

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Hasan Foez Siddique, *Chief Justice*
Mr. Justice Obaidul Hassan
Mr. Justice M. Enayetur Rahim

**JAIL PETITION NO.02 of 2015 WITH CRIMINAL APPEAL
NOS. 28, 29 & 76 OF 2016.**

(From the judgment and order dated 04.06.2012 passed by the High Court Division in Death Reference No.78 of 2006 with Criminal Appeal No.3949 of 2006, Jail Appeal Nos.895 of 2006 and 471 of 2007).

Gias Appellant (In Jail P. No.02 of 2015 and CrI. A. No.76 of 2016)
Tara @ Md. Tara Appellant (In CrI. A. No. 28 of 2016)
Rana Appellant (In CrI. A. No.29 of 2016)

-Versus-

The State Respondent (In all the Cases)
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For the petitioner : Mr. Md. Kurshid Alam Khan, senior Advocate
(In Jail P. No.02 of 2015) (Appointed under Rule 6 of Orders XXIV of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988).

For the respondent : Not represented.
(In Jail P. No.02 of 2015)

For the appellant : Mr. Yusuf Hossain Humayun, senior Advocate
(In CrI.A.Nos.28-29 of 2016) with Mr. Md. Hamidur Rahman, Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the appellant : Mr. Khandaker Mahbub Hossain, senior
(In CrI. A. No. 76 of 2016) Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record.

For the respondent : Mr. Biswajit Debnath, DAG with Ms. Abanti
(In CrI. A. Nos. 28, 29 & 76 of 2016) Nurul, AAG, instructed by Ms. Shirin Afroz, Advocate-on-Record & Mr. Haridas Paul, Advocate-on-Record.

Date of hearing : 17.05.2022 & 01.06.2022.

Date of judgment : The 8th day of June, 2022.

JUDGMENT

Obaidul Hassan, J. This Jail Petition No.02 of 2015 with Criminal Appeal Nos.28, 29 and 76 of 2006 is directed against the judgment and order dated 04.06.2012 passed by the High Court Division in Death Reference No.78 of 2006 with Criminal Appeal No.3949 of 2006

and Jail Appeal Nos.865 of 2006 and 471 of 2007 accepting the Death Reference while dismissing all the appeals and thereby upholding the judgment and order of conviction and sentence dated 30.08.2006 passed in Speedy Tribunal Case No.08 of 2006 arising out of Kotwali P.S. Case No.51 dated 24.02.2005 corresponding to G.R. No.118 of 2005 convicting the accused-appellants under sections 302/34 of the Penal Code and sentencing them to death.

The prosecution case, in short, is that on 24.02.2005 at 4:00 pm victim Mehedi Hassan Milon accompanied by one Pavel and Kishor went out from his house for Kawnia Government Primary School by rickshaw. When they reached at Kawnia Branch Road, at a place 25/30 yards east to Prabin Hospital, accused Mafiz, Gias, Rana, Tara, Mahbub, Badal, Shaon and 5/6 others being armed with deadly weapons, hockey stick, iron rod, *ramdao* etc. resisted them and pulling down the victim from a rickshaw inflicted indiscriminate blows by those weapons on his body causing severely injured on his head, shoulder, both hands, both legs, belly, back and chest resulting profuse bleeding and intestine came out from the right side of his belly. The accused persons threw away the victim in a ditch. On his screaming the nearby people and inmates including mother, brother of victim rushed to the spot and witnessed the incident, then the accused persons departed from the spot leaving the victim in a critical condition. Subsequently the victim was taken to Barisal Shere-

E-Bangla Medical College Hospital by Pavel, Kishor, Khasru and Jashim. When the physical condition of the victim deteriorated he was referred to P.G. Hospital, Dhaka (BSMMU) for better treatment but on the way he succumbed to his injuries. One Mst. Shamsunnahar as informant lodged First Information Report (FIR) with Kotwali Police Station being Case No.51 dated 24.02.2005 corresponding to G.R. No. 118 of 2005.

On receipt of the FIR police took up investigation of the case and after investigation submitted charge sheet being No.260 dated 24.02.2005 under sections 148/149/302/34 of the Penal Code against ten accused persons including the convict-appellants.

Later, the case was duly sent to the Court of Sessions Judge, Barishal and the case was numbered as Sessions Case No.52 of 2006. Subsequently, the case was transferred to the Speedy Trial Tribunal, Barishal for trial, who on taking cognizance of the offence against ten accused persons including the appellants, framed charge under sections 302/34 of the Penal Code in their absence except accused Tara alias Md. Tara. On being read over and explained the charge to him, he pleaded not guilty and claimed to be tried.

To substantiate the case the prosecution examined fourteen witnesses while the defence examined none. The trial was held in absentia against all except convict-appellant Tara alias Md. Tara. But

other absconding accused persons were defended by the State defence lawyer.

Upon closure of the evidence of the prosecution witnesses, the convict-appellant Tara alias Md. Tara was examined under section 342 of the Code of Criminal Procedure, 1898 to which he pleaded innocence. He informed the Court that he would not adduce any evidence on his behalf.

The defence case as it appears from the trend of cross-examination is that the convict-appellants are innocent and have been falsely implicated in this case due to internal political conflicts between them. They also have been implicated in this case out of sheer vengeance at the behest of their local rivals.

During the course of trial, the prosecution adduced as many as 14(fourteen) witnesses including the Medical Officer (MO) and the Investigating Officer (IO). The Tribunal after considering the evidence and materials on record found the convict-appellants along with three others guilty and convicted the convict-appellants under section 302/34 of the Penal Code sentencing them to deaths and acquitted the rest of the accused persons.

