

LEX/BDAD/0035/2014

Equivalent/Neutral Citation: 12ADC(2015)101, 67 DLR (2015) 06

IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Criminal Appeal Nos. 22-24 of 2010

Decided On: 14.05.2014

State and Ors. **Vs.** Abdul Kader and Ors.

Hon'ble Judges/Coram:

Md. Muzammel Hossain, C.J., Surendra Kumar Sinha, Md. Abdul Wahhab Miah and Hasan Foez Siddique, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: Shohrwardi, Deputy Attorney-General instructed by Ibrahim Khalil, Advocate-on-Record

For Respondents/Defendant: Mansurul Haque Chowdhury, Senior Advocate

Case Note:

Criminal - Conviction - Appeal against - Sections 302 and 34 of Penal Code - Present appeal directed against judgment and order passed by High Court Division which confirmed judgment and order of conviction passed under Sections 302 and 34 of Penal Code - Whether judgment and order under challenge need interference - Held, no iota of evidence against accused - Prosecution failed to prove that they were parties to or in any way connected with killing of deceased along with other accused - They are entitled to be acquitted of charges brought against them under Sections 302 and 120B of Penal Code - Order of conviction and sentence as affirmed by High Court Division cannot be sustained - Appeal allowed. [100]

JUDGMENT

Md. Muzammel Hossain, C.J.

1. I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J. and Md. Abdul Wahhab Mian J. I agree with the reasoning and findings given by Md. Abdul Wahhab Miah, J.

Surendra Kumar Sinha, J.

I have had the advantage of reading the draft copy of the judgment proposed to be delivered by my learned brother Md. Abdul Wahhab Miah, J. Though I agree with his ultimate opinion that the High Court Division erred in acquitting accused respondent Abdul Quader @ Mobile Quader and also maintaining the conviction of Aatur Rahman, I am unable to persuade the views taken by my learned brother and accordingly, I feel it proper to express my own opinion.

2. Short facts to dispose of the appeals are thus. Victim Moulana Abdul Kader was shot to death on 17th October, 2001, at about 3 PM at his office Akhter Chamber, 1st floor, 51, Motijheel Commercial Area, Dhaka, by some unknown miscreants on entering into his office. Over the said incident his brother Al-Haj Md. Yousuf (PW 1) lodged an FIR

with the Motijheel Police Station on the following day alleging that the victim had enmity with the accused respondent Abdul Quader and his younger brother co-accused Lowrance and that the said dispute could not have been resolved despite his brother's eagerness to settle the difference. The Dhruva Bichar Tribunal No. 1, Dhaka, which got the case for trial framed charge under sections 302/120B/34 and 307 of the Penal Code against the respondents Abdul Quader @ Mobile Quader, Abdur Razzak @ Thandu, the appellant Aatur Rahman and eight others. In course of the trial the respondent Abdul Quader and seven other accused remained in abscondence and they were tried in absentia. Prosecution in support of its case has examined 18 (eighteen) witnesses and the defence examined 2 (two). It has also relied upon the confessional statement of Bazlur Rahman alias Bazlu. The Tribunal on assessment of the evidence on record found the respondent Abdul Quader @ Mobile Quader and six others guilty under sections 302/120B/34 of the Penal Code and sentenced them to death with fine, the appellant Aatur Rahman, the respondent Abdur Razzak Khan and two others guilty under sections 302/120B of the Penal Code and sentenced them to imprisonment for life with fine.

3. Convict Jane Alam @ Boro Bhai, Bazlur Rahman @ Bazlu, Aatur Rahman, Bazlur Rahman alias Bazlu, and the respondent Abdur Razzak Khan @ Thandu preferred separate appeals. The High Court Division heard the death reference with the connected appeals analogously and by the impugned judgment maintained the conviction of seven accused, set aside the conviction of the respondents Abdul Quader @ Mobile Kader and Abdur Razzak @ Thandu. It, however, commuted the sentence of Bazlur Rahman @ Bazlu, Zane Alam @ Baro Bhai, Zahangir Hossain to life, and confirmed the death sentence of Masud Rana @ Lawrance, Abdur Rashid @ Linkon and Md. Shafi. It also dismissed the appeal of Aatur Rahman without entering into merit of his appeal. State preferred two appeals against the order of acquittal of the above two accused persons and convict Aatur Rahman preferred another appeal against his conviction.

4. Leave was granted to consider whether the High Court Division was justified in acquitting the accused-respondents Abdul Quader @ Mobile Quader and Abdur Razzak @ Thandu Member on the face of the evidence of Ziaur Rahman alias Iblou (PW 2), Abdul Jabbar Molla (PW 3) and Meser All (PW 4) who corroborated each other about their complicity in the conspiracy of killing the deceased Abdul Kader which was hatched up on 5th October, 2001, at the east bhiti hut of accused Abdul Quader and on subsequent dates. Secondly, whether the confessional statement of co-accused Bazlur Rahman @ Bazlu, though retracted subsequently having been corroborated by the oral and the circumstantial evidence is admissible against whole body of conspirators to prove the charge of conspiracy under section 10 of the Evidence Act.

5. The High Court Division held that the confession of co-accused Bazlur Rahman @ Bazlu is inculpatory in nature in which he has inculpated himself in the conspiracy which was chalked out prior to the killing of the victim and in that conspiracy accused Lawrance, Boro Bhai, Shafi, Linkori, Jahangir participated; that the confessional statement demonstrates a vivid picture about the conspiracy in precision leading to the killing and in pursuance of that conspiracy, they materialized the plan of killing; that accused Masud Rana @ Lawrance monitored the execution of the killing, deployed the killing squad; and that Bazlur Rahman disclosed the names of six accused persons in his confession who had conspired to kill the victim and the same is admissible under section 10 of the Evidence Act. It, however, acquitted the respondents Abdul Quader @ Mobile Quader and Abdur Razzak Khan alias Thandu on the reasonings that the prosecution has picked up Ziaur Rahman @ Iblou (PW 2), Abdur Jabbar @ Molla (PW 3), and Md. Nesar Ali (PW 4) for the purpose of the case, who are not at all reliable witnesses and that it has failed to prove the conspiracy hatched up on 5th October,

2001, by adducing reliable evidence. It maintained the conviction of six accused persons relying mainly on the confessional statement of Bazlur Rahman and taking the fact of abscondence of three co-accused namely Masud Rana @ Lawrance, Abdur Rashid @ Linkon and Md. Shafi as circumstantial evidence to corroborate the confessional statement of Bazlu. It however, dismissed the appeal of Aatur Rahman without entering into the merit about his complicity on the ground that after being enlarged on bail for a limited period, he did not seek for extension and that he remained in abscondence as a fugitive from justice.

6. Now the first question is whether a confessional statement of co-accused can be used to prove the charge of criminal conspiracy under section 10 of the Evidence Act. It is argued on behalf of the accused persons that the confession of Bazlur Rahman cannot be used against them in view of the words used in section 10 of the Evidence Act. Elaborating the arguments, it is contended that the words in section 10 are not capable of being widely construed that the statements in the confession related to the past acts done by accused persons and that they were made after the object of conspiracy had been accomplished. On the contrary, the learned DAG. argued that the confession being inculpatory in nature, there is no legal bar to use it under section 10 of the Evidence Act. Section 10 of the Evidence Act reads as follows:

"Section 10. Things said, or done by conspirator in reference to common design Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

7. Section 10 is intended to make as evidence communication between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. The confession of a co-accused was not intended to be put on the same footing as the communication passing between conspirators or between conspirators or other persons with reference to the conspiracy. This provision manifests that a statement or confession made by an accused after his arrest to a Magistrate or to any police officer or to any other person disclosing the existence of a conspiracy, its object and the name of its members is not admissible against the other members, jointly tried with him. Things done, said or written by anyone of the confederate while the conspiracy was afoot are relevant as evidence of common intention once reasonable ground has been shown to believe in its existence, but it would be a very different matter to hold that any statement or confession made to a third party after the conspiracy was no longer operating and had ceased to exist, is admissible against the other party. Such statement, however, may be used to lend corroboration with other independent evidence on record under section 30 of the Evidence Act to prove an offence. There is, therefore, force in the argument advanced by the learned counsel for the accused that the language of section 10 is not capable of being widely construed so far so that the statement of an accused admitting his and confederate relating to the past acts done and they were made after the object of conspiracy had been accomplished.

8. This view has been lucidly explained by the Judicial Committee of the Privy Council as back as in 1940 in the case of Mirza Akbar vs. King of Emperor, AIR 1940 PC 176. The statement of law argued by the Privy Council was approved by the Supreme Courts

of Pakistan and India in series of cases and this Division has also approved the same. This opinion has not been overruled till now by any of the superior courts of the sub-continent and we find no reason to depart from the same.

9. In *Mirza Akbar*, the Judicial Committee was of the view that the words "in reference to their common intention" used in section 10 of the Evidence Act might have been chosen as having the same significance as the word 'related' by Williams and Coleridge, JJ. in *Reg. vs. Blake*, 1844 (6 QB) 126. It was observed that views taken in that case that the thing done, written or spoken, was something done in carrying out the conspiracy and not receivable as a step in the proof of the conspiracy. The words 'written or spoken' may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy; or the words 'written or spoken' may themselves be the acts done in the course of conspiracy. The said statements of law, it was observed, was applicable in section 10 and held that the words of section 10 must be construed in accordance with it and are not capable of being widely constructed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy after it has been completed. Their Lordships concluded their opinion with the following words:

"In their Lordships' judgment, the words 'common intention' signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment section 10 embodies this principle."

10. In *Zulfikar All Bhutto vs. State*, PLD 1979 SC 53, though the conviction of Zulfikar All Bhutto was affirmed by majority, Anwarul Haq, C.J. speaking for the majority approved the views expressed by the Judicial Committee of the Privy Council in *Mirza Akbar* observing that words said, done or written by one conspirator in reference to their common intention to be admissible against his co-conspirator, must have taken place when the conspiracy is still in existence or in progress. Hence "a declaration or act of one of the conspirator is not admissible in evidence against other member of the conspiracy, if it was made after termination of the conspiracy". It was observed that 'the court has got to find from evidence allude on the record that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence or an actionable wrong. After having passed this test, the next phase in the exercise consists in the actual application of the operative part of this section whereby anything said, done or written by any one of such persons in reference to their common intention, during the continuance of the conspiracy, is treated as a relevant fact against each of the persons believed to be conspiring, as well for the purpose of proving the existence of conspiracy as for the purposes of showing that any such person was a party to it. In fact this section deals with the mode of evaluation and the use of the evidence brought on the record. It does not provide that the proof of existence of the conspiracy must necessarily precede any proof of the acts and declarations of the co-conspirators of the accused for use against them'.

11. The views of the Judicial Committee of the Privy Council in *Mirza Akbar* have been

approved by the Supreme Court of India in *Sardul Singh Caveeshar vs. State of Bombay*, AIR 1957 SC 747 : (1958) SCR 161 at P 193) by reproducing the language used in it observing that 'The limits of the admissibility of evidence in conspiracy cases under section 10 of the Evidence Act have been authoritatively laid down by the Privy Council in *Mirza Akbar vs. The King-Emperor*. In that case their Lordships of the privy Council held that section 10 of the Evidence Act must be construed in accordance with the principle that the thing done, written, or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. They notice that evidence receivable under section 10 of the Evidence Act of "anything said, done, or written, by any one of such persons" (i.e. conspirators) must be "in reference to their common intention." But their Lordships held that in the context (notwithstanding the amplitude of the above phrase) the words therein are not capable of being widely construed having regard to the well-known principle above enunciated.'

12. The Supreme Court of India in a latter case in *Bhagwan Swarup vs. State of Maharashtra*, AIR 1965 SC 682, (1964) 2 SCR 378) observed that the expression "in reference to their common intention" is very comprehensive and it appeared to have been designedly used to give it a wider scope than the words "in furtherance of in the English law; with the result, anything, said, done or written by a co-conspirator, after the conspiracy was formed will be evidence against the other before he entered the field of conspiracy or after he left with". In that case the question of admissibility of confessional statement of co-accused on a charge of conspiracy under section 10 of the Evidence Act was not involved. Apparently, the Supreme Court did not consider the opinion of the Privy Council in *Mirza Akbar*.

13. However, in a latter case in *Kehar Singh vs. State*, AIR 1988 SC 1383, K. Jagannatha Shetty, J. approved the views in *Mirza Akbar* and observed that the views taken by the Subba Rao, J. in *Bhagwan Swarup* that "the words of sec. 10 have been designedly used to give a wider scope than the concept of conspiracy in English law may not be accurate" and then his lordship observed that 'Lord Wright said that there is no difference in principle in Indian Law in view of section 10 of the Evidence Act'. In a latter case in *State of Gujarat vs. Mohammed Atik*, AIR 1998 SC 1686, the views taken in the case of *Mirza Akbar* was quoted with approval in paragraph 15 and also its earlier views taken in *Sadrul Singh Caveeshar* (supra). It was observed that the law of agency by rendering the statement of act of one conspirator is binding on the other if it was said during subsistence of common intention as between the conspirators. "If so, once common intention" ceased to exist, any statement made by a former conspirator thereafter cannot be regarded as one made "in reference to their common intention". In other words, it was observed, a post-arrest statement made to a police officer, whether it is confession or otherwise, touching the involvement in the conspiracy, would not fall within the ambit of section 10 of the Evidence Act".

14. The above views were again reiterated by KT Thomas, J. in *State of Tamil Nadu vs. Nalini*, AIR 1999 SC 2640. He disapproved the views taken in *Bhagwan Swarup* by Subba Rao, J. by observing that the opinion that any statement of a conspirator 'whatever be the extent of time, would gain admissibility under section 10 if it was made 'in reference' to the common intention, is too broad a proposition for acceptance.' It was further observed that normally a conspirator's connection with the conspiracy would get snapped after he is nabbed by the police and kept in their custody because he would thereby cease to be the agent of the other conspirator. These views have been approved in subsequent cases in *Mohd. Khalid vs. State of WB*(2002) 7 SCC 334, *Ram Narayan Popli vs. CBI*, (2003) 3 SCC 641 (AIR 2003 SC 2748), *State vs. Navjo Sandhu*, (2005) 11 SCC 600, *State of Gujrat vs. Mohd. Atik*,(1998) 4 SCC 351 (AIR

1998 SC 1686), Arul Raja vs. State of TN,(2010) 8 SCC 233. In Mohd. Khalid, three member Bench after evaluating all previous decisions held that once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under section 10.

15. In Gayendra Saraswathi Swamigal vs. State of TN,(2005) 2 SCC 13, the involvement of three accused persons in the alleged conspiracy is sought to be established by their confessions. The court noticed that two confessions were recorded long after the murder when the conspiracy had culminated and therefore, it was held that, section 10 of the Evidence Act cannot be pressed into service. The court approved the views taken in Mirza Akbor observing in paragraph 12 that 'The correct import of section 10 was explained by the Judicial Committee of the Privy Council in Mirza Akbar..' Of course, it was observed, 'we are not unmindful of rare cases in which a conspirator would continue to confabulate with the other conspirator and persists with the conspiracy even after his arrest. That is precisely the reason why we said that it may not be possible to lay down a proposition of law that one conspirator's connection with the conspiracy would necessarily be cut off with his arrest. 'Thereafter, his Lordship had arrived at the conclusion that the confessional statement made by an accused after his arrest, if admissible and reliable can be used against the maker of the confession as substantive evidence, but its use against other co-accused would be limited only for the purpose of corroboration of other evidence. Similar views were taken in Sidharth vs. State of Bihar, AIR 2005 SC 4352 (2005) 12 SCC 545). In that case the question was whether the confession of accused Arnit Das could be used as corroborative evidence against accused Sidharth. While discarding the confession by invoking section 10, after analysing the oral evidence of three witnesses, it was observed that 'Therefore, the confession made by appellant Arnit Das clearly supports the other items of evidence against Sidharth and his participation in the conspiracy and his role in the crime is fully established.' other conspirator and persists with the conspiracy even after his arrest. That is precisely the reason why we said that it may not be possible to lay down a proposition of law that one conspirator's connection with the conspiracy would necessarily be cut off with his arrest. 'Thereafter, his Lordship had arrived at the conclusion that the confessional statement made by an accused after his arrest, if admissible and reliable can be used against the maker of the confession as substantive evidence, but its use against other co-accused would be limited only for the purpose of corroboration of other evidence. Similar views were taken in Sidharth vs. State of Bihar, AIR 2005 SC 4352 (2005) 12 SCC 545). In that case the question was whether the confession of accused Arnit Das could be used as corroborative evidence against accused Sidharth. While discarding the confession by invoking section 10, after analysing the oral evidence of three witnesses, it was observed that 'Therefore, the confession made by appellant Arnit Das clearly supports the other items of evidence against Sidharth and his participation in the conspiracy and his role in the crime is fully established.'

16. From the above conspectus it is difficult to use the confession of Bazlur Rahman against these accused persons. But this statement, may be used to lend corroboration with other independent evidence under section 30 of the Evidence Act subject to the fulfillment of other conditions. Section 120A of the Penal Code which defines criminal conspiracy has been inserted by Act VIII of 1913 in Chapter V-A introducing into the criminal law of this region a new offence namely the offence of criminal conspiracy. Before that, the sections of the Penal Code which directly deal with the subject of conspiracy were those contained in Chapter-V and section 121. Section 107 provides that a person abets the doing of a thing who-

First- 'Instigates any person to do that thing'; or,

Secondly, "Engages with one more other person or persons in any conspiracy for the doing of that thing, if an act of illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing'; or

Thirdly- 'Intentionally aides, by any act or Illegal omission the doing of that thing".

17. So before insertion of section 120A and 120B, criminal conspiracy was an offence of abetment. Section 120A provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of section 107. In order to constitute conspiracy a person may engage with one or more persons in any conspiracy for doing of that thing in which case he not only instigates the other person but also conspires to commit a crime.

18. For example, 'A' may propose 'B' to murder 'X'. 'B' may dissent or say nothing or he may agree. A's proposal is met by the first clause of section 107 of the Penal Code. If 'B' agrees, he has committed an offence of abetment. As soon as both of them agree, they are liable for abetment of an offence of the first clause. If 'B' dissents, 'A' will be liable as instigator under the first clause. So, 'A' and 'B' must engage in the commission of an act, and the 'act or omission, must take place in pursuance of that conspiracy' and the act or omission must have taken place 'in order to the doing of that thing.' So, there must be two or more persons to be engaged in the conspiracy and in order to constitute an offence of the conspiracy there must take place "an act or omission in pursuance of that conspiracy".

19. These persons may be animated by the same intention and they must agree to carry out their intention into effect, their agreement in an act in advancement of the intention which each of them has conceived in this mind. The offence of abetment by conspiracy consists of not merely in the intention of two or more but in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. So long such design rests in intention, it is not an indictable offence. Abetment by conspiracy consists in the combination and agreement of persons to do some illegal act or to effect some illegal purpose by illegal means. It has been held in *Kalil Munda vs. King Emperor*, ILR 28 Cal. 797, that in order to constitute the offence of abetment by conspiracy, there must be a combining altogether of two or more persons in the conspiracy, and an act for illegal omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused. Nor it is necessary that the abettor should concert the offence with the persons who commit it. It is sufficient, if he engages in the conspiracy in pursuance of which the offence is committed.

