

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL MISCELLANEOUS JURISDICTION)**

Present:

Mr. Justice Md. Akram Hossain Chowdhury

And

Mr. Justice Mohammad Showkat Ali Chowdhury

Criminal Misc. Case No.1283 of 2016.

IN THE MATTER OF:

Under Section 561A of the Code of Criminal
Procedure, 1898

-AND-

IN THE MATTER OF:

Montu Bepary, Son of late Mohammad Bepary
@ Madon Bepary of Village-Khunna
Gobindopur, Police Station-Hizla, District-
Barisal and another

-----Accused-Petitioners

-Versus-

The State and another

-----Opposite Parties

Mr.Mirza Salah Uddin Ahmed, Advocate

-----For the Accused Petitioners.

Mr. Golam Abbas Chowdhury, Advocate with

Mr. Khan Mahmudul Hasan, Advocate

.....For the Informant Opposite Party No.2

Mr. Md. Fazlur Rahman Khan, DAG with

Mr. Md. Awalad Hossain, AAG

-----For the State opposite Party No.1

**Heard on: 16.11.2023, 23.11.2023, 04.01.2024
and 11.01.2024.**

Judgment On: 17.01.2024

Mohammad Showkat Ali Chowdhury, J: On an

application under section 561A of the Code of Criminal Procedure,
1898 (in short the Code) a Rule was issued calling upon the
opposite parties to show cause as to why the order dated 07.01.2016
(so far it relates to not sending up accused persons in the 03 charge
sheets) passed by the learned Senior Judicial Magistrate, Barisal in

Hizla Police Station Case No.4 dated 09.10.12 corresponding to G.R. No. 147 of 2012 (Hizla) under sections 302/34 of the Penal Code, 1860 now pending before the Court of Senior Judicial Magistrate, Cognizance Court No.4 Barisal, should not be quashed and or/ pass such other or further order or orders as to this court may seem fit and proper.

2. The short facts leading for disposal of this Rule are that one Most. Chandraban Begum has lodged a first information report on 09.10.2012 in the Hizla Police Station alleging inter alia that Kutti Bepary, Md. Montu Bepary, Harun Mollah, Jamal Mollah, Jewel Mollah, Abdus Salam Sonar, Jahangir Bepary, Baker Sikder along with 08/09 unknown persons are the accused persons in her case and among them, the accused persons, namely, Kutti Bepary, Montu Bepary and Zantu Bepary are the professional goons in her locality. Some days ago, there was altercation between the accused No.1 Kutti Bepary's son named, Shaheen and one Naion Khan's son, Noman at Teker Bazar in front of the Informant's son, the victim Shafique Ahmed. The accused No.1 Kutti Bepary threatened to kill the victim Shafique Ahmed for the reason that the said Shafique Ahmed did not take any step to stop the said altercation between Shaeen and Noman. The accused Jewel and Jamal came to her house on 08.10.2012 at about 12.30 a.m.(mid night) and other accused persons were standing beside her house and by the order of

the accused Jewel and Kutti Bepary they took away her son Shafique Ahmed from her house with a plea for an urgent discussion with her son and she tried to stop her son holding off his hand in order to prevent her son's going with the said accused persons and at that time they assured her that they within short time, will hand over Shafique Ahmed to her. She indentified all the accused persons including the accused petitioners by the light of Kupi Bati in their hands. But they did not return back her son. Then she at 3.00 a.m. (late night) came out from her house in search of her son but failed to trace out her son. Thereafter, she informed the matter to her brother Malek Sarder and others and they went out in search of Shafique Ahmed and at about 5.00 a.m. she received information that the dead body of her son Shafique Ahmed was lying down beside the house of one Kashem Kari of her locality under the bamboo bush. After receiving that information, she went there and found her son's throat cutting dead body. She thus, doubted that all the accused persons in a pre- planned way slaughtered her son. She informed the matter to her relatives and then lodged the first information report against the 9 (nine) accused persons and 08/09 other unknown persons under section 302 and 34 of the Penal Code, 1860 at the Hizla Police Station. Hence, she lodged the first information report.

3. At the time of the investigation, the accused Rafique Rari was arrested and he made a confessional statement under section 164 of the Code on 02.06.2013 before the learned Senior Judicial Magistrate, Barisal, disclosing the facts of the case in his own way but did not mention the names of the some accused persons including the accused petitioners.

4. The case was investigated by the Detective Branch of Police (D.B Police), Barisal and after investigation the Investigating Officer, Sub-Inspector Md. Matiar Rahman submitted charge sheet on 08.11.2013 under section 302/34 of the Penal Code, 1860 against one Md. Mamun Sardar and 05 others and recommended to discharge first information report named 09 (nine) accused persons. On the basis of Naraji Petition submitted by the Informant Opposite party an order was passed for further investigation of the case by the C.I.D, Barisal and C.I.D after holding investigation of the case, Police Inspector of CID, Uthan Cho submitted charge sheet on 06.12.2014 under section 302/34 of the Penal Code, 1860 again against Md. Mamun Sardar and 05 others and he also recommended to discharge first information report named 09 accused persons. Thereafter, the Informant Opposite Party filed another naraji petition on 05.01.2015 and the learned Magistrate passed an order for holding further investigation of the case for the 3rd time by the Assistant Superintendent of Police

(A.S.P), Sadar Circle, Barisal who produced 3 witnesses, viz.1. Nur Mohammad Bhuiyan 2. Md. Khorshed Alam and 3. Md. Malek Khan before the Senior Judicial Magistrate and those witnesses made statement on 16.08.2015 under section 164 of the Code and after conclusion of the investigation the Investigating Officer Prosantho Kumar Dey, the Assistant Superintendent of Police (A.S.P), Sadar Circle, Barisal, submitted charge sheet on 19.08.2015 under sections 302/ 34 of the Penal Code, again against the aforesaid accused Md. Mamun Sardar and 05 others and he following the former reports also recommended to discharge the first information report named 09 (nine) other accused persons including the present accused petitioners.