Death sentence proceeding has been submitted to the High Court Division by way of Reference by the trial Court and the Reference has been noted as Death Reference No.78 of 2006. The convict-appellant Tara alias Md. Tara also preferred Criminal Appeal

Nos.3949 of 2006 with Jail Appeal No.865 of 2006 while convict-appellant Rana preferred Jail Appeal No.471 of 2007.

The High Court Division by its judgment and order dated 04.06.2012 accepted the Death Reference and dismissed the Criminal Appeal and Jail Appeals affirming the judgment and order of conviction dated 30.08.2006 passed by the Tribunal.

Being aggrieved by and dissatisfied with the judgment and order passed by the High Court Division dated 04.06.2012, the convict-appellants preferred the instant Criminal Appeals along with Jail Appeal before this Division.

Mr. Khandaker Mahbub Hossain and Mr. Md. Khurshid Alam Khan, the learned senior Advocates, appearing for the convict-appellant Gias took us through the FIR, the inquest report, the postmortem report, the charge sheet, testimonies of the witnesses, the judgments and orders passed by the trial Court and the High Court Division, connected materials on record and submitted that the High Court Division failed to consider that the judgment and order of conviction is bad in law as well as in facts and, as such, the impugned judgment and order of conviction and sentence is liable to be set aside. He next submitted that the High Court Division failed to consider that the judgment and order of conviction is based on surmise and conjecture and not on legal evidence and, as such, the impugned judgment and order of conviction and sentence is liable to

be set aside. He submitted further that the conviction and sentence of death of the convict-appellant is based on misreading and non-reading of the evidence and the High Court Division committed illegality in passing the impugned judgments as it failed to consider that the judgment and order of conviction has been passed by the Tribunal without applying its judicial mind as the case was not proved by the prosecution witnesses beyond reasonable doubt and, as such, the impugned judgment and order of conviction and sentence is liable to be set aside. He next submitted that all the prosecution witnesses are interested witness no neutral witness supported the prosecution case and as such the impugned judgment and order of conviction and sentence is liable to be set aside.

Mr. Yusuf Hossain Humayun with Mr. Md. Hamidur Rahman, the learned Advocates, appearing for the convict-appellants Tara and Rana assailed the judgment and order of the High Court Division on manifold grounds. Firstly, there is no specific overt act against the appellants Tara and Rana, secondly, the prosecution did not examine one Kishor as witness who as per prosecution version is a vital witness, thirdly, although the Magistrate, P.W.11 recorded the statement of five witnesses under section 164 of the Code of Criminal Procedure, but the prosecution could not examine all of them, and lastly although P.Ws.4, 8 and 9 are the vital witnesses, but they did not tell the name of accused Tara. The learned advocates further

submitted that the High Court Division misread, misconstrued and misunderstood the materials on record and consequently failed to comprehend the facts of the case. He lastly submitted that the high Court Division erred in law in convicting the appellants without properly weighing and assessing the evidence on record.

In opposition Mr. Biswajit Debnath, the learned Deputy Attorney General, appearing for the State-respondents in Criminal Appeal Nos.28, 29 and 76 of 2016, made his submissions supporting the judgment and order passed by the High Court Division and the Tribunal and prayed for dismissal of the appeals.

Now, to ascertain whether the prosecution has been able to prove the charge against the convict-appellants let us examine and analyze the depositions of the witnesses adduced by the prosecution.

P.W.1, Mst. Shamsunnahar, the informant and mother of deceased Milon stated in her deposition that on 24.02.2005 at about 4:00/4:25 pm her son accompanied by one Pavel and Kishor were going to Kawnia Government Primary School by rickshaw. The moment they reached at a place 25/30 yards east to Prabin Hospital the accused Mafiz, Gias, Rana, Tara, Mahbub, Mohon alias Moina, Roni, Shohag, Munna and 5/6 others being equipped with deadly weapons, *ramdao*, hockey stick and iron rod attacked the victim and pulled him down from the rickshaw and dealt indiscriminate blows by those weapons causing profuse bleeding injuries at his head, neck,

chest, back, hands, legs and his intestine came out due to attack. Hearing the scream of her son she along with other local people rushed to the spot. The accused persons had thrown his son into a ditch in her presence. Thereafter the victim was taken to the hospital by Pavel, Khasru, Kishor and Jashim, from where he was referred to Dhaka for better treatment but on the way he succumbed to his injuries. Subsequently she lodged the FIR. This witness identified the FIR and her signature therein as Exhibits-1 and 1/1 respectively and also identified one photograph of victim as Exhibit-2. She identified accused Tara and Sohag on the dock.

During cross-examination she stated that her residence was within the hearing distance of place of occurrence. She did not mention in the FIR as to which of the accused dealt blows by which weapons. She denied the defence suggestion that she did not see the occurrence and she deposed falsely. She further denied the suggestion that there were several criminal cases against the victim for killing and robbery. She admitted that her son was a leader of Jubo Dal. This witness stated that there were many people at the time of commission of offence. She denied the defence suggestion that she left out the name of real culprits and included the name of the accused persons at the behest of the high ups of the party.

P.W.2, the elder brother of the deceased Milon, stated in his deposition that on 24.02.2005 at 3 pm he came to his house from

outside and sat for having meal with one Monir. Thereafter his brother Milon went outside along with Kishor. Kishor came back after 30/40 minutes and told them that some assailants injured Milon at his head. Hearing the said information he along with Monir rushed at the east side of Probin Hospital and saw that accused Mafiz, Gias, Mahbub, Tara, Rana, Roni, Badal, Sohag, Munna, Mohan and others were chopping the victim with sharp weapons. He along with Monir and other friends failed to rescue the victim. At one stage the victim was thrown into a ditch then accused Gias said, “সালায় এখনো বেঁচে আছে।”. He again dealt two *dao* blows on the chest of victim. When they tried to rescue the victim accused Mafiz, Gias, Rana and others threatened to assault them. Subsequently, when the local people rushed to the scene the accused persons fled away. He together with Monir and Dipu took the victim to hospital, from where he was referred to Dhaka. He along with Tutul, Monim, Jashim and Pavel went with the victim for treatment in Dhaka, but on the way he succumbed to his injuries. Later on, he came back to the hospital wherein the inquest and autopsy of the dead body of victim were held. This witness identified the inquest report and his signature therein as Exhibits-3 and 3/1 respectively. He identified the accused Tara and Sohag on the dock.

