Bench:
Mr. Justice Md. Shawkat Hossain
and
Mr. Justice Md. Ruhul Quddus
and
Mr. Justice ASM Abdul Mobin

Death Reference No. 61 of 2011

The State
-Versus-
Oli
...Condemned prisoner
with
Criminal Appeal No. 6592 of 2011
and
Jail Appeal No. 50 of 2012

Oli
... Appellant in both the appeals

-Versus-
The State
… Respondent in the both

with
Criminal Miscellaneous Case 50897 of 2013

Sabuz Miah
…Petitioner
-Versus-
The State
...Opposite Party

Mr. Md. Moniruzzaman Rubel, Deputy Attorney General (not in office now); Mr. Md. Shafiquel Islam Siddique and Mr. Md. Aminul Islam, Deputy Attorney Generals, with Mr. Abul Kalam Azad Khan and Md. Shafayet Jamil, Assistant Attorney Generals
... for the State

Mr. S M Shajahan with Mr. Kayser Kamal
Advocates
… for the condemned-prisoner

Mr. ABM Rafiqul Haque Talukder, Advocate
…for the petitioner in Cr Miscellaneous Case

Judgment on 28.08.2019

*Md. Ruhul Quddus, J:*

The death reference, criminal and jail appeals, and the criminal miscellaneous case arising out of common judgment and involving common facts and law have been heard together and are disposed of by this judgment. Another appeal being Criminal Appeal No.6799 of 2011 arising out of common facts but different judgment passed in a juvenile case has been simultaneously heard with the above matters and has been disposed of by a separate judgment. The legal points to be answered by the Full Bench were raised in the latter and accordingly, those have been decided there.

Learned Judge of the Druto Bichar Tribunal No.4, Dhaka convicted the condemned-prisoner Oli separately under sections 7 and 8 of the Nari-o-Shishu Nirjatan Daman Ain (Act VIII of 2000) and sections 302 and 34 of the Penal Code and sentenced him to death by judgment and order dated 13.10.2011 in Druto

Bichar Tribunal Case No.03 of 2011 and submitted the death reference under section 374 of the Code of Criminal Procedure for confirmation of the death sentence. By the same judgment and order learned Judge convicted two other accused named Sabuz Miah (petitioner in the criminal miscellaneous case) and Tapash Chandra Saha (absconding) under sections 302 and 34 of the Penal Code and sentenced them to suffer life term imprisonment with a fine of Taka 25,000/= each in default to suffer rigorous imprisonment for another one year while acquitted Feroz Miah, Rafiqul, Emdadul and Farid Miah.

Informant Md. Siddikur Rahman (PW 1) lodged a first information report (FIR) with Kalmakanda Police Station, Netrokona on 16.02.2010 against seven accused including the condemned-prisoner Oli and convict-petitioner Sabuz Miah alleging, *inter alia*, that he had long pending enmity with Oli and his brother Farid Miah. They used to claim subscription and threat him of murder in case of his failure to pay it. Oli asked him to give taka one lac 20/25 days before the occurrence in the pretext of his intention to contest ensuing student union election in his college. The informant declined, but Oli continued with mounting pressure on him. At one stage he gave out threat on his wife on 10.02.2010 and subsequently called him by his (Oli's)

cell phone No. 01718921120 at 7:00 am on 12.12.2010 intimidating him (informant) to face the consequence of refusal within 12 hours. On the same day at about 5:00 pm his son Saikat (7) had gone outside to play, but did not return home. Despite exhaustive search, he could not trace him out and subsequently a general diary (GD) was recorded with the local police station. On the following day the accused persons repeatedly called him from phone No. 01929375229 to his phone No. 01719960374 at about 7.35 am, 7.45 pm, 8.57 pm and 10.07 pm and demanded ransom of taka one lac if he wanted to get his son alive. On the next day i.e. 14.02.2010 the accused called him again from the same number at 8.30 am and 12.09 pm demanding the ransom in the same way. In the hope of getting his son alive, the informant agreed to pay the ransom. According to their instruction he along with the money went at the eastern bank of river Vogai on 15.02.2010 at about 9:00 pm, when accused Oli, Sabuz and Tapash came, took the money and told he would get back his son within an hour. Other accused were standing at a distance of 50 yards or thereabout. After an hour, Oli made a phone call and informed him that his son would be available in an abandoned homestead at the eastern side of his house. He rushed there and got the dead body of his son. His

(victim's) neck was wrung tightly by a nylon cord, right side of his face was injured and right eye was injured by burn.

The police investigated the case and submitted a charge sheet on 31.04.2010 against nine accused under sections 7, 8 and 30 of the Act VIII of 2000 read with sections 302, 201 and 34 of the Penal Code. During investigation the police arrested a juvenile offender named Anis, who made a confession purportedly under section 164 of the Code of Criminal Procedure involving the condemned-prisoner Oli and his three brothers.

The case being ready for trial was sent to the Nari-o-Shishu Nirjatan Daman Tribunal, Netrokona where the learned Judge of the Tribunal took cognizance of offence under sections 7, 8 and 30 of the Act VIII of 2000 read with sections 302, 201 and 34 of the Penal Code against the charge sheeted accused by order dated 21.07.2010 and transferred the case to the Additional Sessions Judge and Nari-o-Shishu Nirjatan Daman Tribunal, Netrokona for trial. The case was transferred again to the Druto Bichar Tribunal No.4, Dhaka under a notification published in official gazette. Learned Judge of the Druto Bichar Tribunal framed charge against all the accused under sections 7 and 8 of the Act VIII of 2000 with sections 302, 201 and 109 of the Penal Code by order dated 15.02.2011. On the same day the juvenile

offender Anis filed an application for holding his trial by Juvenile Court. Learned Judge allowed the application, split the record and registered another case as Juvenile Case No. 01 of 2011 and proceeded with simultaneous hearing of both the cases. It is already stated that Criminal Appeal No. 6799 of 2011 arising out of the said juvenile case has been simultaneously heard by this full bench and disposed of in a separate judgment. However, the charge framed in the present case was read over to accused present on dock, who pleaded not guilty and claimed justice. The charge could not be read over to Oli as he was still absconding. Later on he surrendered on 12.09.2011 after closing the evidence.

In order to prove its case, prosecution examined 13 witnesses including the informant Md. Siddiqur Rahman, his brother Salauddin Ahmed who recorded the GD on 13.02.2010, two Investigating Officers and the Magistrate who recorded confession of the juvenile offender.