5. Thereafter, on 07.01.2016 the learned Senior Judicial Magistrate, Cognizance Court No.4, Barisal on perusal of the materials on record took cognizance of offence under sections 302/34 of the Penal Code, 1860 against the sent up and not sent up accused persons including the accused petitioners. He then issued warrant of arrest against them fixing the next date on 02.02.2016 for execution of the warrant.

6. The accused petitioner Montu Bepary obtained bail from the High Court Division of the Supreme Court of Bangladesh and the accused petitioner Jewel Mollah obtained bail from the learned Sessions Judge, Barisal and still they are on bail.

7. The accused petitioners being aggrieved by and dissatisfied with the order dated 07.01.2016 (so far it relates to the not sending up the accused persons in the 3 charge sheets) passed by the Senior Judicial Magistrate, Barisal in the Hizla Police Station Case No.4 dated 09.10.2012 corresponding to G.R. No.147 of 2012 (Hizla) taking cognizance of offences under sections 302/34 of the Penal Code, 1860 and moved the petition before this Court under section 561A of the Code and obtained the present Rule and order of staying of the operation of the impugned order dated 07.01. 2016 as well as all further proceeding of the aforesaid case (so far it relates the not sending up accused persons in 03(three) charge sheets.

8. Mr. Mirza Salah Uddin Ahmed, the learned Advocate appearing on behalf of the accused petitioners at the very outset submits that there is no basis for initiating the judicial proceedings against the not sent up accused persons in the 3(three)charge sheets including a dead man against whom also cognizance of offence has been taken. He further submits that the case was even investigated for 03(three) times and after investigation the Detective Branch (D.B. Police), CID and last of all ASP Sadar Circle, Barisal also submitted charge sheet against accused Md. Mamun Sardar and 05 (five) other accused persons but finding no prima facie materials submitted final report in favour of 09 (nine) FIR named accused

persons including the present accused petitioners but however, the learned Senior Judicial Magistrate without considering the 03(three) police reports most illegally and arbitrarily took cognizance of offences under sections 302 and 34 of the Penal Code, 1860 against the not sending up accused persons in the 03(three)charge sheets even including a dead man also.

9. Mr. Mirza Salah Uddin Ahmed, the learned Advocate next submits that the impugned order dated 07.01.2016 passed by the Senior Judicial Magistrate is illegal, improper and without any prima facie basis and as such, the impugned order is liable to be quashed to prevent the abuse of the process of the court and also to secure the ends of justice.

10. He further submits that the learned Senior Judicial Magistrate in the impugned order most wrongly and illegally interpreted regulation 283 (a)(i)(ii) of the Police Regulation of Bengal, 1943 (PRB) and most illegally and arbitrarily took cognizance of offence in the case against the not sending up accused persons in 03(three) charge sheets.

11. He in his submission candidly however admits that the Judicial Magistrate has the power to take cognizance of offence against the not sending up accused persons in the charge sheet but he to that extent vigorously submits that the taking of such cognizance of offence by the Magistrate must be judicious but not

capricious and there must be at least minimum iota of prima facie materials in taking cognizance but without any basis the learned Magistrate is not empowered, as per law, to take cognizance of offence ignoring the relevant provision of section 190 of the Code. In support of his above contention, he has referred before us the decision of the Hon'ble Apex Court as laid down in the case of **Abdul Ali Vs. State 30 DLR (SC), 58.**

12. He wraps up his submission by contending that the facts of the case against the accused petitioners is false, fabricated, concocted one, no witnesses in their statements under section 161 of the Code mentioned the names of the accused petitioners and one co-accused Rafique Rari also did not mention the names of the accused petitioners in his confessional statement but the learned Senior Judicial Magistrate did not give any importance to the said statements of witnesses made under section 161 of the Code and also the confessional statement of the accused Rafique Rari, as such, the taking of cognizance of offence by the Magistrate under sections 302/34 of the Penal Code, 1860, pursuant to the impugned order dated 07.01.2016 against the accused petitioners is nothing but an abuse of the process of the court and to secure the ends of justice the impugned order is liable to be quashed. Today before the pronouncement of the judgment, the learned Advocate for the accused petitioners has referred another decision as laid down in

the case of Syed Mohammad Hashem @ Hashim Vs The State 15 BLD (AD) 115. Pursuant to the above case law, he has strongly argued that at the initial stage the court has got power to interfere the proceeding without even taking recourse of sections 241A/265C of the Code. At last, he has tenaciously prayed for making the Rule absolute.