20. In *Mulcahy vs. The Queen*, 1 App. 306, it was observed that "a conspiracy consists not merely in the intention of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, capable of being enforced, if lawful, but punishable, if for a criminal object or for the use of criminal means and so far as proof goes conspiracy is generally a matter of inference deduced from certain criminal act of the parties accused, done in pursuance of an apparent criminal purpose in common between them".

21. In the light of the above exposition of law, let us now examine whether the prosecution has been able to the charge against the accused persons. Of the 18(eighteen) witnesses examined, the prosecution has relied upon the evidence of Md. Ziaur Rahman @ Iblou (PW 2), Abdur Jabbar Molla (PW 3), Meshur All (PW 4) and the circumstantial evidence led by Alhaj Md. Yousuf (PW 1), Md. Mokaram Hossain (PW 6), Abdus Samad Bengal (PW 7), Mobarak Hossain (PW 8), Tota Mia (PW 9), GM Kader (PW 10) and Abdul Kader (PW 13). Besides their evidence, the prosecution has also relied upon the confessional statement of Bazlur Rahman as corroborative evidence over which I have expressed my opinion.

22. PW 2 stated that he was an employee of accused-respondent Abdul Quader and close friend of accused Lawrance, the younger brother of accused Abdul Quader. He further stated that on 5th September, 2001, he along with Lawrance, Shamim, Abdul Quader were discussing in the eastern outer room of accused Abdul Quader at about 4-30 PM and sometimes thereafter, Thandu Member, Aatur, Meshur and Iqbal came there. Soon thereafter, Thandu Member left the place and after half-an hour, Abdul Quader, Sentu and other accused persons came back. At one stage, Thandu Member proposed that since all the persons assembled being members of the same camp, the discussion should be concluded promptly, and at that stage, accused Lawrance disclosed that Moulana Kader was trying to kill him and thus, the task should be left with him. Thandu Member also accepted the proposal and at that time, accused Abdul Quader told that the task should be given to accused Iqbal Hossain instead of giving it to Lawrance and then, accused Iqbal told that since Lawrance was willing to take the responsibility, the latter should be given the task. At that time, Thandu Member told them, respondent Quader should not be worried for that all of them would co-operate in the matter and Lawrance would execute the task. He further stated that on 15th October, 2001, in the evening, he came to know that Minister Mizanur Rahman Sinha would come for holding a public meeting in front of accused Abdul Quader's house and on hearing the news, he went to accused Abdul Quader's house. At about 7-30 PM, accused Abdul Quader, Lawrance, Shamim, Bazlu, Prince and Babu with three unknown persons got down from Abdul Quader's jeep. Accused Lawrance and other accused persons went to Abdul Quader's eastern bhiti room and sometimes thereafter he left. He further stated that he came to attend Mizanur Rahman Sinha's meeting on the following day at about 7-30 AM and saw that deceased Abdul Kader was sitting beside Mizanur Rahman Sinha and also noticed accused Lawrance, Shamim, Bazlu, Jahangir and those three unknown persons who were standing by the side of the podium. He then stated that on hearing the death news of Abdul Kader on 17th October, 2010, he presumed that the killing was perpetrated in pursuance of the conspiracy hatched up in the meeting held earlier.

23. In course of cross-examination, though he admitted that he did not disclose about the conspiracy to kill Moulana Abdul Kader to any body else of village Kazir Pagla, he volunteered that he did not disclose it lest he was put in trouble in future. He re-affirmed this claim on further cross-examination by other set of accused persons. On further query on the question as to whether he disclosed the said fact before he was detained in the Detective Branch Office, he volunteered that before that he was a follower of accused Abdul Quader. He was thoroughly cross examined by the defence but failed to shake his testimony in any manner. He admitted that accused Thandu was an old man. Md. Nazrul Islam (PW 18), the investigation officer also admitted in course cross-examination that accused Thandu Member is an old man. This witness (PW 18) admitted that PW 2 did not tell him that on 5th October, 2001, accused Thandu Member went out and after half-an hour he alongwith other two accused returned back or that accused Thandu Member told him that the task should be given to accused Lawrance or that accused Thandu Member assured accused Abdul Quader not to be worried-all of

them would cooperate and that Lawrance would perform the responsibility. This witness also admitted that PW 2 did not tell him that as BNP came to power, Moulana Kader might cause harm to them; that the task should be given to Lawrance and that all of them would bear the expenses.

24. PW 3 stated about the animosity between deceased Abdul Kader and respondent Abdul Quader over the constitution of the local Bazar Committee situated beside the highway and also on the point of lease of the gum (fishery). He stated that on 16th October, 2001, at about 4-30 PM, the local Member of Parliament, accused Iqbal and the appellant Aatur Rahman came in front of his shop which was situated at the local Bazar and at that time, Iqbal told him to call the respondent Abdul Quader. Abdul Quader came with accused Sentu. On that day, he said, in the evening Mesher Ali (PW 4) of Kazi Pagla village came to his shop for an urgent talk and told him that accused Abdul Quader, Lawrance, Iqbal, Aatur and Thandu Haji were planning to cause serious harm to Moulana Kader. PW 4 further told him that as he was close friend or respondent Abdul Quader, he should prevent the latter from proceeding with the plan otherwise something serious might happen in the locality. He further stated that on 6th October, 2011, at noon, PW 2 came to his shop and he intimidated him the said news requesting him to dissuade Abdul Quader not to proceed with the plan. He further stated that about 3/4 days prior to the incident, the respondent Abdul Quader came to his shop and wanted to know about the constitution of the Bazar Committee. He then stated that he told to Abdul Quader that accused Iqbal, Lawrance, Aatur, Thandu Haji were trying to cause severe harm to deceased Abdul Kader and if any harm had caused to deceased Abdul Kader as planned, respondent Abdul Quader would be in problem. Respondent Abdul Quader in reply assured him that he would not proceed as per plan.

25. He further stated that a few days later, Abdul Kader was assassinated at Motijheel and on hearing the news, he was convinced that accused Abdul Quader with the help of his cohorts killed the victim out of dispute over the local Bazar and the fishery. The Tribunal recorded the statement of this witness in vibration as to the language of accused Abdul Quader about what he told him; “আমি তোকে (বর্তমান স্বাক্ষরকে) কথা দিলাম আমি আর ঐ কাজে যাব নাঃ. As regards non-disclosure of the conspiracy to kill victim Abdul Kader, earlier, this witness on a query made by respondent Abdul Quader stated that he was staying at Dhaka but he did not disclose his exact address for security reason. Though the respondent Abdul Quader thoroughly cross-examined this witness, he did not challenge the incriminating statement as quoted above about his complicity in the plan of Killing the deceased Abdul Kader. He admitted that accused Thandu Member is a businessman and an old man. PW 18 admitted in course of cross-examination that PW 3 did not tell him that on 6th October, 2002, that PW 2 and Sentu told him about the incident.

26. PW 4 deposed on the question of planning to commit the incident stating that on 5th October, 2001, at about 4 p.m., he came to accused Abdul Quader's house with Aatur Rahman and on reaching there he found accused Lawrance and Shamim there. At that time Lawrance took them to their east bhati tin-shed room for sitting where Thandu Member and PW 2 were waiting. Sometimes thereafter, accused Iqbal, Abdul Haque and Sentu entered into the said room. They talked among themselves for sometimes and at that time, Thandu Member told them, since BNP came to power, Moulana Kader might cause harm to them, at which, Lawrance told that he would look at the matter. Thereafter, accused Abdul Quader proposed that the task should be given to accused Iqbal Hossain, at which, Thandu Member told that the task should be given to Lawrance. On hearing the said discussions, he was perturbed on thinking that a serious harm might cause in the locality and he was thinking on whom the said matter should be disclosed. He then told to PW 3 that a serious incident might be committed in the

locality and requested him to redress the matter, who then assured him to look at the matter. On 17th October, 2001, Abdul Kader was killed when he realized that those accused persons perpetrated the killing in a planned manner. Accused Abdul Quader did not specifically deny about the discussions made with other accused persons at his outer house at 4-00 PM of 5th October, 2001, and that in course of such discussion, he told that the task for causing harm to Moulana Kader should be given to accused Iqbal Hossain. In course of cross-examination, PW 18 admitted that PW 4 did not tell him that Thandu member told that since BNP came to power, Moulana Kader might cause harm; that Thandu Member proposed to give the task upon Lawrance and that the expenses would be borne by all of them.

27. The High Court Division did not at all discuss the evidence of PWs 2-4 and after mentioning two or three stray statements in a laconic manner abruptly came to the conclusion that they 'are not competent, reliable and disinterested witnesses and they have been picked up and planted in this case and we cannot put reliance on their evidence before us.' Being the final court of fact, the High Court Division ought to have narrated the relevant evidence of these witnesses meticulously, and then to discuss their evidence and then to give its decision with reasons. Except the reproduction of the submissions of the counsel for the accused who criticised their evidence, the learned Judges were conspicuously silent as to the reliability of the evidence of PWs 2-4 and their claim of presence at the place of conspiracy, where according to them, it was decided to cause harm to deceased Abdul Kader prior to the incident of killing. The appellate court has ample power to disbelieve a witness, and that can be done after a thorough analysis and evaluation of his evidence. The appellate court is required to assign reasons for disbelieving a witness if it does not agree with the reasons assigned by the trial court. Anything short of that may not be regarded as proper exercise of judicial power what is expected from it to exercise in accordance with established norms. We find nothing in the judgment to evaluate the evidence of star witnesses in deposing of the appeals in accordance with law. We also find inconsistency in the judgment so far as it relates to considering the case of accused Abdul Quader while giving him the benefit of doubt. While maintaining the conviction of Masud Rana @ Lawrance, Abdur Rashid @ Linkon and Md. Shafi the High Court Division has considered the fact of their abscondence as a strong circumstance which according to it corroborates the prosecution's case of their participation in the killing, but it has totally overlooked the fact of abscondence of accused Abdul Quader from the initial stage of the proceeding despite that he was suspected as an accused in the FIR.

28. The Tribunal on analysing the evidence on record held that on 5th October, 2001, the accused persons held discussions in the east bhiti room of accused Abdul Quader and hatched up the conspiracy of killing deceased Abdul Kader where PWs 2-4 were present; that in the said meeting the task for killing Abdul Kader was given upon accused Lawrance; that the evidence revealed that PW 2 went there at 4-30 PM when he saw the plan for killing which was hatched up by accused Abdul Quader, Lawrance, Shamim, Abdur Razzak alias Thandu, Aatur Rahman and Iqbal Hossain and heard their exchange of words for its implementation; that similarly PW 4 came there at 4 P.M. and witnessed the utterances made by the accused persons about the implementation of killing Abdul Kader; that these witnesses disclosed the same to PW 3; that after knowing about the conspiracy, PW 3 requested accused Abdul Quader not to proceed according to the plan and that the latter assured him that he would not proceed according to the previous plan; that there was serious rivalry between accused Abdul Quader and deceased Abdul Kader which would be evident from exhibit-1, the evidence of PWs 1, 3, 6, 7, 8, 10, 13 and 15, and the confessional statement of Bazlur Rahman, Ext-5; that subsequently on 15th October, 2001, as a part of the plan, for identification

of the deceased Abdul Kader to the killer party, accused Abdul Quader, Lawrance, Bazlu and Shamim took Zahangir Hossain, Zane Alam, Abdur Rashid Linkon and Shafi with accused Abdul Quader's Jeep; that as part of the conspiracy that was hatched up on 5 October, 2001, Accused Zahangir with accused Lawrance, Bazlu, Linkon sat in one room of the five storey building of Zahangir at Dalkanagor, Dhaka and engaged Jane Alam alias Baro Bhai and Shafi for the implementation of the plan; that subsequently some accused persons discussed about the matter on 15th October, 2001, at accused Abdnul Quader's east bhiti room; that in the political meeting held on 16 October, accused Lawrance showed victim Abdul Kader to the accused killer party Shafi, Linkon and Zahangir and that in pursuance of that conspiracy, the killing of Abdul Kader was implemented on 17th October, 2001, at the tatter's office at Motijheel.

29. The above findings of the Tribunal are based on proper sifting and analyzing the evidence on record. However the Tribunal was wrong in believing the complicity of Thandu Member and Ataur Rahman in the said conspiracy, and also using confessional statement of Bazlur Rahman against all the accused persons to prove the charge of conspiracy. The High Court Division did not express any opinion against the observations and findings of the Tribunal. It has totally overlooked the reasons assigned by the Tribunal in finding the accused persons guilty of the charge. As regards the complicity of Thandu Member in the meeting held on 5th October, 2001, PW 2 stated in chief that before the discussion 'আসামী ঠাকু মেথার পরবর্তীতে বাহিরে যায়'. So Thandu Member went out of the room but he did not say that he again returned back there. He stated that after half an hour, accused A. Quader and Sentu with other accused returned back. He did not specifically mention the name of Thandu Member among those who returned back. This will be evident from the admission of PW 18 who stated that PW 2 did not tell him that on 5th October, 2001, accused Thandu Member went out; that after half-an hour accused A Quader and Sentu with other accused returned back; that Thandu Member told that the task should be entrusted upon Lawrance; that Thandu assured accused Abdul Quader not to think over the matter; that all of them would cooperate and that Lawrance would perform the task. So, this witness did not disclose the incriminating facts of Thandu member's participation in the conspiracy to the investigation officer and his participation in the discussion for implementation of the killing. So, this witness cannot be believed so far as it relates to his statement regarding Thandu Member complicity in the conspiracy.

30. According to this witness (PW 2), Ataur Rahman was present in the meeting held on 5th October, 2001, but he did not utter a single word about Ataur Rahman's participation in the discussions or role in the conspiracy for the killing of Abdul Kader. Ataur Rahman was a simple spectator similar to those of PWs 2 and 4 with the difference that these two witnesses disclosed the fact of conspiracy lateron, but Ataur Rahman suppressed the fact, for which, he cannot be charged with the offence of conspiracy. To constitute an offence of conspiracy, the persons present must agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means. There is nothing from the evidence of PW 2 that Ataur Rahman agreed to kill deceased Abdul Kader through hired killers. He played no role in the discussions in which the initial part of conspiracy was hatched up.

31. PW 3 stated that Accused Iqbal and Ataur Rahman came to his shop at about 4-30 PM on 5th October, 2001. He did not say anything against Ataur Rahman about his involvement in the plan of killing. He then said, on the same day after dusk, PW 4 came to his shop and told him that he had an emergency talk about what he came to know that accused Abdul Quader, Lawrance, Iqbal, Ataur and Thandu Member had conspired to kill Abdul Kader. This statement is hearsay the story of conspiracy of killing was

intimated to him by PW 4, who did not corroborate him. PW 4 stated that in the conspiracy held on 5th October, 2001, at the eastern room of accused Abdul Quader, accused Thandu Member and Ataur were also present. Though this witness corroborated PW 2 that Thandu Member told that since BNP came to power, Abdul Kader might cause harm and that Thandu Member represented that the task of killing should be entrusted upon Lawrance and that all the expenses to implement the plan would be borne by all. He did not say those statements to PW 18, the investigation officer, which the latter admitted in course of cross-examination. Therefore, there is no gainsaying that his statements are inadmissible against Thandu Member and that's too, he introduced those statements on being tutored at the stage of the trial. His evidence about Thandu's complicity in the conspiracy is false and untrue, and basing upon this inconsistent statements, no court of law can convict an accused person particularly in respect of a charge of murder. This witness is also totally silent about Ataur Rahman's participation in the conspiracy. Therefore, the Tribunal was wrong in believing the complicity of accused Thandu Member and Ataur Rahman in the conspiracy hatched up on 5th October, 2001, at the eastern room of accused Abdul Quader. There is no other reliable evidence against them in support of the charge.

32. Questions raised about the delayed disclosure of these witnesses in respect of the complicity of other accused persons in the conspiracy. PWs 2, 3 and 4 explained the cause for delayed disclosure stating that due to fear for reprisal in future, they did not disclose earlier. PW 18 stated that PW 3 made GD Entry No. 732 dated 16th March, 2002, against accused Abdul Quader with Shreenagar Police Station. He further stated that he had shown arrested of accused Abdul Quader in a arms case and took him on remand on 7th September, 2002. These three vital witnesses disclosed about the conspiracy to the investigation officer after accused Abdul Quader was taken into custody. The evidence on record revealed that accused Abdul Quader is an influential person of the locality. He had enmity with the deceased over the mastery of the locality and they were leaders of two rival leading political parties of the country. Naturally, after the killing of Abdul Kader, accused Abdul Quader had dominance over the locality and therefore, the explanation given by PWs 2-4 cannot be said to have no basis at all. They had every reason to believe that they would have to face dire consequences in future had they ever disclosed about the conspiracy.

33. Though section 157 of the Evidence Act mandates that the admissibility of previous statement of a witness should have been made to the competent authority at or near the time when the fact to which the statement relates took place. As to what should be the length of time is a question about which no hard and fast rule can be laid down. What is reasonable must inevitably be a question of fact to be determined in the light of the evidence in each case. It is not a rule of law to be followed that the statement of a witness disclosing a fact should be established by the proximity of time between taking place of the fact and making of the statement. Mere delay in recording the statement of a witness by the investigation officer should not be the sole ground to reject the evidence of that witness. The rule of evidence provided in section 157 of the Evidence Act that the statement of a fact is required to be made at once or at least shortly after the event when a reasonable opportunity for making it present itself is not the mandatory requirement of the rule of law. References may be made in this connection are state of TNV Suresh (1998) 2 SCC 372, Rameshwar vs. State of Rajasthan, AIR 1952 SC 54, Nathuni Yadav vs. State of Bihar (1998) 9 SCC 238.

34. Mr. Monsural Huq Chowdhury, learned counsel appearing for the accused Abdul Quader submitted that in the FIR no motive was disclosed and also the dispute over the Dugachi Bazar between the deceased and the accused Abdul Quader. Though PW 1

added two other disputes between them over the fishery and school committee, the hostility of these two persons over these two disputes were corroborated by the witnesses. The evidence on record revealed that there was hostility between these two persons over local mastery including the disputes over the Kum and School committee. On the question of conspiracy, he has taken us to the relevant evidence of PWs 2 and 4 and submits that these witnesses have not corroborated each other on any of the incriminating part of the alleged conspiracy. He further submits that PW 2 is not at all a reliable witness, inasmuch as, this witness has admitted that he has never gone to Abdul Quader's house to participate in the conspiracy of killing Moulana Kader and that in view of the statements of this witness that. 2/3 years before starting timber business at Dugachi Bazar, he was at Jhinaidah-his presence at the alleged conspiracy is not at all believable. He contended that this witness was not at all present at Munshigonj during the relevant time. He further submits that the confessional statement of co-accused Bazlur Rahman has been extracted by the police which will be evident from the fact that he was arrested on 7th December, 2001, and he made the confession on 29th December, 2001, during which period he was in the police custody.

35. It is on record that PW 2 was an employee of Austin Garments owned by Ashraful Islam, and before that he was an employee of accused Abdul Quader and that the latter gave him the job at Austin Garments. The defence has admitted this fact by giving suggestion to this witness that while he was an employee of Austin Garments, a dispute arose with the owner's son, for which, he was removed from the service. Though he disclosed the plan of conspiracy at belated stage, he stated that it was due to fear of reprisal-he did not disclose it to other. The defence practically failed to reveal any sort of enmity of this witness with accused Abdul Quader which may be a ground to disbelieve him. He is not related to the victim or the informant, rather he was a friend of Lawrance and closely associated with the accused, and there is no earthly reason to discard his testimony. On a close scrutiny of his testimony it cannot be inferred that he was not present at Munshigonj during the relevant time. The submission of the learned counsel merits no consideration.

