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

Criminal Appeal No. 5009 of 2001

Kalon

…Appellant

-Versus-

The State

...Respondent

with

Criminal Miscellaneous Case No. 6634 of 2003

Md. Abdul Karim and another

…Petitioners

and

Criminal Miscellaneous Case No. 27276 of 2012

Joynal

…Petitioner

-Versus-

The State

...Opposite Party in the both

Mr. Md. Mustaque Ahmed with Syeda Rafika Khatun and Ms. Fatima Akhter, Advocates

…for appellant in the Cr Appeal and petitioner 2 in Cr Misc Case 6634 of 2003 and petitioner in Cr Misc Case 27276 of 2012

Mr. Md. Baharuddin Al-Razi, Advocate

… for petitioner 1 in Cr Misc Case 6634 of 2003

Mr. Md. Moniruzzaman Rubel, Deputy Attorney General with Mr. Abul Kalam Azad Khan, Assistant Attorney General

... for the State

Judgment on 20.05.2019

Md. Ruhul Quddus, J:

The above Criminal Appeal under section 24 of the Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 and two Criminal Miscellaneous Cases under section 561A of the Code of Criminal Procedure have arisen out of one judgment and as such these are heard together and are disposed of by one judgment.

Learned Judge of the Nari-o-Shishu Nirjatan Daman Bishesh Adalat, Sylhet convicted the accused (appellant and petitioners herein) under section 6 (3) of the Ain, 1995 for commission of rape upon the wife and daughter of the informant Kazi Md. Nazmul Islam and sentenced them to suffer imprisonment for life by judgment and order dated 14.10.2001 in Nari-o-Shishu Nirjatan Daman Bishesh Adalat Case No.17 of 1998.

Prosecution case, in brief, is that in the night following 06.10.1997 at about 3:00 hours four accused, namely, Arjan, Karim, Joynal and Kalon hailing from the same village of the informant trespassed into his house and committed theft. At

the same time three of them, namely, Arjan, Karim and Kalon committed rape on his wife Ambia Begum and daughter Habiba, a minor girl of 13 years of age. At the time of occurrence, the informant was not at home as he was employed as an Imam of a mosque situated at Biswanath, a different thana under Sylhet district. Receiving information about the occurrence from his nephew Abdul Khaleque, the informant came home and learnt the occurrence from his wife Ambia Khatun. Thereafter, he went to Zakigonj police station along with the victims and his elder brother Haji Ibrahim Ali (PW 3) and lodged the FIR.

The police conducted investigation and submitted a charge sheet on 30.11.1997 against all the four FIR named accused under section 6(3) of the Ain, 1995. Another charge sheet for commission of the offence of theft was also submitted and separate trial was held on that offence.

During investigation, police arrested accused Arjan, who made a confession before the Magistrate involving himself with the offences of rape and theft, where he also disclosed the names of three co-accused.

Eventually the case was sent to the Nari-o-Shishu Nirjatan Daman Bishesh Adalat, Sylhet where the learned Judge framed charge under section 6 (3) of the Ain, 1995 against all the four accused by order dated 20.08.1998. The charge was read over to three of them, namely, Karim, Arjan and Kalon, who pleaded not guilty and claimed justice. Since accused Joynal was absconding, charge could not be read over to him.

Informant Kazi Md. Nazmul Islam deposed as PW 1 where he stated that two victims Ambia Khatun and Habiba Begum were his wife and daughter respectively. He was the *Imam* of Government Alia Madrasha Mosque at Biswanath. The occurrence took place in the night following 06.10.1997. Next morning at about 9:30 am his nephew A. Khaleque communicated him about the occurrence. Then and there he started for home and reached there at about 3:30 pm. He then came to know from his wife that at about 3:00 am in the previous night four accused, namely, Arjan, Karim, Joynal and Kalon entered into his house by digging a hole. His wife victim Ambia Khatun could recognize them in electric light. Accused Kalon and Joynal took her to kitchen on threat and