13. Conversely, Mr. Golam Abbas Chowdhury, the learned Advocate appearing on behalf of the Informant Opposite Party No. 2 in order to refute the submissions of the learned Advocate for the accused petitioners canvassed above, robustly contends that it is not true that the learned Senior Judicial Magistrate without any basis has taken the cognizance of offence under sections 302 and 34 of the Penal Code, 1860 against the accused petitioners who have been recommended by the three Investigating Officers for non-prosecution.

14. Mr. Golam Abbas Chowdhury by drawing our attention to the FIR version contends that as per the first information report the names of the accused petitioners with others have been categorically mentioned by the Informant Opposite Party and the accused No.2 is the Montu Bepary, accused No.6 is Jewel Molla and that Chandraban Begum, the mother of the ill-fated deceased Shafique Ahmed is the Informant who in the FIR very clearly made averments that the accused Jewel, Jamal came to her house on

08.10.2012 at about 12.30 a.m. (mid night) and took away her son victim Shafique Ahmed on saying that they have talk with her son and she tried to stop her son holding off his hand in order to prevent her son's going with them and at that time, all other accused persons were standing beside her house and they assured her that they within short time will hand over the victim Shafique Ahmed to her. The informant opposite party indentified all the accused persons by the light of Kupa Bati in their hands. The learned Advocate for the informant opposite party narrating the above FIR version argues that in such prevailing facts and circumstances, the question puts up before us that what would be the fate of the said portion of FIR story and raises further question for our consideration that should the last seen theory of occurrence of taking away of the Informant's son the victim Shafique Ahmed by the all FIR named accused persons including the accused petitioners, whatever had seen the Informant at the fateful night be brushed aside without trial?

15. He further submits that by the confessional statement of one co-accused, named, Rafique Rari who did not mention the names of the accused petitioners but for that reason, the FIR version as made by the Informant who being the eye witness saw the last episode of taking away the victim Shafique Ahmed by the FIR named accused persons cannot be diverted in line with the

confessional statement of the co- accused Rrafiq Rari and if we accept the confessional statement of the accused Rafique Rari as biblical version, in that case, that would be against the policy of law and the said confessional statement further appears to be partially exculpatory and partially inculpatory in nature which has little value in the present perspective of the case. He further contends that for the sake of argument if the said confessional statement of the accused Rafique Rari is treated entirely as inculpatory in nature, in spite of that no criminal case can be dragged in the negative direction/U turn in whimsical way if the FIR discloses the commission of offence against the accused persons.

16. He next submits that the learned Senior Judicial Magistrate has got wide power to take cognizance of offence under section 190 of the Code and as per clause (c) of that section the Magistrate even on suspicion can take cognizance of offence and as per his submission from reading the case record in its entirety the impugned order clearly states that why the learned Magistrate did not concur with the reports of the three Investigating Officers and then he vehemently argues that in view of the above, the impugned order is very much lawful and cannot be interfered by this Court.

17. He at last but not the least contends that the accused petitioners have not challenged the entire proceeding of the case but they have only challenged the taking of cognizance of offence by

the Magistrate pursuant to the impugned order dated 07.01.2016 against which an alternative efficacious remedy is available under the law and for which they ought to file criminal revision under sections 439A/435 of the Code but rather resorting to section 561A of the Code to redress their grievances and without invoking recourse under sections 439A/435 of the Code, the present Rule is nothing but that will help the accused petitioners to drag the case unlawfully for indefinite period and also they exposes their fancy desire and accordingly, this Rule is not maintainable in the eye of law and echoing the above, he has prayed for discharging the Rule. In support of his contentions, he has referred the decisions as laid down in the **cases of Khalekuzzaman Vs. State, 18 BLC, 40 State Vs. Md. Ariful Islam@ Arif, 19 BLC(AD), 82, State Vs. Md. Aman Ullah Aman, 18 BLC (AD), 81 and Amir Ali Mostafa (Md.) Vs. Shah Md. Nurul Alam and others, 74 DLR (AD), 79.**

18. We have considered the submissions of the contentions of the learned Advocates for both the sides at length, perused the materials annexed thereto and also consulted the relevant provisions of section 190 of the Code and precedents referred by the learned Advocates for the both sides and also other case laws.

19. From the submissions of the learned Advocate for the accused petitioners and counter submissions of the learned Advocate for the Informant Opposite Party, it appears to us that this

division faces **two moot questions** for consideration and adjudication, namely, (1) Whether the learned Senior Judicial Magistrate legally has the power to take cognizance of offence against accused persons who have not been sent up for trial by the Investigating Officers? And (2) Whether the Criminal Miscellaneous Case under Section 561A of Code is maintainable in the facts and circumstances of the case as narrated above?

20. In order to address and adjudicate **these two moot questions**, we need to examine the relevant materials on record and also to examine the provisions of law and case laws referred by the learned advocates for the both sides and other case laws.

21. Let us now discuss and address the **1st question** i.e. whether the Senior Judicial Magistrate can take cognizance of offence against the accused persons who are not sent up in the charge sheet by the Investigating Officers.