36. Similarly, PW 3 was a friend of accused Abdul Quader and the defence failed to show anything by cross-examining him that he was not a friend of Abdul Quader as claimed or that he was not a reliable witness. In course of cross-examination in reply to a query, this witness reaffirmed his claim that he was a close friend of accused Abdul Quader. He was the president of the BNP local union chapter and the accused was also a leader of the same political party. The defence also failed to point out his enmity with the accused or any relationship with the victim. He has corroborated PW 2 so far as relates to latter's claim that after witnessing the discussions of the accused persons for causing harm to the victim on 5 October, 2001, he requested Abdul Quader to forbear from committing the incident. His statement that he requested Abdul Quader not to proceed with the plan when the latter assured him that he would not proceed, had not been controverted by the accused. This statement was made in presence of the accused and in the absence of controversion, it may be taken as an admitted fact. PW 4 corroborated PW 2 regarding the discussions made among the accused persons at the eastern bhati room of accused Abdul Quader on 5th October, 2001. He also corroborated PW 2 regarding the said discussions and requesting accused Abdul Quader from proceeding with the purported plan to cause harm to the victim. There are, thus, corroborative evidence of PW 2-4 so far as it relates to the concerted plan of the accused persons to cause harm to victim Abdul Kader and as pointed above, some of their incriminating evidence have not even been controverted by the defence.

37. On a close scrutiny of the evidence of PWs 2-4, there is no gainsaying that though

these witnesses did not say in verbatim to cause what harm to deceased Moulana Kader, they corroborated each other about the presence of accused Abdul Quader for discussions over victim Abdul Kader at his east bhati tin-shed room on 5th October, 2001, at about 4-30 PM and also on the same day in the shop of PW 3 in the evening. It is proved beyond doubt that the utterances of causing harm to deceased Abdul Kader was to kill him by hiring professional killers is evident from the subsequent event of killing on 17th October, 2001. In this regard PW 2 stated that on 15th October, 2001, at 7-30 PM accused Quader, Lawrance, Shamim, Bazlu, Prince, Babu, Zahangir and three unknown persons got down from the vehicle of accused Quader and that the latter talked with them in his eastern room when accused Lawrance had identified them as his friends. These three unknown persons were present in the political meeting held on 16th October, 2001, beside the podium and they were talking with Lawrance and others. There are also uncontroverted evidence of these witnesses as regards the role of accused respondent Abdul Quader in the meeting and directions given by him to implement the plan.

38. Even if we do not take consideration of the confessional statement of co-accused Bazlur Rahman @ Bazlu, there are sufficient evidence to come to the conclusion that accused Abdul Quader had master minded the killing and he was the architect and the ring leader of the entire episode. He was suspected as the person behind the killing in the FIR which was lodged within few hours of the killing. Besides PWs 2-4, Md. Mahfujul Iqbal (PW 5), Md. Mokarram Hossain (PW 6), Mobarak Hossain (PW 8) and Tota Mia (PW 9) were present at the place of occurrence. They corroborated the prosecution case as regards the time, the place and the manner of occurrence. The defence of course did not challenge the same. Al-haj Md. Yusuf (PW 1), Md. Abdul Samad Bengal (PW 7), Mobarak Hossain (PW 8) and DM Kader (PW 10) stated about the motive behind the killing of Abdul Kader. They proved the enmity between the deceased and accused Abdul Quader over the mastery of the Dugachi Bazar and Kum fishery, and also over the influence of the locality for political activities.

39. PW 10 claimed that he was present at one conciliation meeting. He suspected accused Abdul Quader as the person who was involved in the killing. PW 8 stated that deceased Abdul Kader usually told that he had got enmity with Abdul Quader over Dugachi bazar and the Kum fishery and that he had no other dispute with anybody else other than those disputes. The defence has not challenged this statement. Killing of a person for any reason out of previous enmity implies a concert design and not participation in every detail of execution. It is not necessary that each person who hatched up the plan of killing should have taken part in every act or known the exact part performed or to be performed by others in furtherance of the design.

40. It is not essential for the prosecution to explain or prove the motive against the accused in all cases but by the same time, it cannot be ignored altogether that without motive no one is expected to take part in the killing of another person. It is true that when there is no eye witness of the incident of killing, the prosecution is required to prove as far as possible the motive of the accused to connect him in the incident. If we look at the FIR, we find that the informant has suspected the complicity of the accused Abdul Quader and his younger brother Lowrance, who had serious rivalry with the deceased Moulana Kader over the ownership of Mamar Bazar at Dugachi Bazar and other local matters. PW 1 reiterated the said adding with it stating that besides the said dispute, he has the dispute over the kum fishery and the school committee. So even if we disbelieve him so far the disputes over the fishery and school committee on the ground of embellishment, he has corroborated the dispute over the ownership of Mamar Bazar. So we find no substance in the submission of Mr. Chowdhury.

41. True, the witnesses have included two other disputes between the accused Abdul Quader and deceased Moulana Kader but we find from the evidence on record that there was serious rivalry between these two persons over the ownership of the Bazar and other matters. It is on record that accused Abdul Quader was an influential person of the locality. Criminal conspiracy to commit crime always hatched up in secrecy and its origin always remain in secret and in most cases it will be difficult to prove it by direct evidence it is very difficult to collect direct evidence to prove the charge. Criminal conspiracy, therefore, is a matter of inference that may be deduced from certain circumstances and criminal acts of the accused done in pursuance of an apparent criminal purpose common between them. Normally conspirators cannot discuss the plan in presence of a stranger but in this case two witnesses were present who have disclosed the utterances made by them. In most cases it has to be inferred from the surrounding circumstances which must give rise to a conclusive or irresistible inference of agreement between two or more persons who commit the offence.

42. Conduct of the accused both before and after the commission of offence is also relevant to prove the charge. No written or definite agreement is necessary to constitute a conspiracy-its existence being generally a matter of inference from the acts of the accused. It is sufficient to constitute the offence, so far as the combination is concerned, if there is a meeting of the minds, a mutual implied understanding or tacit agreement, all the; accused working together, is with a single design, for the accomplishment of the common purpose. It is found from the evidence of PWs 2 and 4 that they were camp followers of accused Abdul Quader and PW 3 is his close-friend, and they used to discuss various issues among themselves. In course of cross-examination PW 2 volunteered that before he was detained by DB police, he did not disclose about the conspiracy because he was acolyte of accused Abdul Quader. PW 3 realizing the gravity of the conspiracy made entreaty to accused Abdul Quader to forbear from causing harm to Moulana Kader. Accused Abdul Quader assured him that he would not proceed according to the plan. The statement was not challenged by the accused. What is more, he stated that he had no relationship with Moulana Kader and that is why, he did not disclose the plan. The defence failed to show anything by cross-examining PWs 2-4 why they deposed against Abdul Quader. These witnesses are very natural and neutral witnesses and we find no cogent ground to disbelieve them.

43. Apart from the evidence of PWs 2-4, PW 1 has suspected accused Abdul Quader who had link in the killing, Abdul Quader absconded from the beginning of the initiation of the case. During the trial he absconded and he was tried in absentia at the initial stage. This abscondence in this particular case is a strong circumstance which can be inferred against him. Adding to it, where there is proof of motive for the crime that lends additional support to the charge. It is now settled that where the prosecution proved by clear evidence that the accused had reasons of his own for getting the deceased out of the way, that would lead additional assurance to the circumstantial evidence pointing to his guilt. The High Court Division, in the premises, was in error in giving the accused Abdul Quader the benefit of doubt and that's too, without assigning any reason. The evidence on record are sufficient to come to the conclusion that accused Abdul Quader has instigated accused Lawrance and other accused persons to get Moulana Abdul Kader out of the way and in pursuance of such instigation, the latter was brutally killed by hired killers at broad day in his office.

44. Now turning to the confessional statement, there is no doubt that it is inculpatory one and in the said confession, Bazlur Rahman has given a vivid picture about the direction given by accused Abdul Quader, the hiring of killing squad, the preparation and the implementation of the plan. It corroborates the time, the place, the manner of

occurrence, the injuries caused by fire arms and the medical evidence which corroborates the injuries. This confession is good and sufficient so far the confessing accused is concerned, but it cannot be used against accused Abdul Quader, Aatur Rahman and Thandu Member for two reasons. First, section 10 of the Evidence Act cannot be so widely construed so as to include a statement made by a person in reference to past acts done in actual course of carrying out conspiracy after it was completed. Secondly, confessing accused Bazlur Rahman subsequently retracted his confession. The use of confessional statement which has been retracted against co-accused is very weak type of corroborative fact and a conviction taking it as corroborative evidence is not permissible in law. If the confessional statement is found true and voluntary, it can form the basis for conviction even if retracted so far the maker is concerned but it cannot be used against co-accused.

45. It is now settled that the retraction of a confession has no bearing whatsoever if it was voluntarily made so far the maker is concerned. It is, however, very weak type of a fact like any other fact and it cannot be the basis for conviction of co-accused. The proper way is, first marshal the against the accused excluding the confession altogether from the consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. It should be kept out of consideration and the court is required to see whether the other evidence available with the record are sufficient to award the conviction. The court is required to examine those evidence independently and found that there are sufficient evidence to award conviction-it shall convict the accused without the aid of confession of the co-accuse.

46. The court cannot proceed with the case relying on the confession of co-accused; it must begin with other evidence and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about of reach. If there is no other evidence against co-accused except the confession, then, the confession by itself being merely a matter to be taken into consideration, and not being an evidence under section 3, no conviction of the co-accused could be given relying on such confession. The evidentiary value of this retracted confession is practically zero while considering the charge against co-accused. Reliance can be given in this connection in the cases of *Moqbool Hossain vs. State*, 12 DLR (SC) 217, *State vs. Fazu Kazi*, 29 DLR (SC) 271, *Haroon Haji vs. Maharashtra*, AIR 1968 SC 832, *Bhubani Sahu vs. King*, 2 DLR (PC) 39 and *Kashmira Singh vs. Madhya Pradesh*, AIR 1952 SC 159, *Joyendra Saraswami Swamigal vs. State of TN* (2005) 2 SCC 13 (para 10) and *Sidharth vs. State of Bihar*, (2005) 12 SCC 454. The High Court Division erred therefore, in taking into consideration of this confession against co-accused.

47. The High Court Division dismissed the appeal of convict Aatur Rahman merely on the reasoning that after being enlarged on bail for a limited period, he absconded and did not turn up to press the appeal. Learned counsel appearing for Aatur Rahman has seriously criticized the mode of disposing of the appeal and submits that the High Court Division acted illegally in dismissing accused Aatur Rahman's appeal, and prayed for remanding I he matter to the High Court Division for ends of justice for fresh hearing on merit. Since we have entered into the merit of the matter, considered the entire evidence on record, it will be a futile attempt to send the case of Aatur Rahman on remand after expressing opinion regarding his complicity on analysing the evidence of PWs 2-4. We do not approve the manner in which the High Court Division has dismissed the appeal of Aatur Rahman. So we have decided to dispose of his appeal as well on merit for ends of justice. True, Aatur Rahman has absconded after being enlarged on

bail but this does not debar the High Court Division in disposing his appeal on merit.

48. Section 339B of the Code of Criminal Procedure provides two procedures for trial of an accused person in absentia. Sub-section (2) provides that when an accused person has absconded after being enlarged on bail or concealing himself so that he cannot be arrested and produced for trial, the court after recording its opinion so to do, try such person in absentia. The court need not split up his case or to exhaust the procedures required for holding trial of an accused who has absconded from the beginning. An appeal being the continuation of the original proceeding, section 339B is equally applicable to the appellate court. So, the High Court Division should have disposed of the appeal ex-parte on merit after recording an order in that regard.

49. In course of hearing of other appeals on merit, we have had the advantage of considering the entire materials on record to see the complicity of Thandu Member and Ataur Rahman, I have assigned reasons to discard the evidence of PWs 2-4 so far as it relates to the complicity of Thandu Member and Ataur Rahman in the conspiracy held on 5th October, 2001. PW 2 did not disclose to the investigation officer the incriminating part of Thandu Member's involvement in the conspiracy. PW 18 admitted that PW 2 did not tell him that Thandu Member told accused Abdul Quader not to think over the matter; that all of them would cooperate and that accused Lawrance-would perform the responsibility. He further admitted that PW 4 did not tell him that Thandu Member stated that as BNP came to power, Moulana Kader might cause harm to them and that Thandu Member proposed that the responsibility to be given to Lawrance and that, the expenses for carrying out the job would be jointly borne out by all of them. So, PWs 2 and 4 did not say incriminating statements regarding Thandu Member's participation in the crucial discussions for implementing the conspiracy.

50. As regards Ataur Rahman, though PWs 2 and 4 claimed that in the first meeting held in the eastern outer room of Abdul Quader on 5th October, 2001, at 4/4-30 PM. Ataur Rahman was also present but they did not say anything about his participation in the planning or discussion. They simply stated that he was present on the occasion like PWs 2 and 4. The difference is that these witnesses disclosed the incident later on but Ataur Rahman did not disclose it to anybody. Non-disclosure of the fact of conspiracy itself does not constitute an offence of abetment of conspiracy or in any way constitute an offence that he was a party to the conspiracy. PW 3 simply stated that on 5th October, 2001, at about 4-30 PM. Ataur Rahman accompanied by MP Iqbal came to his shop. He also did not say anything about his active or remote participation in the preparation or planning of the killing of Moulana Abdul Kader. These two accused were not suspected as persons who were responsible behind the killing in the FIR. They have no animosity with Moulana Kader or any sort of rivalry over any local matter with him. In the absence of anything like that, the prosecution failed to prove any motive or design to participate or support in the killing of Moulana Kader. They have been implicated by PWs 2 and 4 long after the occurrence, and their disclosures about accused Abdul Quader's talk with other accused are sufficient to connect him in the conspiracy, but these two accused persons case is quite distinguishable from that of accused Abdul Quader. Abdul Quader had got animosity with victim Moulana Abdul Kader, and accused Abdul Quader was an influential man of the locality, and he had played active role in the conspiracy. PWs 2-4 dared to disclose the fact of conspiracy earlier for fear of vengeance. They did not say anything against Ataur Rahman and Thandu Member.

51. Besides, Thandu Member and Ataur Rahman were not implicated by Bazlur Rahman in his confessional statement. Other witnesses also did not say anything against Ataur

Rahman and Thariu Member. There is no other circumstantial evidence to link them in the incident of killing Moulana Abdul Kader. It is true that in most cases it will be difficult to get direct evidence of the agreement of accused to conspire. It is also fact that a conspiracy can be inferred from the circumstances giving rise to a conclusive inference of an agreement between two or more persons. But that does not mean that a few bits here and a few bits there on which prosecution relies can be held to be adequate for connecting the accused in the offence of criminal conspiracy. The circumstances before, during and after the occurrence about the complicity of the accused in the incident must be proved beyond shadow of doubt. The criminal responsibility for a conspiracy requires more than a merely passive attitude to wards an existing conspiracy for murder. Each one of the circumstances should be proved beyond reasonable doubt. So, practically there is no reliable evidence to connect them in the murder of Moulana Abdul Kader. They are, therefore, entitled to get the benefit of doubt. The prosecution has miserably failed to bring home the charge against them beyond shadow of doubt.

52. As regards accused Abdul Quader, as discussed above, the conduct exhibited by him is sufficient to come to the conclusion that he masterminded the killing. It is proved beyond doubt that he abetted the commission of murder and the High Court was in error in giving him the benefit of doubt. Prosecution has been able to prove his involvement in the murder of Abdul Kader beyond shadow of doubt. His conviction given by the Tribunal is altered to one under sections 302/109 of the Penal Code and sentenced to imprisonment for life. The appeal of Aatur Rahman is allowed and the appeal against Thandu Member is dismissed.

Md. Abdul Wahhab Miah, J.

53. These criminal appeals, by leave, are directed against the judgment and order dated the 25th day of November, 2007 passed by a Division Bench of the High Court Division in Death Reference No. 14 of 2004 heard analogously with Criminal Appeal Nos. 459, 476, 411, 318 all of 2004 and Jail Appeal Nos. 800 and 819 of 2004 rejecting the reference so far as it relates to convicts-Abdul Quader @ Mobile Quader, Jahangir Hossain, Bazlur Rahman @ Bazlu and Zane Alam @ Baro Bhai and confirming the conviction of Jahangir Hossain, Bazlur Rahman @ Bazlu and Jane Alam @ Baro Bhai under sections 120B/302/34 of the Penal Code and commuting their sentence to imprisonment for life from death, dismissing Criminal Appeal No. 476 of 2004 and Jail Appeal No. 800 of 2004 of convict-Bazlur Rahman @ Bazlu, Criminal Appeal No. 459 of 2004 and Jail Appeal No. 819 of 2004 of convict-Jane Alam @ Baro Bhai and Criminal Appeal No. 318 of 2004 of Aatur Rahman, allowing Criminal Appeal No. 411 of 2004 filed by accused-Abdur Razzaque Khan @ Thandu Member and setting aside the order of conviction and sentence passed against him and acquitting him of the charges brought against him under sections 120B/302/34 of the Penal Code and also setting aside the order of conviction and sentence passed against convict-Abdul Quader @ Mobile Quader and acquitting him of the charges brought against him under the said sections of the Penal Code.

54. Respondent of Criminal Appeal No. 22 of 2010, Abdul Quader @ Mobile Quader; respondent of Criminal Appeal No. 23 of 2010, Abdur Razzaque Khan @ Thandu Member and the appellant of Criminal Appeal No. 24 of 2010, Aatur Rahman along with 8(eight) others, namely: Iqbal Hossain, Md. Shamim, Bazlur Rahman @ Bazlu, Jahangir Hossain, Masud Rana @ Lawrence, Jane Alam @ Baro Bhai, Md. Shafi, Abdur Rashid Molla @ Lincon (all hereinafter referred to as the accused) were put on trial before Druta Bichar Tribunal No. 1, Dhaka (hereinafter referred to as the Tribunal) in Druta Bichar Tribunal

Case No. 23 of 2003 and were charged under sections 120B/302/107/34 of the Penal Code. Of the 11 (eleven) accused, Jahangir Hossain, Masud Rana @ Lawrence, Jane Alam @ Bora Bhai, Md. Shall and Abdur Rashid Molla @ Lincon were absconding, so charges could not be read over to them. The accused, who were present in Court, pleaded not guilty to their charges brought against them and claimed to be tried.