During cross-examination he stated that it took 3/4 minutes to reach the place of occurrence. He stated that the occurrence

continued for about one hour. This witness denied the defence suggestion that his brother was the activist of Jubo Dal and was killed due to inter-conflict of the party and local rivalry. He also denied the suggestion that he did not see the occurrence and they incriminated the accused persons in the present case falsely at the behest of the party high-ups.

P.W.3, Md. Jashimuddin stated in his deposition that on 24.02.2005 at 4:00 pm accused Mafiz, Gias, Mahbub, Rana, Tara and 5/6 others indiscriminately dealt blows by sharp cutting weapons on various parts of the body of victim Milon. He along with Monir, Tutul, Khasru, and Pavel were present at that time. Thereafter the victim was taken to hospital and subsequently he was shifted to Dhaka but on the way at Mawaghat the victim succumbed to his injuries. Later on, he returned to hospital wherein the Inquest Report was prepared in his presence. This witness identified his signature in the inquest report as Exhibit-3/2.

During cross-examination he stated that on 15.04.2005 he produced statement to the IO. He denied the defence suggestion that he did not state to the IO that he had witnessed the occurrence and also denied the suggestion that he deposed falsely. He also stated that he went to the spot hearing the incident from Pavel over mobile phone.

P.W.4, Pavel stated in his deposition that victim Milon was his friend. On 24.02.2005 before Asar prayer he along with victim and one Kishor went out for BSIC by rickshaw. No sooner had they reached at a place near east to Probin Hospital at 4/4:15 pm the victim talked with accused Gias. On the way they met with one Lucky *apa*, who advised them to move carefully. After sometime accused Mahbub addressing '*Ustad*' asked victim Milon to stop and said "ওস্তাদ খামেন, একটু কথা আছে।". Then accused Mafiz, Gias, Mohon, Rana, Roni, Badal, Munna and others being armed with deadly weapons surrounded the victim and inflicted indiscriminate blows upon victim Milon causing profuse bleeding injuries and intestine of the victim came out. At their scream local people rushed to the scene. Accused Mahbub assaulted at his shoulder and hand. Mahbub cried out, "এটারেও কোপা". Thereafter Jashim, Khasru and victim's mother came to the spot being informed by him. Later, they took the victim to hospital by rickshaw. Later on, the victim was referred to Dhaka but on the way he succumbed to his injuries. On the same night mother of the victim lodged FIR. In the following day the IO prepared seizure list. This witness identified the seizure list and his signature therein as Exhibits-4 and 4/1 respectively. On 26.04.2005 at 10:15 am police prepared another seizure list. This witness identified the said seizure list and his signature therein as Exhibits-5 and 5/1 respectively

During cross-examination this witness denied the defence suggestion that he did not see the occurrence and deposed falsely.

P.W.5, Md. Zahedur Rahman Monir, deposed that on 24.02.2005 at 3:00 pm he visited the house of Milon to meet with his elder brother. On being informed by Kishor he along with Khosru rushed to the place of occurrence and found that accused Gias, Mafiz, Tara, Mahbub, Rana, Roni and 4/5 others being armed with deadly weapons, *dao*, *ramdao* etc. inflicted indiscriminate blows upon the victim Milon causing profuse bleeding injuries. Accused Gias said, “সালায় এখনো বেঁচে আছে।”. Having said so accused Gias and Mofiz dealt blows on the chest and belly of the victim and in that his intestine came out. He was thrown into a nearby ditch. When Khosru went to defend the victim, the accused persons said, “এই সালাকে ও ধর”. On their scream the nearby people rushed to the scene and the accused persons left the place of occurrence. They took the victim Milon to the hospital from where he was referred to Dhaka but on the way he succumbed to his injuries. Pointing at the accused Tara and Sohag on the dock this witness stated that they also inflicted blows on the body of the victim along with other accused persons.

During cross-examination this witness denied the suggestion that he could not identify the accused persons and deposed falsely. He also stated that he could not remember whether he told to the investigating officer that accused Sohag and Tara inflicted blows on

the body of the victim. He also stated in his deposition that “যারা কোপাচ্ছিল তার মধ্যে তারা ছিল এমন কথা ও আইওকে বলিনি।”.

P.W.6, Masuma Akond stated in his deposition that on 24.02.2005 at 3:30 pm while she was going to her sister-in-law's house near to Probin Hospital, she happened to see victim Milon in a rickshaw along with Kishor and Pavel. She also saw the victim talking with Gias getting down from rickshaw. No sooner had she entered the house of her sister-in-law than she heard that “ধর শালারে তোরা কোপা, কোপা”. He along with others came out from the house and saw the accused Gias striking on the head of the victim with a bat, accused Mafiz inflicted a *ramdao* blow on the shoulder of the victim. Accused Mafiz, Gias, Tara, Roni, Rana, Munna, Shohag, Mohon, Moina along with 4/5 others inflicted indiscriminate blows by sharp cutting weapons upon the victim causing profuse bleeding injuries and his intestine was divulged. Accused Tara threw away the victim into the nearby ditch. The local people including victims' mother, brother named Khasru and one Monir rushed to the place of occurrence. When the victim's mother and brother tried to take him out of the ditch the accused persons also assaulted them. Subsequently while the victim was crying out uttering “বাঁচাও বাঁচাও”, accused Gias, Mahbub and Mafiz dealt fatal blows on the victim. Gias dealt a cut blow on his belly, Mafiz and Mahbub chopped him on his breast. Later on, the victim was taken to the hospital. She had been

living at Nazirpur after the occurrence in fear of the accused persons. The accused persons also asked her not to depose in the Court. They also attacked her husband as she did not pay heed to their request. She identified accused Sohag and Tara on the dock.