asked her to lie down on a *chowki*, which she refused and begged them not to make any injury to her dignity and honour. The accused did not pay heed, slapped her left ear, laid her down on the chowki and committed rape one after another. As she raised an outcry, her elder daughter Habiba woke up and started crying. In that event accused Arjan and Karim took her to the north sided room and raped her one by one. Her younger daughter Lutfa also woke up and started crying, when accused Arjan slapped her and pushed her down on the ground. After committing rape, the accused persons forcefully took the key of almirrah from Ambia Khatun and took away some gold ornaments, apparels, watch, umbrella and Taka 15,000/- in cash. Afterwards, the villagers asked the accused persons and their guardians to hold a *shalish,* but they did not respond. Thereafter, the informant along with his brother Ibrahim Ali, a local Member named Mahtab Uddin (PW 4) and two victims went to Zakigonj police station and lodged the FIR. The Officer-in-charge of the police station wrote the *ejaher* at his instance and sent the victims to Osmani Medical College Hospital, Sylhet for medical test. The victims also recorded their statements to a Magistrate. PW 1 further stated that he

had been employed as an *Imam* of Biswanath Alia Madrasha Mosque for last 19 years. Since the day of occurrence his wife was suffering from short hearing and she had to undergo an operation on her left ear. Education of his daughter Habiba was stopped as a social consequence of the occurrence and it became difficult to get her married anywhere. At this stage, PW 1 burst into tears and his demeanour was noted by the trial Judge.

In cross-examination PW 1 stated that he had received the news of occurrence from his nephew Khaleque. He was not made a witness in this case. In reply to a question made by the Court, PW 1 stated that Khaleque was not at home in that night. He denied the defence suggestion that Khaleque had a greedy eye on the wife of Kalon, which created enmity between them and that is the reason Kalon was falsely implicated in this case. PW 1 further denied the defence suggestion that his younger brother Ibrahim had a dispute with Sakhina, paternal aunty of accused Karim because of which he was falsely implicated. He also denied the defence suggestion that in his absence his house was being used as a venue of gambling.

PW 2 Ambia Begum, one of the victims and wife of the informant stated that the occurrence took place at about 3:00 o'clock in the night following 06.10.1997. Her husband was not at home. The accused persons entered into her room breaking the straw fence, made her awake and asked to go to the kitchen. Accused Kalon pointed a dagger on her and asked her to lie on the *chowki* slapping her left cheek and thereafter both of them committed forceful intercourse on her. As she cried out, her daughter Habiba woke up, when accused Arjan and Karim took her to the north sided room and raped her. The accused persons also beat her younger daughter Lutfa. Thereafter, they took away a table fan, wall clock, wrist watch and Taka 15,000 in cash opening an almirah. They switched on the light to collect the materials. Besides, there was a dim light in the room by which she could recognize them. Her nephew-in-law A. Khaleque communicated her husband. He came home and informed the local elites about the occurrence and thereafter lodged the FIR. She and her daughter made statement to the Magistrate and were examined by Doctor.

In cross-examination PW 2 stated that the petticoat she wore at the time of occurrence was given to the Investigating

Officer. The accused persons hailed from the same village and as such they were known to her. She denied the defence suggestion that her character was questionable and her nephew-in-law Khaleque used to conduct gambling at her house, which the accused persons protested and as such she falsely implicated them or that she had an illicit relation with accused Arjan and there was a conflict between Arjan and Khaleque over sharing of board money, for which he concocted the case.

PW 3 Haji Ibrahim Ali, stepbrother of the informant stated that early in the morning on the day of occurrence he went to the victims' house and came to know that accused Arjan, Karim, Joynal and Kalon entered into their house, committed rape on them and took away goods. He called a *shalish,* but the accused persons did not respond.

In cross-examination PW 3 denied the defence suggestion that at the ill advice of his nephew A. Khaleuqe, accused Kalon and Arjan were falsely implicated in this case.

PW 4 Mahtab Hossain Chowdhury stated that early in the morning on 07.10.1997 he came to know that an

occurrence took place in the house of the informant. He rushed there and saw the victims to cry. He also saw a hole (সিধ) at the eastern side of their house. The victims narrated the occurrence to him. After arrival of the informant, they went to police station along with Hazi Ibrahim Ali, Ijjat Ali and Mahbub Ali and lodged the FIR.

In cross-examination PW 4 stated that they communicated the informant through his nephew A. Sobhan, who was residing at another house.

PW 5 Ijjat Ali deposed in similar line of PW 4 and did not deviate from his stand despite exhaustive cross-examination.

