending between the parties over that Shaymahar Dighi. This witness could not be shaken by the defence on the vital facts regarding time, place and manner of the occurrence.

P.W. 23 S.I., Md. Anisur Rahman , while serving at the Badalgachchi Police Station on 3.6.1994 seized a white colored private car being No. Bogra –Ka- 3583 as alamat from the house(under construction) of Dr. Md. Nurul Islam at Naogaon town by preparing a seizure list which he exhibited as Ext.16 and his signature therein as Ext.16(1). In cross-examination he has stated that on the date of seizure the said car was serviceable .

The evidence of P.Ws. 1-10, 12,13, 15,18,21 and 22 is consistent with each other on all material particulars regarding time place and manner of the occurrence whereby they have given a vivid picture of the alleged occurrence. Their evidence coupled with the chain of strong circumstantial evidence as above explicitly show that Hashem Reza Chowdhury @ Togor was done to death by gun shot injuries. No suggestion from the side of the defence was even put to the prosecution witnesses, during cross-examination, denying the

fact of causing death of the deceased Togor by gun shot injuries. From the evidence as discussed above as well as from the trend of cross-examination of the P.Ws. by defence it is apparent that the accused party made efforts to suppress the fact of commission of the alleged occurrence and also remained silent about the possession of the Shaymahar Dighi and creating any sort of violence thereover for taking possession of the said Dighi but from the evidence of P.W. 20 Dr. Md. Habib Newaz it is apparent that accused Dr. Nurul Islam alongwith other convicts were present there being armed with guns and deadly weapons and there were gun shots and fights between the parties where accused Dr. Nurul Islam, Abu Sayeed, Sabuj, Toslim and Ashraful Islam sustained injuries and received treatment at the Naogaon Hospital. Had the presence of those accused not been at the place of occurrence at the alleged time they would not have sustained injuries as such at the alleged place of occurrence. Besides, P.Ws. 1, 2, 4, 10, 21 and 22 stated that although there was dispute over the Shaymahar Dighi between the parties the deceased Togor had been in possession thereof. The evidence of those P.Ws, coupled with those of the other P.Ws. and the conduct and gesture of the accused-convicts, as discussed above, as well as the broad probabilities of the facts and circumstances of the case and taking and showing deeds at the place of occurrence by condemned prisoner Dr. Md. Nurul Islam, as deposed by P.W. 4, show that on the alleged date and at the time of occurrence Dr. Nurul Islam, alongwith his accomplices, forming an unlawful assembly being armed with fire arms and other deadly weapons trespassed into the Shaymahar Dighi in furtherance of their common intention of all to kill Togor and forcibly take possession of the Shaymahar Dighi from the informant party and, in fact this has been admitted by the accused party when, admittedly, over the self-same occurrence the accused party filed a counter case being No. 46 of 1994 wherein most of the P.Ws. of the instant case and other persons of the informant party sustained conviction and sentence against which Criminal Appeal being No. 3260 of 2005 is pending before this Court.

P.Ws. 2, 3, 4, 5, 6, 7, 9 and 10 are eye-witnesses to the occurrence. They have said corroborating each other that on the alleged date of occurrence at about 10 hours in the morning the accused persons including the convicts, under the leadership of the condemned-prisoner, Dr. Md. Nurul Islam forming

an unlawful assembly being armed with guns, farsha, teta, iron rod etc. in furtherance of their common intention of all, to take forceful possession of the Shyamahar Dighi trespassed into the said Dighi and started planting banana plants on the bank of the Dighi and releasing fries into the Dighi and when Hashem Reza Chowdhury @ Togor came there and raised protest for their doing such acts there was altercations between the parties on the northern bank of the Dighi and at one stage Dr. Md. Nurul Islam from his double barrel gun, from a distance about the 15/20 cubits, shot at Hashem Reza Chowdhury @ Togor on his chest and on sustaining gun shot injuries he dropped down there and succumbed to his gun shot injuries. P.W. 8 was working in the nearby field of the said Dighi and hearing gun shots he rushed to the place of occurrence and saw the deceased Togor lying there and Dr. Md. Nurul Islam and his accomplices, the accused persons leaving the place of occurrence by opening two blank fires. His testimony is also consistent with those of the P.Ws. 1-7, 9 and 10 on all material particulars regarding time, place and manner of the occurrence. The statements of P.Ws. 2-10 are corroborative to that of the informant, P.W.1 who has corroborated the allegations made in the F.I.R. in toto on all material particulars regarding time, place and manner of the occurrence. Besides, the defence got sufficient opportunity to cross-examine the above P.Ws. but inspite of the fact failed to shake their testimony on any vital point regarding time, place and manner of the occurrence and the defence also failed to elicit anything from them for the benefit of the defence.