During cross-examination this witness stated that she gave statement before the 1st Class Magistrate about the occurrence. She saw the occurrence at a distance less than ten cubits. She told about the occurrence to the informant. She witnessed the occurrence till the last. This witness denied the defence suggestion that she did not see Tara and Sohag at the place of occurrence. She further denied the suggestion that she deposed falsely due to good relationship with the victim's family.

P.W.7, Monir Ahmed Titu stated in his deposition that on 24.02.2005 in the afternoon he went to hospital to see Milon where he heard that on the date of occurrence at 3:30 pm accused Mafiz, Gias, Rana, Tara, Mahbub, Mohon, Sohag, Roni and Munna dealt series of blows on the victim by deadly weapons. At 8:00/8:30 pm doctor referred him to Dhaka for better treatment. He along with others started for Dhaka by microbus. When the victim succumbed to his injuries on the way at Mawa Ferry Ghat they came back to the hospital. Police prepared inquest report of the dead body. He identified the signature in the inquest report as Exhibit-3/3. He identified accused Sohag and Tara on dock.

During cross-examination he stated that he gave statement to the police on 05.04.2005. He denied the suggestion that he deposed falsely.

P.W.8, Riaz stated in his deposition that on 24.02.2005 at 3:30 pm while he was coming to home and reached at the place of occurrence he saw that accused Gias, Mafiz, Mohon, Badal, Rana, Roni, Munna along with others were dealing indiscriminate blows upon the victim with sharp cutting weapons. He proceeded towards the front to see the occurrence. Victim Milon was thrown in the ditch and succumbed to his injuries. The accused persons chased Khosru.

During cross-examination he denied the defence-suggestion that being influenced by the informant he deposed falsely although he did not see the occurrence.

P.W.9, Hamida Begum Lucky stated in his deposition that victim Milon was his neighbour. On 24.02.2005 at 3:30 pm while she was standing in front of her house near the place of occurrence she saw Milon, Kishor and Pavel going towards Prabin Hospital. Milon got down from rickshaw and asked about her wellbeing and left for Prabin Hospital. Thereafter at about 4:15 while she was standing at the gate of her home she heard the outcry and saw that Mafiz assaulted the victim at the back of his head with a bat. At that time accused Gias, Mafiz, Mahbub, Rana, Mohon, Badal, Munna, Roni and

others dealt series of blows with sharp weapons. Victim Milon fell in the ditch. Accused Gias dealt a severe cutting blow at the stomach of the victim and as a result his intestine came out. When she was screaming the accused persons chased her. Thereafter many people rushed to the spot and the victim was taken to the hospital. Later on, she heard that victim succumbed to his injuries.

During cross-examination on behalf of the accused Tara and Sohag she stated that she did not see them at the place of occurrence. She denied the suggestion that she did not see the occurrence and being influenced by the informant she deposed falsely. Her house was at a distance of 15/20 feet from the place of occurrence.

P.W.10, Dr. Md. Habibur Rahman, stated in his deposition that on 25.02.2005 while he was posted as Assistant Professor, Forensic Medicine Department at Sher-E-Bangla Medical College Hospital, Barisal, held autopsy upon the cadaver of victim Mehedi Hassan Milon and found the following injuries:

1. Five cut injuries in the left parietal region, left frontal region, right frontal region and two on the anterior frontal region of the head 6"x1/2"x1/2"; 4"x1"x1/2"; 3"x1/2"x1/2"; 2"x1/2"x1/2" and 2"x1/2"x1/2";
2. A cut injury 2"x 1"x1" on the right scapular region;
3. At the right hand there were thirteen cut injuries of various size and shape and right radius ulna were found

cut fracture at the distal portion 3" x 2" x 1"; 3" x 1" x 1"; 4" x 1" x 1/2"; 4" x 1/2" x 1/2"; 3" x 1/2" x 1/3"; 2" x 1/2" x 1/2"; 1" x 1/2"; 1" x 1/2" x 1/2"; 1/2" x 1/2" x 1/2"; 1/2" x 1/2" x 1/2"; 1/3" x 1/3" x 1/2"; 1" x 1/3" x 1/3" and 1/3" x 1/2" x 1/2";

4. Nine cut injuries of various size and shapes on the left hand 4" x 1/2" x 1/2"; 3" x 1/2" x 1/2"; 3" x 1/2" x 1/3"; 2" x 1/2" x 1/2"; 1"; 2" x 1" x 1"; 1" x 1/2"; 1" x 1/2" x 1/2" x 1/2"; 1/2" x 1/2" x 1/2"; 2" x 1/2" x 1/3"; 2" x 1/3" x 1/2";

5. At the chest region there were two cut injuries 3" x 1" x 1"; 2 x 1" x 1". The injuries were at the left side;

6. A cut injury 2" x 1" x 1" on the right lower abdominal region through which intestinal coils coming out;

7. At the right leg there were six cut injuries of various sizes and shapes;

8. At the left leg there were eight cut injuries of various sizes and shapes and

9. At the back of the body there were two cut injuries 2" x 1" x 1"; 3" x 1" x 1".

In his opinion the cause of death was neurogenic and hypovolemic shock resulting from above mentioned injuries and post-mortem finding consistent with homicidal death.