PW 1 Md. Siddiqur Rahman, the informant and father of victim stated that on 12.02.2010 at afternoon Saikat had gone outside for playing, but did not return home. He unsuccessfully searched for him everywhere. In the next morning at about 9:00/9:30 hours some kidnappers informed him over a phone call

that Saikat was under their custody. They demanded ransom of taka one lac, otherwise threatened him of killing Saikat. In order to make it sure that Saikat was really under their custody, he asked them for proof. In response, they called him on the next day at about 12:00 o'clock and connected Saikat to talk. Getting no way, the informant mobilized the money and got ready to hand it over to the kidnappers. In the evening, the kidnappers asked him to go to a machine room situated behind his house. At that time, accused Farid came there, observed the situation and told the kidnappers not to come to receive the money as there was a possibility of their apprehension by local people. As a result they did not come to receive the money. On the following day at about 8:30 pm the kidnappers called him again and asked him to go to the bank of river Vogai with the money and a gas lighter in hand. Accordingly, he went there, when accused Sabuz Miah took position at his right side and Tapash at left, then Oli appeared in front of him and received the money while accused Farid, Rafiqul, Emdadul and Asad were standing at a distance. The informant asked them the whereabouts of his son, when they replied he would get his son after an hour. Thereafter the kidnappers asked him over a cell phone to go to the abandoned homestead adjacent to his house and get his son there under

some dried leafs. He along with others rushed there and found the dead body of his son. His neck was twisted by a nylon cord, right side of his face and right eye were injured and there were burn injuries on his person caused by burning cigarette. They brought the dead body home, where the police came and prepared an inquest report. He signed the inquest report. Police sent the dead body for conducting autopsy and thereafter, he lodged the FIR. Earlier his brother made a GD entry on 13.02.2010. He proved his signatures on the FIR and inquest report and also proved the GD entry made by his brother. PW 1 further stated that two days before the kidnap, accused Oli had reiterated his demand of money and threatened him of dire consequence in case of failure.

In cross-examination by the defence PW 1 stated that his brother Salauddin (PW 4) had recorded the GD. The FIR was lodged at his dictation, but the handwriting was not of him. Salauddin and he resided in the same house. Before recording the GD they talked to each other. The Public Prosecutor of Netrokona Mr. G M Khan Milan was his brother. He denied the defence suggestion that the accused due to their belonging to opposition party were falsely implicated.

PW 2 Md. Bazlur Rashid, a hearsay witness and cousin of victim Saikat stated that at the time of occurrence he was on training at PTI, Netrokna. On receipt of the news of occurrence, he came home. He, however, was in contact with home and learnt everything over cellular phone. Then he narrated the prosecution case in brief and further stated that police had arrested his cousin Anis, who confessed that the accused had kidnapped Saikat and killed him. He (Anis) was also involved in the occurrence.

In cross-examination PW 2 stated that he was a Teacher of Government Primary School at Kalmakanda and received training uptill 30th June staying at Netrokona. He used to reside at a rented house at Kalmakanda Thana Sadar.

PW 3 Shahin stated that his cousin Saikat was missing at 5:00 pm on 12.02.2010. On the following day his uncle Salauddin made a GD entry with the police station. The accused persons made phone call to his uncle Siddiq (PW 1) disclosing they had kidnapped Saikat and demanded ransom of taka one lac, otherwise threatened him of killing the victim. They asked him (Siddiq) over a phone call on the next day i.e.14. 2.2010 to bring the money to a machine room near to their house at about 8:00 pm. PW 3 and his companions planned to follow his uncle and

apprehend the kidnappers. At that time accused Farid came there and since he had alerted the kidnappers to the consequence of their apprehension, they did not come to receive the money on that day. On the next day i.e. 15.02.2010 they made a phone call again and demanded the money within the day; otherwise, to face dire consequence. They asked his uncle to carry a hariken in hand and go to a place as they would instantaneously instruct. His uncle along with the money and a gas lighter in hand went to the bank of river Vogai at about 9:00 pm. Just after reaching there, his uncle saw accused Sabuz Miah to stand at his right side and Tapash at left. Accused Oli, Farid, Rakibul and Emdad were also standing there. His uncle handed over the money to Oli, who told that he would get his son after an hour. His uncle then came back home and informed the matter to all of them. After an hour, Oli told him over a phone call to go to the abandoned homestead adjacent to his house and get his son there under some dried leafs. They rushed there and found the dead body of Saikat. His (victim's) neck was fastened tightly by a nylon cord, right side of his face was injured and right eye was protruded. There were burn injuries on his person caused by burning cigarette. After some time, police came there and prepared an inquest report. They seized the nylon cord under a seizure list and took his

signature. Subsequently the police arrested his cousin Anis with a mobile phone set and seized the phone under a seizure list, which he also signed. PW 3 proved his signatures on both the seizure lists and also proved the seized article as material exhibit.

In cross-examination PW 3 stated that the police station was six miles away from their house. There was no direct transport to approach the police station from their house, but after walk for thirty minutes, one could avail transport. The abandoned homestead was 200 yards away from their house. There were three houses around the homestead, one of Hashim uncle at the east and two of Balaram and Shuvash at south.

PW 4 Md. Salauddin stated that on 12.02.2010 at about 5:00 pm Saikat had gone outside for playing, but did not return home. As they could not trace him out, he recorded a general diary. On 13.02.2010 at about 9:00 am Oli and his accomplices made a phone call to the informant disclosing they had kidnapped Saikat and demanded ransom of taka one lac. They also threatened to kill the victim, if the ransom was not paid. The informant had to agree and according to their instruction got ready with the demanded amount of money on 14.02.2010 at evening, when Farid came to their house and observed the situation. After the informant left the house towards the

designated place, PW 4 along with PW 3 and others started following him with a plan to apprehend the kidnappers. At that time Farid alerted them to the possibility of their apprehension, if they would come to receive the money. As a result they did not come. Oli called the informant again on 15.02.2010 at the noontime and asked him to hand over the money within the day, otherwise they would kill Saikat. According to his instruction, the informant along with the money and a gas lighter in hand went to the bank of river Vogai at about 9:00 pm. Accused Oli, Tapash and Sabuz came to him while Farid, Emdadul and Rafiqul were standing nearby. Oli received the money telling that he (informant) would get his son back after an hour. The informant came back home and informed the matter to all of them. After an hour, Oli told him over a phone call that Saikat was at the northern side of their abandoned homestead. They rushed there and found the dead body. On receipt of information the police came, prepared an inquest report and sent the dead body for conducting autopsy. PW 4 then gave description of the injuries found on the dead body and stated that police seized the nylon cord and thereafter some dried leafs from the place of recovery under two seizure lists and took his signatures there.