P.W. 18 held inquest on the dead body of the deceased Hashem Reza Chowdhury @Togor and seized alamats and found marks of gun shot injuries on the person of the deceased. P.W. 12 Dr. S. A. Faruk on holding autopsy recovered 7 pillets of gun from the wounds of the dead body of Hashem Reza Chowdhury @ Togor and opined that the deceased died of those gun shot injuries which are ante mortem and homicidal in nature. P.W. 18 while holding inquest on the dead body of the deceased found marks of gun shot injuries on the person of the deceased. P.W. 16 Md. Sobdor Ali, a ballistic expert, on examining the seized guns and the empty caps of the gun recovered from the place of occurrence and 6 pillets recovered from the dead body of the deceased, found those pillets to have been fired from the right barrel of the seized double barrel gun bearing No. 60601. P.W.22 S. I., M. A. Hamid,

the Investigating Officer, while holding investigation of the case collected the incriminating materials as discussed above which show that at the alleged time of occurrence Dr. Md. Nurul Islam along with other accused persons including the convict-appellants committed the alleged occurrence and that Dr. Md. Nurul Islam from his double barrel gun shot at the deceased Togor which resulted in his death. This witness could not also be shaken by defence on any material vital point regarding time place and manner of the alleged occurrence.

Besides, we also find no reason to disbelieve the evidence of the witnesses adduced by the prosecution, as above. It is also apparent from the evidence of the P.Ws. that at the time of the alleged occurrence the deceased was unarmed and the deceased on coming to the place of occurrence simply raised protest against the planting of banana plants and releasing fries into that Dighi whereupon there was altercations between the parties and there was no circumstance to show that accused Dr. Md. Nurul Islam had no other alternative but to shot at him on his chest from a distance of 15/20 cubits. More so, Dr. Md. Nurul Islam is a responsible person and a human physician whose professional responsibility is to save the human life from distress but here in this case we find him with an undesirable reversed character taking the life of the deceased by gun shot from his double barrel gun on the chest of the deceased although there was no circumstance to open such fire.

Mr. Amirul Islam, the learned Advocate appearing for the condemned prisoner as well as for the other convict-appellants has further argued that there is no evidence that the accused persons had a common object of killing Hashem Reza Chowdhury @ Togor. So, according to him the impugned order of conviction under section 302/149 of the Penal Code passed against all the convict-appellants including the condemned-prisoner was not proper and legal.

Section 149 of the Penal Code does not itself create any offence. The Section is as follows :-

“149.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly,

Or such as the members of that assembly knew to be likely to be committed in prosecution to that object, every person who, at

the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

To decide whether in a particular case provisions of section 149 is attracted, it is to be proved that the accused was a member of an unlawful assembly. An ‘unlawful assembly’ is an assembly of five or more persons as explained in Section 141 of the Penal Code. The same section is also re-produced below:-

“141:- an assembly of five or more persons is assigned an ‘unlawful assembly’ if the common object of the persons composing that assembly is –

First.- To overawe by criminal force. Or show of criminal force, the [Government or legislature], or any public servant in the exercise of the lawful power or such public servant; or

Second. – To resist the execution of any law, or of any legal process: or

Third. – To commit any mischief, criminal trespass, or other offence: or

Fourth. – By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth. – By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do so.

Explanation – An assembly which was not unlawful when it is assembled, may subsequently become an unlawful assembly”.

In the instant case we find that the accused persons including the appellants on the alleged date, at the alleged time and place, assembled to commit an offence armed with guns, teta, farsha, iron rod and other weapons when accused Dr. Nurul Islam was holding a double-barrel gun and accused Ashraful a single barrel gun. From the evidence of the eye-witnesses it is clear that all the appellants under the leadership of Dr. Md. Nurul Islam formed an unlawful assembly at the alleged place of occurrence (commonly known as Shyamahar Dighi) and they had a common object of committing an offence and taking forceful possession of the said Shyamahar Dighi and they knew that any consequence including murder to any one of the other party might follow.

It is now a settled principle of law that actual participation is not necessary to attract the offence under Section 149 of the Penal Code. In this

connection, we may refer to the case of Abdus Samad @ A.K.M.Abdus Samad and others Vs. the State reported in 44 D.L.R. (AD) 233. In this case, it is observed that Section 149 postulates an unlawful assembly and commission of an offence by any of its members in prosecution of the common object of the unlawful assembly. Once the Court finds that an offence, such as culpable homicidal has been committed by any member of an unlawful assembly in prosecution of the common object of the unlawful assembly, then not only the principal offender but all other members of that unlawful assembly may be constructively liable and convicted for the offence provided they had the intention and knowledge as required under Section 149 of the Penal Code.