PW 6 Habiba Begum, another victim and daughter of the informant stated that the occurrence took place at about 3:00 am in the night following 06.10.1997. She woke up hearing the outcry of her mother. In that event accused Arjan took her at the adjacent room holding her nape and accused Karim pointed a knife on her. Both of them committed forceful rape on her. After she was released from their clutch, she rushed to her mother. She informed her that accused Kalon

and Joynal committed rape on her too. She (PW 6) could recognize the accused persons in electric light. Before leaving the house, they took away a table fan, clock, gold ornaments etcetera from their house.

In cross-examination PW 6 stated that at the time of occurrence she was studying in class-VII. Long before the occurrence, her cousin Khaleque used to stay in the north sided room of their house. In the night of occurrence she wore *sallower* and *kamij*. During commission of rape on her, the *sallower* was stained with blood. She handed it over to the Investigating Officer. The petticoat of her mother was also given to him. These were seized under a seizure list.

PW 7 Shahazuddin Ahmed, the Magistrate who recorded statements of the victims stated that on 08.10.1997 victim Habiba Begum and Ambia Khatun were brought to him. He gave them sufficient time for reflection and recorded their statements following the procedural law in toto. He proved their statements as exhibits: 2-4/4.

PW 8 Solaiman, a Sub-Inspector of Police and Investigating Officer of the case stated that after being

assigned with investigation of the case he visited the place of occurrence, prepared a draft sketch map and an index thereof. He arrested accused Arjan, who recorded confession before the Magistrate. As a prima-facie case was found against the accused, he submitted charge sheet against them.

In cross-examination PW 8 stated that he did not seize the wearing apparels of the victims or the means of recognition of the accused. He, however, saw the hole through which the accused persons entered into the house of occurrence, but as there was no instrument of digging the hole, he could not seize those articles. He denied the defence suggestion that the confession of accused Arjan was extracted on physical torture, or that he did not properly conduct the investigation and being influenced by the informant party submitted the charge sheet.

PW 9 Nargis Bahar Chowdhury, Professor of Forensic Medicine Department at Sylhet Medical College Hospital stated that on 09.10.1997 she examined victim Ambia Khatun and thereafter victim Habiba Begum. Police Constable Rezaul identified the victims. On examination of victim Ambia Khatun she did not find any sign of forceful intercourse on

her. But on examination of victim Habiba Begum, she found sign of forceful intercourse. She was a girl of 14 years of age. She (PW 9) proved the medical certificates and her signatures there as exhibits 8-9/1.

In cross-examination PW 9 stated that the injuries found on Habiba were not friendly. She denied the defence suggestion that being otherwise influenced she submitted the report on Habiba.

After closing the prosecution evidence, learned Judge of the Adalat examined all the four accused under section 342 of the Code, when they reiterated their innocence, but did not examine any witness in defence.

Learned Judge of the Bishesh Adalat on conclusion of trial pronounced the judgment and order of conviction and sentence as stated above giving rise to the instant criminal appeal and miscellaneous cases.

During pendency of the cases accused Kalon was released on bail after serving nearly 13 years and seven months, accused Karim was released after serving nearly about 12 years and seven months, accused Arjan was released

after serving 19 years ten months and Joynal was released after serving nearly 13 years seven months. In the miscellaneous cases three of them explained that due to extreme poverty they could not prefer any appeal in time. However, they availed themselves to manage some tadbirkars and arrange the cost of litigation and moved the miscellaneous cases under section 561A of the Code for quashing of the impugned judgment.

Mr. Mustaque Ahmed, learned Advocate appearing for the appellant in Criminal Appeal No. 5009 of 2001, petitioner No.2 in Criminal Miscellaneous Case No. 6634 of 2003 and the petitioner in Criminal Miscellaneous Case No. 27276 of 2012 takes us through the FIR and evidence of the prosecution witnesses and submits that PW 2 Ambia Khatun stated that the accused persons had entered into her room by removing straw fence, but according to other witnesses they entered through a hole (সিধ). So their entrance into the room of occurrence on contradictory evidence becomes doubtful. It is also unbelievable that some thieves would commit theft in a house switching on the light so that they can easily be recognized by the inmates of the house. The manner of recognition is equally

doubtful. It has been affirmed by the expert evidence of PW 9 Dr. Nargis Bahar Chowdhury, who herself examined the said victim, that no sign of forceful rape was found on her person. Receiving information from her, the informant lodged the FIR, where the name of accused Joynal did not appear as a rapist, but subsequently the prosecution witnesses implicated him for commission of rape on her in a stereographic manner. The legal principle, "false in one, false in all" would affect the whole case here and make the case seriously doubtful. The role of Khaleque, who used to stay at the house of occurrence, but surprisingly claimed to be absent in the fateful night without any explanation and his appearance there at the following morning without any communication whatsoever further makes the case doubtful.