PW 4 further stated that the police seized a phone set from Anis on 21.02.2010 and took his signature on the seizure list. He recorded GD No. 420 dated 13.02.2010 with Kalmakanda police station. He proved his signatures on the GD, inquest report and the seizure lists.

In cross-examination PW 4 stated that there was no mention of time on the GD. He, however, recorded it in morning sometime after 7:00/7:30 am. He did not suspect any person in the said GD. He denied the defence suggestion that he had not told the IO about the phone call made by the accused on 13.02.2010.

PW 5 Md. Ichhar Uddin stated that his nephew Saikat was found missing at the evening on 12.02.2010, upon which a GD was recorded. On the next day at about 8:00/8:30 am some kidnappers called the informant and demanded ransom of taka one lac. They arranged the money and went to the machine room situated in the field at the south to their house. The kidnappers did not come to receive the money, but told over a phone call that they had guessed their plan to apprehend them. On the following day the kidnappers made another phone call and asked the informant to bring the money at evening without hatching up any further plan. Accordingly, he went to the place as instructed

and handed over the money to the kidnappers. At about 8:00 pm he came back home and disclosed that he had given the money to Sabuz Miah, Tapash and Oli. Accused Farid, Emdadul and Rafiqul were also standing there. On receipt of their phone call after an hour, they went to the abandoned homestead and recovered the dead body. He then gave description of injuries found thereon, arrival of police, and seizure of the nylon cord and dried leafs. He proved his signatures on the seizure lists.

In cross-examination PW 5 stated that they were five brothers including him. They lived in the same homestead having 15 separate rooms. The juvenile offender Anis was his nephew. They did not communicate the local Chairman and Member about the occurrence.

PW 6 Idris Ali stated that the informant and he went to say prayer together on 12.02.2010. The informant told him that Saikat was missing. On the next day at about 8:00/8:30 pm he (PW 6) went to his house and came to know that some terrorists had kidnapped Saikat and demanded ransom. Then he briefly narrated the prosecution case in similar line of PW 1. He further stated that after preparation of inquest report, police took his signature. The police arrested Anis and he confessed to the police to have been involved in the occurrence. In cross-

examination he denied the suggestion that due to conflict on a Masjid Committee he deposed falsely.

PW 7 Md. Hazrat Ali, a Constable of Police stated that on 15.02.2010 at about 10:30/11:00 pm they went to the informant's house at village Pachh Bagajan. The Sub-Inspector of Police held inquest on the dead body of the deceased, prepared a report and instructed him to take it to morgue. After conducting autopsy, he handed back the dead body. He proved the *chalan*, command certificate and his signature there. In cross-examination he denied the suggestion that he had not taken the dead body to morgue.

PWs 8 and 10 Mofazzal Hossain and Golam Mostafa respectively were tendered by the prosecution, and the defence cross-examined them, but no important statement came out.

PW 9 Dr. A K M Abdur Rab stated that at the material time he was posted at Netrokona Sadar Hospital as a Medical Officer. He conducted autopsy on the dead body of Saikat, a boy of 7 years of age. He found one defuse swelling on right side of his head, ecchymosis at right cheek and right temporal region, loss of right cheek exposing teeth gum, one blackish ligature mark oblique in size on right side and middle of the neck measuring ½ inch breadth, ecchymosis on left shoulder, lacerated

wounds on dorsum and 3rd and 4th toes. His (victim's) right eye ball was partially protruded and left eye was reddish with ecchymosis on the upper eye lid. He (PW 9) opined that the death was due to asphyxia from strangulation resulted by injury No.6 meaning the ligature mark. All the injuries were antemortem and homicidal in nature. He further stated that a medical board including him conducted the autopsy. He proved the autopsy report, his signature there and that of other members of the board.

In cross-examination PW 9 stated that he himself had no extra degree on forensic medicine. Except the ligature mark, the other injuries did not cause the death. There was no mention of age of those injuries. No burn injury was found on the dead body. He denied the defence suggestion that biting of dog and foxes caused those injuries or that the victim died of accidental wringing of a rope on his neck.

PW 11 Md. Aminul Haque, Senior Judicial Magistrate stated that the offender Anis Miah was produced before him on 22.02.2010 and he recorded his confession following the provisions of sections 164 and 364 of the Code of Criminal Procedure. Alongside the prescribed form, the confession required six more additional pages to be written. After recording

the confessions, the text was read over to Anis and as it was correctly recorded, he put his signatures there. He (PW11) proved the confession, his signatures there and that of Anis.

In cross-examination PW 11 stated that he gave three hours time to the offender for reflection and did not notice any injury on his person. The confession was true and voluntary. He (PW 11) denied the suggestion that the offender was tortured and injured in custody or that he did not make any confession.

PW 12 Md. Abul Khayer, a Sub-inspector of Police and 1st IO of the case stated that he was the Duty Officer on the day of lodging the FIR. He received the *ejahar*, filled in the FIR form and recorded the case. He went to the spot at about 11:00 pm on 15.02.2010 under GD No. 482 and held inquest on the dead body, prepared an inquest report, took signatures of local witnesses there and sent the dead body for conducting autopsy through Constable Hazrat Ali. He also seized the nylon cord under a seizure list and took signatures of the witnesses there. He took up the case for investigation, visited the place of occurrence, prepared a sketch map with index, seized some dried leafs and recorded statements of nine witnesses under section 161 of the Code. He had collected eleven call lists, arrested some accused including Anis and recovered a silver coloured mobile

phone set from his possession. Its IME number was 354929027302449 and SIM number was 01820843851. He seized the phone set under a seizure list. Anis made a confession under section 164 of the Code before the Magistrate. On transfer he handed over the case docket. He proved the inquest report, seizure list, mobile call lists and his signatures on different documents and also proved the seized articles as material exhibits.