55. The case of the prosecution as stated by PW 1, informant-Alhaj Md. Yousuf (hereinafter referred to as the PW) was that his younger brother, Alhaj Abdul Quader (hereinafter referred to as the deceased-Moulana Abdul Quader) had come to his business establishment "M/s. Sonargaon Chingri Prokalpa" at the first floor at Akter Chamber, 51, Motijheel Commercial Area, Dhaka on 17-10-2001 at 1-30 hours by getting a telephone call. After coming to office, he (deceased-Moulana Abdul Quader) talked to his employees about the business and while he was going to bath room, 4 (four) youths aged about 25-35 years being armed with weapons entered into the business establishment of his brother at 3-00 PM and shot him. Mokarram Hossain, Manager of deceased-Moulana Abdul Quader and a visitor named Shah Alam, were also hit by the bullets. Immediately, after shooting, the 4 (four) youths got down. His brother, the deceased fell on the floor bleeding. The bullets hit the deceased at his shoulder, stomach, chest and backside. Driver-Shakil Khan, Bengal and Mobarak Hossain took the deceased to Dhaka Medical College Hospital with bleeding where the doctor declared him dead. On getting a telephone call from Tota Mia, a peon of the office of the deceased, the PW went to Dhaka Medical College Hospital where he found his brother dead. The deceased was a sweet-tongued (মিষ্টভাষী) and good conversationist (সদালাপী). The deceased had strong rivalry with Abdul Quader @ Mobile Quader (hereinafter referred to as Mobile Quader) and his younger brother Lawrence over Mamar Bazar at village-Dugachhi under Police Station-Sreenagor, a neighbouring Police Station of their own area (আমাদের নিজ এলাকার পার্শ্ববর্তী থানার) and also over a fish Gher (মাছের জলাশয়) (Kum) beneath a bridge near the said bazar. Deceased-Moulana Abdul Quader was not involved with politics. Mr. Mizanur Rahman Sinha contested the 8th Parliament election in their area as a candidate from BNP. During the last Awami League Government, the people of the locality as well as from Dhaka tried to settle the dispute, but Mobile Quader and Lawrence did not come to any term. During the Care-taker Government, Mobile Quader and Lawrence came to a compromise and participated in the 8th Parliament Election and eventually, through the meditation of the local people, a compromise was made. The deceased had no other enemies. Subsequently, the PW could understand that the compromise which took place, was not a real compromise, but it was shame compromise (লোক দেখানো মিমাসা). The PW lodged the First Information Report (FIR) after discussion with the employees of the business establishment of the deceased, his relatives and the witnesses.

56. The further prosecution case was that after accused-Bazlur Rahman @ Bazlu had been arrested, he told that he (Bazlu) along with accused-Lawrence made a conspiracy with accused-Jahangir and Lincon at the residence of Jahangir at 5th floor at Sutrapur to kill the deceased. Accused-Jahangir and Lincon went to the professional killers-Shafi and Baro Bhai who told them to identify the deceased to them. As per the statement of Bazlu, in order to identify the deceased, on 16-10-2001, accused-Lawrence, Bazlu, Shafi, Baro Bhai, Lincon, Jahangir, Shamim, Babu and Prince came from Dhaka on 15-10-2001 in the High Lux Zeep of accused-Mobile Quader and stayed in the night in his house and on the next date, i.e. on 16-10-2001 at 7-30 AM, the deceased was identified at the meeting. After the meeting, accused-Mobile Quader and others went back to Dhaka and the office of the deceased was also shown, on 17-10-2001 at 3 PM Deceased-Abdul Quader was Killed by accused-Shafi, Lincon, Jahangir and Baro Bhai @

Jane Aim as per the previous plan. Bazlu further told that Lawrence could tell the names of the people who were behind the scence in killing the deceased. As per the statements of the arrested accused-Shamim made in his (the PW) presence, when he (Shamim) on 5-10-2001 at 4-30 PM had gone to the house of accused-Mobile Quader and Lawrence and sat in a tin shed room at East bhiti of their house, he found accused-Mobile Quader, Lawrence, Iqbal Hossain. Ataur Rahman, Abdur Razzaque Khan @ Thandu Member, Shafiuddin (Sentu) and witnesses-Ziaur Rahman @ Iblloo and Meser Ali talking. Accused - Thandu Member told that all present were their own men and discussion should be finished quickly. Accused-Iqbal Hossain told accused-Lowrance to take the responsibility to kill deceased-Abdul Quader. Accused-Mobile Quader told accused-Iqbal to take the responsibility. But the responsibility to kill the deceased was given to Lawrence, it was decided that the expenses, which would be incurred in killing the deceased, would be borne by all the accused.

57. To substantiate the charges, the prosecution examined, 18 (eighteen) witnesses and they were duly cross-examined by the defence. On behalf of accused-Jane Alam, 2 (two) defence witnesses were examined and they were duly cross-examined by the prosecution.

58. The case of the defence as it appears from the trend of cross-examination of the prosecution witnesses, the statements of the accused recorded under section 342 of the Code of Criminal Procedure (the Code) and the defence witnesses was that the accused were innocent and they were implicated in the case falsely just to humiliate them; the confessional statement made by accused-Bazlur Rahman was neither voluntary nor true and the same was extracted from him by inhuman police torture, oppression, threat and intimidation. The story of hatching conspiracy on 5-10-2001 to kill Moulana Abdul Quader was an afterthought and was concocted long after the occurrence only to implicate the accused in the case falsely; the deceased might have been killed by others due to the business rivalry and dispute with his business partners. The separate defence taken by accused-Jane Alam was that there was no title like Baro Bhai with his name. He was not involved with any killing and for the last 1/2 years, he was doing the job of contractorship of Rupayan Housing and doing the job of earth filling and supplying bricks and sand.

59. On conclusion of trial, the Tribunal by its judgment and order dated the 29th day of January, 2004 found accused-Mobile Quader (the respondent in Criminal Appeal No. 22 of 2010) Masud Rana @ Lawrence, Jahangir Hossain, Shafi, Abdur Rashid @ Lincon, Bazlur Rahman @ Bazlu, Jane Alam @ Baro Bhai guilty under sections 302/120B/34 of the Penal Code and sentenced each of them to death and also to pay a fine of Taka 50,000 each and found accused-Iqbal Hossain, Ataur Rahman (appellant in Criminal Appeal No. 24 of 2010), Abdur Razzaque Khan @ Thandu Member (respondent in Criminal Appeal No. 23 of 2010), Shamim Ahmed guilty under sections 302/120-B of the Penal Code and sentenced each of them to suffer imprisonment for life and to pay a fine of Taka 20,00000 in default to suffer rigorous imprisonment for 1(one) year more.

60. The Tribunal submitted the proceedings of the case to the High Court Division for confirmation the death sentence under section 374 of the Code and the same was registered as Death Reference No. 14 of 2004. Convict-Jane Alam @ Baro Bhai filed Criminal Appeal No. 459 of 2004, Convict-Bazlur Rahman @ Bazlu filed Criminal Appeal No. 476 of 2004, Abdur Razzaque Khan @ Thandu Member filed Criminal Appeal No. 411 of 2004 and Ataur Rahman filed Criminal Appeal No. 318 of 2004. Convict-Bazlur Rahman @ Bazlu also filed Jail Appeal No. 800 of 2004 and Jane Alam @ Baro Bhai filed Jail Appeal No. 819 of 2004. A Division Bench of the High Court Division on hearing the

death reference along with the criminal appeals and tin jail appeals by the impugned judgment and order accepted the death reference in respect of Masud Rana @ Lawrence, Abdur Rashid @ Lincon and Md. Shafi. The High Court Division, though, rejected the reference in respect of Bazlur Rahman @ Bazlu, Jane Alam @ Baro Bhai aid Jahangir Hossain, it maintained the order of conviction passed against them, commuted their sentence of death to imprisonment for life. The High Court Division rejecting the reference in respect of Mobile Quader, set aside the order of conviction passed against him and acquitted him of the charges brought against him. Accordingly, the High Court Division dismissed Criminal Appeal No. 476 of 2004 and Jail Appeal No. 800 of 2004 filed by Bazlur Rahman @ Bazlu. The High Court Division also dismissed Criminal Appeal No. 459 of 2004 and Jail Appeal No. 819 of 2004 preferred by Jane Alam @ Baro Bhai and Criminal Appeal No. 318 of 2004 filed by Aatur Rahman. The High Court Division allowed Criminal Appeal No. 411 of 2004 filed by Abdur Razzaque Khan @ Thandu Member, set aside the order of conviction and sentence passed against him and acquitted him of the charges brought against him.

61. Against the judgment and order passed by the High Court Division acquitting Mobile Quader and Abdur Razzaque Khan @ Thandu Member, the State filed Criminal Petition for I Leave to Appeal Nos. 193 of 2008 (giving rise to Criminal Appeal No. 22 of 2010) and 194 of 2008 (giving rise to Criminal Appeal No. 23 of 2010) respectively and convict-Aatur Rahman filed Criminal Petition for Leave to Appeal No. 32 of 2009 before this Division. All the leave petitions were heard together and leave was granted on 21-3-2010 in all the 3 (three) petitions to consider the submissions as under:

"Mr. Rokonuddin Mahmud, loaned Counsel, appearing for the petitioners submitted that PW 2, Ziaur Rahman alias Iblou and PW 4 Maser Ali immediate after the meeting of conspiracy for killing the victim, disclosed the name of the accused persons including the name of respondent to PW 3, Abdul Jabbar Mulla and these three witnesses corroborated each other regarding the date, time, place and name of the accused persons who were present in the conspiracy meeting and subject matter of that conspiracy meeting. The learned Counsel further submitted that the depositions of PW 2, Ziaur Rahman alias Iblou, (PW 3) Abdul Jabbar Mulla and PW 2, Ziaur Rahman alias Iblou, PW 3 Abdul Jabbar Mulla and PW 4, Maser Ali do not suffer from any inherent improbability and the defence failed to impeach the credit of the suit (sic, it would be said) witnesses in cross-examination but the High Court Division failed to put any reliance on their evidence; that the statement of a co-conspirator is admissible against the whole body of conspirators hatched in secrecy and executed in darkness, envisaged by the section 10 of the Evidence Act and convict-accused, Bazlur Rahman alias Bazlu, a co-conspirator mentioned the name of accused Abdul Quader alias Mobile Quader in his confessional statement which has been found by the High Court Division as voluntarily and true, that is admissible against the co-conspirator, Abdul Quader alias Mobile Quader. The learned Counsel also submitted that the confessional statement of Bazlur Rahman supported the circumstantial evidence though it was retracted, it cannot be denied. The High Court Division ought to have considered it in their findings and in the decisions committed an error occasioning failure of justice. The impugned judgment and order of the High Court Division is liable to be set aside."

62. Though, in all the 3 (three) leave petitions (two filed by the State against the order of acquittal of Mobile Quader, Abdur Razzaque Khan @ Thandu Member and the other one filed by convict-Aatur Rahman), leave was granted, in the leave granting order, the submissions made on behalf of the State in Leave Petition No. 193 of 2008 only have

been noted. It appears that on behalf of the respective respondent in Leave Petition Nos. 193 and 194 of 2008, caveat was filed and they were represented by their separate learned Counsel, but their submissions were not also noted down. However, 3 (three) appeals being Criminal Appeal Nos. 22, 23 and 24 of 2010 have been registered out of the 3 (three) leave petitions as stated earlier. Concise statement has been filed in all the appeals on behalf of the respective appellant and the respective respondent in support of their respective case. And we have heard the learned Deputy Attorney-General appearing in Criminal Appeal Nos. 22 and 23 of 2010 and Mr. Abdul Baset Majumder, learned Counsel for the appellant in Criminal Appeal No. 24 of 2010, Mr. Mansurul Haque Chowdhury and Mr. Abdul Matin Khasru, learned Counsel for the respective respondent in Criminal Appeal Nos. 22 and 23 of 2010.

63. Mr. Shohrowardi, learned Deputy Attorney-General, appearing for the State in Criminal Appeal Nos. 22 and 23 of 2010 and for the respondent in Criminal Appeal No. 24 of 2010 (the State is the respondent in this appeal) submitted that the prosecution proved beyond reasonable doubt its case of conspiracy hatched up on 5-10-2001 by accused-Mobile Quader, Aaur Rahman and Abdur Razzaque Khan @ Thandu Member along with the other co-accused, namely: Masud Rana @ Lawrence, Jahangir Hossain, Md. Shafi, Abdur Rashid Molla @ Lincon, Bazlur Rahman @ Bazlu, Jane Alam @ Baro Bhai, Iqbal Hossain and Shamim Ahmed (they are not the appellants before this Court) by adducing direct as well as circumstantial evidence, but the High Court Division without considering the evidence of the prosecution witnesses in a dispassionate manner acquitted the said accused of the charges brought against them, on the omnibus finding that the prosecution miserably failed to prove its case of alleged conspiracy dated 5-10-2001 by reliable and acceptable legal evidence. In support of his submission, the learned Deputy Attorney General has referred to the testimonies of PWs 2 and 4 to show that these two witnesses were present at the sitting on that particular date at 4-30/4-00 PM at the East bhiti tin shed room in the house of accused-Mobile Quader and Lawrence where conspiracy to kill deceased-Moulana Abdul Quader was made by the 3 (three) accused and the other co-accused as mentioned above. The learned Deputy Attorney-General has referred to the relevant testimonies of PW 3 to whom PWs 2 and 4 on 05-10-2001 and 6-10-2001 respectively stated the fact of said conspiracy dated 5-10-2001 and also the testimonies of PWs 1, 3, 6-8, 10 and 13 to show that there was rivalry between deceased-Moulana Abdul Quader and accused-Mobile Quader and his brother-Lawrence over Mamar Bazar, fish gher (kum) beneath a bridge near the said Bazar and the Chairmanship of the Managing Committee of Kazir Pagla High School giving the motive for the conspiracy to kill deceased-Moulana Abdul Quader and their assumption that due to the said rivalry, Mobile Quader, his brother-Lawrence along with other accused might have killed the deceased which clearly corroborated the testimonies of PWs 2 and 4 as to the conspiracy to kill deceased-Moulana Abdul Quader hatched up on 5-10-2001. He submitted that the High Court Division without considering and sifting the testimonies of PWs, 2, 3 and 4 at all with the other circumstantial evidence on record as discussed above including the confessional statement of co-accused, Bazlur Rahman @ Bazlu which was admissible in evidence under section 10 of the Evidence Act against the other accused and corroborated the testimonies of the said PWs as to the conspiracy hatched up on 05-10-2001 to kill deceased-Moulana Abdul Quader just discarded their testimonies with the wild comment that they were "not competent, reliable and disinterested witnesses and they have been picked up and planned in this case and we cannot put any reliance on their evidence before us" and thus erred in law in acquitting the accused, namely: Mobile Quader and Abdur Razzaque Khan @ Thandu. He submitted that co-accused-Bazlur Rahman @ Bazlu in his confessional statement gave in detail the plan hatched up by accused-Mobile Quader and his full brother-Lawrence to kill the deceased and

eventually, the plan was executed by causing the death of the deceased by the hired killers on 17-10-2001 pursuant to the said conspiracy and this coupled with the strong circumstantial evidence as emerged from the testimonies of PWs 1, 3, 6-8, 10 and 13 as to the rivalry which existed over Mamar Bazar, Kum and the Chairmanship of Kazir Pagla High School Managing Committee between deceased-Moulana Abdul Quader and accused-Mobile Quader proved beyond reasonable doubt the involvement of accused-Mobile Quader with the killing of deceased-Moulana Abdul Quader, the High Court Division was wrong in acquitting him of the charges brought against him under sections 120B/302/34 of the Penal Code. The learned Deputy Attorney-General submitted that in the FIR, it was categorically stated that strong rivalry existed between the informant's younger brother, deceased-Moulana Abdul Quader and accused-Mobile Quader and his brother-Lawrence over the ownership of Mamar Bazar at Dugachhi village under Police Station-Sreenagor, an adjacent Police Station of their own area and this was substantiated by the informant while he deposed in Court as PW 1. He submitted that the motive behind the conspiracy to kill the deceased was also apparent from the evidence of PWs 3, 6-8, 10 and 13 who clearly deposed that there was rivalry between the deceased and accused-Mobile Quader and his brother-Lawrence over Dugachhi Bazar, the Chairmanship of the Managing Committee of Kazir Pagla School and also 'Kum' (কুমাৰ) beneath the bridge near the said Bazar. If the evidence of the said PWs (PWs 1, 3, 6-8, 10, 13) are considered along with the confessional statement of co-accused, Bazlur Rahman @ Bazlu which was found by both the Courts below as true and voluntary and the direct evidence of PWs 2, 3 and 4 as to the conspiracy to kill the deceased, the involvement of accused-Mobile Quader, in no way, can be doubted, but the High Court Division totally failed to consider the evidence of the said PWs along with the confessional statement of co-accused, Bazlu and thus erred in law in acquitting accused-Mobile Quader of the charges brought against him. Therefore, the order of acquittal of accused-Mobile Quader cannot be sustained. The learned Deputy Attorney-General further submitted that although the High Court Division did not consider the individual case of accused-Ataur Rahman (appellant in Criminal Appeal No. 24 of 2010) on merit with reference to the evidence on record, he being "a fugitive from law and justice", the Tribunal discussed the evidence on record with regard to his involvement with the killing of the deceased. And the finding of guilt of the Tribunal in respect of Ataur being based on proper consideration of the evidence of the PWs, no interference is called for with the judgment and order of the High Court Division dismissing the appeal of accused-Ataur Rahman and the appeal filed by him be dismissed.