Similar view has also been reiterated by our apex Court in the case of Hyder Ali and others Vs. the State reported in 2004 (XII) B.L.T. (A.D) 196 referring the case of Bangladesh Vs. Abed Ali and others reported in 36 D.L.R.(A.D) 234 wherein it has been held that, “ if an offence is committed by any member of an unlawful assembly which used force or violence in prosecution of the common object of that unlawful assembly, each and every member is guilty even one of them did not do any overt act”.

It is true that the members of the unlawful assembly in the instant case might not have the common object of murdering Hashem Reza Chowdhury @Togor but it is clear from the evidence that they had the common object of committing an offence of any nature including murder to any one of the other party. This common object is clear from the other party. This common object is clear from the fact that all the convict-appellants unlawfully assembled at the Shyamahar Dighi, the alleged place of occurrence, armed with different weapons including two guns and other deadly weapons. So, we are of the view that though there is evidence that only the condemned prisoner Dr. Md. Nurul Islam actually opened fire from his double barrel gun aiming the chest of the deceased Hashem Reza Chowdhury @ Togor from a distance of 15/20 cubits and on sustaining gun shot injuries he dropped down there on the ground and succumbed to such injuries, the other appellants being members of that unlawful assembly are equally liable.

It is submitted by the learned Advocate for the appellants that most of the P.Ws. have admitted that they got enmity with the appellants and as such their testimony can not be safely relied upon. In reply to this , the learned

Deputy Attorney General has submitted that the fact of having enmity between the parties by itself can not be a ground for rejecting the testimony of a witness unless it is shown that the witness was biased and resorted to falsehood and here in this case the defence, during cross-examination of the P.Ws., has utterly failed to shake the credibility of their testimony. We also find no reason to disbelieve the testimony of the P.Ws. on material particulars regarding time, place and manner of the alleged occurrence which finds sufficient corroboration from the evidence of other independent and disinterested prosecution witnesses coupled with the chain of strong circumstantial evidence.

As regards the sentence passed against the condemned prisoner Dr. Md. Nurul Islam, the learned Advocate appearing for him prayed for commutation of his sentence on the ground of long delay in disposal of the Death Reference and also on the ground of his old age and other attending circumstances.

Let us now consider as to whether there are extenuating circumstances for commutation of the sentence of death of the condemned prisoner, Dr. Md. Nurul Islam. It appears from the record that at the time of passing the order of conviction and sentence of death on 10.7.2005 the condemned prisoner Dr. Md. Nurul Islam was aged about 72 years and at present is about 79 years. Furthermore, since arrest, immediately after the occurrence, he had been in custody for about 18 months prior to passing of his conviction and sentence on 10.7.2005 and he has been languishing in the condemned cell of the Jail custody with much agony and anxiety since the date of passing the conviction and sentence on 10.7.2005. Moreover, from the date of making the Death Reference by the learned Additional Sessions Judge on 14.7.2005 about 6 ½ years have already elapsed not due to any laches of the condemned prisoner in making the Death Reference and the Appeals ready for disposal as a result of which also the condemned prisoner has undergone the mental agony and anxieties of gallows around his neck for a long period. Thus, on giving our consideration to the delay in disposal of the Death Reference and Appeals as well as his old age alongwith other factors as extenuating circumstances, we think that the ends of justice would be sufficiently met if we commute the sentence of death passed upon the

condemned prisoner Dr. Md. Nurul Islam to imprisonment for life. Considering the circumstances mentioned, we are not inclined to set aside the conviction of the convict-appellants Dr. Md. Nurul Islam and 17 others and at the same time we are also not inclined to accept the Reference of death sentence while confirming the conviction and hence we hereby commute the sentence of death of the condemned prisoner Dr. Md. Nurul Islam to imprisonment for life and also sentence him to pay a fine of Tk. 10,000/00 (ten thousand only), in default, to suffer rigorous imprisonment for one year more.

For the reasons stated above, we reject the Death Reference No. 104 of 2005 and also dismiss the Jail Appeal No. 791 of 2005 and Criminal Appeal No. 2953 of 2005 with modification of the sentence of the condemned-prisoner, Dr. Md. Nurul Islam from death to imprisonment for life and to pay a fine of Tk. 10,000/- (ten thousand only) in default, to suffer rigorous imprisonment for one year more.

All the convict-appellants are entitled to get the benefit as provided under Sub-Section (1) of Section 35 A of the Code of Criminal Procedure.

The orders granting bail to the convict-appellants by this Court are hereby vacated and they are directed to surrender before the Court below at once.

Let the Lower Court Records, alongwith a copy of this judgment and order, be sent to the concerned Court below for information and necessary action at once.

MD. EMDADUL HAQUE AZAD,J;

I agree.