Mr. Bahar Uddin Al-Raji, learned Advocate appearing for petitioner No.1 in Criminal Miscellaneous Case No. 6634 of 2003 adopts the submission of Mr. Mustaque and further submits that there is/was special limitation for filing an appeal and the appellants despite their presence at the time of pronouncement of the judgment and order of conviction could not prefer an appeal within time due to extreme poverty. Being

an illiterate man he was not supposed to know the provision of jail appeal under section 420 of the Code. The jail authority also did not give him any advice/information about the said provision. Under the circumstances, an application under section 561A of the Code is quite competent, where the Court can look into whether the evidence clearly or manifestly fails or have been able to prove the charge. If it appears that the evidence adduced fails to prove the charge, the High Court can entertain such application for securing the ends of justice. To meet this sort of situation a wide power has been given upon the High Court Division under section 561A of the Code, scope of which is sometime narrower, but sometime very much wide. It always depends on the facts and circumstance of a particular case.

Mr. Md. Moniruzzaman, learned Deputy Attorney General appearing for the State on the other hand submits that in our social condition evidence of a prosecutrix has got special weight. In the facts and circumstance of the present case there is no earthly reason to disbelieve the evidence of PWs 1, 2 and 6. A woman cannot invite any stigma on her

honour and dignity to get some poor villagers punished in a false case of rape. Similarly a parents cannot destroy the future of their minor unmarried girl by sticking stigma on her chastity. The allegation of rape committed on the victims have been further corroborated by the confession of accused Arjan and circumstantially corroborated by the evidence of PWs 4 and 5 Mahtab Hossain Chowdhury and Ijjat Ali respectively, who rushed to the house of occurrence early in the next morning and saw the victims to cry. PWs 3, 4, 5 and 8 saw the hole (সিধ) through which the accused persons entered into the bedroom of the victims. The statement made by PW 2 for whatever reason that the accused persons entered into the room by removing straw fence would not destroy the prosecution case. It may happened that one or some of the victims first entered into the room through the hole and the rest by removing straw or that she stated it on mere presumption. Similarly non-examination of Abdul Khaleque, informant's nephew would not adversely affect the case. It is a settled principle of law that the number of evidence is not important to prove a particular case, but the quality. The case

having been proved by all tests, learned trial Judge rightly convicted and sentenced the accused.

Learned Deputy Attorney General further submits that a judgment can only be challenged by an application under section 561A of the Code, when it is passed by a Court having no jurisdiction or suffers from quorum non-judice or it is a case of no evidence. Since the instant case does not fall within any of the above categories, the Rules are liable to be discharged. In support of his submission Mr. Deputy Attorney General refers to the cases of *Ali Akkas vs Enayet Hossain and others*, 17 BLD (AD) 44 and *Abdul Quader Chowdhury and others vs The State*, 28 DLR (AD) 38.

We have considered the submissions of the learned Advocates of both the sides, perused the evidence and other materials on record and also gone through the decisions cited by the learned Deputy Attorney General.

The Informant was the *Imam* of a Mosque at Biswanath Thana situated at the opposite end of the District. On receiving the information, he rushed to his home at village Mansurpur within Zakigonj Thana at about 3:30 hours and lodged the FIR

at 18:15 hours gathering information from his wife. He raised allegation of rape committed on his wife and daughter. His daughter was a minor girl and student of class VII. He deposed in full support of the statements made in the FIR. Both the victims deposed supporting the prosecution case and disclosed nothing adverse despite exhaustive cross-examination. The allegation of forceful sexual intercourse on victim Habiba was corroborated by the evidence of PW 9 Dr. Nargis Bahar Chowdhury read with her medical report vide exhibits-9 and 9/1. Although no sign of forceful intercourse was found on victim Ambia (PW 2), it cannot be said the she was not raped as alleged in the FIR. She was mother of two children and presumably habituated in sexual intercourse. Because of age, experience and maturity, she was supposed to speculate the consequence of resistance against the accused, who pointed a dagger on her. It was quite natural that she would not make any resistance and therefore, no sign of violent rape would be found on her person. It is quite usual that the sign of rape on an experienced woman may not be so distinct and clear as it would be in case of a virgin like the victim Habiba. Victim Ambia (PW 2) herself deposed