This witness proved the Post Mortem Report and his signature therein as Exhibits-6 and 6/1 respectively.

This witness was not cross-examined by the defence.

P.W.11, Monim Hassan, Magistrate First Class stated in his deposition that while he was posted in Barishal on 07.03.2005, 19.04.2005 and 26.04.2005 he recorded the statements of Sanaul Kabir alias Pavel, Zahid Hasan Dipu, Hamida Begum and Masuma Akand, Quaiyum Hossain Chowdhury alias Sohel under section 164 of the Code of Criminal Procedure. This witness identified the said statements and his signatures therein as Exhibits-7, 7/1, 7/2, 8, 8/1, 8/2, 9, 9/1, 9/2, 10, 10/1, 10/2 and 11, 11/1, 11/2.

During cross-examination this witness stated that the names of Tara and Sohag were not available in the statement of Zahid Hasan Dipu. He denied the defence suggestion that the witnesses did not make true statement to him.

P.W.12, S.M. Mizanur Rahman stated in his deposition that on 24.02.2005 while he was posted as Officer-in-Charge at Kotwali Police Station he recorded the FIR of the informant. This witness identified the FIR and his signatures therein as Exhibits-1, 1/2, 1/3 and 1/4 respectively.

During cross-examination this witness stated that in the column of FIR the date of occurrence was mentioned as 24.02.2005 at 4:15 pm and he recorded the FIR at 11:15 pm. The name of accused Shohag was not mentioned in the FIR. He admits that the content of FIR was not read over to the informant.

P.W.13, S.I. Didarul Alam, the Investigating Officer of the case stated in his deposition that on 24.02.2005 the case was assigned to him for investigation. During investigation he visited the place of occurrence, prepared the sketch map and index, prepared the inquest report of the cadaver of victim and got recorded statements of five witnesses under section 164 of the Code of Criminal Procedure before the Magistrate. He sent the dead body of the victim to the morgue for autopsy through *chalan*. This witness identified the *chalan* of the dead body and his signature therein as Exhibits-14, 14/1. He also identified his signature in the inquest report as Exhibit-3/4. He also identified the sketch map, index and his signatures therein as Exhibits-12, 12/1, 13, 13/1. He also seized some *alamats* and prepared two seizure lists. This witness identified the said seizure lists and his signatures therein as Exhibits-4, 4/2, and 5, 5/3 respectively. He identified the *alamats* as material Exhibits I-V. Later on upon his transfer to elsewhere he handed over the case docket.

During cross-examination he stated that the name of accused Sohag was not available in the FIR. Khasru stated to him that he took the victim to the hospital. He denied the defence suggestion that P.W.5 did not state to him the name of accused Sohag. P.W.5 also did not tell him that he did not see the accused Tara chopping the victim. The nearby people within the boundary of the place of occurrence

did not give statement to him in fear of the accused persons. He denied the suggestion that he did not investigate the case properly.

P.W.14, S.I. Abdur Rab Khan stated in his deposition that the case was handed over to him for investigation on 24.05.2005 due to transfer of earlier investigating officer. During investigation he reexamined the papers prepared by his earlier IO and submitted charge sheet against ten accused persons.

During cross-examination this witness denied the suggestion that he did not investigate the case directly and submitted charge sheet against the accused persons although there was no sufficient evidence against them.

These are the witnesses adduced by the prosecution. Out of the fourteen witnesses P.W.1 is the informant and mother of the deceased Mehedi Hasan Milon, P.W.2 is the elder brother of the victim and both P.Ws.1 and 2 are the eye witnesses too. P.Ws. 3, 4, 5, 6, 7, 8, 9 are the local witnesses as well the eye witnesses except P.W.7. P.Ws.10-14 are the formal witnesses, out of them P.W.10 is the doctor performing autopsy of the dead body while P.W.11 is the Magistrate, who recorded the statements of five witnesses under section 164 of the Code of Criminal Procedure and P.W.12 is the Officer-in-Charge, who recorded the FIR. P.W.13 is the IO, who investigated into the case but could not submit charge sheet due to his transfer and P.W.14

is the IO, who submitted charge sheet on the basis of investigation done earlier by P.W.13.

It transpires from the record that in the instant case, some witnesses namely Sanaul Kabir Pavel, Jahid Hasan Dipu, Hamida Begum, Masuma Akhond, Kaiyum Hossain Chowdhury Sohel had been produced before the Magistrate (P.W.11) and their statements had been recorded by the P.W.11 under section 164 of the Code of Criminal Procedure. Those witnesses narrated in details the whole incident of gruesome killing of the victim.

Now let us turn to the evidence, which is available on the record to ascertain the guilt of the convict-appellants. At this juncture it is pertinent to embark upon the discussion in respect of convict-appellants Gias and Rana.

P.W.1, the informant stated in his deposition that on 24.02.2005 at about 4:00/4:25 pm her son accompanied by one Pavel and Kishor were going to Kawnia Government Primary School by rickshaw. The moment they reached at the place of occurrence the accused Mafiz, Gias, Rana, Tara, Mahbub, Mohon alias Moina, Roni, Shohag, Munna and 5/6 others being equipped with deadly weapons, *ramdao*, hockey stick and iron rod attacked the victim and pulling him down from the rickshaw dealt indiscriminate blows by those weapons causing profuse bleeding injuries on the different parts of his body and his

intestine came out due to attack. Hearing the scream she along with other local people rushed to the place. The accused persons had thrown his son into the ditch in her presence. Thereafter the victim was taken to the hospital by Pavel, Khasru, Kishor and Jashim, from where he was referred to Dhaka for better treatment but on the way he succumbed to his injuries. Subsequently this witness lodged the FIR. This witness identified the FIR and her signature therein as Exhibits-1 and 1/1 respectively and also identified one photograph of victim as Exhibit-2.

