

Present:

Mr. Justice Afzal Hossain Ahmed

And

Mr. Justice Md. Emdadul Haque Azad

DEATH REFERENCE NO.134 OF 2005

The State ... Petitioner

Vs.

Md. Saiful Huq @ A.Saiful and 6 others

.....Condemned prisoners.

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. Jamir Uddin Sircar with

Mr. Md. Idris Khan,

Mr. Md. Shahjahan,

Mr. Md. Amirul Islam

Mrs. Sufia Akter Helen

...for the informant to assist the State.

Mr. Khairul Alam ... on behalf of condemned
prisoners- Hazrat Ali, Amani, Yousuf Ali
Chowkider, Marfat Ali (Absconding condemner)
and Faruque (absconding condemner by Court's
Order dated 13.12.2011)

Mr. Aminul Haque with

Ms. Rana Kawser and

Ms. Samia Afroz Khan ... For Md. Saiful Haq @
A.Saiful

... condemned prisoner.

Md. Harun Absconding (Condemner)

Mr. A.M.Md. Azizul Haque with

Ms. Rana Kawser (by Court's Order dated
13.12.2011)

on behalf of the absconding (condemner)

WITH

CRIMINAL APPEAL NO. 3838 OF 2005

Enayet alias Ena and Kurban ... convict-
appellants

Vs.

The State.....Respondent

Mr. Abdul Matin Khasru with

Ms. Rana Kawser..... For the convict-
appellants

Above named Attorneys-General are also for the
respondent

WITH

CRIMINAL APPEAL NO. 3873 OF 2005

Yousuf Ali, Amani & Hazrat Ali...convict-
appellants

Vs.

The State.....Respondent

Mr. Khairul Alam.... For the convict-appellants.

Above named Attorneys General are also for the
respondent

WITH

CRIMINAL APPEAL NO. 4103 OF 2005

Elahi Member ... convict- appellant

Vs.

The State.....Respondent

Mr. Amirul Islam with

Mst. Nasrin Sultana.

..... For the convict-appellant.

Above named Attorneys General are also for the respondent

WITH

CRIMINAL APPEAL NO. 4497 OF 2005

Shahin and Liton ... convict- appellants

Vs.

The State.....Respondent

Mr. Abdul Matin Khasru with

Ms. Rana Kawser...

..... For the convict-appellant.

Above named Attorneys General are also for the respondent

WITH

CRIMINAL APPEAL NO. 4321 OF 2005

Nasiruddin @ Nasu ... convict- appellant

Vs.

The State.....Respondent

Mr. Abdul Matin Khasru with

Ms. Rana Kawser.

..... For the convict-appellant.

Above named Attorneys General are also for the respondent.

WITH

CRIMINAL APPEAL NO. 1139 OF 2005

Golam Mustofa ... convict- appellant

Vs.

The State.....Respondent

Mr. Amirul Islam with

Mst. Nasrin Sultana.

..... For the convict-appellant.

Above named Attorneys General are also for the respondent

WITH

CRIMINAL APPEAL NO. 4093 OF 2005

Rafique alias Rafu alias Hazi Rafiqul Islam.

... convict- appellant.

Vs.

The Sate.....Respondent

Mr. Abdul Matin Khasru with

Ms. Rana Kawser... For the convict-appellant

This appeal was dismissed on 12.01.2012 by this Court.

Above named Attorneys-General are also for the respondent

WITH

CRIMINAL APPEAL NO. 4490 OF 2011

Md. Saiful Islam alias Shafiul alias Shafil Mia.

..... convict- appellant.

Vs.

The State.....Respondent

Mr. Aminul Haque with

Ms. Rana Kawser..... For the convict-appellant

Above named Attorneys General are also for the respondent

AND

JAIL APPEAL NO. 1040 OF 2005

Yousuf Ali Condemned prisoner-appellant

Vs.

The StateRespondent

Mr. Md. Aminur Rashid Ranju with
Mrs. Khalifa Shamsunnahar Bari and
Mrs. Hasna Begum ... for the convict-appellant

AND

JAIL APPEAL NO. 1041 OF 2005

Hazrat Ali Condemned prisoner-appellant

Vs.

The StateRespondent.

Mrs. Shirin Afroz with

Mrs. Khalifa Shamsunnahar Bari and

Mrs. Hasna Begum

AND

JAIL APPEAL NO. 1042 OF 2005

Amani Condemned prisoner-appellant

Vs.

The StateRespondent.

Mr. Baharuddin Al-Razi with

Mrs. Khalifa Shamsunnahar Bari and

Mrs. Hasna Begum ... for the convict-appellant

AND

JAIL APPEAL NO. 186 OF 2011

Saiful Islam @ Safiul

...Condemned prisoner-appellant.

Vs.

The StateRespondent

Mrs. Hasna Begum ... for the convict-appellant

Mr. Abdul Matin Khasru with

Mrs. Rana Kawser...for the absconding convict
Monuruddin and Shahid

Heard on the 30.11.2011, 1st, 5th, 7th, 8th, 11th - 15th
December, 2011 and 2nd - 5th & 8th - 12th January,
2012.

&

Judgment on the 12th and 18th January, 2012.