supporting the allegation of rape to have been committed on her, which was corroborated by Habiba (PW 6), who was also raped at adjacent room of the same house at the same time. PW 2's evidence and that of PW 6 were circumstantially corroborated by PWs 4 and 5, who being villagers of the same village went to the house of occurrence just in the next morning, heard the occurrence and saw the victims to cry. In our society, a woman does not invite any stigma of rape on her and no parents bring false allegation of rape on their minor daughter, whose full life is yet to live and who is yet to be married. That is why the evidence of prosecutrix in the instant case should be given highest consideration.

Under the facts and circumstances of the present case, we do not find any earthly reason to disbelieve the material part of the evidences of PWs 2, 6 and 9 and that of other prosecution witnesses.

It further appears that accused Arjan was arrested on 8.10.1997 at about 8:30 am and was produced before the Magistrate at 11:30 am on the same day, where he made a confession involving himself as well as co-accused Kalon, Joynal and Karim. Accused Arjan made confession at the

earliest opportunity and without going on police remand even without staying at Thana hajot. From the manner of narrating the facts, his confession also appears to be true and voluntary. But it was not recorded on the form as prescribed in the General Rules and Circular Orders (Criminal), which was in force at that time. Even the recording Magistrate did not make any endorsement on it as to why he had to record the confession on a plain paper. The Magistrate was not examined and the recorded confession was not formally adduced in evidence. Nevertheless, recording of the confession as stated by the Investigating Officer (PW 8), is a circumstance which lends support to the prosecution witnesses.

The petitioners in the miscellaneous cases appear to be poor having no financial support to prefer an appeal within time. They have also no family/social support to take care of their respective cases. They did not have any practical reason to be involved in land dispute or enmity with the informant party. In such a position we do not believe the defence case that due to land dispute with aunty of one of them, the accused were falsely implicated. The defence plea of conducting gambling at the house of occurrence and false implication of

Arjan out of dispute on distribution of board money or false implication of accused Kalon because of illicit relation of his wife with A. Khalek or Arjan's relation with victim Ambia do not match the facts and circumstances of the case and appear to be mere a defence plea.

Now let us see whether all the accused were involved in commission of rape on the victims. The informant lodged the FIR on hearing the facts from his wife, where he did not raise any allegation of rape against accused Joynal. In her statement made before the Magistrate, Ambia Khatun (PW 2) also did not raise any such allegation against Joynal. But at the time of recording evidence, both of them stated that accused Joynal had committed rape on victim Ambia Khatun. So, there is an embellishment in the evidence of these two vital witnesses. It is already stated that accused Arjan made a confession involving himself as well as co-accused Kalon, Joynal and Karim. Under the circumstance, there is possibility of adding the name of accused Joynal to make the prosecution case fully consistent with the confession of accused Arjan, which creates a doubt over Joynal's involvement in the offence of rape. Besides, it appears that Joynal was arrested from Chittagong

sometime after 16.05.1999 and before 15.12.1999. The information of his arrest was communicated to the trial Court by a Memo No.2818 dated 15.12.1999 of Zakigonj police station, which the trial Court noted in order dated 03.01.2000, but proceeded with hearing till 04.03.2001 in absence of him. The trail Court by order dated 17.10.2000 issued a production warrant to ensure his presence and in orders dated 19.11.2000 and 12.02.2001 observed that he was still in Chittagong and not brought to Sylhet. In the orders subsequent to 04.03.2001 although he was shown to be in custody along with three others, it was not specifically mentioned that he was brought from Chittagong jail. It is, therefore, not clear whether he was in custody at Sylhet or Chittagong. It appears from order dated 14.01.2001 that the trial Court by allowing an application filed by the Public Prosecutor decided to proceed with the case in absence of accused Joynal. In order dated 17.04.2001, learned trial Judge for the first time mentioned his presence with name in the following manner:

"...(১) জয়নাল (২) করিম (৩) আরজান ও (৪) কালন জেল হাজত আছে। তাহাদেরকে ট্রাইব্যুনালে আনা হইয়াছে..."