P.W.2, the elder brother of the deceased corroborated P.W.1 and stated in his deposition that on 24.02.2005 at 3 pm he came to his house from outside and sat for having meal with one Monir. Thereafter his brother Milon went outside along with one Kishor. Kishor came back to his house after 30/40 minutes and told them that Milon was attacked by some assailants. Hearing so he along with Monir rushed at the east side of Probin Hospital and saw that accused Mafiz, Gias, Mahbub, Tara, Rana, Roni, Badal, Sohag, Munna, Mohan and others were chopping the victim with sharp weapons. At one stage the victim was thrown into the ditch then accused Gias said, “শালা এখনো বেঁচে আছে।”. He again dealt two *dao* blows on the chest of victim. He along with Monir and Dipu took the victim to the Shree-Bangla Medical College Hospital from where he was referred to Dhaka for better treatment. Tutul, Monir, Jasim and Pavel

accompanied him on the way to Dhaka but on the way the victim succumbed to his injuries. They returned to the Hospital with the dead boy of victim wherein inquest report was prepared. This witness identified the inquest report and his signature therein as Exhibits-3 and 3/1 respectively.

P.W.3 also corroborated P.Ws.1 and 2 and stated in his deposition that on 24.02.2005 at 4:00 pm accused Mafiz, Gias, Mahbub, Rana, Tara and 5/6 others indiscriminately dealt blows by sharp cutting weapons on various parts of the body of victim Milon. He along with Monir, Tutul, Khasru, and Pavel were present at that time. Thereafter the victim was taken to local hospital and subsequently he was shifted to Dhaka but on the way at Mawaghat the victim succumbed to his injuries. Later on, he returned to the hospital wherein the inquest report was prepared in his presence. This witness identified his signature in the inquest report as Exhibit-3/2. During cross-examination this witness stated that he went to the spot hearing about the incident from one Pavel over mobile phone.

Another eye witness of the incident P.W.4, Pavel corroborates P.Ws.1, 2 and 3 and stated in his deposition that on 24.02.2005 before Asar prayer he along with the victim being his friend and one Kishor went out for BSIC by rickshaw. No sooner had they reached at a place near east to Probin Hospital at 4/4:15 pm the victim talked with accused Gias. After sometime accused Mahbub addressing '*Ustad*'

asked victim Milon to stop and said “ওস্তাদ থামেন, একটু কথা আছে।”. Then accused Mafiz, Gias, Mohon, Rana, Roni, Badal, Munna and others being armed with deadly weapons surrounded the victim and inflicted indiscriminate blows upon victim Milon causing profuse bleeding injuries from the body and intestine of the victim came out. At their scream local people rushed to the scene. Thereafter Jashim, Khasru and victim’s mother came to the spot being informed by this witness. Later, they took the victim to hospital by rickshaw. Subsequently the victim was referred to Dhaka but on the way he succumbed to his injuries. On the following day the IO prepared seizure list. This witness identified the seizure list and his signature therein as Exhibits-4 and 4/1 respectively. On 26.04.2005 at 10:15 am police prepared another seizure list. This witness identified the said seizure list and his signature therein as Exhibits-5 and 5/1 respectively.

Another vital witness of the case P.W.5, Md. Zahedur Rahman Monir, deposed that on 24.02.2005 at 3:00 pm he visited the house of Milon to meet with his elder brother. On being informed by Kishor he along with Khosru rushed to the place of occurrence and found that accused Gias, Mafiz, Tara, Mahbub, Rana, Roni and 4/5 others being armed with deadly weapons, *dao*, *ramdao* etc. inflicted indiscriminate blows upon the victim Milon causing profuse bleeding injuries. Accused Gias said, “সালায় এখনো বেঁচে আছে।”. Having said so

accused Gias and Mafiz dealt blows on the breast and belly of the victim and in that his intestine came out. He was thrown to nearby ditch. When Khosru went to defend the victim, the accused persons said, “এই সালাকে ও ধর”. On hearing their outcry the nearby people rushed to the scene and the accused persons left the place of occurrence. They took the victim Milon to the hospital from where he was referred to Dhaka, but on the way he succumbed to his injuries.

Another eye witness P.W.6, Masuma Akond, stated in her deposition that on 24.02.2005 at 3:30 pm while she was going to her sister-in-law's house near to Probin Hospital she saw the victim Milon on a rickshaw along with Kishor and Pavel. She also saw the victim talking with Gias getting down from rickshaw. No sooner had she entered the house of her sister-in-law then she heard that “ধর শালারে তোরা কোপা, কোপা”. He along with others came out from the house and saw the accused Gias striking on the head of the victim with a bat, accused Mafiz inflicted a *ramdao* blow on the shoulder of the victim. Accused Mafiz, Gias, Tara, Roni, Rana, Munna, Shohag, Mohon, Moina along with 4/5 others inflicted indiscriminate blows by sharp cutting weapons upon the victim causing profuse bleeding injuries and his intestine was divulged. Accused Tara threw away the victim to the nearby ditch. The local people including victims' mother, brother named Khasru and one Monir rushed to the place of occurrence. Subsequently while the victim was crying out uttering

“বাঁচাও বাঁচাও”, accused Gias, Mahbub and Mafiz dealt fatal blows on the victim. Gias dealt a cut blow on his belly, Mafiz and Mahbub chopped him on his breast. Later on, the victim was succumbed to his injuries on the way to Dhaka for better treatment. Thus, P.W.6 also corroborated the statements of P.Ws.1-5.