22. To address the **1st question**, let us now, at first see why the Investigating Officers have not recommended 09 (nine) accused persons including the accused petitioners for prosecution. It appears from the three reports of the Investigating Officers that on perusal of the confessional statement of the co-accused Rafique Rari, the statements of the witnesses made under section 161 of the Code and other materials and circumstantial evidence they did not find the commission of alleged offence against the 09 (nine) accused

persons including the accused petitioners. So, it appears to us that the said statements of the witnesses under section 161 of the Code and the confessional statement of co-accused Rafique Rai also were the two main factors for the Investigating Officers to decide for recommending non-prosecution against 09 accused persons including the present accused petitioners but all the Investigating Officers during investigation on misconception of law throttled the Informant's version made in the FIR where she has vividly made description that she saw who took away her son the victim Shafique Ahmed (25) at the mid of night from her house and indentified those accused persons by the light of Kupa Bati in their hands. Though they assured her to return back her son but did keep their words. Later on, she went out at 3.00 a.m. (late night) to search the whereabouts of her son and informed the matter to her brother Malek Sarder and others and they made search the whereabouts of the victim Shafique Ahmed and at 5.00 a.m. she heard that her son's dead body was lying in front of the house of one Kashem Kari of her locality under the bamboo bush and she went there and found her son's throat cut dead body.

23. On perusal of the above materials on record, it appears to us that the Informant Opposite Party No.2, Chandraban Begum, the mother of the ill-fated deceased as eye witness has lodged FIR and made vivid description in the FIR how her son (deceased) was

taken away by all accused persons including the accused petitioners and she clearly indentified them. Though the three successive Investigating Officers recommended in discharging of the 09 (nine) accused persons including accused petitioners basing on the statements of witnesses made under section 161 and a confessional statement made under section 164 of the Code by a co-accused Rafique Rari but for that reason if we brushed aside/ brush off the FIR story as made by the Informant Chandraban Begum as eye witness who is to be considered as star witness can provide crucial information in the case in our hand, it would be against the principle of law. As per section 134 of the Evidence Act, 1872, conviction can well be recorded on the basis of solitary witness/single witness if her/his evidences inspires the confidence of the court or worthy of credit. For the statements of witnesses as made under section 161 and confessional statement of a co-accused Rafique Rari under section 164 of the Code, if the door of the court we close against the Informant Opposite Party, then the real culprit will be escaped from clutches of law, the mouth of the Informant who happened to be the eye witness be shut up and the whole scheme of criminal jurisprudence will be upset and the door of justice for the aggrieved persons would be closed and sealed and if such incident happens in criminal justice system, the relevant poem

of Nobel laureate Rabindra Nath Tagore will be true but which must not allowed to be happened.

The extract of his poem reads as under;

“আমি -যে দেখেছি গোপন হিংসা কপট রাত্রি -ছায়ে
হেনেছে নিঃসহায়ে,
আমি -যে দেখেছি প্রতিকারহীন, শক্তের অপরাধে
প্রচারের ঝগী নীরবে নিভতে কাঁদে।
আমি- যে দেখিনি তরুণ ঝালক উন্মাদ হয়ে ছুটে
কী যন্ত্রনায় মরেছে পাথরে নিষ্ফল মাথা কুটে।”

24. We further observe that if we accept the contention of the learned Advocate for the accused petitioners that since co-accused Rafique Rari did not mention the names of the accused petitioners and nothing against the accused petitioner in the statement of witnesses as they made under Section 161 of the Code is found and that is why there is no materials to take cognizance of offence against the 09 (nine) accused persons including the present accused petitioners, thereafter, to our mind, it would be debacle of law and justice and be very dangerous and would also be giving a kind of undue premium to the criminals which is not permissible by law. Besides that, for the sake of arguments, if we accept the contention for the learned Advocate of the accused petitioners as mentioned above, in that case, the influential and powerful criminals/ goons of the society will set any accused to make any sort of confessional

statement wherein that accused at the instance of those culprits might not mention the names of real culprits and if we base on it, in that case, that co-accused and along with those hidden criminals would occupy the driving seat in piloting the fate of criminal case in the direction at their own whim at the guidance of the real criminal and the concerned Magistrate or the Judge would be remained as nothing in the administration of justice but be mere idle spectator of the administration of justice which is totally Greek to the Criminal Jurisprudence in any jurisdictions in this globe. So, we are unable to accept the contentions of the learned Advocate for the accused petitioners that due to statements of witnesses under section 161 of the Code and a confessional statement of a co-accused Rafique Rari who did not mention the names of the accused petitioners and who have been recommended by the three Investigating Officers for non-prosecution and for that reasons, the accused petitioners cannot be put on trial by taking cognizance by the learned Senior Judicial Magistrate. In view of the above, we opine that the submissions of the learned Advocate for the accused petitioners factually and legally find no merit in this regard.

25. In the above paradigm, we would like to make observation that the Magistrate in taking cognizance of offence must exercise his judicial discretion, examine relevant laws and materials annexed thereto otherwise he would be misguided and on

misconception of law the concerned Magistrate would be compelled to come up on wrong and illegal findings as to against whom the cognizance of offence should be taken and against whom the cognizance of offence should not be taken. But law does not contemplate such type of principle and it is well settled principle of law that confession of a co-accused cannot be considered as substantive piece of evidence against other accused unless it is corroborated by independent witnesses and which can be judged at the trial after taking evidence.