From the above quoted order it is not very clear whether accused Joynal was in custody in Chittagong or in Sylhet, and what does mean the word তাহাদের (their) in the above quoted order. Did it mean all the four accused or three of them? If it meant all the four accused, then when accused Joynal was brought from Chittagong and where was it noted?

If it is presumed that he was present before the Court on 17.04.2001 then it was incumbent upon the trial Court to bring into his notice about the evidence of PWs 4, 5 and 6 who were examined during 28.7.1999-14.01.2001 apparently in absence of accused Joynal and suo-motu give him an opportunity to cross-examine the said witnesses. But we do not find any such order in the order sheet.

It is a settled principle of law that illegality at any stage of a trial renders it to be illegal as a whole. It is, therefore, not clear whether he was really brought from Chittagong or the trial Judge mistakenly mentioned his name with other co-accused in the order sheet. It is to be kept in mind that right to defence is an essential element of criminal trial and its denial whether direct or implied vitiates the trial.

However, on scrutiny of the evidence as adduced in the present case, it does not appear that it manifestly or clearly proves the offence of rape against accused Joynal and there is scope to raise question about the legality of the instant criminal proceedings so far it relates to him.

In the above premises let us see whether the criminal miscellaneous case under section 561A of the Code filed by accused Joynal can be entertained. On this point two/three decisions in our jurisdiction are often cited, two of which have already been cited by the learned Deputy Attorney General.

In the case of *Abdul Quader Chowdhury and others* (*ibid*) proceedings of an anti-corruption case was challenged by the partners of a beneficiary firm before framing of charge. The High Court Division refused to quash the proceedings. They went up to the Appellate Division and obtained special leave. Ultimately the Appellate Division dismissed the appeal with some observations, *inter alia,* that,

> "12. ... A third category of cases in which the inherent jurisdiction of the High Court Division can be invoked may also arise. In cases failing under this category 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." (emphasis supplied).

From the above quoted view taken in *Abdul Quader Chowdhury and others vs The State*, 28 DLR (AD) 38 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 reexamination 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 reexamine 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.

In the instant case, accused Joynal was present before the trial Court at the time of pronouncement of the judgment, but he could not prefer any appeal due to poverty and also could not prefer any jail appeal presumably for his ignorance of procedural law. Whenever he could have afforded, the

special limitation expired, where section 5 of the Limitation Act was not applicable. This is correct that poverty or ignorance of law is not an excuse, but these are harsh reality, which we cannot ignore mechanically. The cases cited by the learned Deputy Attorney General were initiated against proceedings before commencement of trial, but the case in hand has been filed after conclusion of trial in presence of the petitioner. It is logically presumed that due to poverty or ignorance of law the petitioner could not exercise his right to appeal under the law within the special limitation. His failure in preferring appeal was therefore, quite unintentional and beyond his control. In such a case the inherent power "otherwise to secure the ends of justice" as given to the High Court Division under section 561A of the Code will come into play. We are in agreement that the scope of section 561A is very narrow, but sometime very wide and uique, which in an exceptional circumstance gives a handle to the High Court for reexamining or reassessing evidence to see whether the evidence adduced clearly or manifestly fails to prove the charge against a convict.

In the present case no proceeding has been challenged, but final judgment. This sort of case clearly falls within the "third category" as categorized in the above cited case of *Abdul Quader Chowdhury and others*. The evidence of PW 2 so far it relates to accused Joynal appears to a subsequent embellishment. In the confession of co-accused Arjan his name though appeared, the recorded confession was not formally proved in evidence and not affirmed by the recording Magistrate. It was also not recorded on a prescribed form and there was no endorsement of the recording Magistrate as to why he had recorded the confession on a plain paper. It is a settled criminal law that one cannot be convicted on the basis of confession of co-accused. Besides, there is a doubt whether his trial in absentia despite the trial Court's knowledge about his custody in Chittagong jail was legally valid or not. The quoted observation of the Appellate Division as made in *Abdul Quader Chowdhury's* case does also not support the contention of learned Deputy Attorney General. It rather speaks of applicability of section 561A of the Code to re-examine the evidence as to whether it clearly or manifestly fails to prove the charge. It is needless to say that without re-

examination of the evidence it is not possible for the High Court Division whether "the evidence adduced clearly or manifestly fails to prove the charge".