Another eye witness P.W.8, Riaz stated in his deposition that on 24.02.2005 at 3:30 pm while he was coming to home and reached at the place of occurrence he saw that accused Gias, Mafiz, Mohon, Badal, Rana, Roni, Munna along with others were dealing indiscriminate blows upon the victim with sharp cutting weapons. Thereafter, the victim succumbed to his injuries. Thus, P.W.8 also corroborated other prosecution witnesses.

Another direct witness of the incident, P.W.9, Hamida Begum Lucky stated in his deposition that victim Milon was his neighbour. On 24.02.2005 at 3:30 pm while she was standing in front of her house near the place of occurrence she saw Milon, Kishor and Pavel going towards Prabin Hospital. Milon got down from rickshaw and asked about her wellbeing and left for Prabin Hospital. Thereafter at about 4:15 while she was standing at the gate of her home she heard the hue and cry and saw that Mafiz assaulted the victim at the back of his head with a bat. At that time accused Gias, Mafiz, Mahbub, Rana, Mohon, Badal, Munna, Roni and others dealt series of blows with sharp weapons. Victim Milon has thrown to the ditch. Accused Gias

dealt a severe cutting blow towards the stomach of the victim and as a result his intestine came out. Thereafter many people rushed to the spot and the victim was taken to the hospital. Later on, she heard that victim succumbed to his injuries.

From the record it reveals that although P.W.7, Monir Ahmed Titu is not a direct witness of the occurrence, but he stated in his deposition that on 24.02.2005 in the afternoon he went to hospital to see Milon where he heard that on the date of occurrence at 3:30 pm accused Mafiz, Gias, Rana, Tara, Mahbub, Mohon, Sohag, Roni and Munna dealt series of blows on the victim by deadly weapons. At 8:00/8:30 pm doctor referred the victim to Dhaka for better treatment. He along with others started for Dhaka by microbus. But the victim succumbed to his injuries on the way to Dhaka. Police prepared inquest report of the dead body. He identified the signature in the inquest report as Exhibit-3/3. Thus this witness also supported the case of prosecution. In this way P.Ws.1-9 corroborated one another to prove the case of the prosecution.

Again, P.W.10 is the doctor performing autopsy of the victim's dead body. He proved the postmortem report and his signature therein as Exhibits-6 and 6/1 respectively. It transpires from the postmortem report (Exhibit-6) that P.W.10 stated nine types of injury found on the dead body of the deceased Milon and opined that "the cause of death was neurogenic and hypovolemic shock resulting

from above mentioned injuries and post-mortem findings consistent with homicidal death”.

P.W.11 is the Magistrate who recorded the statement of five witnesses and he identified the said statements as Exhibits 7-11. P.W.12 is the Officer-in-Charge, who recorded the FIR. He identified the FIR as Exhibit-1. P.W.13 is the IO, who taking the responsibility of investigation, thoroughly investigated into the case. He prepared the sketch map and index of the place of occurrence and he also seized various *alamats* of the case. He identified the sketch map, index and his signatures therein as Exhibits-12, 12/1, 13, 13/1 respectively. He also proved two seizure lists and his signatures therein as Exhibits-4, 4/2, 5, 5/3. He also proved the seized *alamats* as Exhibits I-V.

From the foregoing discussions it is evident that the P.Ws.1-6, and 8-9 corroborated each other supporting the prosecution case. Notwithstanding the fact that P.W.7 is not an eye witness he also deposed in support of the prosecution case. P.Ws.10-14 also supported the case of the prosecution. Again, P.Ws.1-14 had been cross-examined by the defence elaborately but nothing could be elicited to shake their credibility in any manner whatsoever. From the discussion made above, as regards convict-appellants Gias and Rana we can come to the conclusion that P.Ws.1-9 all in one voice deposed against those appellants. None of those witnesses omitted the names of those appellants in their deposition resultantly the prosecution has

been able to prove the charge against the convict-appellants Gias and Rana along with other accused Mafiz, Mahbub and Roni beyond reasonable doubt and the trial Court has rightly convicted and sentenced the convict-appellants to death and the confirmation thereof by the High Court Division is justified. We find no cogent reason to interfere with the judgment and order passed by the High Court Division so far as it relates to the appellants Gias and Rana.

It is pertinent to mention here that whether there is any mitigating circumstance to take a lenient view in awarding sentence to the appellant Gias. P.W.2 stated in his deposition that while the accused dealt series of blows by sharp weapons, at one stage the victim was thrown into the ditch then accused Gias said, “শালা এখনো বেঁচে আছে।”. He again dealt two *dao* blows on the chest of victim. P.W.5 stated in his deposition that accused Gias said, “সালায় এখনো বেঁচে আছে।” and having said so accused Gias and Mafiz dealt blows on the chest and belly of the victim and in that his intestine came out. P.W.6 stated in her deposition that while the victim was yelling uttering “বাঁচাও বাঁচাও”, accused Gias, Mahbub and Mafiz dealt fatal blows on the victim. Gias dealt a cut blow on his belly, Mafiz and Mahbub chopped him on his breast. Accused Gias dealt a severe cut blows towards the stomach of the victim and as a result his intestine came out. P.W.9 stated in his deposition that Accused Gias dealt a severe cut blow at the stomach of the victim and as a result his intestine

came out. From the foregoing discussion it is crystal clear that convict Gias dealt a sharp cut blow towards the stomach of the victim and in that his intestine came out and on scrutiny of the postmortem report (Exhibit-6) it is seen that at serial No.6 an injury was noted in the following manner:

“A cut injury 2”x 1”x1” on the right lower abdominal region through which intestinal coils coming out.”