In cross-examination PW 12 stated that Salauddin (PW4) did not state to him that accused Oli had disclosed their acts of kidnapping Saikat over phone call to the informant. He did not seize the call lists under any seizure list and those were not bearing the signature or seal of the concerned authority. He did not collect the received call list of the informant or seize his phone set. His cell phone number was 01719960374. Eleven phone calls were made to his number from cell number 01929375229 during 13-15.02.2010. He did not seize any document of ownership of the latter. He denied the defence suggestion that he did not properly investigate the case.

PW 13 Md. Abdul Karim, the then Officer-in-charge of Kalmakanda police station and the 2nd IO stated he had received the case docket on 20.03.2010. He found the sketch map and

index prepared by the 1st IO to be correct. He himself prepared another sketch map of the place, wherefrom the victim was kidnapped. During his investigation he seized a cut piece of half pant produced by Constable Hazrat Ali under a seizure list and recorded statements of 8 witnesses under section 161 of the Code. On completion of investigation, he found a prima-facie case against the accused and accordingly submitted the charge sheet.

In cross-examination PW 13 stated eleven phone calls were made from Oli's phone number 01929375229 to the informant. IME number of the caller's phone was 354929027302440, which originally belonged to Anis, but Oli used it at the time of occurrence. Anis's phone number was 01820843851 and IME number of his phone set was 354929027302449. He could not recover the SIM, wherefrom call was made to the informant, but recovered the phone set. It would be evident from exhibit-15 series (unsigned call lists). The SIM was not a registered one and there was no document of ownership of the phone.

After closing the prosecution evidence, learned Judge examined the accused under section 342 of the Code. They reiterated their innocence, but did not make any explanation and

examine any witness in defence. Subsequently accused Oli surrendered before the Court on 12.09.2011 and filed an application for recalling the prosecution witnesses for cross-examination. As they were already cross-examined by the State Defence Lawyer appointed for him, learned Judge rejected the application and examined him under section 342 of the Code, when he claimed himself to be innocent and wanted to examine defence witnesses.

The defence, at the instance of accused Oli, thus examined two witnesses. Of them DW 1 Md. Zahirul Haque, Imam of Ugg Bagajan Village Mosque stated that he was serving the mosque since 2001. He was acquainted with the accused and there was no shop adjacent to their house. Accused Farid, Oli, Ahsan, Rafiq and Emdad were full brothers while Feroz was their step brother. All of them resided in joint family and were financially affluent. They used to grow 2000-2500 maund of rice per anum and were having a clean social image.

In cross-examination DW 1 stated that his father-in-law was Abul Kashem and he was not related to the accused. He, however, remained silent over the suggestion that Abul Kashem was their cousin and on a second thought stated ‘might be’. He denied that being a relation to the accused, he deposed falsely.

DW 2 Kari Mohammad Abdullah deposed in similar line of DW 1 and denied the suggestion that being influenced by the accused he deposed falsely.

Learned Judge of the Druto Bichar Tribunal No. 4, Dhaka on conclusion of trial, pronounced the impugned judgment and order of conviction and sentence as stated above and submitted the death reference while the condemned-prisoner Oli preferred the Criminal Appeal and prior to that the Jail Appeal. Convict Sabuz Miah was initially present but absconded during trial. After pronouncement of the impugned judgment and order he voluntarily surrendered and moved the criminal miscellaneous case under 561A of the Code of Criminal Procedure for quashing the judgment and obtained the Rule.

Mr. Md. Moniruzzaman, learned Deputy Attorney General appeared for the State to support the death reference and made submissions at length. Subsequently a new set of Law Officers have been appointed and entered into office. As a result Mr. Moniruzzaman is no more present before us to receive the judgment. However, the newly appointed Deputy Attorney Generals Mr. Md. Aminul Islam and Mr. Shafiquel Islam and other Law Officers have been present to receive the judgment.

Mr. Moniruzzaman, learned Deputy Attorney General took us through the evidence and submitted that the direct evidence of PW 1 was circumstantially corroborated by PWs 3-6 and 9, 12-13 read with the call lists (exhibit-15 series), inquest and autopsy reports, seizure of nylon cord, dried leafs and phone set of Anis. The juvenile offender Anis himself made a confession involving himself and the other accused including the main culprit Oli. PW 11, the recording Magistrate affirmed the confession to have been correctly recorded and also asserted it to be voluntary and true. The confession also corroborated the prosecution evidence as mentioned above.

Opposing the Rule in the miscellaneous case, Mr. Moniruzzaman submits that the scope of quashing a judgment under section 561A of the Code is really narrow and exceptional power of this Division should be exercised sparingly. In the instant case, petitioner Sabuz Miah absconded during trial. His status was completely a fugitive from law, who deliberately kept himself away from the process of justice despite his full knowledge of the criminal charge of murder pending against him. He is not even entitled to any general relief under the law, and the rare relief of quashment is at all not available to him. The

Rule issued on the application under section 561A of the Code is, therefore, liable to be discharged.

Mr. Moniruzzaman concludes with his anxiety that this is a heinous offence of killing an innocent child in a barbaric manner, which must be dealt with strictly. If the offenders escape punishment, people's confidence over the criminal justice system would be shaken. Learned Judge of the Tribunal considered each and every piece of evidence and all the socio-legal aspects of the case and rightly passed the order of conviction. There is nothing to interfere with the same by this Court.

Mr. SM Shajahan, learned Advocate for the condemned-prisoner submits that the victim's missing information was first communicated to police through a general diary recorded by PW 4 on 13.02.2010 at morning. The said GD did not speak of any allegation/suspicion against the principal accused Oli and his threat of dire consequence given out on the informant as well as on his wife before the occurrence. None of the prosecution witnesses stated the specific time of recording the GD. PW 4 stated he had made the GD in the morning, but not before 7:00/7:30 am. In cross-examination PW 1 stated before recording the GD they talked to each other. In FIR it was clearly stated accused Oli made the first phone call to him at about 7:00 am. In

view of prior demand of money, threat on the informant and his wife before the occurrence and subsequent demand of ransom by the accused at 7:00 am on 13.02.2010, it was quite natural that all these facts and names of the accused would be mentioned there. But the GD was mysteriously silent over the very important events already took place before its recording. After frequent phone calls made by accused Oli and his accomplices and receiving the money directly from the informant, the inquest report prepared by PW 12 at 11:00 pm on 15.02.2010 was similarly silent over their names. Despite prior demand of ransom by Oli, his full brother Farid was allowed to visit the informant's house on 14.02.2010. This is another inconsistency on the part of the prosecution. The episode at the evening on 14.02.2010 as narrated in the evidence of PW 1 and his relations is completely absent in the FIR. All these are the indication of subsequent embellishment in FIR as well as manufacturing of evidence to get the accused punished. In the background of admitted enmity between the parties, evidence of the witnesses of facts cannot reasonably be relied upon. In support of this part of submission, Mr. Shajahan refers to *Abu Taher Chowdhury and others vs The Stae*, 11 BLD (AD) 2.