26. Now we turn to examine legal provision with regard to taking cognizance by Magistrate which is known to every law knowing person. Section 190 of the Code empowers the Magistrate to take cognizance of offences. We think that clause (c) of sub-section (1) of section 190 of the Code is relevant in the instant case; as such, we opine that it would be benefitted for all of us, if we go through section 190 of the Code which provides as under;

“Cognizance of offences by Magistrate- (1) Except as hereinafter provided, any Chief Metropolitan Magistrate, Magistrate of the first class, and any other Magistrate specially empowered in this behalf under sub-section (2) or (3) may take cognizance of any offence-

- (a)-----
- (b)-----

(c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.”

27. From a careful analysis of clause (c) of sub-section (1) of section 190 of the Code, it appears that the law has given a wide and unfettered power upon the Magistrate to take cognizance of offence on suspicion if it appears to the Magistrate so and exercising of such power is the discretionary power of the Magistrate. From the above discussions, law gives clear impression that the Magistrate has got unfettered power to take cognizance defying the recommendations of the Investigating Officers if he in his opinion there is suspicion that the offence has been committed. We find support in respect of our above observation as laid down in the case of **Shamsun Nahar @ Maina Vs. the State 4BLD (AD), 206**, wherein their lordships observed, “if however the Magistrate is not satisfied with the final report he is competent when receives the report to take cognizance against the accused in favour of whom final report was submitted, under the provision of section 190 (b) of the Criminal Procedure Code. If he does not take cognizance at that stage, but if subsequently evidence transpires to make out a prima facie case against a person, who was not charge sheeted, cognizance may be taken against him under section 190 (c) of the Criminal Procedure Code”. In the case of **Abdul Awal Vs. Abdul**

Mannan & another, 1986 6 BLD (AD) 328= 6 BCR (1986) (AD) 174=38 DLR (AD) 254 wherein it has been held that a police report in which no accused is recommended to be prosecuted is ordinarily known as final report. But in fact there is no term like ‘final report’ in the Code of Criminal Procedure. But this term is used in the Police Regulations to denote a report in which police after investigation do not propose to prosecute any accused person even if he had been implicated in the First Information Report. But if the Magistrate is satisfied that a particular person has been improperly excluded from the charge-sheet, he may take cognizance against him on the basis of the same police report even if it is a final report, and such cognizance falls within clause, (b) of subsection (1) of section 190 Cr.P.C. In the case of **Abdul Ali and another Vs. the State 30 DLR (AD), 58**, wherein their lordships referring the decision as laid down the law by the Hon’ble Appellate Division of the Supreme Court in the **case of Abdul Quader Vs. the State, 28 DLR (1978) 38** in the following words,

“Ordinarily criminal proceedings instituted against an accused person must be tried under the provision of the Code and the said proceedings should not be generally interfered with at an interlocutory stage in exercise of the inherent jurisdiction provided under section 561A of the Code. But a pertinent question may be posed as to when and under what circumstances the said

jurisdiction can and should be exercised by the High Court. The consensus of judicial opinion is that it is not possible, desirable or expedient to lay down any inflexible rule which should govern the exercise of this inherent jurisdiction. The exercise of this jurisdiction will depend upon the facts and circumstances of each case. Interference even at an initial stage may be justified where the facts are so preposterous that even on the admitted facts no case can stand against the accused and that a further prolongation of the prosecution would amount to harassment to an innocent party and abuse of the process of the Court”. The case of Abdul Ali and another (Supra) as relied upon by the learned Advocate for the accused petitioner is not helpful for the accused petitioners and not applicable in the case in our hand since we have already observed in the foregoing paragraphs that the F.I.R version of the instant case clearly discloses the commission of offences under sections 302 and 34 of the Penal Code, 1860, against FIR named 09 accused persons including the accused petitioners. If the FIR version discloses a prima facie case against the accused person no application under section 561A of the Code is maintainable. Our view finds support from the case of Dr. Khalekuzzaman Vs. State and another 18 BLC, 40 wherein, it has held, ‘when First Information Report discloses a prima facie case against the

petitioner, no application under section 561 A of the Code is at all maintainable.

28. Considering the whole gamut of the instant case, let us now see why the learned Senior Judicial Magistrate, Barishal formed suspicion and took cognizance of offence in the instant case defying recommendations of the 03(three) Investigating Officers in the Police Reports. To visualize the whole gamut of the facts of the instant case and the relevant provisions of law and also to appreciate the reasons of taking of cognizance of offences by the Senior Judicial Magistrate, we would like to see the impugned order passed by the said Magistrate which goes as under;

“দেখিলাম। নথি আদেশের জন্য নেয়া হলো। নথিসহ নারাজী দরখাস্ত, অভিযোগকারীর জবানবন্দি, অভিযোগপত্র সম্পূরক অভিযোগপত্র সমূহ, ফৌজদারি কার্যবিধির ১৬৪ ধারায় রেকর্ডকৃত আসামী রফিক রাড়ীর দোষ স্বীকারোক্তিমূলক জবানবন্দি এবং অন্যান্য কাগজাদি পর্যালোচনা করলাম। এজাহারে উল্লেখ আছে যে, আসামী মন্টু বেপারী, ঝন্টু বেপারী, কুট্রি বেপারী, হারুন মোল্লা, জামাল মোল্লা, জুয়েল মোল্লা, ছালাম, জাহাঙ্গীর, বাকের সিকদার বিগত ০৮/১০/২০১২ ইং তারিখ রাত ১২.৩০ ঘটিকার সময় এজাহারকারীর ছেলে অর্থাৎ ভিকটিম সফিক আহম্মেদকে ঘর থেকে ডেকে নিয়ে যায় এবং আসামীরা এজাহারকারীকে বলে তারা তার ছেলেকে কিছুক্ষনের মধ্যে ফেরত দিবে। পরবর্তীতে এজাহারকারীর ছেলেকে তারা আর ফেরত দেয়নি। পরবর্তীতে সফিক আহম্মেদকে মৃত পাওয়া যায়।