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, 5th Court, Dhaka for confirmation of the sentence of death dated 22.08.2005 imposed upon the Condemned prisoners (1) Md. Saiful Haq @ A.Saiful, son of Nur Mohammad of village- Abdullahpur (absconding condemner but subsequently arrested), (2) Marfat Ali (still absconding), son of Safar Ali, (3) Hajrat Ali son of late Ramizuddin @ Ramu (4) Amani son of late Kamaruddin @ Kamu (5) Yousuf Ali Chowkider, son of late Kamaruddin @ Kamu, (6) Faruque (Absconding) son of Shamser Ali, all of village Abdullahpur (Karergaon) and (7) Md. Harun (absconding), son of Siddique Miah of village Bhaghapur, all of Police Station Keraniganj, District-Dhaka in Sessions Case No. 319 of 1996 arising out of Keraniganj Police Station Case No. 27(1)95 dated 24.1.1995 corresponding to G.R.Case No. 122 of 1995. By the self-same judgment and order the learned Additional Sessions Judge also convicted 7 others on the self-same charge and sentenced them to imprisonment for life. The condemned-prisoners filed Jail Appeals being Nos. 1040 of 2005 filed by Yusuf Ali, 1041 of 2005 filed by Hajrat Ali, 1042 of 2005 filed by Amani and 186 of 2011 filed by Saiful Islam @ Shafiul . Besides, they have also filed separate Criminal Appeals being Nos. 3838 of 2005 filed by Enayet and Korban, 3873 of 2005 filed by Yusuf Ali, Amani and Hajrat Ali, 4103 of 2005 filed by Elahi Member, 4497 of 2005 filed by Shahin and Liton, 4321 of 2005 filed by Nasiruddin @ Nasu, 1139 of 2008 filed by Golam Mustafa and 4490 of 2011 filed by Md. Saiful Islam @ Shafiul @ Shafil Miah . Because of his

death the Appeal being No. 4093 of 2005 filed by Md. Rafiqul @ Rafu @ Rafiqul Islam was dismissed on 12.01.2012 by this Court.

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

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

One Nazmul Haque Swapan son of late Haji Md. Nurul Haque of village- Charail , Hajibari , P.S. Keraniganj, District- Dhaka lodged a First Information Report with Keraniganj Police Station on 24.1.1995 at 23-15 hours alleging, inter alia, that his elder brother Md. Enamul Haque Ratan was running Haque Fisheries and Poultry Farm at village- Dighirpar, Subadhya Union of Keraniganj Police Station. On 24.1.1995 at about 10 A.M. the said Md. Enamul Haque Ratan along with his maternal uncle Jaj Mia went to the said Farm and at about 4 P.M. they took meal there along with others and at about 18-30 hours when the said Md. Enamul Haque Ratan along with his companions was taking meal and gossiping enlightening a hurricane some 50/60 miscreants, of whom some wearing musk armed with various deadly weapons, suddenly assailed on them. The miscreants dealt blow on the right side of Ratan's head with sharp weapon as a result of which his brain came out and he was damped in an empty house of water. The miscreants also dealt blows by different weapons on his companions and then they fled away. In the meantime, the Caretaker of the Farm, Towfiz informed the fact to the mother of the informant who then sent several persons of the locality to the place of occurrence who rescued the injured Ratan from an empty house of water of that Farm and took him to the Mitford Hospital, Dhaka where the Doctor declared him dead. On 24.1.1995 at about 9 P.M. when the informant was returning from his place of business at Patuatoli and reached near Mitford Hospital came to know about the said fact. He went to the Mitford Hospital and saw the dead body of his brother Ratan. Then the informant went to his house and having heard more about the occurrence from his maternal uncle Jaj Mia, Khokan, Syed, Mizan, Anis and Caretaker, Towfiz, who were the companions of the deceased at the alleged time of occurrence, and after having consulted with them in details the informant lodged the ejahar. It is

also stated in the ejahar that the aforesaid companions of the deceased would be able to identify the killers of his brother Ratan if they are seen again.

Upon lodging the aforesaid ejahar the present Keraniganj Police Station Case No. 27(1) 95 dated 24.1.1995 under Section 302 along with other Sections of the Penal Code has been started. The Police investigated the case and submitted charge sheet against 39 accused persons under Sections 302/149 along with other Sections of the Penal Code. Ultimately, charge was framed against all the 39 charge-sheeted accused persons under Section 302/34 of the Penal Code.

The prosecution, with a view to establish the charge levelled against the accused persons, examined as many as 18 witnesses and the defence examined none.

Besides the aforesaid 18 witnesses being examined, the prosecution has also adduced evidence which are marked as exhibits and material exhibits. The State Defence Lawyer was provided for the absconding accused Marfat Ali, Faruque, Harun, Monurruddin and Shahid .

The defence case, as it transpires from the trend of cross-examination of the P.Ws., is that Ratan might have been killed but not at the alleged place of occurrence at Dighirpar Haque Fisheries and Poultry Farm but somewhere else not by the accused persons but by his rivals and that the informant himself got Ratan murdered by his companions for his being the Managing Director of the Shams Chemical Company Private Limited and that the accused persons are quite innocent and they have been falsely implicated in this case.

The learned Additional Sessions Judge, 5th Court, Dhaka having heard both the parties and considered the evidence and materials on record passed the impugned judgment and order dated 22.8.2005 convicting, 17 accused persons under Sections 302/34 of the Penal Code and sentencing, of them, 7 accused persons including 4 Condemned-prisoners and 3 absconding-condemners Marfat, Faruque and Harun to death and the rest 10 accused persons to imprisonment for life, of whom, Md. Rafiqul @

Rafu @ Rafiqul Islam died and accused Monoruddin and Shahid are still absconding.