The said injury is in fact fatal and usually such injury is caused in order to ensure the death of a person. Apart from this if we observe the words used by convict-appellant Gias while giving blow are “সালায় এখনো বেঁচে আছে।”. Using such slang and ferocious words indicates the gruesome and daunting attitude of the accused. Therefore, from the record the overt act by convict-appellant Gias is proved beyond the shadow of doubt. Thus appellant Gias deserves highest punishment.

The prayer from Mr. Mahbub Hossain to take lenient view in awarding sentence to Gias considering his age at the time of commission of offence cannot be accepted. We are of the view that sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a threefold purpose-punitive, deterrent and protective.

In the case of *Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat* reported in 7 SCC(2009)254 his Lordships P. Sathasivam, J. observed that *"The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to break the law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime but the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."*

As discussed above, we are of the view that in the given circumstances only the death penalty would be the proper punishment for the appellant Gias which will serve the ends of justice.

Now as regards Tara let's scan the evidence adduced by the prosecution. P.W.4, Pavel is one of the vital witnesses on which the prosecution case hinges on. P.W.4 was friend of the victim Milon and was one of the companions of victim at the time of occurrence. Naturally P.W.4 could tell the name of the accused caused injury to the victim. But P.W.4 in his deposition did not state the name of appellant Tara. Again, P.W.8, Riaz being a direct and eye witness of the case also did not tell the name of accused Tara. In the same way P.W.9, Hamida Begum Lucky being an eye witness of the case also did not tell the name of accused Tara. P.W.9 also stated in her cross-examination on behalf of the accused Tara and Sohag that she did not see them at the place of occurrence. On the other hand, P.W.6 stated in his deposition that Tara threw the victim into the ditch and chopped. But the said deposition of P.W.6 had not been corroborated by any other witness and as such the deposition of P.W.6 as regards the complicity of the accused Tara is a bit doubtful. Moreover, P.Ws.1, 2, 3, and 5 could not tell specifically against accused Tara at which part of the body of victim Tara dealt blow. Thus, although P.Ws.4, 8 and 9 are the vital witnesses of the case they did not disclose the presence of accused Tara in the spot at the time of commission of offence, which casts a reasonable shadow of doubt as to the complicity of the accused Tara in the occurrence. According to

law the benefit of such doubt goes in favour of the accused and as such convict Tara is liable to be acquitted.

Due to the above stated facts, in our opinion, the conclusion reached by the Courts below was not correct. On the basis of such scanty evidence, the Courts below should not have passed the order of conviction in respect of accused Tara. The trial Court as well as High Court Division committed illegality misreading the evidence in so far as it relates to accused Tara. For the reasons stated hereinabove, we are of the view that the judgment and order convicting the accused-appellant Tara is not justified and, therefore, the Criminal Appeal No.28 of 2016 is liable to be allowed.

Mr. Yousuf Hossain Humayun with Mr. Md. Hamidur Rahman the learned Advocates appearing for the convict-appellant Rana lastly drew our attention regarding the age of the appellant Rana at the time of commission of offence and submitted that the present age of the convict-appellant is 43 years and he has scope to contribute a lot to his family. The learned Advocates submitted further that the convict-appellant Rana had been languishing in the condemned cell since 11.04.2007 and considering the age and length of confinement in the condemned cell the sentence of death may be reduced.

In this regard it is pertinent to mention the observation of their Lordships U.U. Lalit and two other honourable judges of the

Supreme Court of India made in the case of *Arvind Singh Vs. The State of Maharashtra*, AIR 2020 SC 2451, Para-98 that-

“(i) The extreme penalty of death need not be inflicted except in gravest case of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the Rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight age and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

We fully agree with the above observations except the observations that “Life imprisonment is the Rule and death sentence is an exception.” Because in our jurisdiction our Apex Court in many cases has decided in a reverse way.

However, from the materials on record, it appears that the convict-appellant Rana is in the condemned cell for more than 14 (fourteen) years suffering the pangs of death. It was held in the case

of *Nazrul Islam (Md) vs. State* reported in **66 DLR(AD) 199** that *“Lastly with regard to the period of time spent by the accused in the condemned cell, there are numerous decisions of this Division which shed light on this aspect. In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death.”*

In view of the decisions cited above as well as the circumstances of this case, we are of the view that justice would be sufficiently met if the sentence of death of the appellant Rana be commuted to one of imprisonment for life.

In the result the Jail Petition No.02 of 2015 and Criminal Appeal No.76 of 2016 preferred by the convict-appellant Gias are **dismissed**. The conviction and sentence of death awarded to the appellant Gias, son of Younus Hang, of Village-Chaul Owala House, Kawnia Branch Road, Police Station-Kotwali, District-Barishal by the trial Court and affirmed by the High Court Division is maintained.

The Criminal Appeal No.28 of 2016 preferred by the convict-appellant Md. Tarek Hasan alias Tara alias Md. Tara is **allowed** and he is acquitted from the charge levelled against him and his

conviction and sentence is set aside. Let him be set at liberty forthwith if not wanted in connection with any other case.

The Criminal Appeal No.29 of 2016 is **dismissed with modification of sentence**. The sentence of death of the appellant, namely, Rana, son of Salam Sarder of Village-Kawnia Branch Road, Police Station-Kotwali, District-Barishal is commuted to imprisonment for life and he is ordered to pay a fine of Tk.10,000.00(ten thousand), in default, to suffer rigorous imprisonment for 3(three) months more. He will get the benefit of section 35A of the Code of Criminal Procedure in calculation of his sentence and other remissions as admissible under the Jail Code.

The concerned Jail Authority is directed to move the appellant Rana, son of Salam Sarder to the regular jail from the condemned cell forthwith.

C.J.

J.

J.