নথি পর্যালোচনায় দেখা যায় প্রথম তদন্তকারী কর্মকর্তা পি.আর.বি এর বিধি ২৮৩ (এ)(১) এর বিধান অনুসরণ না করে তদন্ত কার্যক্রম পরিচালনা করেছেন। ৩ জন তদন্তকারী

কর্মকর্তা আসামী রফিক রাড়ীর দোষ স্বীকারোক্তিমূলক জবানবন্দির উপর ভিত্তি করে অভিযোগপত্র দাখিল করেছেন।

পি.আরবি এর বিধি ২৮৩ (এ)(১) তে উল্লেখ আছে যে কোনো তদন্তে স্বীকারোক্তি প্রকাশের ইচ্ছা প্রকাশ করা হলে স্বীকারোক্তিতে কোনো প্রমাণ কারীর সাক্ষ্য থাকলে তা নিশ্চিত করবার জন্য প্রচেষ্টা চালাতে হবে। তদন্ত কর্মকর্তাকে বিভ্রান্ত করার জন্য স্বীকারোক্তি বলে বিবৃতি চালিয়ে দেয়ার চেষ্টা হবে। এই ধরনের বিবৃতি প্রায়ই অসত্য এবং অন্যের উপর দোষ ছাপাবার জন্য ঘনঘন করা হয়। অধিকতর তদন্ত হতে বিরত রাখা ও ইহার অন্যতম উদ্দেশ্য হতে পারে। এ জন্য তথাকথিত স্বীকারোক্তি যাচাই বাচাই করতে হবে এবং সেগুলোকে চূড়ান্ত মনে করা যাবে না।

উল্লেখ্য যে, ফৌজদারি কার্যবিধির ১৬৪ ধারায় জবানবন্দি প্রদানকারী আসামী রফিক রাড়ী বিগত ২০/১০/১৩ ইং তারিখ আদালতে এক দরখাস্ত দাখিল করে বলেন যে তিনি তার দোষ স্বীকারোক্তিমূলক জবানবন্দি প্রত্যাহার করতে চান কারণ পুলিশ তাকে দোষ স্বীকারের জন্য অমানবিক অত্যাচার করেছিল, তাকে দোষ স্বীকারে বাধ্য করেছিল। পুলিশ তাকে হুমকি দিয়েছিল যে যদি সে দোষ স্বীকার না করে তাহলে তাকে রিমান্ডে নিয়ে এন্স ফায়ার দিয়ে মেরে ফেলবে। তার দরখাস্তে আরো উল্লেখ আছে তিনি ম্যাজিস্ট্রেটের কাছে যেসব কথা বলেছেন তা পুলিশ কর্তৃক শেখানো।

সার্বিক বিবেচনায় আমি মনে করি এজাহার নামীয় আসামী মন্টু বেপারী, ঝন্টু বেপারী, কুট্রি বেপারী, হারুন মোল্লা, জামাল মোল্লা, জুয়েল মোল্লা, ছালাম, জাহাঙ্গীর, বাকের সিকদার ঘটনার সাথে ভালো ভাবে সম্পৃক্ত অর্থাৎ তাদের বিরুদ্ধে prima facie case রয়েছে। সুতরাং তদন্ত কর্মকর্তাদের তদন্ত প্রতিবেদনের সাথে একমত পোষণ করাটা আমি যৌক্তিক মনে করি না বিধায় মন্টু বেপারী, ঝন্টু বেপারী, কুট্রি বেপারী, হারুন মোল্লা, জামাল মোল্লা, জুয়েল মোল্লা, ছালাম, জাহাঙ্গীর, বাকের সিকদার মোঃ মামুন সরদার, মোঃ জলিল বেপারী, হারুন বেপারী, আঃ মালেক বেপারী, আবু তাহের সরদার ও রফিক রাড়ী-দের

বিরুদ্ধে পেনাল কোডের ৩০২/৩৪ ধারার অপরাধ আমলে গ্রহণ পূর্বক পুলিশ প্রতিবেদন গৃহিত হলো। আসামী মোঃ কুট্টি বেপারী, জলিল বেপারী ও হারুন মোল্লা-দের পূর্ব জামিন বাতিল করা হলো। তাদের প্রতি গ্রেফতারি পরোয়ানা ইস্যু করা হোক।

আসামী মোঃ মামুন সরদার, আঃ মালেক সরদার, হারুন মোল্লা, জামাল মোল্লা, আঃ সালাম সোনার ও মোঃ বারেক সিকদারদের প্রতি গ্রেফতারি পরোয়ানা ইস্যুকরা হোক”