The instant Death Reference being No. 134 of 2005 arises out of the aforesaid judgment and order of conviction and sentence and being aggrieved by that the convict-appellants except Marfat, Faruque, Harun, Monurruddin and Shahid have filed the Jail appeals and the regular Appeals as above.

Mr. Jahangir Alam, the learned Deputy Attorney-General with Mr. Md. Ensanuddin Sheikh and Mr. Md. Nurul Islam Matubbor, the learned Assistant Attorneys-General appearing for the State submits that about one month prior to the alleged occurrence there was a quarrel between Amani, Caretaker of Momtaz Mia's Tank with Towfiz, the Caretaker of the deceased Ratan's Farm over grazing by cattles which was reported to the deceased, Ratan whereupon Ratan slapped Amani and also cautioned him. Then accused Amani informed the fact to Elahi Member and his sons of village Abdullahpur whereupon the accused persons, in furtherance of their common intention of all, conspired to kill Ratan and, accordingly, they committed the murder of the deceased as alleged by the prosecution. The learned Deputy Attorney-General further submits that in this case there are as many as 7 eye-witnesses who have recognized the accused persons. More so, 5 of the accused persons made statements recorded under Section 164 of the Code of Criminal Procedure confessing their involvement in committing the murder of the deceased Ratan which are true and made voluntarily 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. Mr. Jamiruddin Sircar, the learned Advocate, with Mr. Idris Khan, Mr. Md. Shahjahan, Mr. Md. Amirul Islam and Mrs. Sufia Akter Helen, also assisted the learned Deputy Attorney-General in making the above submissions for the State.

Mr. M. Amir-Ul Islam, the learned Advocate with Mst. Sultana Nasrin, the learned Advocate appearing for the convict-appellants Elahi

Member and Golam Mustofa submits that there is no eye-witness and also no evidence against the aforesaid appellants in this case and they also made no confessional statement in this case and that they have been falsely implicated in this case at the instance of his village rivals. Mr. Islam further submits that in this case the informant in the F.I.R. stated that after the occurrence he had conversations with his maternal uncle Jaj Mia, Caretaker Towfiz and 5 others who were the companions of the deceased at the time of alleged occurrence and after having detailed consultation with them he lodged the F.I.R. without naming any accused therein. Had those persons namely, P.Ws. 2-6 and 8 recognized the assailants, certainly, they would have disclosed their names and such names, surely, would appear in the F.I.R. So, those persons P.Ws. 2-6 and 8 can never be considered as eye-witnesses and their evidence can not be relied upon. More so, the confessional statements made by 5 accused persons in this case recorded under Section 164 of the Code of Criminal Procedure are not true and voluntary which have been procured by exercising physical torture, threat and coercion on them. Thus, it is a case of no evidence so far his aforesaid 2 appellants are concerned and that in the circumstances their Appeals are liable to be allowed.

Mr. Aminul Haque, the learned Advocate with Ms. Rana Kawser and Ms. Samia Afroz Khan appearing on behalf of accused Md. Saiful Haq submits that there is no eye-witness against the condemned prisoner Md. Saiful Haq @ A. Saiful and that he has also made no confessional statement recorded under Section 164 of the Code of Criminal Procedure in this case. In fact, the prosecution case rests on the confessional statements made by 5 convict-accused wherein they have named this appellant Saiful but the said confessional statements are neither true nor voluntarily made and those have been procured by inducement, threat and coercion and that those confessional statements have been procured by producing those accused before the Magistrate, after arrest, confining 3/4 days in hajat. Although the P.Ws. 2-6 and 8 claimed themselves to be eye witnesses of the occurrence, their statements naming the accused Saiful is nothing but mere embellishment. Mr. Haque further submits that the place of occurrence of the case has been shifted and that the informant himself,

with intent to become the Managing Director of the Shams Chemical Company Private Limited, got his brother Ratan murdered by his foes or his companions who, at the time of the alleged murder, had been with the deceased and that the learned Additional Sessions Judge failed to appreciate all those aspects of the matter as well as the evidence on record and thereby came to an erroneous decision in convicting the appellant Saiful and as such the same is liable to be set aside and his appeal be allowed.

Mr. Abdul Matin Khasru, the learned Advocate, with Ms. Rana Kawser, appearing for the appellants, Enayet @ Ena, Kurban, Shahin, Liton and Nasiruddin @ Nasu submits that there is no eye-witness and also no iota of evidence to connect his aforesaid appellants in this case. The prosecution could not show specifically which is the place of occurrence in this case and also could not show from where and by whom the deceased was taken to the Mitford Hospital and no blood-stained earth was even seized in this case. More so, although it was mentioned in the F.I.R. that the assailants could be identified if seen again but inspite of the fact no Test Identification Parade was held in this case. Mr. Khasru, lastly, submits that in the circumstances the impugned order of conviction and sentence, so far as it relates to the above named appellants, is not sustainable in law and their Appeals are liable to be allowed.