64. Mr. Mansurul Haque Chowdhury, learned Counsel, appearing for respondent-Mobile Quader in Appeal No. 22 of 2010 submitted that the entire allegation against the respondent was that he along with his brother accused-Lawrence, accused-Abdur Razzaque Khan @ Thandu and Ataur Rahman made a conspiracy on 5-1-2001 at 4-30/4-00 PM sitting in the East bhiti tin shed room in his village home to kill deceased-Moulana Abdul Quader and eventually, the conspiracy was executed though accused-Lawrence, Shamim, Bazlu, Prince, Babu, Jahangir and the other co-accused by killing the deceased on 17-10-2001 at his office at about 3-00 PM. In support of the said allegation of conspiracy, the prosecution examined PWs 2, 3 and 4. And of these 3 (three) witnesses, PWs 2 and 4 claimed to be present when the conspiracy was hatched up, but these two witnesses could not at all be believed for the simple reason that they were examined by the Investigation Officer on 30-1-2003, i.e. long after 1 (one) year and 3 (three) months from the date of occurrence; PW 3 to whom PWs 4 and 2 narrated the said fact of conspiracy on 5-10-2001 and 6-10-2001 respectively, was also examined on 27-2-2003, i.e. long after 1 (one) year and 4 (four) months. The delay in examining these 3 (three) witnesses by the Investigation Officer after such an

inordinate delay, was unusual, in the facts and circumstances of the case and itself creates a doubt about the veracity of their testimonies of conspiracy dated 5-10-2001 to kill Moulana Abdul Quader, the High Court Division rightly disbelieved them. Mr. Chowdhury submitted that the suo-moto explanations given by PW 2 that he did not disclose the fact of conspiracy to any one, because had he disclosed, he would have been in trouble, was not acceptable, inasmuch as the position of the case remained the same when he was examined by the Investigation Officer on 30-1-2003 and moreso, he did not complain any threat by any of the accused or anybody else not to disclose the said fact of conspiracy. Mr. Chowdhury pointing out the above factual aspect submitted that three witnesses (PWs 2, 3 and 4) were set up by the last Investigation Officer as an afterthought by concocting the story of conspiracy dated 5-10-2001 to kill deceased-Moulana Abdul Quader just to implicate the accused falsely in the case; the High Court Division rightly held that they were not competent, reliable and disinterested witnesses and were picked up and planted in the case and that the prosecution miserably failed to prove its case of alleged conspiracy dated 5-10-2001 by reliable and acceptable legal evidence. Mr. Chowdhury submitted that there cannot be any conspiracy without motive, but the prosecution totally failed to prove the motive in the case for the alleged conspiracy to kill the deceased. He elaborated his submission by pointing out that in the FIR, only one motive, namely, that strong rivalry was going on between the informant's brother (the deceased) and Mobile Quader and his brother-Lawrence over the ownership of Mamar Bazar at Dugachhi village under Police Station-Sreenagor, but while he deposed in Court as PW 1, he added two more motives, namely, discord over 'Kum' 'মাদের কলাশয়' beneath the bridge near the Bazar and the School Committee which was nothing but afterthought and shows prima facie falsity in imputing motive in the case to implicate accused-Mobile Quader falsely. He submitted that even if, for argument's sake, it is conceded that there was rivalry between deceased-Moulana Abdul Quader and accused-Mobile Quader and his brother-Lawrence over all the 3 (three) matters, as stated by PW 1, those were settled before the occurrence as PW 1 (the informant) himself stated in his examination-in-chief that during the Caretaker Government accused-Mobile Quader and Lawrence came for compromise and the discords between his brother and Mobile Quader and his brother-Lawrence were compromised at the intervention of the local people (in the deposition sheet, in Bangla, it has been recorded as 'আমার ভাইয়ের সাথে এলাকার লোকজনের মধ্যস্থতায় মোবাইল কাদের ও লরেন্সের মিমাহসা হয়ে যায়'), so after that, there could not be any motive to kill the deceased. Mr. Chowdhury by referring to the evidence of PW 1 to the effect that "দোগাছি বাজারে আমাদের কোন রেজিষ্ট্রিকৃত জমি নেই", his other evidence to show that deceased-Moulana Abdul Quader had no stake or interest in Dugachhi Bazar or with its establishment, the evidence of PW 3 in cross-examination that Baser Howlader was the owner of Mamar Bazar, the evidence of PW 1 on the question of ownership of the "Kum" by both deceased-Moulana Abdul Quader and accused-Mobile Quader, the evidence of PW 1 as to the Managing Committee of Kazir Pagla High School submitted that the evidence of PWs 1 and 3 prima facie disproved the existence of any motive on the part of accused-Mobile Quader to hatch up a conspiracy to kill the deceased and factually, there was no nexus between the prosecution case of conspiracy to kill the deceased by accused-Mobile Quader and the motive behind such killing, the High Court Division rightly acquitted accused-Mobile Quader. Mr. Chowdhury submitted that it is a well settled legal principle that the confessional statement of a co-accused cannot be the basis for the purpose of coming to the finding of guilt of a charge brought against an accused and in the instant case, although co-accused, Bazlur Rahman @ Bazlu made a confessional statement stating the fact of conspiracy by accused-Mobile Quader and his brother-Lawrence along with others to kill deceased-Moulana Abdul Quader, the confession made by him is an evasive one like 'ধরি মাছ না ছুই পানি' and a close reading of the same would show that accused-Mobile Quader was not all involved with the actual

conspiracy of killing deceased-Moulana Abdul Quader which allegedly took place at the house of accused-Jahangir at Dhaka Nagar, so the confessional statement of co-accused, Bazlur Rahman could not be used in any way to link accused-Mobile Quader with the conspiracy of killing of Moulana Abdul Quader. He lastly submitted that the confessional statement of Bazlu could not be used against Mobile Quader invoking the aid of section 10 of the Evidence Act, inasmuch as he made the confessional statement after he had been arrested by the police and that too after materialization of the alleged conspiracy with the killing of deceased-Moulana Abdul Quader. Therefore, no interference is called for with the order of acquittal of the High Court Division and there being no merit in the appeal, the same be dismissed.

65. Mr. Abdul Matin Khasru, learned Counsel, appearing for respondent-Abdur Razzaque Khan @ Thandu Member, in Criminal Appeal No. 23 of 2010, adopted the argument of Mr. Mansurul Haque Chowdhury as to the credibility of the testimonies of PWs 2, 3 and 4 in respect of the alleged conspiracy hatched up on 5-10-2001 by the respondent (Abdur Razzaque Khan) along with accused-Mobile Quader and Ataur Rahman to kill deceased-Moulana Abdul Quader and on the question of motive behind such conspiracy. He further submitted that the name of the respondent was neither mentioned in the FIR nor in the confessional statement of co-accused, Bazlur Rahman @ Bazlu and he was implicated in the case as one of the conspirators in hatching up a conspiracy on 5-10-2001 to kill the deceased through PWs 2, 3 and 4, whose testimonies are not at all trustworthy and believable, the High Court Division rightly discarded their testimonies as to the involvement of the respondent with killing of the deceased and acquitted him of the charges brought against him. In the context, he also referred to the relevant portions of the cross examination of PW 18, the Investigation Officer, to show the contradictions in the statements of PWs 2, 3 and 4 made to him and their testimonies in Court to show that they were not the truthful and credible witnesses and therefore, the High Court Division rightly refused to put reliance on their testimonies, therefore, no interference is called for with the judgment and order of the High Court Division and the appeal be dismissed.

66. Mr. Abdul Baset Majumder, learned Counsel, appearing for Ataur Rahman, appellant in Criminal Appeal No. 24 of 2010 also adopted the argument of Mr. Mansurul Haque Chowdhury on the two points as mentioned hereinbefore. He further submitted that so far as Ataur Rahman is concerned, he stands on the same footing as that of accused-Abdur Razzaque Khan who has been acquitted by the High Court Division. The name of Ataur Rahman was neither mentioned in the FIR nor in the confessional statement of accused-Bazlur Rahman @ Bazlu. He further submitted that the involvement of Ataur Rahman as one of the conspirators to kill deceased-Moulana Abdul Quader was based on the evidence of PWs. 2, 3 and 4, but the story of conspiracy through the mouth of those 3 PWs after long period was nothing but a deliberate and afterthought attempt on the part of the prosecution to implicate him in the case falsely, the Tribunal was absolutely wrong in relying upon their testimonies in believing the prosecution case of criminal conspiracy dated 5-10-2001 to kill deceased-Moulana Abdul Quader. Mr. Majumder further submitted that the appeal filed by Ataur Rahman was before the High Court Division and was being heard along with the death reference, so the High Court Division ought to have disposed of the same along with the other appeals and the case of the other convicts on merit and ought to have acquitted him of the charges brought against him, when it acquitted Abdur Razzaque Khan standing exactly on the same footing, instead it dismissed the appeal on the ground that after being enlarged on bail, he absconded and was "a fugitive from law and justice." He concluded by submitting that the appeal be allowed and the order of conviction and sentence passed by the Tribunal against Ataur Rahman and as maintained by the High Court Division, be set

aside and the appellant be acquitted of the charges brought against him.

67. The learned Deputy Attorney-General, in reply to the submissions of the learned Counsel for Mobile Quader on the question of motive, has pointed out the relevant portions of the testimonies of PWs 1, 3, 4, 6-8, 10 and 13 in their cross examination to show that deceased-Moulana Abdul Quader had stake in Mamar Bazar and he was constructing a building therein which was completed after his death and he also took lease of the 'Kum' (কুমা) beneath the bridge near the Bazar and there was also dispute between the deceased and accused-Mobile Quader over the Managing Committee of Kazir Pagla School. He further submitted that in order to find the motive behind the criminal conspiracy to kill Moulana Abdul Quader, the evidence of the said witnesses has to be read as a whole; a reading of their testimonies as a whole would show that the prosecution proved beyond reasonable doubt the motive in hatching up the criminal conspiracy to kill deceased-Moulana Abdul Quader by accused-Mobile Quader, the High Court Division was not justified in acquitting him of the charges brought against him.

68. Before we proceed to consider the points on which leave was granted and the submissions made by the learned Deputy Attorney-General and the learned Counsel for the respective respondent of the respective appeal and appellant-Ataur Rahman at the hearing, we feel it necessary just to state that there is no dispute that the death of deceased-Moulana Abdul Quader was caused on 17-10-2001 at 3-00 PM by the bullet injuries as alleged by the prosecution. The fact of death of Moulana Abdul Quader by bullet injuries was proved by the inquest report (exhibit-3) and the post mortem report (exhibit-13) (the post mortem report was admitted into evidence under section 509A of the Code). Both the Tribunal and the High Court Division also found so. It is also a fact that the persons who participated in the killing mission have been spotted out by the Tribunal and the High Court Division, they being accused: Jane Alam @ Baro Bhai, Shafi, Masud Rana @ Lawrence, Abdur Rashid @ Lincon and Jahangir. The High Court Division also gave finding that accused-Masud Rana @ Lawrence "monitored every move towards the execution of the plan and operation of the killing squad" and accused-Bazlu was also with him, and accordingly, maintained the order of conviction passed against them. And they are not the appellants before us. So, we need not dwell upon on those matters. And we shall confine over selves to the charges brought against the 3 (three) accused, namely: Mobile Quader, Abdur Razzaque Khan @ Thandu Member and Ataur Rahman (hereinafter referred to as the three accused) involved in these 3 (three) appeals.

69. The prosecution case against the 3 (three) accused, in fact, is dependent upon two sets of evidence: one set the confessional statement of co-accused, Bazlur Rahman @ Bazlu and the other set on the testimonies of PWs 2, 3 and 4 along with the circumstantial evidence as testified by PWs 1, 3, 6-8, 10 and 13. In the confessional statement, co-accused, Bazlur Rahman @ Bazlu mentioned, the name of accused-Mobile Quader only (besides the other accused who are not appellants before this Court) linking him with the chalking out of the plan with the other accused including his brother-Lawrence to kill deceased-Moulana Abdul Quader. But PWs 2, 3 and 4 testified as to the fact of a discussion by all the 3 (three) accused along with the other accused (names already mentioned earlier) on 5-10-2001 to do big harm to deceased-Moulana Abdul Quader. It needs to be mentioned that in the FIR the names of Ataur Rahman and Md. Abdur Razzaque Khan @ Thandu Member were not also mentioned.

70. Let us, first, consider the second set of evidence, namely, the testimonies of PWs 2, 3, 4 and those of PWs 1, 6-8, 10 and 13.

71. PW 1 (the informant) in his examination-in-chief categorically stated that the deceased had strong rivalry with accused-Mobile Quader over Mamar Bazar at village Dugachhi, under Police Station-Sreenogar, the adjacent Police Station of their own area and a fish gher beneath a bridge near the said Bazar and school Committee. In the FIR, it was also specifically stated that strong rivalry was going on between Mobile Quader, his brother-Lawrence and the informant's younger brother deceased-Moulana Abdul Quader over the ownership of Mamar Bazar at Dugachhi under adjacent Police Station of Sreenogar of their area. Though the informant as PW 1 added two more things as the subject matter of discord to show rivalry between deceased-Moulana Abdul Quader and accused-Mobile Quader, that, in no way, made his testimony unworthy of belief on the question of rivalry.

72. PW 2, Ziaur Rahman @ Ibloo stated in his examination-in-chief that from 1996 to June, 2001 he was employed as the Caretaker of Austin Garments at Bashabo owned by Ashraful Islam, a partner of accused-Mobile Quader and prior to that, he used to serve in the office of accused-Mobile Quader. Accused-Lawrence, brother of accused-Mobile Quader is his close friend and when he (Lawrence) used to come to his village, the PW used to stay with him. On 5-10-2001, at about 4-30 PM when the PW, accused-Lawrence, accused-Shamim were having discussions (in the deposition sheet, in Bangla, it has been recorded as 'বসে আলাপ আলোচনা করাকর্তা বলছিলাম') in the East bhiti tin shed room in the house of accused-Mobile Quader, accused-Thandu came there. Sometime, thereafter, accused-Ataur, Meser and Iqbal Hossain came there. Subsequently, accused-Thandu Member went out and then after half an hour, came back with accused-Mobile Quader and Sentu and they discussed different matters. Accused-Thandu Member told that all present, there were own men (in the deposition sheet, in Bangla, it has been recorded as 'উক্ত স্থানে নিজেদের লোক রয়েছে') and he asked to finish the discussion quickly. Accused-Ataur told that BNP was in power, if something was not done quickly, they would not be able to come to their village (in the deposition sheet, in Bangla, it has been recorded as 'আর দেশে আসা যাবে না'). Accused-Lawrence told that Moulana Abdul Quader tried to kill him, so he asked to give him the responsibility to take care of him. Accused-Thandu Member also told to give the responsibility to accused-Lawrence. Then accused-Mobile Quader told to give the responsibility to accused-Iqbal, but Iqbal told to give the responsibility to Lawrence and at this, Lawrence felt encouraged and told that he would take the responsibility. Accused-Thandu Member told accused Mobile Quader not to think over the matter and asked all to cooperate and further told that accused-Lawrence would carry the duty (in the deposition sheet, in Bangla, it has been recorded as 'আসামী লরেপই দায়িত্ব পালন করবে'). The PW further stated that from the discussions, he formed an idea that the accused would do big harm to deceased-Moulana Abdul Quader (in the deposition sheet, in Bangla, it has been recorded as 'বড় ধরনের ক্ষতি করবে') and he became confused as to whom he would tell about the said incident and on the next day, at noon, he informed the incident to Jabbar Molla (PW 3), a friend of accused-Mobile Quader. In the evening of 15-10-2001, one Shahin informed the PW that Minister Sinha would come for a meeting in front of the house of accused-Mobile Quader. In the evening of that day, the PW went to the house of accused-Mobile Quader and saw accused-Sentu and others sitting. At 7-30 PM accused-Mobile Quader, accused-Lawrence, accused-Shamim, accused-Bazlu, accused-Prince, accused-Babu, accused-Jahangir, a friend of Lawrence and 3 (three) unknown persons came in the Jeep of accused-Mobile Quader. Prince and Babu went to their house, accused-Lawrence and the other accused sat in the East bhiti tin shed room of the house of accused-Mobile Quader. The PW talked to Lawrence for sometime, Lawrence told him that the 3 (three) unknown persons were his friends and then he went to his house. On 16-10-2001, at 7-30 AM, the PW went to the meeting venue of Minister Mizanur Rahman Sinha and saw

deceased-Moulana Abdul Quader sitting in the dais by the side of the Minister. He also saw accused-Lawrence, Shamim, Bazlu, Jahangir friend of Bazlu and the 3 (three) other unknown persons standing by the side in the dais and talking together. The PW further stated that after hearing the news of the killing of deceased-Moulana Abdul Quader by gun shot at his office, he assumed that accused-Mobile Quader and the other accused whom he saw to hold the meeting killed him as per the plan chalked out in the meeting (in the deposition sheet, in Bangla, it has been recorded as “উক্ত সভার পরিকল্পনামত”). The PW identified accused-Mobile Quader, Bazlu, Thandu Member, Iqbal Hossain and one of the unknown persons in the dock whom he saw in the evening of 15th (in the deposition sheet, in Bangla, it has been recorded as “১৫ তারিখের বিকেলে দেখা অপরিচিতদের মধ্যে একজন রয়েছে”).

73. The PW in his cross-examination gave a suo motu explanation for non-closure of the said fact of conspiracy dated 5-10-2001 for long 15(fifteen) months from the date of the occurrence (the PW was examined by the Investigation Officer on 30-1-2003) saying that he did not disclose the fact of conspiracy earlier as he would have been in trouble (in the deposition sheet, in Bangla, it has been recorded as “স্বাক্ষীর স্ব-উক্তি বলে বিপদে পড়বো নাকি”). Then in another place of his cross examination, PW 2 gave another suo muto explanation saying that he did not disclose the fact of conspiracy dated 05-10-2001 to kill deceased-Moulana Abdul Quader to anyone till he was confined in DB office, because he was the man of accused-Mobile Quader (in the deposition sheet, in Bangla, it has been recorded as: “স্বাক্ষীর স্ব-উক্তি বলবো কেন আমি আসামী আঃ কাদেরের লোক ছিলাম”).

74. PW 3, Abdul Jabbar Molla, is a man of Dugachhi and he deals in rice in Dugachhi Bazar, stated in his examination-in-chief that accused-Mobile Quader is his friend. The mother of accused-Mobile Quader had a house at Dugachhi Bazar, Mobile Quader sold the same after liberation of the country to Baser Howlader and Sohrab Mia After the sale of the house the villagers established a Bazar therein. The place is by the side of the Bishaw Road. In 1998, a 'Kum' (জলাশয়) was created due to the erosion. The Bazar was fully established in 1997. Deceased-Moulana Abdul Quader entered into a contract with Sohrab Mia and Awal for purchasing about 2.00 acres of land adjacent to the Bazar. Accused-Mobile Quader told him (PW 3) to form a new Bazar committee by dissolving the previous one. The owner of the land at the Bazar raised structures, but he and Mobile Quader dismantled the same. Accused-Mobile Quader told the PW that he would establish a new Government market by breaking the existing one and over this a rivalry started. Deceased-Moulana Abdul Quader took lease of the ‘জলাশয়’ from the Government and reared fish there and discord cropped up over the said ‘জলাশয়’ as well. This PW further stated that accused-Mobile Quader was made chairman of Kazir Pagla High School by removing Bashar Shaheb (full brother of deceased-Moulana Abdul Quader) and enmity also grew up between deceased-Moulana Abdul Quader, his brother and the accused over the same. On 5-10-2001 after sun set, Meser (PW 4) of village Kazir Pagla came to his shop and told him that he had some urgent talk with him and then said accused-Mobile Quader, Lawrence, Iqbal, Aatur and Thandu Haji made a plan to do big harm to Moulana Abdul Quader (in the deposition sheet, in Bangla, it has been recorded as “এসে বলে আসামী আঃ কাদের, লরেন্স, ইকবাল, আতাউর ও ঠান্ডু হাজী নিহত মাওলানা কাদেরের বড় ক্ষতি করার পরিকল্পনা করেছে।”) Meser further told him that since he (the PW) was the friend of accused-Mobile Quader, he should restrain them from doing any such thing, otherwise something big would happen in the area (in the deposition sheet, in Bangla, it has been recorded as “নচেৎ এলাকায় বড় কিছু ঘটে যাবে।”) Meser further told him that nothing should happen to a philanthropist like deceased-Moulana Abdul Quader. On the next day, i.e. on 6-10-2001, at noon, witness-Iqbal (PW 2) came to his shop and called him saying that he had a talk with him (in the deposition sheet, in Bangla, it has been recorded as “ডাক দিয়ে বলে আমার সাথে কথা রয়েছে”) and then taking him in

the middle of the Bazar told him the same thing as told by Meser. Ibloo further told the PW to request accused-Mobile Quader not to do such dangerous act (in the deposition sheet, in Bangla, it has been recorded as 'ঐ ধরনের সাংঘাতিক ঘটনা যেন না ঘটায়'). He further stated that after 3/4 days of the occurrence (dated 5-10-2001) accused-Mobile Quader had come to the village and came to his rice shop in the Bazar and he (the PW) told him that accused-Iqbal, Lawrence, Aatur, Thandu Haji were trying to do big harm to deceased-Moulana Abdul Quader, he would be in trouble for the plan which he made. The PW further told "দোগাছিকে তুমি কি দ্বিতীয় বাখরা বানাতে চাউ", accused-Mobile Quader asked the PW who said all those to him. The PW replied whosever told him, he (Mobile Quader) should not go for doing big harm to deceased-Moulana Abdul Quader. After some days, on 17-10-2001, Moulana Abdul Quader was killed in his office at Motijheel. As there was rivalry over the Bazar and the 'জলাশয়' he believed that accused-Mobile Quader in league with all other accused killed deceased-Moulana Abdul Quader.