29. From the meticulous analysis of the impugned order dated 07.01. 2016 passed by the learned Senior Judicial Magistrate, it appears to us that the learned Magistrate in the impugned order has stated last seen theory of the occurrence of taking away the Informant's son victim Shafique Ahmed by the accused persons including the accused petitioners on giving assurance by them that they would give back her son to her but ultimately they did not keep their word and later on her son's dead body has been found with throat cut in front of the house of one Kashem Kari under bamboo bush as averred by the Informant in the FIR and the learned Senior Judicial Magistrate also opined that the so called confessional statement of co-accused Rafique Rari must not be taken as conclusive and it must be verified, considering overall aspect, as he thought that there is a prima facie case against FIR named all the accused persons and accordingly he took cognizance of offence under section 302/34 of the Penal Code, 1860 against all accused persons including the accused petitioners in not giving consent with the reports of the Investigating Officers in respect of

accused persons against whom recommended for non- prosecution. Keeping mind with the above observations, we find that the said decision of the learned Magistrate cannot be said to be illegal, rather the said impugned order is lawful and is praiseworthy. Moreover, if the Informant Opposite Party Chandraban Begum who is to our mind, as star witness of the instant case and who also saw the last episode of taking away her son (deceased) from her house by the accused persons including the accused petitioners in the mid night and the Informant Opposite Party who also identified the accused persons including the accused petitioners by the light of the Kupi Bati in the hands of the accused persons and in such scenario, if the Informant Opposite Party (the mother of the deceased) is not allowed to depose before the trial court what she saw on the fateful night (certainly her testimony be cross examined by the defence to assess the veracity of her testimony), the important piece of evidence of the instant case against the 09 (nine) accused persons including accused petitioners (who have been recommended for non-prosecution) would be left out without any legal basis.

30. We have carefully scrutinized regulation 283 (a) (ii) of the Police Regulation of Bengal, 1943 (in short the PRB, 1943) and on perusal of sub-relegation (ii) of regulation 283, (a) of the PRB, 1943 which is very important and for understanding, the

implication and status of confessional statement of the accused before taking evidence at the trial is quoted as under:

“(ii) Anything which savours of oppression or trickery in obtaining a confession must be avoided. The aim of a police officer should be to obtain circumstantial and oral evidence so convincing that the accused person cannot escape. If he succeeds in obtaining such evidence, the confession will often follow and will materially strengthen the case, but to seek to obtain the confession first and the corroborative evidence afterwards is to reverse the proper order of proceedings. If, however, a confession is volunteered in an inquiry, every effort must be made to ascertain if there is evidence corroborative; of any point in the confession which can be verified. A statement purporting to be a confession will often be made in order to mislead the inquiring officer, and such statements are very rarely true in all particulars, and also are frequently made in order to throw blame on other persons, or with a view to deter from further inquiry. Also they are generally retracted in court in which case, if they stand alone and uncorroborated, they have little or no probative value. There is thus every reason for testing so-called confessions very carefully and not accepting them as final and conclusive, and stopping the inquiry”.

31. From the plain reading of the text of regulation 283 (a) (ii) of PRB, 1943, it appears that the confessional statement of co-

accused has little value and there is reason to justify the so called confessional statement and that confessional statement cannot be taken as conclusive and it is still not at the stage of trial to corroborate by other evidences, both oral and documentary and on settled principle of law that it cannot be treated as conclusive piece of evidence and to our mind, the observations given by the learned Senior Judicial Magistrate keeping in mind with the relevant provisions is quite justified and legal.

32. Mr. Golam Abbas Chowdhury, the learned Advocate for the Informant Opposite Party No.2 arguments before us that the accused petitioners have challenged the impugned order but not the entire proceeding of the case and the said impugned order is revisable and without resorting the recourse as provided under section 435 read with section 439A of the Code, however, invoking jurisdiction under section 561A of the Code is not maintainable, since an alternative forum is available in the Code. His contention is that having in such wide avenue invoking section 561A of the Code by the accused petitioners to redress any grievances is patently unjustified. We find that there is sufficient force in the submission of the learned Advocate for the informant Opposite Party. To justify our above observation we have made search for case law of our Apex Court and have found the relevant observation made our Honorable Apex Court in the case of **State**

Vs. Md. Ariful Islam @ Arif 19 BLC (AD) 82, wherein it has been held, ‘Even if any order was passed by the learned Magistrate, the said order was reversible under section 439A of the Cr.PC by the learned Metropolitan Sessions Judge. The accused respondent without exhausting the said forum directly moved the High Court Division a petition under section 561A of the Cr. PC. The High Court Division is not invested with any appellate or alternative power under section 561A of the Code of Criminal Procedure”.

33. In order to appreciate the above contention of the learned Advocate for the informant opposite party No. 2 we need to reproduce, section 561A of the Code which reads as under;

“Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this code or to prevent abuse of the process of any Court or otherwise to secure the ends of Justice”

34. From a careful reading of the text of section 561A of the Code, it appears to us that this inherent power of the High Court Division has not been given by section 561A of the Code rather it protects the inherent of the power of the court which the court enjoys from the very beginning of the creation of the court and the settled principle is that if any alternative remedy is available in the Code to redress grievances, in that case, no aggrieved person can

invoke section 561A of the Code. It cannot be invoked in respect of any matter covered by the specific provisions of the Code. In a good number of case laws, it has been consistently observed by our Hon'ble Apex Court that inherent jurisdiction of the High Court Division under **section 561A of Cr.P.C can be invoked very sparingly only** when there is no other remedy to prevent the abuse of the process of the court or otherwise to secure the ends of justice.