Mr. Md. Khairul Alam, the learned Advocate appearing for the appellants, Hazrat Ali, Amani, Yusouf Ali Chowkider (condemned prisoner), and, as State Defence Lawyer, for Marfat Ali and Faruque (absconding condemners) by adopting the submissions of the learned Advocates for the appellants, as above, submits that Ratan was not murdered at the alleged place of occurrence at Haque Fisheries and Poultry Farm at Dighirpar and that P.Ws. 2-6 and 8 did never see the assailants of the deceased and they also did never bring the deceased from the aforesaid place of occurrence to the Mitford Hospital and that it is evident from the statement of P.W. 12 and the inquest report, Ext. 2 that the miscreants of Keraniganj Police Station chopped Ratan and in that injured condition he was taken to Mitford Hospital for treatment by one Ashraful and that at the time of holding inquest one Md. Moinuddin, a

maternal uncle of the deceased, identified the dead body but neither that Ashraful nor that Md. Moinuddin have been examined in this Case. Mr. Alam further submits that the informant, as PW-1, stated that at the time of the alleged occurrence the deceased Ratan, his another brother and he himself had been in their factory situated at Patuatoli which tends to show that the alleged occurrence took place not at the alleged place of occurrence at Haque Fisheries and Poultry Farm at Dighirpar but somewhere else and that in the circumstances the Appeals preferred by these appellants are liable to be allowed and the impugned order of conviction and sentence, so far as it relates to them, is liable to be set aside.

Ms. Rana Kawser, the learned Advocate appearing as State Defence Lawyer for Monoruddin and Shahid, the absconding convicts, by adopting the submissions of the learned Advocates for the appellants, as above, submits that it is a case of no evidence and there is nothing to connect her aforesaid absconding-convicts with this murder and as such their conviction and sentence is liable to be set aside.

Mr. A.M.Md. Azizul Haque, the learned State Defence Lawyer engaged for the absconding condemner Harun and also other learned State Defence Lawyers and the learned Advocates on behalf of the appellants of the Jail Appeals have adopted the submissions made by the learned Advocates appearing for the above named condemned prisoners, absconding condemners and the appellants, as above.

In this case the prosecution examined as many as 18 witnesses and they are as follows:-

P.W.1 Md. Nazmul Haque Swapan is the informant of this case and a full brother of the deceased Md. Enamul Haque Ratan, P.W. 2 Md. Mezbahuddin Mizu, P.W. 3 Khokan, P.W. 4 Md. Anis, P.W. 5 Syed are the friends of the deceased Ratan who are claimed to be the companions of the deceased at the time of alleged occurrence at Haque Fisheries and Poultry Farm at Dighirpar and also claimed themselves to have witnessed the occurrence. P.W. 6 Morzina is the wife of P.W. 7 Md. Towfiz, Caretaker of Haque Fisheries and Poultry Farm at Dighirpar and both of them reside there who also claimed themselves to have witnessed the occurrence.

P.W.8 Md. Mohsin is another Caretaker of the said Farm who also claimed himself to have witnessed the alleged occurrence. P.W.9 Md. Bhulu is the witness to the inquest report marked as Ext. 2. P.W. 10 Dr. Md. Habibuzzaman Chowdhury held autopsy on the dead body of the deceased Ratan. P.W.11 A.M. Kabir Ahmed, Magistrate recorded the statements under Section 164 of the Code of Criminal Procedure made by the accused Hajrat Ali , Yusuf Ali Chowkider, Harun, Marfat and Faruque. P.W. 12 Md. Malek , S.I. of Police held inquest on the dead body of the deceased Ratan. P.W. 13 Shamsul Huda, S.I. of Police recorded the F.I.R, as dictated by the informant and filled up the F.I.R. form marked as Ext. 10. P.W. 14 Constable No. 3795 Mokhlesur Rahman carried the dead body of Ratan from Mitford Hospital to Sir Salimullah Medical College Hospital . P.W. 15 Mokhlesur Rahman Sub-Inspector of Police partly investigated the case and produced Faruque and Harun and some other accused before the Magistrate for recording their statements under Sections 164 of the Code of Criminal Procedure. However, subsequently he denied that he did not produce accused Harun before the Magistrate. P.,W. 16 Md. Sohrab Ali, Sub- Inspector of Police partly investigated the case, visited the place of occurrence, prepared the sketch map with index (Ext. 11 and 12) and the seizure list (Ext. 13). He produced accused Yusuf and Hajrat Ali before the Magistrate for recording statements under Section 164 of the Code of Criminal Procedure. P.W. 17 A.K.M. Kamrul Ahsan @ Kamrul Ahmed , Sub-Inspector of Police partly investigated the case and got the statement of accused Marfat Ali recorded by the Magistrate under Section 164 of the Code of Criminal Procedure. P.W. 18 Md. Nazmul Islam Khan, Sub-Inspector of Police completed the investigation of the case and submitted the Charge Sheet against 39 accused persons including the condemned prisoners, the absconding condemners and other convicts.

As stated in the F.I.R. the alleged occurrence took place at the Haque Fisheries and Poultry Farm at Dighirpar under Police Station Keraniganj at 6-30 P.M. on 24.1.1995 and at that time it was dark when by enlightening a hurricane the deceased Ratan along with his companion friends, the P.Ws. 2-5 were taking meal on a “Macha” where P.W. 6 Morzina, her husband P.W.7 Towfiz, a Caretaker of Haque Fisheries and

Poultry Farm at Dighirpar and P.W.8 Mohasin another Caretaker were also present. At that time 50/60 miscreants being armed with sharp and deadly weapons suddenly assailed on them and dealt blow by sharp weapon on the right back of the head of Ratan whereby his brain came out and he was damped in the waterless Choubachcha (House) of the Farm. The assailants also inflicted assaults on them (P.Ws. 2-8) and they fled away therefrom.