75. PW 4, Meser Ali, a business man by profession from Kazir Pagla, stated in his examination-in-chief that on 5-10-2001, at 4-00 PM, he along with Aatur went to the house of accused-Mobile Quader and saw accused-Lawrence and Shamim there. Accused-Lawrence called Aatur to their East bhiti tin shed room and he also went there. Accused-Thandu Member and witness-Ibloo (PW 2) were also present there. Sometime, thereafter, accused-Iqbal, accused-Mobile Quader and Sentu came to the room and then they discussed amongst themselves. Accused-Thandu Member told that BNP was in power, deceased-Moulana Quader might do harm to them, accused-Lawrence said that he would look into the matter. Afterwards, accused-Mobile Quader told to give the responsibility of the matter to accused-Iqbal Hossain, accused-Lawrence again said that he himself would look into the matter. Accused-Thandu Member told to give the responsibility to accused-Lawrence and he further told that the expenditure would be born by all. The PW further stated that hearing those talks, he became very much worried (in the deposition sheet, in Bangla, it has been recorded as 'এই কথা শুনে আমি চিন্তিত হয়ে পড়ি') as he thought that there would be big harm in the area (in the deposition sheet, in Bangla, it has been recorded as 'ভাবি এলাকায় বড় ধরনের ক্ষতি হয়ে যাবে'). In the evening of that date, he told about the said facts to Jabbar Molla (PW 3) at Dugachhi Bazar and he requested him (PW 3) to do something, otherwise something big might happen in the area. Jabbar Molla told him that he would look into the matter. When Moulana Abdul Quader was killed on 17-10-2001, the PW thought that those accused caused the occurrence. In cross-examination, the PW gave explanations for non-disclosure or non-informing the fact of conspiracy to any one before telling to the police (he was examined by the Investigation Officer on 30-1-2003) by saying that except Jabbar Molla (PW 3), he did not feel the necessity to tell about the conspiracy to kill Moulana Abdul Quader to any one of the village, he did not say so, because he might be in trouble and he did not say so to the family of deceased-Moulana Abdul Quader such as, his wife, sons or the deceased-Moulana Abdul Quader openly or secretly as a cautious step.

76. PW 6, Md. Mokarram Hossain, stated in his examination-in-chief that he heard by the by that discord was going on between accused-Mobile Quader and deceased-Moulana Abdul Quader over the land in the area.

77. PW 7, Abdus Samad Bengal, stated in his examination-in-chief that he hailed from village Dakhin Paksha, Sreenagor, Munshigonj. He knew accused-Mobile Quader, Lawrence, Aatur Rahman and the other accused as they are from the same area. He also knew deceased-Moulana Abdul Quader. He further stated that for quite a long time, rivalry was going on between accused-Mobile Quader, Lawrence and deceased-Moulana Abdul Quader. Deceased-Moulana Abdul Quader raised structures in the Bazar, but accused-Mobile Quader and Lawrence dismantled the same. There is a fish "Kum" by the

side of Dugachhi Bazar, deceased-Moulana Abdul Quader used to rear fish there, but accused-Mobile Quader and Lawrence used to catch away fish therefrom (in the deposition sheet, in Bangla, it has been recorded as 'আসামী আঃ কাদের ও লরেন্স গং মাছ ধেরে ফেলাতো'); Bashar Shaheb, the brother of deceased-Moulana Abdul Quader was the Chairman of the Managing Committee of Kazir Pagla School, but when Awami League came to power, accused-Ataur along with accused-Mobile Quader removed him and then accused-Mobile Quader was made the Chairman. He further stated that accused-Mobile Quader through Milton of Shampur made a contract with top terror-Tikka of Dhaka to kill deceased-Moulana Abdul Quader and as the said fact became known in the area (in the deposition sheet, in Bangla, it has been recorded as 'এই ব্যাপারটি এলাকায় জানাজানি হয়ে যায়'), the killing did not take place. After Moulana Abdul Quader had been declared dead, he thought that accused-Lawrence, Mobile Quader, Ataur and their companions killed him due to local discord.

78. PW 8, Mobarak Hossain, a man from village Kazir Pagla, Police Station-Lawhajang, District-Dhaka stated in his examination-in-chief that deceased-Moulana Abdul Quader used to visit his village home after gape and when he used to visit his home, he used to call the PW and asked to stay with him in the night. The PW used to sleep with the deceased. The deceased told him that he had discord with accused-Mobile Quader and Lawrence over the land at Dugachhi Bazar, 'Kum" beneath the bridge and except them, he had no enemy. He further stated that deceased-Moulana Quader used to donate the sale price of the fish of the 'জলাশয়' for the graveyard and the mosque. Accused-Mobile Quader and Lawrence used to catch away fish from 'the 'জলাশয়'' oft and often. Deceased-Moulana Abdul Quader and others erected a structure at Dugachhi Bazar, but accused-Mobile Quader and Lawrence dismantled the same. Bashar Shaheb, the brother of the deceased was the Chairman of the Managing Committee of Kazir Pagla High School, during the last Awami League Government, accused-Ataur Rahman made accused-Abdul Quader Chairman of the Managing Committee over which there were many litigations, salish darbar and for these, there was always chaos in the locality. As per the desire of accused-Mobile Quader and Lawrence, Milton of Shampur village hired one Tikka of Dhaka to kill deceased-Moulana Abdul Quader and since the said fact became known in the area killing did not take place (in the deposition sheet, in Bangla, it has been recorded as 'উক্ত বিষয় এলাকায় জানাজানি হয়ে যায় তখন আর হত্যাকাণ্ড ঘটতে পারে নাই'). He suspected that accused-Mobile Quader, Lawrence and others killed Moulana Abdul Quader due to the discord over Dugachhi Bazar and 'জলাশয়'.

79. PW 10, DM Kader stated in his examination-in-chief that deceased-Moulana Abdul Quader had rivalry with accused-Mobile Quader of village Dugachhi and his brother-Lawrence over the Bazar of the said village and a "হুম জলাশয়", there were salishes over the said rivalry and in one of the salish, he was present. He suspected that accused-Mobile Quader, accused-Lawrence and others might have been involved with the killing of deceased-Moulana Abdul Quader.

80. PW 13, Abdul Quader, is the ex-chairman of Bultali Union under Lauhaganj Upazila. He stated in his examination-in-chief that he went to Medical college Hospital 10/15 minutes after the incident and heard that Moulana Abdul Quader expired. He found informant Yusuf crying and saying that Mobile Quader and the other accused killed his brother (the deceased) (in the deposition sheet, in Bangla, it has been recorded as 'বাদী ইউসুফ বল ছিলো কান্না কাটি করে মোবাইল কাদের আসামীর তার ভাইকে হত্যা করেছে'). He further stated that earlier the deceased told him that discord was going on between him and accused-Mobile Quader and Lawrence over Kum, Dugachhi Bazar and School committee. And there was salish over the matter. One and half months before, one day, deceased-Moulana Abdul Quader told the PW to go to Hotel Purbani to attend a salish to be held there, but he did not go

saying that accused-Mobile Quader did not tell him anything. Subsequently, deceased-Moulana Abdul Quader told him that there was compromise between them.

81. Of the witnesses, discussed above, PWs 2 and 4 are the witnesses to the discussions made in the meeting held on 5-10-2001 in the East bhiti tin shed room in the village home of accused-Mobile Quader. PWs 2 and 4 specifically stated about the decision taken in the said meeting to do a big harm to deceased-Moulana Abdul Quader and this was also intimated by them to PW 3 on 6-10-2001 and 5-10-2001 respectively. Though PWs 2 and 4 did not specifically say about the criminal conspiracy to kill deceased-Moulana Abdul Quader, but by saying big harm would be done to deceased-Moulana Abdul Quader, they meant so. PW 2 further stated about the fact of coming of accused-Mobile Quader at his village home in his Jeep along with accused-Lawrence, Shamim, Bazlu, Prince, Babu, Jahangir, a friend of Lawrence and 3 (three) other unknown persons on 15-10-2001 at 7-30 PM, seating of accused-Lawrence and the other accused in the East bhiti tin shed room of accused-Mobile Quader, the fact of going to the meeting venue of Minister Mizanur Rahman Sinha on 16-10-2001 at 7-30 AM where he saw deceased-Moulana Abdul Quader sitting in the dais by the side of the Minister and accused-Lawrence, Shamim, Bazlu, Jahangir, friend of Lawrence and the 3 (three) other unknown persons talking together by the side of the dais of the meeting. And notably on these two dates, i.e. on 15-10-2001 and 16-10-2001, accused-Abdur Razzaque Khan @ Thandu Member and Aatur Rahman were not present.

82. PWs 2 and 4 were cross-examined by the defence in a marathon manner, but the credibility of their testimonies as to the fact of their presence in the meeting held on 5-10-2001 in the East bhiti tin shed room of accused-Mobile Quader, the presence of accused-Aatur Rahman, Abdur Razzaque Khan @ Thandu Member, accused-Mobile Quader, and his brother, accused-Lawrence and the other accused, namely: Shamim, Sentu, Iqbal in the meeting and their testimonies as to the fact of their hearing of the discussion of the accused including the 3 (three) to do big harm to deceased-Moulana Abdul Quader and the disclosure of the fact of such discussion in the said meeting to PW 3 on 5-10-2001 and 6-10-2001 by PWs 4 and 2 respectively could not be shaken. Omission on the part of PW 2 in not stating to the Investigation Officer as to the utterances of accused-Thandu Member in the sitting on 5-10-2001 that he told that accused-Lawrence should take the responsibility and he told accused-Mobile Quader not to think over the matter and that all should co-operate and Lawrence would discharge the responsibility and on the part of PW 4 that accused-Thandu Member told that the BNP was in power, deceased-Moulana Abdul Quader might do harm to them and Thandu Member further told that responsibility should be given to accused-Lawrence and the expenses would be born by all did not at all make their testimonies that Thandu Member was present in the sitting where decision to do big harm to deceased-Moulana Abdul Quader was taken unworthy of belief. We have gone through the unusually lengthy cross-examination of the 3 (three) PWs, the defence failed to show any ill motive or biasness on their part to depose falsely against the three accused, particularly, against accused-Mobile Quader. The defence also failed to show any connection or relationship of these three witnesses with deceased-Moulana Abdul Quader and the other surviving members of his family or the informant. Rather PW 2 was an employee of accused-Mobile Quader and in cross-examination, he stated that he was the man of accused-Mobile Quader. PW 3 also claimed that accused-Mobile Quader was his friend. The defence, in no way, could shake the credibility of these witnesses (PWs 2, 3 and 4) as truthful witnesses. The testimonies of PWs 2, 4 and 3 cannot be disbelieved merely because they were examined by the Investigation Officer long after 15 (fifteen) and 16 (sixteen) months respectively from the date of the occurrence.

83. It is true that section 157 of the Evidence Act stipulates that the statement of a fact by a witness should be made to the competent authority at or near the time when the fact to which the statement relates took place. What should be the span of time of making such statement by a witness is basically a question of fact and no hard and fast rule can be laid down in that regard. It would vary from case to case and upon the peculiar circumstances of a particular case under which delay in recording the statement of a witness about the fact which he knew or knows might be caused. And mere delay in recording the statement of a witness by the investigation officer cannot be the sole ground to discard his evidence, if he withstands the test of cross-examination and thus appears to be truthful witness. As in the instant case, the defence by cross-examining PWs 2, 3 and 4 failed to shake the credibility of their testimonies as discussed above. More so, we find the explanations given by PWs 2 and 4 for non-disclosing and non-informing the fact of holding meeting in the East bhiti tin shed room of accused-Mobile Quader on 5-10-2001 and of the decision taken therein for doing big harm to deceased-Moulana Abdul Quader to others quite plausible and so acceptable. It is also a fact that as many as 3 (three) different Police Officers investigated the case, namely: PW 16, Md. Taibur Rahman, PW 17, Md. Akteruzzaman Bhuiya and PW 18, Md. Nazrul Islam. PW 18 examined PWs 2, 3 and 4, and it appears to us that the change of Investigation Officer also contributed to the delay in examining them.

84. The defence also extensively cross-examined PWs 1, 6-8, 10 and 13, but could not shake or impeach their testimonies as to the existence of rivalry between deceased-Moulana Abdul Quader and accused-Mobile Quader over Dugachhi Bazar, Kum and the Chairmanship of the Managing Committee of Kazir Pagla High School.

85. The Tribunal believed the testimonies of PWs 2, 3 and 4 as to the conspiracy allegedly hatched up on 5-10-2001 by the 3 (three) accused (Mobile Quader, Aaur Rahman, Abdur Razzaque @ Thandu Member) along with the other accused. But the High Court Division did not at all consider their evidence and disbelieved them just saying that they were not "competent, reliable and disinterested witnesses" and picked up and planted in the case. The High Court Division did not give any reason as well, as to why PWs 2, 3 and 4 appeared to be "not competent, reliable and disinterested" and why it considered those witnesses as picked up and planted in the case. We strongly disapprove this kind of exercise by the High Court Division in disposing of an appeal. When the Tribunal which had the privilege of seeing the demeanour of the witnesses, believed the testimonies of PWs 2, 3 and 4, the High Court Division as the first Appellate Court had an obligation to consider their testimonies and then it could discard their testimonies if they felt so and that by adverting the findings of the Tribunal on the said PWs too.

86. For the reasons stated hereinbefore, we do not find any substance in the submissions of the learned Counsel for the three accused as noted and cannot also agree with the view taken by the High Court Division that PWs 2, 3 and 4 were not "competent, reliable and disinterested witnesses" and that they were picked up and planted in the case. The testimonies of these 3 (three) PWs appear to us natural, credible and trustworthy and we hold that the prosecution could prove beyond reasonable doubt the fact of holding the meeting on 5-10-2014 in the East Bhiti tin shed room in the house of accused-Mobile Quader and the discussion by the three accused and the other accused about doing big harm to deceased-Moulana Abdul Quader.

87. Now let us consider the confessional statement of co-accused, Bazlu. The confessional statement reads as follows:

“আমি ১৯৯৩ সালের শ্রীনগর সরকারী কলেজ থেকে এইচ এস সি পাশ করে কিছু দিন বেকার ছিলাম। গ্রামে টিউশনি করতাম। ১৯৯৫ সালের শেষের দিকে আইডিয়াল টেক্সটাইল মিলস সিঃ এর অফিসে ৪০ আহসান উল্লাহ রোড, ইসলামপুর ঢাকায় আমার চাকরি হয়। উক্ত টেক্সটাইল মিলটি আমাদের দোগাছি গ্রামের মোবাইল কাদের দের। তার পিতার নাম হাজী আঃ সাত্তার শিক্ষানবীশ হিসাবে চাকুরীতে ঢুকলেও ১৯৯৬ সালের শেষের দিকে আমার দক্ষতার কারণে মোবাইল কাদের আমাকে মার্কেটিং ম্যানেজার পদে উন্নীত করে। ১৯৯৯ সালের শেষের দিকে মিলটি ইসলামী ব্যাংকের ঋণের দেনার দায়ে খেলাপী হয়ে বন্ধ হয়ে যায়। তখন আমি এবং বাবু, পিতা-আবুল হোসেন, সাং-দোগাছি, খানা-শ্রীনগর, জেলা-মুন্সিগঞ্জ, আমরা এই দুঃসময়ে মোবাইল কাদেরের সাথে থাকতাম। অর্থাৎ মোবাইল কাদেরের বডিগার্ড হিসাবে থাকি। মোবাইল কাদের সন্ত্রাসী ছিল। তার সংগে ঢাকার উপটেরদেদের খ্যাতির ছিল। মোবাইল কাদেরের ছোট জাই লরেস আমার ক্লাস ফ্রেন্ড এবং ঘনিষ্ঠ বন্ধ। তার সাথেও আমার খুব ভাব ছিল। আজ থেকে ৭/৮ মাস আগে ঢাকার উপটেরদে টিক্কে নিয়া মিলটন পিতা-অজ্ঞাত, সাং-পূর্ব সমসপুর, খানা-শ্রীনগর, জেলা-মুন্সিগঞ্জ দোগাছি বাজারে যেয়ে মোবাইল কাদের ও লরেসের সাথে টিক্কে পরিচয় করিয়ে দেয় এবং মওলানা কাদিরকে খুন করার জন্য বলে। মিলটন মোবাইল কাদেরের প্রতিবেশী এবং মোবাইল কাদেরকে ভাই বলে ডাকে। মিলটনকে মোবাইল কাদের ইসলামপুর চায়না মার্কেটে ব্যবসা করে দিয়েছে। উল্লেখ্য যে, মোবাইল কাদেরের সংগে মওলানা কাদেরের দুইটি বিষয় নিয়ে দন্দ ছিল। প্রথমতঃ দোগাছি বাজারে মওলানা কাদেরের প্রায় ৩(তিন) কাঠা রাস্তার ধারে মার্কেট করার মত মূল্যবান জমি ছিল। ঐ জমির প্রতি মোবাইল কাদের ও লরেসের দৃষ্টি যায়। মওলানা কাদের জমিতে মার্কেট করতে যেয়ে পারে নাই। মোবাইল কাদেরের বাধার কারণে। দ্বিতীয়তঃ দোগাছি বাজারের সাথে ব্রীজের নীচে অনুমান ৩(তিন) কানি কুম (জলাশয়) ছিল। কুমটা সরকারী খাস জমিতে ছিল। ঐ কুমটি আওয়ামী লীগ সরকারের সময় মোবাইল কাদের সরকারের নিকট থেকে লীজ নিয়ে বিক্রি করে দিত। গত বছর মোবাইল কাদের লীজ নিয়ে তার চাচা আবুল হোসেনের নিকট ৩(তিন) লক্ষ টাকায় বিক্রি করে। এই কুম ও বাজারের জায়গা নিয়া মোবাইল কাদের ও মওলানা কাদের এর সাথে দীর্ঘ দিন দন্দ ছিল। কারণ বাজারের জায়গাটি মওলানা কাদেরের হলেও মোবাইল কাদের মওলানা কাদেরকে মার্কেট বানাতে বাধা দিত। আবার খাস কুমটি মওলানা কাদের নিতে চাইত। এছাড়া এলাকার আধিপত্য বিস্তার নিয়া পক্ষদ্বয়ের মধ্যে দন্দ ছিল। গত সংসদ নির্বাচনে মোবাইল কাদের আওয়ামীলীগের এম পি প্রার্থী সুকুমার রঞ্জন ঘোষের পক্ষে নির্বাচন করে এবং মওলানা কাদের বিএনপির এম পি প্রার্থী মিজানুর রহমান নিহার পক্ষে নির্বাচনী কাজ করে।

মওলানা কাদেরকে খুন করার জন্য মোবাইল কাদের, লরেস ও মিলটনের প্রস্তাবটি গ্রামে জানাজানি হয়ে যায়। টিক্কে মওলানা কাদেরকে খুন করতে অস্বীকার করে এবং মওলানা কাদেরকে তার মতিঝিল

