

IN THE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)

Present:

Mr. Justice Md. Tafazzul Islam
Mr. Justice Md. Abdul Aziz
Mr. Justice B. K. Das
Mr. Justice Md. Muzammel Hossain
Mr. Justice S. K. Sinha.

CRIMINAL APPEAL NOS.55-59 OF 2007 WITH
JAIL APPEAL NO. 02 of 2007 WITH
CRIMINAL MISC. PETITION NO.08 OF 2001 WITH
CRIMINAL REVIEW PETITION NO.03 OF 2000.

Major Md. Bazlul Huda (Artillary) Appellant (In CrI.A.No.55/07,
CrI.M.P.No.08/01 and
CrI.R.P.No.03/00

Lieutenant Colonel Syed Faruque Rahman
Appellant (In CrI.A.No.56/07)

Lieutenant Colonel Sultan Shariar
Rashid Khan (Retd) Appellant (In CrI.A.No.57/07)

Lieutenant Colonel (Retd) Mohiuddin
Ahmed (2nd Artillery) Appellant (In CrI. A.No.58/07)

Major (Retd) AKM Mohiuddin
Ahmed (Retd) Appellant (In CrI. A.No.59/07
and Jail A. No.02/07)

-Versus-

The State

Respondent (In all the Cases)

<u>For the Appellant:</u> (In Cr.L.No.55/07)	Mr.Abdullah-Al-Mamun, Advocate, instructed by Mr.Md. Nurul Islam Bhuiyan, Advocate-on-Record.
<u>For the Appellant:</u> (In Cr. A.No.56/07)	Mr. Khan Saifur Rahman, Senior Advocate, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
<u>For the Appellant:</u> (In Cr. A.No.57/07)	Mr. Abdur Razzaque Khan, Senior Advocate, instructed by Mr. Md. Nawab Ali, Advocate-on-Record.
<u>For the Appellant:</u> (In Cr. A.No.58/07)	Mr. Khan Saifur Rahman, Senior Advocate, instructed by Mr. Md. Nawab Ali, Advocate-on-Record.
<u>For the Appellant:</u> (In Cr. A.No.59/07)	Mr. Abdullah-Al-Mamun, Advocate, instructed by Mr. Md. Nawab Ali, Advocate-on-Record.
<u>For the Petitioner:</u> (In Jail A.No.02/07)	Mr. Khan Saifur Rahman, Senior Advocate, (with Mr. Abdullah-Al-Mamun, Advocate) instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
<u>For the Petitioner:</u> (In Cr. M.P.No.08/01)	Mr. Abdullah-Al-Mamun, Advocate, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
<u>For the Petitioner:</u> (In Cr. R.P.No.03/00)	Mr. Abdullah-Al-Mamun, Advocate, instructed by Mr. Nurul Islam Bhuiyan, Advocate-on-Record.
<u>For the Respondent:</u> (In all the cases)	Mr.Mahbubey Alam, Attorney General, Mr.A.K.M.Zahirul Hoque, Addl. A.G. Mr. A.S.Md. Abdul Mobin, D.A.G. Mr. Md. Motaher Hossain Sami, D.A.G. Ms.Mahfaza Begum, A.A.G. Mr. Sarder Md. Rashed Jahangir, A.A.G. Mr. Md. Ekramul Hoque, A.A.G. Mr. A.B.M. Altaf Hossain A.A.G. Mr. Khandaker Dilrussarwan, A.A.G.

Ms. Fazlaturrasa Bappy, A.A.G. (Above Addl. A.G., D.A.G and A.A. Generals with him) instructed by Mrs. Sufia Khan, Advocate-on-Record.

Mr. Anisul Haq, Advocate, (Govt. Chief Prosecutor)

Mr. Mosharrap Hossain Kajoil,

Mr. Abdul Matin Khasru, Advocate,)

Mr. Nural Islam Sujon, Advocate,

Mr. Sheikh Fazlay Nur Rapash, Advocate

Mrs. Toufiqa Karim,

Mr. Mointaj Uddin Mebedi,

Mr. Anamul Kabir Emon,

Mr. Intiaz Uddin Asif, (Govt. Prosecutors with him).

Mr. Ajmalul Hossain Q.C. Senior Advocate. (Govt. Prosecutor.)

Mr. Tawfiq Nawaz, Senior Advocate, (Govt. Prosecutor).

Mr. Mohammad Mohsen Rashid, Advocate, (Govt. Prosecutor with him).

Mr. A.F.M. Mosbahuddin, Senior Advocate. (Govt. Prosecutor).

Mr. Yousuf Hossain Humayun, (Govt. Prosecutor).

Mr. Md. Abu Zafar Siddiqi, (Govt. Prosecutor).

Mr. Zahangir Hossain Selim, (Govt. Prosecutor).

Mr. S.M. Rezaul Karim, (Govt. Prosecutor).

Mr. Rabiul Alam Bada, (Govt. Prosecutor).