35. It is settled principle of law that if alternative remedy is available in the Code or any other law, no petition under section 561A is maintainable. It has not been denied by the learned Advocate for the accused petitioners that the petitioner has alternative remedy in the other forum but he vigorously contends that as per decision of our Hon'ble Apex Court as laid down in the **case of Ali Akkas Vs. Enayet Hossain and others 17 BLD (AD), 44** that the High Court Division can interfere to criminal proceeding in initial stage if no case stands against the accused. In the case of **Ali Akkas Vs Enayet Hossain and others (supra)** (reliance made on the case of **Abdul Quader Chowdhury and others Vs. The State, reported in 28 DLR (AD) 38**, wherein it **has clearly** spelt out the categories of cases where the High Court Division should interfere to quash a criminal proceeding. In that decision our Hon'ble Apex Court observed as follows: -

(1) Interference even at an initial stage may be justified where the facts are so preposterous that even on the admitted facts no case can stand against the accused.

(2) Where institution or continuance of criminal proceedings against an accused person may amount to an abuse of the process of the court or when the quashing of the impugned proceedings would secure the ends of justice.

(3) Where there is a legal bar against institution or continuance of a criminal case against an accused person.

(4) In a case where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged and in such cases no question of weighing and appreciating evidence arises.

(5) The allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge.

This refers to a case at a trial stage and thereafter.”

36. We have already been observed in the foregoing discussions that there is prima facie case against the all accused persons including the present accused petitioners, so the decision laid down in the case of **Ali Akkas Vs. Enayet Hossain and others (supra)** referred by the learned Advocate for the accused petitioners does not attract any one of the criterias spelt out in the said case law and as such, in no way the above case law will rescue the accused petitioners from the clutches of law.

37. More so, the learned Advocate for the Informant opposite party submits that the accused petitioner has not exhausted all other procedure before coming this court under section 561A and accordingly the extraordinary power of the . High Court Division must not be exercised to quash the proceeding. In support of that contention, the learned Advocate for the opposite party referred a decision of our Hon’ble Apex Court as laid down in the case of **Amir Ali Mostafa (Md) Vs. Shah Md. Nurul Alam and others 74 DLR (AD), 79** wherein their Lordships observed, “**Inherent power of the High Court Division is generally exercised where no other remedy is available for obtaining justice in the cause-it should not be invoked where another remedy is available. This power has not been vested upon the High Court Division where another remedy is available. This is an extraordinary power**

and is exercised in extraordinary circumstances in the interest of justice". Their Lordships further observed in the said case that the respondents should have exhausted the procedure of section 241A of the Code of Criminal Procedure before making application for quashing of C.R case under section 561A of the Code. In **the case of State Vs. Aman Ullah Aman 18 BLC (AD) 81**, their lordships held, **"this Division repeatedly observed that the High Court Division shall sparingly exercise power and when there is alternative remedy, this power shall not be exercised"**.

38. From the perusal of the materials on record, it appears that the accused petitioners did not challenge the entire proceeding of the case but they simply challenged the impugned order dated 07.1.2016 passed by the learned Senior Judicial Magistrate in taking the cognizance of offence against not sent up the accused persons and as per law the said order is revisable under section 435/439A of the Code.

39. The learned Advocate for the accused petitioner to that extent has referred a decision in the **case of Syed Mohammad Hashem @ Hashim Vs. The State, 15 BLD (AD), 115** and argues that criminal proceedings can be interfered if FIR/ complaint in their entirety, do not disclose the offence alleged. We have gone through the above mentioned case law but Alas! We find that the

said case law will not give any protection to the accused petitioners for the reasons of foregoing discussions.

40. However, on plain reading of the FIR of the instant case, it appears to us that the FIR clearly discloses the offences under sections 302/34 of the Penal Code against the accused petitioners and it is not preposterous case and the criterion as set by our Hon'ble Appellate Division in the case of **Ali Akkas Vs. Enayet Hossain and others (Supra)** do not attract to interfere to quash the proceeding of the in the instant case. It appears to us that nothing is ventilated before us that any one of five criteria attracts in the case in our hands for entertaining the application under section. 561A of the Code.

[All above underlines are supplied for emphasis]

41. Having regard to the facts and circumstances and provisions of law as well as the principle settled by our Hon'ble Apex Court as narrated above, we find no merit in the instant |Rule.

42. In the result, the Rule is discharged.

43. The order of staying the operation of the proceeding in the Hizla Police Station Case No. 04 dated 09.10.2012 corresponding to GR Case No. 147 of 2012 (Hizla) under section 302/34 of the Penal Code, 1860,(so far as relates to the not sent up accused persons in the 03 (three) charge sheets) at the time of issuance of the Rule is hereby recalled and vacated.

44. The learned Senior Judicial Magistrate or concerned Court below is directed to proceed with the case in accordance with law and dispose of the case, expeditiously, preferably within 08 (eight) months from the date of the receipt of this judgment and order of this Court.

45. Office is directed to send a copy of the judgment and order of this Court to the concerned Senior Judicial Magistrate or the Court concerned at once.

Md. Akram Hossain Chowdhury, J

I agree.