In the case of *Ali Akkas* as referred to above a minor girl aged about 11 years was kidnapped and wrongfully confined with dishonest intention. Charge sheet was submitted under section 366A, 109 of the Penal Code. The accused filed an application under section 561A of the Code before the High Court Division for quashing the proceedings. The High Court Division upon hearing ultimately quashed the proceedings. The informant moved in the Appellate Division and obtained leave. While allowing the appeal, the Appellate Division in the same words reiterated the nature and scope of the inherent power of the High Court Division under section 561A of the Code referring to the case of *Abdul Quader Chowdhury and others* (ibid).

We have got another important case on the scope of quashing a judgment and order of conviction under section 561A of the Code. In *Mofazzal Hossain Mollah and others vs State* 45 DLR (AD) 175, the appellants were jointly tried on

the charge of theft and ultimately were convicted under section 379 of the Penal Code by a Magistrate of 2nd Class. They preferred an appeal, which was dismissed by the Additional District Magistrate. They challenged the appellate order by filing a revisional application before the concern Sessions Judge, which was summarily rejected and they brought it before the High Court Division by moving with an application under section 561A of the Code. The High Court Division also rejected the application summarily. Ultimately the Appellate Division re-examined the entire evidence and found their conviction was solely based on confession of co-accused and thus set aside the conviction. In so doing Shahabuddin Ahmed, CJ observed:

> *"7. In disposing of the application under section 561A CrPC the learned Judges of the High Court Division fell into the same error as the learned Sessions Judge and did not take into consideration whether the conviction was based on any legal evidence. The relevant portion of the judgment is quoted below:*
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> > *"It is further seen that two judgments, one in appeal and one by the Court of first instance,*

were passed in this case and all against the petitioners and there is also a revision that was also against him. How many times the petitioners will challenge a judgment and lastly in a quashing petition which is not at all maintainable."

The learned Judges proceeded on the assumption that section 561A CrPC is meant only for quashing a criminal proceeding before the trial has started and that when the trial, as in this case, has been concluded, followed by an appeal and a revision, both being unsuccessful, how the convicted accused could come under this section for quashing the proceeding. Section 561A has only reiterated the Court's inherent power to give effect to any order under the Code of Criminal Procedure "to prevent the abuse of the process of any court or otherwise to secure the ends of justice". In this case, the appellants invoked the inherent power of the Court to secure ends of justice by getting the order of their conviction quashed or set aside on the ground that the conviction was based on no evidence. The learned

Judges failed to exercise their power under this section to look into the matter and see whether the conviction was valid and legal or whether it was invalid on the very face of it for want of any legal evidence to support it. The fact that the accused were tried and found guilty and then unsuccessfully filed an appeal and a revisional application cannot be a ground, in the facts of the present case, for refusing to exercise the Court's power under section 561A CrPC." (emphasis supplied)

In the first two cases, proceedings were challenged at premature stage i.e before framing of charge. In the third case of *Mofazzal Hossain Mollah and others,* the appellants were convicted in trial, unsuccessfully preferred an appeal, moved with a revisional application and at fourth tier unsuccessfully moved in the High Court Division. Still the Appellate Division entered into merit of the case, re-examined the evidence and set aside the conviction holding that "the learned Judges of the High Court Division fell into the same error". The present case is far better than all the three cases. It is already stated that here accused Joynal was present at the time of pronouncement of his conviction, but due to poverty could not prefer an

appeal within special limitation, against which section 5 of the Limitation Act does not operate, although his inability was unintentional and beyond his control. This is the exceptional circumstance under which the High Court Division can exercise its inherent power under section 561A of the Code to secure the ends of justice.

In view of the discussions made above, we find that the evidence adduced in the instant case though proves the charge of rape against accused Kalon, Md. Abdul Karim and Arjan, clearly and manifestly fails to prove the charge against accused Joynal and the application filed by him under section 561A of the Code is quite competent.

Accordingly, Criminal appeal No. 5009 of 2001 is dismissed and the Rule in Criminal Miscellaneous Case No. 6634 of 2003 is discharged. The impugned judgment and order, so far it relates to the convict-appellant Kalon and convict-petitioners Md. Abdul Karim and Arjan, is maintained.

The Rule in Criminal Miscellaneous Case No. 27276 of 2012 is made absolute. The impugned judgment and order of conviction and sentence, so far it relates to accused Joynal, is

quashed. The petitioner Joynal is acquitted of the charge and discharged from his bail bond.

Send down the lower Court's record.

ASM Abdul Mobin, J:

I agree.