The informant P.W. 1 Md. Nazmul Haque Swapan, also as stated in the First Information Report (Ext.1), was not present at the alleged place of occurrence and at that time he was in the factory at Patuatoli and that on the same day, at about 9 P.M., while he was returning therefrom and reached in front of the Mitford Hospital heard of the occurrence and saw the dead body of his brother and then he came home where he heard of the occurrence from P.Ws. 2-8 and after having detailed consultation with them lodged the ejarah of this case. It is mentioned in the F.I.R. that some of the assailants were with mask and some without mask and that the assailants could be identified if they are seen again.

It is mentioned in the F.I.R. that the informant, after having detailed consultation with the P.Ws. 2-8, who are alleged to have been with the deceased Ratan at the time of the alleged occurrence at Haque Fisheries and Poultry Farm at Dighirpar, lodged the F.I.R. of this case and that the occurrence took place at 6-30 P.M. and it was dark at that time. According to the F.I.R. version all those persons namely, P.Ws. 2-8 and the deceased had been there and P.Ws. 2-5 along with the deceased were taking meal enlightening a hurricane. In such circumstances, if the assailants abruptly attacked them, how far it would be possible for them to recognize the assailants in the light of a hurricane when, on sustaining assaults on their persons, they fled away therefrom.

The informant appearing as P.W.1 has said that on the next day of the occurrence he came to learn from the aforesaid P.Ws. 2-8 that the accused persons including the condemned prisoners, absconding condemners and other convicts had committed the murder of the deceased Ratan, of whom, accused Saiful Islam and another Delwar dealt dao blows on the back of the head of the deceased whereby his brain came out of the skull. It appears

that on this vital aspect as to recognition of the accused persons by P.Ws. 2-8 the informant P.W.1 has departed from his statement made in the F.I.R. The informant has categorically stated in the F.I.R. that having heard of the occurrence from the P.Ws. 2-8 and after having detailed consultation with them as to the occurrence he lodged the ejahar at about 11-15 P.M. on the very date of occurrence. If that be so, had the P.Ws. 2-8 seen and recognized the accused persons at the time of occurrence at the alleged place of occurrence, certainly, they would have disclosed their names to the informant and their names, surely, would find place in the F.I.R. but mysteriously enough, inspite of the fact, not a single name of the accused persons appeared in the F.I.R. In the circumstances, it is very hard to believe that the P.Ws. 2-8 could ever recognize any of the accused persons.

F.I.R., being an earliest record of the case, has got much importance and it enables the Court to see what was the prosecution case at the initial stage and to check up subsequent embellishment or departure therefrom as the case proceeds through different stages. If the names of the accused persons are omitted from the F.I.R. and during trial their names are introduced by the informant, as precisely has happened in the instant case, it should not be believed, specially when the informant asserts himself to have heard of the occurrence from the P.Ws. 2-8 and consulted the matter in details with them before lodging the F.I.R. Thus, the statement of P.Ws. 2-8 asserting themselves to have recognized the accused persons and the statement of the P.W. 1 to that effect and lodging of the F.I.R. after having detailed consultation with the PWs. 2 to 8, the omission of the informant in mentioning the names of the offenders in the F.I.R. will be a circumstance in favour of the accused persons and such endeavor of the P.Ws. 1-8 is considered as a serious infirmity in the prosecution case. It is mentioned in the F.I.R. that at the time of committing the alleged occurrence some of the offenders were with mask and some without mask and the witnesses (PWs. 2-8) were present at the alleged place of occurrence and that they (PWs. 2-8) would be able to identify the offenders if they are seen again but inspite of the fact no Test Identification Parade was held in this case. In the F.I.R. it is stated that the offenders dealt blow with sharp weapon on the back side of the head of the deceased whereby his brain came out and then

the deceased was damped in a vacant Choubachcha. But the P.Ws. 2-8 who claimed themselves to be the eye-witnesses of the occurrence have said in a parrotic way that the deceased Ratan, on sustaining blow on the back side of his head by sharp weapon, fled away and fell down in a vacant Choubachcha. There are serious contradictions on this vital point between the statements of the P.W.-1 as well as his statement made in the F.I.R. and those of the P.Ws. 2-8. On sustaining such a blow on the head whereby the brain of the deceased came out, how far it would be possible for the deceased to run away from that place to such an empty Choubachcha. As deposed by P.Ws. 2-8, because of such assaults on the head of the deceased, certainly, there was profused bleeding which was expected to fall down on the ground but inspite of the fact no blood-stained earth was seized in this case. Here in this case, as appears from the seizure list marked as Ext. 13, not the blood-stained earth but only some blood-stained straw and blood clots were seized from the Choubachcha. Here, also on this point there are serious contradictions in the statements of P.Ws. 2-8 with that of the informant, P.W.-1 as well as his statement made in the F.I.R. F.I.R. version says that the deceased was damped in the empty Choubachcha but according to the version of P.Ws. 2-8, Ratan himself, on sustaining blow on his head, ran away and fell down in that empty Choubachcha. Thus, it appears that the evidence of the above P.Ws. are full of contradictions on material particulars whereby the F.I.R. case of the prosecution was departed from and embellished during the course of trial which has always been looked with disfavour and considered as a serious infirmity in the prosecution case.