অফিসে গেয়ে টিক্কা গোপনে ঘড়যন্ত্রের কথা ফাঁস করে দেয়। এই ঘটনার অনুমান ৩(তিন) মাস পর মাওলানা কাদেরের দুই সহযোগী (১) বেংগল, পিতা-অজ্ঞাত, দক্ষিণ পাকশা, শ্রীনগর, মুন্সিগঞ্জ ও (২) মোবারক হোসেন, পিতা-অজ্ঞাত, কাজির পাগলা লৌহজং মুন্সিগঞ্জ এর দুজনে মোবাইল কাদের লরেন্স ফ্রপের সজীবকে গুলি করে। ঢাকা পল্লু হাসপাতালে সজীবকে ভর্তি করলে আমি, লরেন্স, জাহাঙ্গীর, পিতা-অজ্ঞাত, ঢালকা নগর গেভারিয়া, ঢাকা, লিংকন, পিতা-অজ্ঞাত, ঢালকা নগর গেভারিয়া, ঢাকা এই চারজনে সজীবকে দেখতে পল্লু হাসপাতালে যাই। সজীবের অসুস্থতার কথা শুনে মাওলানা কাদেরও সজীবকে দেখতে পল্লু হাসপাতালে আসে। লরেন্স, জাহাঙ্গীর, লিংকন ও আমি মাওলানা কাদেরকে গুলি করার জন্য উদ্যত হলে সজীবের বড় ভাই রাজীব ও নারায়নগঞ্জের টিটু (সজীবের ফুফাত ভাই) বাধা দেয়। লরেন্স রাগান্বিত হয়ে রাজীবকে পল্লু হাসপাতালেই মারধর করে। এই ঘটনার ১৫ দিন পর দিনের বেলায় বেলা ১২-০০ টার দিকে কে বা কাহারো খোলাইখালে লরেন্সকে গুলি করলে লরেন্স সামান্যের জন্য বেঁচে যায়। লরেন্স এই ঘটনার জন্য মাওলানা কাদেরকে সন্দেহ করে। আমার সাথে লরেন্সের খুবই মিল ছিল। বিশেষ করে তার চেহারা আমার চেহারা প্রায় একই রকম। অনেকে সহোদর ভাই মনে করতো। লরেন্স সব ঘটনা আমাকে জানাতো। সেও আমাকে বলেছিলো যে, মাওলানা কাদের তাকে খুন করার জন্য ভাড়াটিয়া গুন্ডা ঠিক করেছে। এই ঘটনার পর লরেন্স প্রতিজ্ঞা করে যেভাবেই হউক মাওলানা কাদেরকে খুন করতে হবে এবং লরেন্স, আমি, লিংকন, ও জাহাঙ্গীর মাওলানা কাদেরকে হত্যা করার জন্য জাহাঙ্গীরের বাসা ঢালকা নগর পাঁচ ভলায় একটি রুমে বসি। তখন জাহাঙ্গীর এবং লিংকন বলে ফতুলা ভুইঘরে গ্রামে শফি ও বড়ভাই নামে দু'জন লোক আছে যাদের কাজ খুন খারাপী করা। ঐদিন সন্ধ্যা ৭-০০ টায় আমি ও লরেন্স রিক্সাযোগে জাহাঙ্গীরের বাসা থেকে লরেন্সের বাসা অভিসার সিনেমা হলের পিছনে তাকে রেখে আমি ইসলামপুরে চলে আসি। পরের দিন লিংকন জাহাঙ্গীর ও লরেন্স ফতুলা ভুইঘরে শফি ও বড়ভাই এর নিকট যায় মাওলানা কাদেরকে হত্যার ব্যাপারে আলাপ করার জন্য। তারা তিনজনে জাহাঙ্গীরের সি ডি হোভা নিয়া যায় এর পর আমি লরেন্স ও জাহাঙ্গীর ফতুলা ভুইঘরে যাই শফি ও বড়ভাই এর সাথে দেখা করার জন্য। এরপর শফি, বড়ভাই ও জাহাঙ্গীর লরেন্সের ইসলামপুর সাগর ম্যানশন অফিসে আসে দেখা করার জন্য ও মাওলানা কাদের হত্যার ব্যাপারে কথা বলার জন্য। লরেন্স শফি ও বড়ভাই-কে শার্ট ও প্যান্ট পিস কিনে দেয়। শফি ও বড়ভাই মাওলানা কাদেরকে চিনিয়ে দিতে বলে। তখন আমার জানাই ১৬-১০-২০০১ ইং তারিখে মির্জানুর রহমান সিনহা এলাকায় যাবেন। মাওলানা কাদেরও মন্ত্রীর সাথে সঙ্গ দিবেন। ঐ সময় তারা বিক্রমপুরে গেলে চিনিয়ে দিতে সুবিধা হবে। পরিকল্পনা মত ১৫-১০-২০০১ ইং তারিখে লরেন্স আমাকে মদ কেনার জন্য ১৬০০ টাকা দেয়। আমি মতিঝিল ডিম্পল বর দেখে (sic) VAT 69 একটি বোতল ক্রয় করি। ঐ দিন সন্ধ্যা ৬-০০ টার সময় মোবাইল কাদের, লরেন্স, জাহাঙ্গীর, লিংকন, বড়ভাই, শফি, শামীম, পিতা-গদুদ মুখা, মেদীনমতল গ্রাম, লৌহজং, মুন্সিগঞ্জ, খ্রিপ পিতা আবুল হোসেন, দোগাছি, শ্রীনগর, মুন্সিগঞ্জ বাবু (খ্রিপের ছোট ভাই) এবং আমি মোবাইল

কাদেরের হাই লার্জ Jeep এ করে ঢাকা ত্যাগ করি। আমরা অনুমান ৭-০০ টার সময় মোবাইল কাদেরের ধামের বাড়ী পৌছাই। খ্রিঃ ও বাবু বাদে আমরা সবাই লরেলদের বাড়ীতে ছিলাম। আমরা সবাই লরেলদের পূর্বের ভিটা টিন শেড বাসায় রাত্রি যাপন করি। মদ খাই। আনন্দ কুর্তি করি। গভীর রাত্রে আমরা (লরেল, বড়ভাই, শফি, লিংকন, জাহাঙ্গীর ও আমি) মাওলানা কাদেরকে হত্যা করার ব্যাপারে পরিকল্পনা করি। পরদিন ১৬-১০-২০০১ ইং সকাল ৭-৩০ টার সময় মিজানুর রহমান সিনহা শিল্পমন্ত্রী লরেলদের বাড়ির সামনে (পূর্ব নির্ধারিত মিটিং) মিটিং করে। আমরা তাড়াহুড়া করে ছুম থেকে উঠে মিটিং এ যাই। মহীর পার্শ্ব মাওলানা কাদেরকে বসা দেখি। শফি, লিংকন, জাহাঙ্গীর ও বড়ভাইকে লরেল দূর থেকে মাওলানা কাদেরকে চিনিয়ে দেয়। এর পর ঐ দিন ঢাকায় আসার আগে লরেল একটি ২২ বোর পিস্তল এবং একটি 7.65 পিস্তল নিয়া বেলা ১১-০০ টার দিকে দেশ থেকে ঢাকার উদ্দেশ্যে রওনা হয়। বেলা অনুমান ১২-০০ টার দিকে আমরা ইসলামপুর আসি। আমি আমার অফিসে যাই। লরেল বাকীদেরকে নিয়ে সাগর ম্যানসন, ইসলামপুরে যায়। আমি আধা ঘন্টা পর লরেলদের অফিসে যাই। খ্রিঃকে জিজ্ঞাসা করি লরেল কোথায়। খ্রিঃ বলে লরেল ডাই, লিংকন, জাহাঙ্গীর, শফি ও বড়ভাইকে নিয়া মতিঝিল ডিম্পল বায়ে (sic) যাই। সেখানে শফি, বড়ভাই, লিংকন ও জাহাঙ্গীর আসে। আমরা সবাই মদ্যপান করি এবং মাওলানা কাদেরকে হত্যার ব্যাপারে লরেল আমাদের

instruction দেয়। লরেল একটি পিস্তল লিংকনকে ও একটি পিস্তল শফিকে দেয়। রাত্রি ১০-০০ টার দিকে বাসায় যায়। আমি ও লরেল অভিসারের পিছনে লরেলের বাসায় যাই এবং আমি লরেলের বাসায় রাত্রিতে অবস্থান করি। পর দিন ১৭-১০-২০০১ ইং তারিখে সকাল ১০-০০ টার সময় লিংকন লরেলের বাসায় আসে। লরেল জিজ্ঞাসা করে জাহাঙ্গীর, শফি ও বড়ভাই কোথায়? লিংকন বলে ওরা বেবী রিজার্ভ করে মাওলানা কাদেরের অফিসের সামনে আছে। আমি, লিংকন ও লরেল একসাথে বাসা থেকে বের হই। অভিসার সিনেমা হলের সামনে আসলে লরেলের মোবাইল যার নং-০১৮২২৬৪৭২ লিংকনকে দেয় এবং ৫০০ টাকা সাথে দেয়। উল্লেখ্য যে, আমি এবং লরেল হত্যাকাণ্ডের সময় মতিঝিল মাওলানা কাদেরের অফিসের নিকট ছিলাম না। আমরা ইসলামপুর চলে আসি। কারণ আমরা একই এলাকায় বিধায় আমাদেরকে চিনে ফেলবে। লরেল ও আমি ইসলামপুর চলে আসি। ইসলামপুর চায়না মার্কেটে এসে লরেল ইউনুসের মোবাইল নেয় এবং মোবাইলে কিছুক্ষণ পর পর লিংকনের সাথে যোগাযোগ করতে থাকে। বেলা অনুমান ৩-০০/৩-৩০ টার দিকে লরেল লিংকনের সাথে মোবাইলে কথা বলে। “কাজটা কনফার্ম হয়েছে কিনা”। ওপার থেকে লিংকন জানায় কাজটা পরিকল্পনামত success হয়েছে। লরেল বলে “আমি এখন বিক্রমপুরের রাজা” এই বলে আমার ও শামীমের সাথে কোলাকুলি করে সাথে সাথে লরেল তার বড় ভাই মোবাইল কাদেরকে বলে “কাজটা পরিকল্পনামত মাওলানা কাদেরকে হত্যা করা হয়েছে!” এর পর লরেল ক্যাশ থেকে ৫০০ টাকার দুটা বাউন্স নেয় এবং আমাকে বলে “শাখারী

বাজার মোড়ে লিংকন এবং জাহাঙ্গীর দাঁড়িয়ে আছে। তুই যা'। আমি শাখারী বাজার মোড়ে এসে লিংকন ও জাহাঙ্গীরকে মটর সাইকেল নিয়ে দাঁড়িয়ে থাকতে দেখি। জাহাঙ্গীর আমাকে জানায় কাজটা আমাদের পরিকল্পনামত হয়েছে। লিংকন ও মাওলানা কাদেরের অফিসে ঢুকে প্রথম স্থলি লিংকন ও মাওলানা কাদেরকে করেছে মর্মে আমাকে জানায়; এর পর লরেন্স শাখারী বাজার মোড়ে আসে এবং বলে "বাজারে ঘর আর উঠবে না"। এরপর লরেন্স, লিংকন ও জাহাঙ্গীর হত্যায় করে চলে যায়। আমাকে বলে আধা ঘন্টা পর আমার মোবাইলে রিং করিস। আমি লরেন্সকে আধা ঘন্টা পর মোবাইলে ফোন করে পাইনি। উল্লেখ্য যে, জাহাঙ্গীর বাসায় লরেন্স জাহাঙ্গীর ও লিংকনের সাথে এই মর্মে মৌখিকভাবে চুক্তি করেছিল যে, মাওলানা কাদেরকে হত্যার জন্য সে ৪(চার) লক্ষ টাকা দিবে। ঐ টাকা লরেন্স দিয়েছে কিনা জানি না। এই হত্যাকাণ্ডের সাথে আরও কারা পর্দার অন্তরালে জড়িত রয়েছে তা লরেন্স বলতে পারবে। মাওলানা কাদের হত্যার মামলার অন্যতম আসামী মোবাইল কাদের সম্ভবত ৫-১২-২০০১ ইং তারিখে জামিনে ছাড়া পাবার পর (২১ রোজার দিন) আমাকে সে দেশে যাইতে বললে আমি ৭-১২-২০০১ ইং বুধবার দেশে যাই। শ্রীনগর থানাধীন একটি মামলায় পুলিশ আমাকে শ্রেফতার করে। পরে মতিবিল থানায় মাওলানা কাদের হত্যা মামলায় আমাকে এ্যারেস্ট করে। আমি যখন মুন্সিগঞ্জ জেলাখানায় তখন এই ঈদের একদিন আগে মোবাইল কাদের আমার সাথে জেলখানায় দেখা করতে যায়। আমাকে সে বলে পুলিশ রিমান্ডে নিলে মাওলানা কাদের হত্যার পরিকল্পনার ব্যাপারে বা হত্যার ব্যাপারে কোন কিছু বলবি না। ম্যাজিস্ট্রেটের সামনে এসে অসুস্থতার জান করবি। আমি বিবাহিত। ১৯৯৭ সালে চাকুরী পাবার পর বিয়ে করেছি। বাচ্চা হয়নি। আমি ফমা চাই। আমি অনুতপ্ত।"

88. Accused-Bazlu in his confessional statement has stated that he was an employee of accused-Mobile Quader in between the last part of 1995 and the last part of 1996 and worked in Ideal Textile Mills Limited owned by him. After the Mills had been closed at the last part of 1999 due to the default in paying the loan of Islami Bank Limited, the accused along with one Babu of Dugachhi village used to stay with Mobile Quader as his bodyguards. Mobile Quader was a terrorist and he had good relationship with top terrors in Dhaka. Lawrence, the younger brother of Mobile Quader was his class friend and close friend as well. 7/8 months (Bazlu made the statements on 29-12-2001) before Milton of East Shampur of Police Station-Sreenagar, District-Dhaka brought top terror Tikka of Dhaka at Dugachhi Bazar and introduced him to Mobile Quader and Lawrence and they told Tikka to kill deceased-Moulana Abdul Quader. It has further been stated that deceased-Moulana Abdul Quader had long rivalry over two matters with Mobile Quader, one: 3 (three) kathas valuable land at Dugachhi Bazar situated by the side of the road fit for establishing a market, Mobile Quader and Lawrence had craved for the land. Moulana Abdul Quader could not establish the market on the land though he attempted to do the same because of the resistance by Mobile Quader. The other over the 'Kum' (জলাশয়) beneath the bridge adjacent to Dugachhi Bazar, the Kum was on the Government Khas land. During the Awami League Government, Mobile Quader used to sell the same after taking lease and in the last year, Mobile Quader sold out the Kum to his uncle Abul Kashem at Taka 3,00,000 after taking lease. Besides the above two matters, there was also rivalry over establishment of supremacy in the locality. In the last Parliament Election, Mobile Quader canvassed for Awami League nominee-Sukumar Ranjan Gosh, whereas Moulana Abdul Quader canvassed for BNP nominee-Mizanur Rahman Sinha. As the proposal of Mobile Quader, Lawrence and Milton to kill Moulana Abdul Quader, became known to the villagers, Tikka refused to kill Moulana Abdul Quader and he disclosed the fact of said secret conspiracy to kill him at his office at

Motijheel. After 3 (three) months from the date of the said occurrence, two companions of Moulana Abdul Quader shot Shajib, a man of Mobile Quader, Lawrence group. Shajib was admitted to Dhaka Pangu Hospital. Bazlu, Lawrence, Jahangir of Dhaka Nagar and Lincon had gone to Pangu Hospital to see Shajib. Hearing the news of illness of Shajib, Moulana Abdul Quader also went to Hospital. In the Hospital, when Bazlu, Jahangir, Lawrence and Lincon attempted to shoot Moulana Abdul Quader, Rajib, elder brother of Shajib and Titu of Narayanganj (cousin of Shajib) resisted. After 15 (fifteen) days of the said occurrence, at 12-00 noon, some one shot Lawrence at Dhulaikhal, but Lawrence survived. Lawrence suspected Moulana Abdul Quader behind the occurrence. After the said incident, Lawrence made a promise that anyhow Moulana Abdul Quader had to be killed; Bazlu, Lawrence, Lincon and Jahangir sat at the residence of Jahangir at Dhaka Nagar at a 5 storied building to kill Moulana Abdul Quader. Jahangir and Lincon told that there were two professional Killers named Shafi and Baro Bhai at Bhuighor, Fatullah. On the next day, Lincon, Jahangir and Lawrence went to Shafi and Baro Bhai at Bhuighar, Fatullah and discussed with them about the killing of Moulana Abdul Quader. Subsequently, Shafi, Baro Bhai and Jahangir came to the office of Lawrence at Sagar Mansion, Islampur to talk about the killing of Moulana Abdul Quader. Shafi and Baro Bhai told Lawrence to identify Moulana Abdul Quader to them, then they informed them that on 16-10-2001, Minister, Mizanur Rahman Sinha would go to that area and Moulana Abdul Quader would accompany him and if they go to Bikrampur, it would be easy for them to identify him to them. Accordingly, as per the plan, on 15-10-2001 at 6-00 PM, Mobile Quader, Lawrence, Jahangir, Lincon, Baro Bhai, Shafi, Shamim, Babu and Bazlu left Dhaka by the High Lux Jeep of Mobile Quader and reached the house of Mobile Quader at about 7-00 PM and stayed there in the night, and in the dead of night, they (Lawrence, Baro Bhai, Shafi, Lincon, Jahangir and Bazlu) planned to kill Moulana Abdul Quader. On the next day, i.e. on 16-10-2001 at 7-30 AM Minister Mizanur Rahman Sinha held a meeting in front of the house of Lawrence. Lawrence identified Moulana Abdul Quader who was sitting by the side of the Minister to Shafi, Lincon, Jahangir and Baro Bhai from a distance. On that very day, at about 11-00 AM, Lawrence started for Dhaka with two pistols and reached Islampur at 12-00 noon and then Bazlu went to his office and Lawrence went to Sagar Mansion at Islampur with others. On that date, Lawrence, Lincon, Jahangir went to Motijheel with Shafi and Baro Bhai and showed the office of Moulana Abdul Quader. At about 8-00 PM, Bazlu and Lawrence went to Dimpol Bar, Shafi, Baro Bhai, Lincon and Jahangir also came there and they all took wine and Lawrence gave them instructions for the killing of Moulana Abdul Quader. Lawrence gave one pistol to Lincon and another to Shafi and then they went to their respective residence at 10 P.M. Eventually, Moulana Abdul Quader was killed on 17-10-2001 by bullet shoot and it is Lincon who shot first. From the statement of Bazlu, it further appears that Lawrence monitored the entire killing operation and he at 3-00/3-30 PM over telephone ascertained from Lincon that the killing was done as per the plan. And immediately, thereafter, Lawrence telephoned his elder brother-Mobile Quader and told him that the job was done as per the plan (the exact language used in the statement is “সাথে সাথে লরেন্স তার বড় ভাই মোবাইল কাদেরকে বলে কাজটা পরিকল্পনামত মাওলানা কাদেরকে হত্যা করা হয়েছে।” Bazlu has further stated in his statement that while he was in Munshiganj Jail, one day before Eid, Mobile Quader met him in Jail and told him not to tell anything to the Police about the plan to kill Moulana Abdul Quader or about the killing of Moulana Abdul Quader, if he was taken on Police remand. He (Mobile Quader) further told him pretending to illness.

89. Both the Tribunal and the High Court Division found the confessional statement of accused-Bazlu true and voluntary and inculpatory. We have also perused the confessional statement and the deposition of PW 12 who recorded the same. We do not find any reason to take a different view about the confessional statement of accused-Bazlu. From the confessional statement of Bazlu as summarized hereinbefore, it prima

facie appears to us that accused-Mobile Quader had rivalry with deceased-Moulana Abdul Quader over 3 (three) matters, namely, land at Dugachhi Bazar, Kum near the Bazar and the supremacy in the locality and had also clear complicity with the killing of deceased-Moulana Abdul Quader with his brother-Lawrence and the other co-accused including the confessing accused, Bazlu. The confessional statement of Bazlu further reveals that previously accused-Mobile Quader and his brother-Lawrence also tried to kill deceased-Moulana Abdul Quader by hiring a top terror of Dhaka named Tikka through one Milton of East Sham spur.