Mr. Shajahan further submits that the confession made by a child purportedly under section 164 of the Code is unknown to law and as such not admissible in evidence. For the sake of argument even if confession of a child is admissible, some extra cautions must be taken in recording such confession such as presence of parents, guardian, custodian or legal representatives. The confession must be absolutely true voluntary. In the present case the confession was recorded in absence of his parents and subsequently retracted by filing of an application stating that it was extracted on physical torture and threat. The confession was at all not voluntary. Such confession cannot lend any support to the evidence of prosecution witnesses. Mr. Shajahan refers to *Jaibar Ali Fakir vs The State*, 28 BLD 627 to support his contention.

Mr. Shajahan lastly submits that the call lists (exhibit-15 series) were in photocopies. It was not explained where the original copies were lying with and why not produced before the Court. Admittedly those did not contain any signature or seal of the supplying authority and were not formally seized. None of the phone operating company was examined to prove its authenticity. Therefore, the call lists were not formally proved. By the evidence of two Investigating Officers (PWs 12 and 13) it

was virtually established that the SIM number or phone set of Anis was not used to call the informant. There was no legal evidence even any material to show that the SIM number and phone set which was used to call the informant was owned by accused Oli. The informant's call list was also not collected. Learned trial Judge relied on such inadmissible documents in arriving at the finding of guilt against the accused without any supportive materials and thereby committed wrong.

Mr. ABM Rafiqul Haque Talukder, learned Advocate for the petitioner in the criminal miscellaneous case submits that accused Sabuz Miah voluntarily surrendered before the Tribunal on 24.06.2010 and after being in prison for nearly one year was granted bail on 12.04.2011. He faced the trial all along and remained absent only on one date, but the learned trial Judge without giving him minimum accommodation cancelled his bail on the next date on 05.09.2011. After pronouncement of the impugned judgment, he voluntarily surrendered again on 28.11.2012. Meanwhile the special limitation of preferring an appeal expired. However, when the High Court Division being satisfied already issued Rule to examine the matter, question of maintainability cannot be agitated at this stage of hearing. In fact, this is the case where the High Court Division would

exercise its unique power under section 561A of the Code otherwise to secure the ends of justice.

Touching the merit, Mr. Talukder adopts the submission of Mr. Shajahan so far it relates to the reliability and credibility of PW 1 and further submits that nowhere in the evidence of any other witnesses or in the confession of Anis, the petitioner's name is mentioned. If the evidence of PW 1 is unworthy of credit, the present case is a case of no evidence so far it relates to the petitioner.

In turn of reply Mr. Moniruzzaman submits that it is a well settled principle of law that a child is competent to record evidence. When he is competent to record evidence, there is no reason of being incompetent on his part to make a confession and use it against him as well as against the co-accused within the scope of section 30 of the Evidence Act. Mr. Moniruzzaman referring to the evidence of PW 11 further submits that the confession was reaffirmed on oath by the recording Magistrate. He deposed that no mark of injury was found on the person of the juvenile offender, he was given three hours time for reflection, all legal procedures as prescribed in sections 164 and 364 of the Code were strictly observed, the contents of the confession was read over to him, and on clear understanding of

its correct reproduction, he put his signature there, and that the confession was true and voluntary. In *State vs Shukur Ali*, 9 BLC 239, the High Court Division confirmed the death sentence of a child awarded on the basis of his confession. The said decision was also upheld by the Appellate Division.

We have considered the submissions of the learned Advocates of both the sides, examined the evidence and other materials on record, gone through the decisions cited with some other decisions and consulted the laws involved. Under the facts and circumstances of the case and in view of the evidence on record there is no reason of doubt that the ill-fated boy Saikat was kidnapped and killed. But we have to decide whether the complicity of the convict-accused in kidnapping and murder of the victim have been proved beyond reasonable doubt or not. Let us have a careful scrutiny of the material evidence.

It appears that the informant Md. Siddikur Rahman (PW1) was the star witness in this case who deposed involving the accused straightway. PWs 2-6 were hearsay and at to some extent circumstantial witnesses, but narrated the prosecution case in a manner as if they were direct witnesses. Of them PWs 2 and 3 were nephews of PW 1 and PWs 4 and 5 were his full brothers while PW 6 was his co-villager and co-musalli of the same

Mosque, who heard of kidnapping Saikat from him. Rest part of his evidence is brief reproduction of the prosecution case in the same style.

It appears that PW 4 Salauddin, brother of the informant recorded a general diary on 13.02.2010 with Kamlakanda police station, which was the first communication to police. Self copy of the GD was adduced in evidence as exhibit-3. After recovery of the dead body an inquest report was prepared by the 1st IO Md. Abul Khayer (PW 12) at 11:00 pm on 15.02.2010, where the informant (PW 1), PWs 4 and 6 were made witnesses. The FIR was lodged on 16.02.2010 at 7.50 am.

According to the FIR there was pending enmity between the parties. Accused Oli demanded taka one lac prior to kidnapping of Saikat and as the informant declined, Oli threatened him of dire consequence within twelve hours. On the following day of kidnapping, he made a phone call to the informant at 7.35 am on 13.02.2013. Although the time of recording the GD was not mentioned there, in cross-examination PW 4 stated he had recorded it at the morning on 13.02.2010, but not before 7:00/7:30 am. In cross-examination the informant (PW 1) stated before recording the GD they talked to each other. It was quite natural that an allegation at least suspicion would be

raised against Oli and his name would be mentioned in the general diary, but we do not find any such statement there.