P.W.3 Khokan and P.W.8 Mohsin, who claimed themselves to be the eye-witnesses of the occurrence and also claimed to have recognized the accused persons, have stated that they did not disclose the names of the accused persons out of fear which the Investigating Officer P.W. 16 has confirmed saying that the P.Ws. 3 and 8 had said to him as such. These P.Ws. 3 and 8 together with their other companions namely, P.Ws. 2, 4, 5 and 6 if, in fact, recognized the accused persons at the time of commission of the alleged offence they would certainly disclose the names of the

accused persons to the informant with whom all of them met and consulted in details before lodging the F.I.R.

For the belated disclosure of the knowledge of recognition of the accused persons, if fear or threat is easily accepted as an explanation, particularly in a case punishable by death, then it will endanger administration of criminal justice by opening up opportunities for concoctions and false implications. This was the majority view of their Lordships in the case of Abu Taher Chowdhury & others Vs. The State, reported in 11 BLD (1991) (AD)2.

Non-disclosure of the recognition of the accused persons by the P.Ws. 2-8, who are claimed to be present at the time of the alleged occurrence with the deceased Ratan and also eye-witnesses of the occurrence, to the informant with whom they met and consulted in details before lodging the F.I.R., startling disclosure of the recognition of the accused persons, thereafter with explanation, not worthy of any credit, the only reason that may be is that their story is a afterthought embellishment and product of dress-rehearsal given by the Investigating Officer. This view of ours finds support from the decision in the case of Abu Taher Chowdhury and others Vs. The State reported in 11 B.L.D. (1991) (AD) 2.

As regards taking Ratan, either dead or injured, from the alleged place of occurrence at Haque Fisheries and Poultry Farm at Dighirpar immediately after the occurrence in the alleged night on 24.1.1995 to the Mitford Hospital the informant P.W. 1 has said that immediately after the occurrence Towfiz P.W.7 went to the house of the deceased and informed his mother about the occurrence whereupon she sent the local people to the place of occurrence who took Ratan to the Mitford Hospital. In this regard P.Ws. 2-6 have said corroborating each other that they themselves carried Ratan to the Mitford Hospital but P.W. 8 Mohsin, a Caretaker of the said Farm has said that none came from the house of Ratan to take him to the Hospital inspite of information given to his house by P.W.7 Towfiz and that none of the vicinity also came to take Ratan to Hospital. Here also P.Ws. 1-8 are giving self-contradicting statements as to the carrying of the deceased from the alleged place of occurrence to the Mitford Hospital

which gives rise to concoction as to the veracity of presence of the P.Ws.2-8 at the alleged place of occurrence at Haque Fisheries and Poultry Farm at Dighirpar at the alleged time of occurrence.

P.W. 12 Md. A. Malek, Sub-Inspector of Police held the inquest of the dead body of Ratan at 10-45 P.M. on 24.1.1995 at Mitford Hospital, Dhaka being identified by the maternal uncle Md. Moinuddin and prepared the inquest report marked as Ext. 2. This P.W. 12 has stated during his cross-examination that one Ashraful took the dead body of Ratan to the Hospital but neither that Moinuddin nor that Ashraful stand as a witness in the inquest report nor even they have been examined as witnesses in this case. This P.W. 12 has further stated that during inquiry he came to learn that the miscreants of Keraniganj region chopped Ratan and then he was taken to Mitford Hospital for treatment. However, this witness P.W. 12 has not stated anything from where the said Ashraful took the deceased Ratan to Mitford Hospital.

Besides, the informant himself stated that at the time of the alleged occurrence his elder brother Ratan, his another brother Liton and he himself had been staying at the Factory situated at Patuatoli. In this regard there was a specific suggestion put to the P.W. 1 by the defence that there was no occurrence at the alleged place of occurrence at Haque Fisheries and Poultry Farm at Dighirpar and that the deceased Ratan was done to death not at the alleged place of occurrence but elsewhere and that the informant himself with intent to become the Managing Director of the Shams Chemical Company Private Limited got Ratan murdered by his companions or rivals which he denied. In this connection, it needs be mentioned that in reference to the statement of P.W. 12 and inquest report Ext. 2, as well as the statement of P.W.1, P.Ws. 2-8 and the averments made in the F.I.R. the location of the exact place of occurrence as to where Ratan was murdered calls in question. In this connection, Ashraful, a relative of the deceased Ratan, who, according to P.W. 12 and inquest report, Ext.2, brought the deceased Ratan to Mitford Hospital and Md. Moinuddin, a maternal uncle of the deceased Ratan, who identified the dead body to the P.W. 12 for inquest are the most important witnesses in this case and it is expected that the truth might have come from them as to the

murder of the deceased and from where the deceased Ratan was brought to the Mitford Hospital by that Ashraful but, for the reasons best known to the prosecution, they have not been examined in this case and withholding of such important witnesses gives rise to belief that had they been examined in this case they would not have supported the prosecution case. Thus, as claimed by the appellants, they are entitled to get the benefit as provided under Section 114 (g) of the Evidence Act and, consequently, withholding of the aforesaid important witnesses shakes the foundation of the prosecution case so far as it relates to the location where the murder of the deceased actually took place which is one of the material particulars of a criminal case. More so, the sketch map and index marked as Ext. 11 and 12 respectively do not show any Choubachcha from where Ratan was picked up with severe injuries and then taken to the Hospital which also shakes the foundation of the prosecution case.