90. The 3 (three) accused along with others were charged under sections 120B/302/307/34 of the Penal Code. The Tribunal found Mobile Quader guilty under sections 302/120B/34 of the Penal Code and accused-Ataur Rahman and Abdur Razzaque Khan @ Thandu Member guilty under sections 302/120B thereof. The High Court Division acquitted Mobile Quader and Abdur Razzaque Khan @ Thandu Member and maintained the order of conviction and sentence passed against Ataur Rahman. Section 120B of the Penal Code has provided punishment for criminal conspiracy, but criminal conspiracy has been defined in section 120A thereof. A reading of section 120A of the Penal Code shows that in order to constitute criminal conspiracy, the elements to be present are (a) an agreement between two or more persons (b) to do an illegal act or (c) to do a legal act by illegal means or (d) an overt act done pursuant to the conspiracy. So, we are to see whether the evidence of PWs 2, 3 and 4 proved the charge of criminal conspiracy against the 3 (three) accused beyond reasonable doubt.

91. PWs 2 and 4 were not parties to the alleged criminal conspiracy dated 5-10-2001 to kill deceased-Moulana Abdul Quader and none of the alleged conspirators including the 3 (three) accused before us said anything to them. PWs 2 and 4 claimed about their knowledge to do big harm to deceased-Moulana Abdul Quader through their presence during the discussions held on 5-10-2001 in the East bhiti tin shed room in house of accused-Mobile Quader and they disclosed those to the Police after the killing of deceased-Moulana Abdul Quader, i.e. after the execution of the alleged criminal conspiracy. PWs 2 and 4 mentioned the name of accused-Abdur Razzaque Khan @ Thandu Member and Ataur Rahman along with accused-Mobile Quader and the other accused, namely, Shamim, Lawrence, Iqbal and Sentu who were present in the said meeting and took part in the discussion, but PW 2 did not, at all, mention the names of accused-Abdur Razzaque Khan @ Thandu Member and Ataur Rahman in the subsequent events which took place on 15-10-2001 and 16-10-2001 on which dates, in fact, the plan to kill deceased-Moulana Abdul Quader through the identification of the deceased to the hired killers was given a halfway gait. It may be stated that on both the occasions as stated by PW 2, confessing accused-Bazlu was very much present along with accused-Mobile Quader, Lawrence, Shamim, Prince, Babu, Jahangir and the 3 (three) other unknown persons. Besides, PWs 1, 3, 6-8, 10 and 13 did not say a word about any enmity and any sort of rivalry or discord between deceased-Moulana Abdul Quader and accused-Abdur Razzaque Khan @ Thandu Member and Ataur Rahman. Except the evidence of PWs 2 and 4 as to the presence of accused-Ataur Rahman and accused-Abdur Razzaque Khan @ Thandu Member in the meeting held on 5-10-2001 in the East bhiti tin shed room in the house of accused-Mobile Quader and their participation in the discussion to do a big harm to Moulana Abdul Quader, there is no iota evidence to show any association or collaboration with accused-Mobile Quader, his brother-Lawrence or any other accused or any link with them or any further act on their part to chalk out any plan or any sort of agreement with accused-Mobile Quader or with the other accused to kill deceased-Moulana Abdul Quader as a follow up pursuant to the decision taken on 5-10-2001 to do big harm to deceased-Moulana Abdul Quader, not to speak of any overt act by them in that regard to constitute the offence of criminal conspiracy within the

meaning of section 120A of the Penal Code. Moreso, mere discussion in the meeting held on 5-10-2001 amongst the accused present there to do big harm to deceased-Moulana Abdul Quader as stated by PWs 2 and 4 cannot be construed as an agreement to do, or cause to be done, an illegal act, here the killing of deceased-Moulana Abdul Quader to term the same as a criminal conspiracy within the meaning of section 120A of the Code. So we find it difficult to connect the said two accused with the criminal conspiracy to kill Moulana Abdul Quader as alleged by the prosecution and thus to find them guilty under sections 302/120B of the Penal Code. But accused-Mobile Quader stands on a different footing. In the FIR, the informant specifically mentioned about “কটন বিরোধ” with accused-Mobile Quader, his brother-Lawrence and deceased-Moulana Abdul Quader over the ownership of Mamar Bazar of Dugachhi.

92. Now the question comes as to whether confessing accused Bazlu can be figured as a co-conspirator in the alleged criminal conspiracy to kill deceased-Moulana Abdul Quader and so to use his confessional statement against Mobile Quader under section 10 of the Evidence Act. Admittedly, PWs 2 and 4 did not say that Bazlu was present in the meeting held on 5-10-2001 in the East Bhati Tin shed room in the house of accused-Mobile Quader where, as per the case of the prosecution criminal conspiracy to kill deceased-Moulana Abdul Quader was hatched up. Rather PW 2 in his cross-examination categorically stated that in the sitting in which the alleged criminal conspiracy of killing deceased-Moulana Abdul Quader was taken as testified by him, Bazlu was not present and he did not also inform Bazlu about such conspiracy. PW 2 further stated that he had no talk with Bazlu about the criminal conspiracy of killing deceased-Moulana Abdul Quader. Bazlu in his confessional statement did not also say a word about the criminal conspiracy of killing deceased-Moulana Abdul Quader that was allegedly hatched up on 5-10-2001. As per the testimony of PW 2, Bazlu came in the picture only on 15-10-2001, when he along with accused-Mobile Quader and the other accused went to the village home of Mobile Quader. A critical examination of the testimonies of PWs 2 and 4 and PWs 1, 3, 6-8, 10 and 13 and the confessional statement of accused-Bazlu, appears to us that it is accused-Mobile Quader and his brother-Lawrence who, in fact, joined hands together and abetted each other in planning to kill deceased-Moulana Abdul Quader because of rivalry between them over Dugachhi Bazar, Kum and the Chairmanship of the Managing Committee of Kazir Pagla High School and eventually got him killed through hired killers and Bazlu also abetted them in that respect as accused-Mobile Quader was his former employer and Lawrence his friend. In such context, accused-Bazlu cannot be figured as a co-conspirator within the meaning of 120A of the Penal Code. Further it is also a fact that Bazlu made the confessional statement after his arrest and that too after the alleged criminal conspiracy culminated with the killing of deceased-Moulana Abdul Quader. So, the confessional statement of accused-Bazlu cannot be used as evidence against Mobile Quader under section 10 of the Evidence Act.

93. At the risk of repetition, if, we analyse the testimonies of PW 2, we find the 3 (three) separate events (a) the holding of meeting on 5-10-2001 in the East bhati tin shed room in the house of accused-Mobile Quader where discussion was made to do big harm to deceased-Moulana Abdul Quader (b) coming of accused-Mobile Quader on 15-10-2001 at 7-30 PM to his village home in his Jeep along with accused-Lawrence, Shamim, Bazlu (the confessing accused) prince, Babu, Jahangir, a friend of Lawrence and the 3 (three) unknown persons and (c) the attendance of the meeting venue of Minister Mizanur Rahman Sinha by accused-Lawrence, Shamim, Bazlu, Jahangir, friend of Lawrence and the 3 (three) unknown persons and talking together by the side of the dais of the meeting on 16-10-2001. And of these 3 (three) events, accused-Bazlu in his confessional statement clearly and specifically stated about the two events, i.e. dated 15-10-2001 and 16-10-2001 adding that he along with the other accused including

accused-Mobile Quader had gone to his village home in his Jeep along with the hired killers-Shafi and Jane Alam @ Baro Bhai just to identify deceased-Moulana Abdul Quader, they stayed in the night in the house of accused-Mobile Quader and in the dead of night, they planned to kill Moulana Abdul Quader and on 16-10-2001 at 7-30 AM, Lawrence identified Moulana Abdul Quader to Shafi, Lincon, Jahangir and Baro Bhai. PW 2 stated in his testimonies that in the meeting of Mizanur Rahman Sinha, deceased-Moulana Abdul Quader seated in the dais by his side.

94. Now another pertinent legal question arises as to whether, in the facts and circumstances of the case and the state of evidence as discussed above, the confessional statement of accused-Bazlu can at all be considered and used against accused-Mobile Quader as evidence under any other section of the Evidence Act to link him with the killing of deceased-Moulana Abdul Quader on 17-10-2001, and if so to find him guilty under what offence of the Penal Code. We can readily refer to section 30 of the Evidence Act. The section has clearly provided that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other of such persons as well as against the person who makes such confession. According to the explanation added to the section "offence" as used therein includes the abetment of, or attempt to commit, the offence. The confessional statement of accused-Bazlu was proved by PW 12, the Magistrate, First Class and the same was marked as exhibit-'5' It is by now well settled that confession of a co-accused is a very weak type of evidence, as it does not come within the definition of "evidence" vide section 3 of the Evidence Act; confession of a co-accused cannot be treated as substantive evidence against the other person to find him guilty of the offence charged with and it would require other evidence whether direct or circumstantial linking such a person with the crime, before a confession made by a co-accused can be adverted to in adjudging the guilt of that person. And, on the point, we may refer the cases of Bhuboni Sahu vs. The King, 2 DLR, Privy Council, 39 and Maqbool Hussain vs. State 12 DLR (SC) 217. Their Lordships of the Privy Council considering section 30 of the Evidence Act held:

"Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed, come within the definition of "evidence" contained in section 3, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of these infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, make it evidence on which the Court may act; but the section does not say that confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of conviction, is correct." In the case of Maqbool Hussain, Pakistan Supreme Court, while considering the legality of the order of conviction and sentence passed against him on the basis of statements of two co-accused before the Tahsildar, held:

"We next take up consideration of the question whether section 30 of the Evidence Act could not be called in aid of the prosecution in support of the appellant's conviction. Assuming that statements of a confessional nature were made by the co-accused of the appellant, to the Tahsildar, affecting themselves and the appellant, section 30 of the Evidence Act merely provides that the Court "may take into consideration" such confessions as against the appellant, as well as against their makers. The language of the section is very guarded and lends no warrant to the inference that such a statement made by a co-accused could be treated as substantive evidence against the other person, sufficient to sustain his conviction. It is well settled that there ought to be other evidence, whether direct or circumstantial, linking such a person with the crime, before a confession made by a co-accused could be adverted to, in adjudging the guilt of that person."

95. From the testimonies of PWs 2 and 4 discussed above, we have found that accused-Mobile Quader was very much present in the meeting dated 5-10-2001 held in his East bhiti tin shed room in his house where discussions were made in presence of other accused about doing big harm to deceased-Moulana Abdul Quader and in the subsequent event which took place on 15-10-2001 as stated by PW 2. The very fact of coming of accused-Mobile Quader to his village home on 15-10-2001 at 7-30 PM in the same Jeep with his brother, accused-Lawrence and the other accused including the confessing-Bazlu as stated by PW 2 is a substantive evidence to link him with the killing of deceased-Moulana Abdul Quader. In view of the other evidence against accused-Mobile Quader, as discussed above, we can very much consider and use the confessional statement of co-accused Bazlu within the meaning of section 30 of the Evidence Act with the other evidence adduced in the case in seeing his link or connection with the killing of deceased-Moulana Abdul Quader.

96. The evidence of PWs 1, 3, 6-8, 10 and 13 as discussed hereinbefore, also prima facie proved that there was rivalry between deceased-Moulana Abdul Quader and accused-Mobile Quader and his brother-Lawrence over Mamar Bazar at Dugachhi, Kum beneath the bridge near Mamar Bazar and the chairmanship of the Managing Committee of Kazir Pagla High School and that unerringly proved the motive behind the killing of Moulana Abdul Quader and that is a very strong circumstance also to infer as to the involvement of accused-Mobile Quader with the killing of deceased-Moulana Abdul Quader.

97. To consider the circumstantial evidence in a charge of murder against an accused, motive is a very important element. In the instant case, the motive behind the killing of Moulana Abdul Quader by accused-Mobile Quader in league with his brother, accused-Lawrence and the other accused as it appears to us unhesitatingly was to get rid of him so that he (the accused-Mobile Quader) could establish his full control over Mamar Bazar at Dugachhi, gets lease of the Kum near the Bazar and then dispose of the same as he likes without any hindrance and can perpetuate on the chairmanship of the Managing Committee of Kazir Pagla High School and to establish his supremacy in the locality. It may be recalled that in the confessional statement of Bazlu, he also clearly stated about the existence of rivalry between deceased-Moulana Abdul Quader and accused-Mobile Quader over 3 (three) kathas of land at Dugachhi Bazar and a Kum beneath the bridge near Dugachhi Bazar and also over establishment of supremacy in the locality. The link of accused-Mobile Quader with the killing of Moulana Abdul Quader by his brother accused-Lawrence and the other accused including the hired ones can also be prima facie traced from the confessional statement of Bazlu to the effect

“সাথে সাথে লরেল তার বড় মোবাইল কাদেরকে বলে কাজটা পরিকল্পনামত মাওলানা কাদেরকে হত্যা করা হয়েছে।” It may further be stated that as per the statement of Bazlu, on 15-10-2001, the two professional killers-Shafi and Jane Alam @ Baro Bhai and the other accused-Lawrence, Jahangir, Lincon, Shamim, Prince and Babu along with Mobile Quader went to his village home in his High Lux Jeep and stayed there in the night and in the dead of night, they planned to kill deceased-Moulana Abdul Quader. Had accused-Mobile Quader no link with the killing of deceased-Moulana Abdul Quader, then why he accompanied them to his village home in the same Jeep and again why just after the killing of deceased-Moulana Abdul Quader, Lawrence should give a phone call to his brother, accused-Mobile Quader saying “কাজটা পরিকল্পনা মত মাওলানা কাদেরকে হত্যা করা হয়েছে।” and why accused-Mobile Quader met accused-Bazlu in Jail hayat at Munshiganj one day before Eid and asked him not to divulge anything about the plan to kill Moulana Abdul Quader or the killing as stated by Bazlu. The statement of accused-Bazlu that 7/8 months before accused-Mobile Quader and Lawrence hired one Tikka, a top terror of Dhaka through Milton of Shamsnagor to kill Moulana Abdul Quader is clearly in line with the testimonies of PWs 7 and 8 who testified exactly to the same effect and this particular fact pointedly figure at me involvement of accused-Mobile Quader with the killing of Moulana Abdul Quader.

98. A careful consideration and sifting of the evidence of PWs 2, 3 and 4, the circumstantial evidence as emerged from the testimonies of PWs 1, 3, 6-8, 10 and 13 as to the rivalry between deceased-Moulana Abdul Quader and accused-Mobile Quader and his brother-Lawrence as discussed hereinbefore, and the confessional statement of co-accused, Bazlu, we find that accused-Mobile Quader was the mastermind and was very much involved with the process of planning to kill deceased-Moulana Abdul Quader, he instigated, abetted and aided accused-Lawrence and the other accused to chalk out the plan to kill Moulana Abdul Quader by the hired killers within the meaning of section 107 of the Penal Code and eventually got the plan executed by killing him at the place, on the date, time and in the manner as alleged by the prosecution and thus committed the offence punishable under sections 302/109 of the Penal Code and therefore, he is liable to be convicted and sentenced under the said sections of the Penal Code.

99. Though accused-Mobile Quader was not charged under sections 302/109 of the Penal Code, in view of the provisions of section 535 of the Code, we do not find any legal difficulty in finding him guilty under the said sections and convicting and sentencing him thereunder as there are abundance of evidence against him to warrant the conviction under the said sections. Moreso, we do not see any prejudice to be caused to accused-Mobile Quader for non framing of charges against him under sections 302/109 of the Penal Code by the Tribunal as he got all the opportunities to defend him by cross-examining the prosecution witnesses.

100. As found earlier, so far as accused-Ataur Rahman and Abdur Razzaque Khan @ Thandu Member are concerned, there is no iota of evidence against them direct and circumstantial except their presence in the meeting held on 5-10-2001 and participation in the discussion along with the other accused including accused-Mobile Quader to do big harm to deceased-Moulana Abdul Quader to link or connect them with the killing of deceased-Moulana Abdul Quader. The names of these two accused were also neither mentioned in the FIR nor in the confessional statement of accused-Bazlu. In other words, the prosecution failed to prove that they were parties to or in any way connected with the killing of deceased-Moulana Abdul Quader along with the other accused. Therefore, they are entitled to be acquitted of the charges brought against them under sections 302/120B of the Penal Code. Consequently, the order of conviction and sentence passed against Ataur Rahman by the Tribunal and as affirmed by the High Court Division cannot be sustained and the same is liable to be set aside. For the same

reason, the question of interference with the judgment and order of the High Court Division acquitting Abdur Razzaque Khan @ Thandu Member does not also arise at all.

101. In the result, Criminal Appeal No. 22 of 2010 is allowed. The judgment and order passed by the High Court Division acquitting accused-Abdul Quader @ Mobile Quader altogether is set aside. And he is found guilty under sections 302/109 of the Penal Code and sentenced to suffer imprisonment for life and to pay a fine of Taka 1,00,000 (one lakh) in default to suffer rigorous imprisonment for 6 (six) months more.

102. Criminal Appeal No. 23 of 2010 is dismissed. The order of acquittal passed by the High Court Division in respect of respondent-Abdur Razzaque Khan @ Thandu Member is maintained.

103. Criminal Appeal No. 24 of 2010 is allowed. The order of conviction and sentence passed by Druta Bichar Tribunal No. 1, Dhaka in Druta Bichar Case No. 23 of 2003 finding Ataur Rahman guilty under sections 302/120B of the Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Taka 20,000'00 in default to suffer rigorous imprisonment for 1 (one) year more as affirmed by the High Court Division in Criminal Appeal No. 318 of 2004 is set aside. Appellant, Ataur Rahman is acquitted of the charges brought against him under sections 302/120B of the Penal Code and he be released from Jail at once, if not wanted, in connection with any other case.

Hasan Foez Siddique, J.

104. I have gone through the judgments proposed to be delivered by my brothers, Surendra Kumar Sinha, J. and Md. Abdul Wahhab Miah, J. I agree with the reasoning and findings given by Md. Abdul Wahhab Miah J.

Court's Order

105. Criminal Appeal No. 22 of 2010 is allowed. The judgment and order passed by the High Court Division acquitting accused-Abdul Quader @ Mobile Quader altogether is set aside. And he is found guilty under sections 302/109 of the Penal Code and sentenced to suffer imprisonment for life and to pay a fine of Taka 1,00,000 (one lakh) in default to suffer rigorous imprisonment for 6 (six) months more.

106. Criminal Appeal No. 23 of 2010 is dismissed. The order of acquittal passed by the High Court Division in respect of respondent-Abdur Razzaque Khan @ Thandu Member is maintained. Criminal Appeal No. 24 of 2010 is allowed. The order of conviction and sentence passed by Druta Bichar Tribunal No. 1, Dhaka in Druta Bichar Case No. 23 of 2003 finding Ataur Rahman guilty under sections 302/120B of the Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Taka 20,000'00 in default to suffer rigorous imprisonment for I (one) year more as affirmed by the High Court Division in Criminal Appeal No. 318 of 2004 is set aside. Appellant, Ataur Rahman is acquitted of the charges brought against him under sections 302/120B of the Penal Code and he be released from Jail at once, if not wanted, in connection with any other case.

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