Date of hearing : 05.10.2009, 06.10.2009, 07.10.2009,
08.10.2009, 11.10.2009, 12.10.2009,
13.10.2009, 14.10.2009, 15.10.2009,
18.10.2009, 19.10.2009, 20.10.2009,
21.10.2009, 22.10.2009, 25.10.2009,
26.10.2009, 27.10.2009, 28.10.2009,
29.10.2009, 01.11.2009, 02.11.2009,
03.11.2009, 04.11.2009, 05.11.2009,
08.11.2009, 09.11.2009, 10.11.2009,
11.11.2009, 12.11.2009

SHORT ORDER

For reasons to be recorded later on in details, we hereby make the following order.

The appellants Major Md. Baqul Huda, Lt. Col. Syed Farooque Rahman, Lt. Col. Sultan Shabir Rashid Khan, Lt. Col. Mohiuddin (Artillery) and Major A.K.M.Mohiaddin Ahmed (Lancer) filed 5(five) leave petitions against the judgment and order dated 30th April, 2001 passed by the High Court Division in Death Reference No. 30 of 1998 and Criminal Appeal Nos. 30 of 1998, 2604 of 1998, 2613 of 1998 and 2616 of 1998 and also the order dated 14th December, 2000 of the first and second learned Judges of the Division Bench of the High Court Division in the above matters.

Leave was granted to consider the following points:

- a) Because the learned Judges of the Division Bench have delivered and signed two separate dissenting opinions, the third learned Judge has committed a fundamental error of law in not considering the reference in its entirety, i.e. in respect of all the convicts and considering the cases of six convicts only.

b) Because there is inordinate delay of 21 years in lodging the F.I.R.; this unreasonable delay speaks of ill intention and design on the part of the prosecution to falsely implicate the appellants by introducing a concocted story - the High Court Division, in the premises, erred in law in maintaining the capital sentence without properly considering this aspect of the matter.

c) Because the evidence on record disclose a case of mutiny leading to the murder of the then President and his family members and thus the said killing not being a case of murder simplicitor, the trial of the appellants by a normal criminal court has vitiated the trial.

d) Because the evidence on record do not disclose a case of a criminal conspiracy to commit murder but disclose a case of conspiracy to commit mutiny to change the then Mujab Government, hence the conviction and sentence are illegal.

e) Because the prosecution having failed to prove the charge under section 302/34 of the Penal Code against the appellants on proper evaluation and sifting of evidence on record, there has been a serious miscarriage of justice..

Our opinion on the above points is as under:

a) Sections 378 and 429 of the Code of Criminal Procedure contemplate that it is for the third learned Judge to decide on what points he shall hear arguments, if any, and, that postulates that he is completely free in resolving the difference as he thinks fit, and therefore, the third learned Judge was competent to decide the case of six convicts of whom the learned judges were equally divided in their opinion and thus the third learned Judge was in agreement with the decision of the learned Judges of the Division Bench in respect of 9(nine) convicts of whom there was no difference of opinion.

b) The learned Sessions Judge as well as the learned Judges of the High Court Division have believed the explanation given by the prosecution regarding the delay in lodging the First Information Report on assessment of the evidence on record; this finding being a concurrent finding of fact, in our view, does not call for any interference.

c) An offence of murder has been included in section 59(2) of the Army Act, 1952 triable under the Army Act subject to the condition that if the offender commits the said offence while in 'active service, but as the appellants were not in 'active service' within the meaning of section 8(1) of the Army Act, their trial by an ordinary criminal Court is not barred by the provisions of the Army Act, and secondly,

even if it is assumed that it is a 'civil offence' within the meaning of Section 8(2) of the Army Act, there is no legal bar for trial of such offence in view of section 94 of the said Act.

d) There is no legal evidence on record to come to the conclusion that the murder of Bangabandhu Sheikh Mujibur Rahman and other members of his family including the three security personnel was committed as a consequence of mutiny, we are of the view that it is not a case of criminal conspiracy to commit mutiny, rather it is a criminal conspiracy to commit the murder of Bangabandhu Sheikh Mujibur Rahman and other members of his family.

e) The learned Judges of the High Court Division having believed that the prosecution has been able to prove beyond reasonable doubt the charge of murder against the appellants and other convicts by adducing reliable evidence, and the appellants having failed to make out a case that the High Court Division has caused a grave substantial injustice or a miscarriage of justice in accepting the death reference so far as it relates to the appellants without proper evaluation and sifting of evidence, we find no cogent ground to interfere with the impugned judgment and order of the High Court Division.

(f) The appellants having failed to make out a case of extenuating circumstance to commute their sentence of death, we are not inclined to interfere with the sentence of death awarded to the appellants by the learned Sessions Judge and maintained by the High Court Division.

In the premises, Criminal Appeal Nos. 55-59 of 2007 with Jail Appeal No. 2 of 2007 with Criminal Misc. Petition No. 8 of 2001 with Criminal Review Petition No. 3 of 2000 are hereby dismissed.

The order of stay passed by this Court is hereby vacated.

This short order shall form part of the judgment.

J.

J.

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J.

The 19th November, 2009.