Besides the above, now let us see how far the prosecution case rests on the confessional statements of 5 accused persons namely, Hazrat Ali, Marfat Ali, Yusuf Ali Chowkider, Faruque and Harun recorded under Section 164 of the Code of Criminal Procedure . P.Ws. 15,16 and 17 produced these 5 accused persons before the Magistrate P.W. 11 Mr. M.A.Kabir Ahmed who recorded their statements under Section 164 of the Code of Criminal Procedure which are marked as Ext. 5-9. It appears from the testimony of the P.Ws. 15, 16 and 17 that while producing those accused persons before the Magistrate they also sent the statements of those accused persons recorded under section 161 of the Code of Criminal Procedure with their forwardings which is not usually done whereby voluntariness of the accused in making such confessional statements may be called in question. More so, the P.W. 11 Mr. M.A. Kabir Ahmed, the learned Magistrate, during cross-examination, has stated that the confessing accused Hajrat and Yusuf, on being arrested on 15.2.1995, were taken to the Police Station and produced before him on 23.2.1995 on which date their statements were recorded under Section 164 of the Code of Criminal Procedure. This shows that these accused Hazrat and Yusuf, after arrest by Police, were produced before the Magistrate after about 8 days without any explanation. He has stated that he did not assure these accused that they

would not be handed over to the Police, if they did not make any confession.

As regards accused Marfat Ali, P.W.11 has further stated that this accused was arrested on 16.5.1995 and produced before him for recording his statement under Section 164 of the Code of Criminal Procedure on 20.5.1995 and that accused Harun was arrested on 5.12.1995 and produced before him on 9.12.1995 i.e. they were produced before the Magistrate after 4 days of their arrest without any explanation. Besides, it appears from the Ext.8, confessional statement made by the accused Faruque that, on being arrested on 17.8.1995, he was produced before the Magistrate (P.W.11) on 22.8.1995 on which date his confession was recorded which shows that after 5 days of his being arrested by Police he was produced before the Magistrate for recording his confession. The statements made by Hazrat Ali and Yousuf Ali Chowkider recorded under Section 164 of the Code of Criminal Procedure appear to be exculpatory in nature and those of the rest 3 accused inculpatory in nature. In view of the above statements of P.W.11, the learned Magistrate, recorded the statements of the aforesaid 5 accused persons recorded under Section 164 of the Code of Criminal Procedure and, after their arrest by Police, accused Hajrat Ali and Yousuf Ali Chowkider were produced before him for recording such statements after 8 days of their arrest, accused Marfat Ali and Harun after 4 days and as appears from Ext.7, the confessional statement made by Faruque, he was also produced before the Magistrate for recording his confessional statement after 5 days of his arrest. It is well settled that a conviction may be made on the basis of confessional statement if, of course, the same is found to be true and voluntary and when the aforesaid 5 accused persons were kept in Police custody, 2(two) of them, for 8 days, 1 (one) for 5 days and the rest 2(two) for 4 days preceding their making confessions without any explanation, such confessions marked as Ext. 5-9 lose its voluntariness and the genuineness and veracity of such confessions, thus, calls in question. This view of ours finds support from the decisions reported in 49 D.L.R. (1997) (HCD) 66 and 8 B.L.T.(AD)(2000)90.

Besides, the P.W.11, the learned Magistrate has said that the confessing accused Hajrat, Marfat and Faruque were not asked with assurance that whether or not they make their confessional statements they will not be sent back to the Police custody.

In the instant case, although the confessing accused Hajrat Ali and Yousuf Ali before making their confessions were detained by Police for 8 days and of, the rest, 2 accused namely, Harun and Marfat for 4 days and Faruque for 5 days it was a bounden duty on the recording Magistrate to assure them that they would not be sent back to the Police custody whether or not they make any confession which being a requirement of law having not been done by the recording Magistrate, P.W.11 the confessional statements (Ext. 5-9) can not be considered as voluntary and true and it can not be used against them nor against other co-accused. Thus, we hold that the Magistrate having not followed the requirement of law while recording the alleged confessions (Ext.5-9) of the aforesaid 5 confessing accused the genuineness of such confessional statements was rightly challenged. This view of ours finds support from the decisions in the cases State Vs. Ali Hossain and others reported in 4 B.L.C. (HCD) 43, State Vs. Abul Hashem reported in 50 D.L.R. 17 and Belal @ Bellal and two others Vs. The State reported in 54 D.L.R. (HCD) 80.

In a criminal case the accused are not required to prove their innocence. It is the duty of the prosecution who is to prove the charge against the accused beyond reasonable doubt.

In the instant murder case, testimony of the witnesses 2-8, who are claimed to have witnessed the occurrence and recognized the accused persons, in view of the above discussion of facts, appear to us to be of dubious nature and, thus, their claim to such effect looks askance at. Even the testimony of the informant P.W.1 also appears to us to be of the same nature. The place of occurrence, recognition of the accused and the confessional statements made by 5 (five) of the accused are the most important particulars of a criminal case but here in this case the evidence adduced by the prosecution, as referred to above, are all of dubious in nature whereby we are inclined to hold that the prosecution case is fully

made pregnant with the legends of surmise and conjecture and in absence of sufficient reliable evidence such suspicion, however strong it may be, is not a substitute for evidence on which to base a conviction.

The accused must be presumed to be innocent unless he is found to be guilty. This is the basic fundamental of the criminal jurisprudence. The accused are not required to prove their innocence, it is the duty of the prosecution who is to prove the charge against the accused beyond reasonable doubt.