It was also stated in FIR that accused Oli directly called the informant over his cell phone on several occasions within 13-15.02.2010 and demanded ransom disclosing that Saikat was under their custody. Ultimately he along with his accomplices received the money from the informant at about 9:00 pm on 15.02.2010 at the bank of river Vogai and just one hour thereafter the dead body was found. After that, police came to the place of occurrence and prepared an inquest report on 15.02.2010 at 11:00 pm, when the informant was equipped with all material information, names and identity of the accused. So, it was similarly logical that there would be disclosure of the names of the accused in the inquest report, but it is mysteriously silent over their names. This is an indication of afterthought as well as manufacturing of evidence to get the accused punished in the background of admitted enmity between the parties.

Besides, the way accused Oli demanded ransom without hiding his identity is against criminal psychology as well as against the natural course of human conduct. It is also questionable that when accused Oli already disclosed his identity in demanding the ransom and there was previous enmity between

the parties, the informant party would allow his brother Farid to come to their house and leak information therefrom to the kidnappers. All these inconsistencies make the prosecution case seriously doubtful.

In *Nowabul Alam and others vs The State,* 15 BLD (AD) 54 the trial Court convicted 10 accused on a double murder charge and sentenced four of them to death and six others to life term imprisonment relying on some eyewitnesses (PWs 2, 3 and 5) who were relations to the victims. One of them was also injured witness. Their evidence was corroborated by two other prosecution witnesses, namely, PWs 4 and 11. There were six circumstantial witnesses (PWs 1, 6-8 and 10-11) who saw the assailants to run away from the place of occurrence with deadly weapons in their hands. In that case prior to lodging the formal FIR there was a GD made at the instance of PW 4, but no name of the assailants was mentioned. High Court Division on the resultant death reference commuted the death sentence to life imprisonment of the four and acquitted the six. Ultimately the Appellate Division in a majority judgment acquitted the rest four relying on the cases of *Hamida Bano vs Ashiq Hussain and others*, 15 DLR (SC) 65; Ali Ahmed vs State, 14 DLR (SC) 81

and Masalti vs State of Uttar Pradesh, AIR 1965 (SC) 202 where Mustafa Kamal, J (as his lordship then was) observed:

> "*The principle that is to be followed is that the evidence of persons falling in the category of interested, interrelated and partisan witnesses, must be closely and critically scrutinised. They should not be accepted on their face value. Their evidence cannot be rejected outright simply because they are interested witnesses for that will result in a failure of justice, but their evidence is liable to be scrutinised with more care and caution than is necessary in the case of disinterested and unrelated witnesses. An interested witness is one who has a motive for false implication of an accused person and that is the reason why his evidence is initially suspect. His evidence has to cross the hurdle of critical appreciation. As his evidence cannot be thrown out mechanically because of his interestedness, so his evidence cannot be accepted without critical examination.* (para 17)

In the case of *Bangladesh (State) vs Paran Chandra Baroi*, BCR 1986 AD 225 victim Nikhil Chandra Bala was killed in broad day light at 9:30 am allegedly in presence of his wife

and two others (PWs 4-6). There was admitted long standing enmity between the parties. On information received by the police a GD was recorded with no name of assailant. A Sub-Inspector of Police rushed to the PO and held inquest on the dead body, met the eyewitnesses and prepared a report where nobody mentioned the names of the accused. The trial Judge on consideration of evidence convicted accused Paran Chandra Baroi and sentenced him to death. In the resultant death reference and a jail appeal preferred by him the third Judge of the High Court Division on critical appreciation of evidence doubted the truthfulness of the eyewitnesses, considered the omission of his name in the inquest report and acquitted him of the charge. In so doing learned third Judge of the High Court Division relied on three cases of Indian jurisdiction one reported in AIR 1978 (SC) 1558 and two in AIR 1975 (SC) 1252, 1962. On appeal the Appellate Division affirmed the judgment of the High Court Division and observed:

> "*It will be seen that the learned Judges started doubting the prosecution case because, as referred to above, the Investigating Officer wrote in the inquest report that the names of the culprit or culprits would be available from his relations later on. In other words till the time of*

*making inquest at 2 pm on the date of occurrence nobody apparently disclosed the name of the respondent or any other person to the IO as the killers of Nikhil although all the eyewitnesses met the Investigating Officer at or about the time of inquest*." (para 15)

In the case of Abu Taher Chowdhury and others vs The State, 11 BLD (AD) 2 as cited by Mr. Shajahan five accused were put on trial on a murder charge under sections 302 and 34 of the Penal Code. In that case victim Zafar was killed in the night following 29.04.1984 and after exhaustive search on the next day his dead body was found in a tank 250 yards away from his house. Victim's father lodged FIR at about 3:00 pm strongly suspecting three of the accused. Most of the witnesses of fact were present, when the IO came to the place of occurrence and stayed there up to 11:00 pm, but none of them made any disclosure to him. Subsequently PW 3 made a statement before the Upazila Nirbahi Officer under section 164 of the Code of Criminal Procedure claiming himself to be an eyewitness and deposed in trial in the same line. His father PW 10 corroborated his evidence in part. Some other witnesses also claimed that they had seen the accused around the place of occurrence at the

material time. There was admitted enmity between the principal accused and their uncle Abdul Bari Chowdhury (PW 17), employer of PWs 3 and 10. Trial Court convicted all the accused and sentenced one to death and four to transportation for life. On the resultant death reference and appeal by the convicts, the conviction was upheld by the High Court Division but the death sentence of one was commuted to transportation for life. The Appellate Division critically reappraised the evidence, and disbelieved the eyewitness and ultimately acquitted all the five accused by a majority judgment relying on the cases of *Taleb vs State*, 19 DLR (SC) 135 and *Abdur Rashid Khondkar vs Chandu Master and others*, 16 DLR (SC) 605 where Shahabuddin Ahmed, CJ discussed the inconsistencies, improbability and absurdities of the main witnesses and observed:

> *"...Explanation of PW 3 for not disclosing the matter when the dead body was recovered or when he moved with the Daroga in the place of occurrence, is his mortal fear of the accused. Neither of these explanations is worthy of any credit; the only reason that may be attributed is that their story is an afterthought and product of a dress-rehearsal given by the IO for 8 hours."* (para 17)

> "…no critical examination of the deposition of the witness has been made and whatever they have said in examination-in-chief has been accepted as gospel truth" [para 18 (a)]

The main features of the above cited cases clearly match the case in hand. We have already reappraised the evidence of the prosecution witnesses and expressed our view as to how they were unworthy of credit.

In passing the order of conviction, learned trial Judge borrowed support also from the confession of the juvenile offender Anis (exhibit-10) and evidence of PW 11 who affirmed it to be true and voluntary. In Criminal Appeal No. 6977 of 2011 which was simultaneously heard with these cases, we have already held that confession made by child has no evidentiary value. The case of *Jaibar Ali Fakir vs The State* has also been discussed there. Moreover, within the scope of section 30 of the Evidence Act confession of a co-accused can only be taken into consideration in a joint trial. In the case in hand, the confessing offender was tried separately in a juvenile case purportedly under the Children Act. So, the confession recorded by the juvenile offender Anis cannot lend any support to any other evidence in

the present case and learned trial Judge was wrong in relying on the confession.

According to PW 12 Md. Abul Khayer the IME number of the phone set belonged to the juvenile offender was 354929027302449 and SIM number 0182084385. PW 4 Salauddin did not tell him that Oli had called the informant and disclosed of kidnapping Saikat. He (PW 12) proved a set of call lists (exhibit-15 series), but did not seize it under any seizure list and those did not bear the signature of any official or seal of the phone operating company. Eleven calls were made to the informant's number 01719960374 from cell number 01929375229 during 13-15.02.2010. He did not seize any document of ownership of the latter. PW 13 Md. Abdul Karim, the 2nd IO stated in cross-examination that eleven calls were made from Oli's phone number 01929375229 to the informant. IME number of the caller's phone was 354929027302440, which originally belonged to Anis, but Oli used it at the time of occurrence. Anis's phone number was 01820843851 and IME number was 354929027302449. Oli's call to the informant would be evident from exhibit-15 series (call lists). His SIM was not registered and there was no document of ownership of the phone set.

It appears from original record that in the oral evidence of PW 12 the last digit of IME number of caller's phone set was overwritten as '9' on a '0' without any correcting signature. In the evidence of PW 13 it is written as 354929027302440 and he also deposed reiterating the same number. The call lists (exhibit-15 series) also show the IME number of the caller's phone set to be 354929027302440, which does not match the IME number of the phone set recovered from Anis.

Under the circumstances, the confession of Anis having no evidentiary value if not considered, Oli's complicity in the occurrence cannot be inferred. In absence of recovery of SIM or proof of his ownership over the same or its use by him at the time of occurrence, it cannot be held that Oli made phone call to the informant using that phone and demanded the ransom. The evidence of PWs 12 and 13 read with the call lists make the case totally doubtful.

Regardless of the discrepancy of recovered phone set's IME number, it is required to examine whether the call lists (exibits-15 series) alleged to have been collected from a private cellular phone company and have been exhibited in this case can be said to be a legal evidence.

In case of the public document as defined in section 74 of the Evidence Act, the original or certified copy (as secondary evidence) can be proved as evidence, but in order to prove a private document the original needs to be produced and proved unless a case of secondary evidence is made out. According to section 62 of the Act original document is primary evidence and secondary evidence is replica of the original one, which is more particularly described in section 63 thereof. In certain cases replica of private document can be adduced as secondary evidence under the provision of section 65 of the Act.

Call list of a cellular phone company is no doubt an electronic document of private nature. Our Evidence Act has not been amended to deal with the electronic record/document and as such the existing provisions of the Act are followed to deal with such document. The mode of proving the contents of any documents irrespective of its nature has been dealt with in chapter V of the Act. Mere production of the documents purporting to have been written, printed, signed or generated from an electronic record by a third person is no evidence of its authorship. It is necessary to prove their genuineness, execution and generation. The contents of every document have to be proved following the provisions of section 67 of the Act that

requires proof of both the contents, hand writing/typing and signature on it. Mere production of a document and marking it as an exhibit cannot be the proof of its contents.

A call list is generated by electronic process, and is not made like execution of a paper document. For the purpose of proving the contents of any electronic record, any procedure for its certification has not yet been introduced. In order to prove an electronic record or signature under the existing law of evidence, it is necessary to stamp its printed version with seal of the company or office and sign it. When it is adduced in evidence in a proceeding of Court, either the person who generates or signs it or in his absence, any other person who is acquainted with the record and signature must come before the Court to prove the contents and his signature thereon.

In *Khaleda Akhter vs State,* 37 DLR 275 a question was raised as to whether a video cassette was a document and admissible in evidence within the scope of the Evidence Act. In replying the question ATM Afzal, J (as his lordship was then) relied on AIR 1968 SC 147 and accepted it as an admissible evidence if otherwise relevant. In the said case of *Khaleda Akhter* the person who recorded the video was examined. In *State vs Md. Rafiqul Islam alias Shakil and seven others*, 70

DLR 26 objection was raised to admissibility of some video footages, paper clippings and still photographs of the news of occurrence on the grounds that the respective journalists/photographers were not examined. A Division Bench where one of us was the author Judge considered the footages as evidence under the particular facts and circumstances of that case observing that the said footages were officially supplied to the Detective Branch of Police by the respective TV channels and handed over to the Investigating Officer under a seizure list. The seizure list and official correspondence were duly proved.

In the case in hand the call lists do not bear any seal of the private phone company or signature of the person who generated it. These are also not printed on the letter head of the company, and are mere computer generated information on plain papers. Its authenticity has not been proved in any manner. No correspondence through which the Investigating Officer officially collected the lists has been produced. In fact it is not clear how the Investigating Officer collected the lists. Any call list/information of a private phone company printed on a plain paper without any seal or signature of the person who generated it, production of such document in Court by a third party and making it exhibit do not have the value of legal evidence. Its

authenticity must be proved in line with the provisions of section 67 of the Evidence Act. The call lists in question as such cannot be considered as legal evidence.

In this regard it may not be out of place to point out that the practice of collection of call list/audio discussion from public/private phone companies without any formal requisition and formal seizure, and also behind the knowledge of the subscriber must be stopped. It is our common experience that nowadays private communications between the citizens including their audios/videos are often leaked and published in social media for different purposes. We must not forget that the citizens' right to privacy in correspondence and other means of communication is guaranteed under article 43 of the Constitution which cannot be easily violated at the instance of any interested quarter. Bangladesh Telecommunication Regulatory Commission and the phone companies operating in Bangladesh have a great responsibility towards proper compliance of the Constitutional mandate of maintaining privacy in communication. They cannot provide any information relating to communication of their subscribers and the citizens of the Country, unless it is permissible in law matched with the Constitution. So, when the Investigating Officers in relation to

particular investigation/inquiry require any call lists or information relating the one's communication, they must make a formal request to the concerned authority of the respective company/office stating the reason why it is necessary for that investigation/inquiry, not in a roving and fishing manner. Only in that case the phone companies have obligation to supply the call list or information within the knowledge of the subscriber. Otherwise the supplied documents would lose its evidentiary value and the supplying person/authority would also be liable for aiding violation of one's fundamental right guaranteed under the Constitution.