In a gruesome murder like the instant case when the accused cannot be brought to book for lack of evidence beyond reasonable doubt the prosecution, instead of bewailing on an order of acquittal, should take heed to improve its quality of investigation in other cases.

Considering all the above aspects of the matter we are inclined to hold that the learned Additional Sessions Judge failed to appreciate all the above pertinent aspects of the matter and relying upon the vacillating evidence of the prosecution, as above, arrived at an erroneous decision in convicting and sentencing the appellants as well as the non-appealing convicts and as such the impugned order of conviction and sentence passed against them is not sustainable in law. It is a case of gruesome murder, no doubt, but in absence of sufficient reliable evidence and the quality of the evidence adduced by the prosecution, as above, being so feeble and scanty we find no other alternative but to reject the Death Reference and allow the Appeals as well as the Jail Appeals and set aside the impugned judgment and order of conviction and sentence passed against the appellants and non-appealing-convicts.

Accordingly, the Death Reference No. 134 of 2005 is rejected and the Jail Appeals being Nos. 1040 of 2005 filed by Yusuf Ali, 1041 of 2005 filed by Hajrat Ali, 1042 of 2005 filed by Amani and 186 of 2011 filed by Saiful Islam @ Shafiul as well as the Criminal Appeals being Nos. 3838 of 2005 filed by Enayet and Korban, 3873 of 2005 filed by Yusuf Ali, Amani and Hajrat Ali, 4103 of 2005 filed by Elahi Member, 4497 of 2005

filed by Shahin and Liton, 4321 of 2005 filed by Nasiruddin @ Nasu, 1139 of 2008 filed by Golam Mustafa and 4490 of 2011 filed by Md. Saiful Islam @ Shafiul @ Shafil Miah are allowed. Because of his death the Criminal Appeal no. 4093 of 2005 filed by Md. Rafiqul @ Rafu @ Rafiqul Islam was dismissed on 12.01.2012 by this Court. The impugned judgment and order of conviction, dated 22.08.2005, passed by the learned Additional Sessions Judge, 5th Court, Dhaka imposing death penalty upon the Condemned-prisoners (1) Md. Saiful Haq @ A. Saiful, son of Nur Mohammad of village- Abdullahpur (absconding condemner but subsequently arrested), (2) Marfat Ali (still absconding), Son of Safar Ali, (3) Hajrat Ali son of late Ramizuddin @ Ramu (4) Amani son of late Kamaruddin @ Kamu (5) Yousuf Ali Chowkider son of late Kamaruddin @ Kamu, (6) Faruque (Absconding) son of Shamsar Ali, all of village Abdullahpur (Karergaon) and (7) Md. Harun (absconding) son of Siddique Miah of village Bhaghapur, both of Police Station Keraniganj, District- Dhaka and sentencing imprisonment for life to 10(ten) others, namely, (1) Gholam Mustafa @ Mustafa son of Elahi, Member, (2) Shahin son of Abdul Awal (3) Leton son of Abdul Awal, (4) Enayet @ Ena son of Shamsuddin (5) Kurban Ali son of Kurban son of Tota Matbor (6) Elahi , Member son of late Chand Mia (7) Nasiruddin @ Nasu son of Ful Chand @ Sultan, (8) Monurruddin (absconding convict) son of Noor Mohammad and (9) Shahid (absconding convict) son of Fazar Ali, all of village- Abdullahpur (Karergaon), Police Station- Keraniganj, District- Dhaka and another Md. Rafiqul @ Rafu @ Rafiqul Islam (since deceased) in Sessions Case No. 319 of 1996 arising out of Keraniganj Police Station Case No. 27(1)95 dated 24.1.1995 corresponding to G.R.Case No. 122 of 1995 is set aside and they all be acquitted of the charges whereunder they were convicted .

The above named condemned prisoners namely, Md. Saiful Haque @ A.Saiful, son of Nur Mohammad (2) Hajrat Ali, Son of late Ramizuddin @ Ramu,(3) Amani, son of late Kamaruddin @ Kamu,(4) Yousuf Ali Chowkider, Son of late Kamaruddin @ Kamu all of Village- Abdullahpur (Karergaon), Police Station Keraniganj, District- Dhaka be set at liberty at once if not wanted in any other connection and the convict-appellants (1)

Gholam Mustafa @ Mustafa son of Elahi, Member, (2) Shahin son of Abdul Awal (3) Liton son of Abdul Awal, (4) Enayet @ Ena son of Shamsuddin (5) Kurban Ali son of Kurban son of Tota Matbor (6) Elahi Member son of late Chand Mia (7) Nasiruddin @ Nasu son of Ful Chand @ Sultan, all of village-Abdullahpur (Karergaon), Police Station- Keraniganj, District- Dhaka, who are on bail, be discharged from their bail bonds.

Regarding the non-appealing absconding condemners (1) Marfat Ali, Son of Safar Ali, (2) Faruque, Son of Samser Ali of Village – Abdullahpur (Karergaon) and (3) Md. Harun, Son of Siddique Miah of Village- Bhaghapur, Police Station- Keraniganj, District – Dhaka and absconding convicts (1) Monurruddin son of Noor Mohammad and (2) Shahid son of Fazar Ali, both of village-Abdullahpur (Karergaon), Police Station- Keraniganj, District-Dhaka, the warrants of arrest issued against them be recalled at once.

Send down the Lower Court Records with a copy of this judgment and order at once for information and necessary action.

MD. EMDADUL HAQUE AZAD, J:

I agree.