This is also a demand of time that after unimaginable development of Information and Communication Technology and its use in commission of various offences, our Evidence Act should be made up-to-date by way of amendment or new legislation to deal with the developed technology as well as electronic record/document. In India some special provisions i.e. sections 65A, 65B and 67A are incorporated in their Evidence Act. Some other provisions, namely, sections 47A, 73A, 85A, 85B, 85C, 88A, 90A are also added to harmonize it for dealing with electronic record and definition of evidence as given in section 3 has also been amended. The procedure of certification

of electronic document has also been introduced there by the Information Technology Act, 2000.

In the Druto Bichar Tribunal Ain, 2002 under which the instant case has been tried, any video or still photographs, recorded tape and disc are given evidentiary value, but without any ancillary amendment to the Evidence Act providing the manner of seizure and proof of the contents thereof and its generation/conversion into printed material/paper copy and certification. In the same way those have been given evidentiary value in Ain Sringkhola Bighnakari Aporadh (Druto Bichar) Ain, 2002. The Pornography Niontron Ain, 2012 has recognized the soft or converted hard copy of pornography, CD, VCD, DVD or any information or memory preserved in electronic process to be evidence with the same insufficiency. Recording of evidence through video conference in the case of money laundering committed within more than one countries and that of humane trafficking have been introduced by Mutual Legal Assistance in Criminal Matters Act, 2012 and Manab Pachar Protirodh Ain, 2012 respectively. The Tothyo-o-Jogajoge Projukti Ain, 2006 has defined electronic signature, internet, electronic mail, data message, website, computer network etcetera and preservation of electronic record and document in its definition clauses in

section 2 while sections 5 and 36 thereof provides certification of electronic signature and record and sections 6 and 7 give legal recognition and evidentiary value thereto. All these special laws are lacking specific provisions as to how the materials would be collected and adduced in evidence. The only exception is the Anti-Terrorism Act, 2009 where an overriding rule of evidence has been introduced in its section 21 (3) which says that any discussion and conversation through Facebook, Skype, Twitter of any internet site by a terrorist person or entity, or still picture or video involving his offence if produced by the Police or law enforcers to any Court for the purpose of investigation, the information so produced shall be admissible in evidence. However, the above laws are made applicable for the purpose of functioning of the Tribunals constituted thereunder. We have already pointed out that no amendment to the Evidence Act or any supplemental law providing the manner of proving the contents of electronic record/document and its generation into printed material and certification has yet been made for the purpose of regular proceedings under the general laws. It is, therefore, expected that the Legislature would take initiative for amendment of the existing Evidence Act or new legislation to address the issues.

Let us examine the scope of appreciating the Rule obtained by accused Sabuz Miah. In an unreported decision in Criminal Miscellaneous Case No. 27276 of 2012 (*Joynal vs The State*) heard and disposed of with a bunch of cases arising out of common judgment and order, a Division Bench where two of us were parties discussed some cases of the Appellate Division including *Abdul Quader Chowdhury and others vs The State,* 28 DLR (AD) 38 and observed:

> *"...it is clear that the High Court Division sitting on an application under section 561A of the Code can see whether 'the evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge'. It is needless to say that without re-examination and independent assessment of evidence, no Court can arrive at any such finding of fact. In other words, the High Court Division is fully competent to re-examine and assess the evidence independently sitting on an application for quashing a judgment and order of conviction in exceptional circumstances for securing the ends of justice."*

It is already stated that both the times accused Sabuz Miah voluntarily surrendered before the Court, which indicates his willingness to face the trial and its consequence. But the trial Judge in order to justify his order of conviction against Sabuz Miah took an additional ground that initially he was absconding and was arrested by police, which does not match the record. It appears from record that he voluntarily surrendered before the Nari-o-Shishu Nirajatan Daman Tribunal, Netrokona on 24.06.2010, granted bail on 12.04.2011, remained present before the trial Court till 21.08.2011 and found absent from 23.08.2011. After pronouncement of judgment, he surrendered again on 28.11.2012.

Due to special limitation he was not in a position to prefer an appeal explaining the reason of his absence. A Division Bench being prima-facie satisfied already issued Rule on his application under section 561A of the Code. Besides, a death reference and appeal preferred by the principal convict Oli, the High Court Division has reopened the whole case. In such a situation, if the principal convict succeeds in his appeal, the co-convict standing on better footing cannot be compelled to serve out the sentence because of expiry of the special limitation. Only because he absconded at some stage of trial, his application

cannot be thrown away on strict interpretation of section 561A of the Code.

Above are the special and exceptional circumstances, under which the petitioner's application for quashing the judgment and order of conviction can well be appreciated for securing the ends of justice and in such a case the Court can also look into whether the evidence adduced in support of the prosecution case manifestly failed or succeeded to prove the charge. We have already discussed that in view of the principle of critical appreciation and reasonable assessment of evidence, the evidence of PW 1 cannot be relied upon. If his evidence is discarded, there is basically no evidence against co-convict Sabuz Miah.

In view of the discussions made above, we are not inclined to uphold the conviction of condemned-prisoner Oli and convict-petitioner Sabuz Miah.

Accordingly, the death reference is rejected and Criminal Appeal No.6592 of 2011 is allowed and Jail Appeal No.50 of 2012 is accordingly disposed of. The Rule in Criminal Miscellaneous Case No.50897 of 2013 is made absolute. The impugned judgment and order of conviction and sentence is set

aside so far it relates to the appellant Oli and petitioner Sabuz Miah and they are acquitted of the charge leveled against them.

Communicate a copy of this judgment to the Ministry of Law, Justice and Parliamentary Affairs for taking necessary step and also to Bangladesh Telecommunication Regulatory Commission for circulation of the relevant part with necessary direction to the phone companies.

*Md. Shawkat Hossain, J:*

I agree.

*ASM Abdul Mobin, J:*

I agree.