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

Criminal Appeal No. 6799 of 2011

Md. Anis Miah
…Appellant
-Versus-
The State
… Respondent

Mr. SM Shajahan with Md. Abu Hanif Advocates
…for the appellant

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

Mr. Khandker Mahbub Hossain and Mr. M I Farooqui, Senior Advocates and Mr. Shahdeen Malik, Advocate
… Amici Curiae

Judgment on 28.08.2019

Md. Ruhul Quddus, J:

This criminal appeal under section 28 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 is directed against judgment

and order dated 13.10.2011 passed by the Judge, Juvenile Court and Druto Bichar Tribunal No.4, Dhaka in Juvenile Case No. 01 of 2011 finding the appellant (a juvenile offender) guilty under sections 8 and 30 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (hereinafter referred to the Ain, 2000) read with section 52 of the Children Act, 1974 (hereinafter referred to the Act, 1974) and awarding him punishment of detention and imprisonment for 10 (ten) years in total, out of which he would be detained in a certified institute till attainment of 18 years of age and thereafter suffer imprisonment for the remaining period.

In course of simultaneous hearing of this appeal with Death Reference No. 61 of 2011 and three other connected cases by a Division Bench, the matters were referred to the learned Chief Justice for constitution of a Full Bench to decide the law points involved in the present appeal, namely, legal implication of confession made under section 164 of the Code of Criminal Procedure by a child in conflict with law and jurisdiction of a Juvenile Court constituted under the Children Act and that of different Tribunals constituted under different special laws enacted before or after the Children Act came in

force. Learned Chief Justice by order dated 02.10.2018 constituted this Full Bench for hearing and disposal of the matters including the instant criminal appeal.

Considering the importance and gravity of the above law points, we requested Mr. Khandker Mahbub Hossain and Mr. M I Farooqui, both Senior Advocates and Mr. Shahdeen Malik, Advocate of the Supreme Court of Bangladesh to assist this Court as Amicus Curiae, and also requested them to make their submissions on two other collateral issues as to whether the Druto Bichar Tribunal constituted under the Druto Bichar Tribunal Ain, 2002 (hereinafter referred to the Ain, 2002) can *suo motu* assume the jurisdiction of a Juvenile Court and what should be the maximum term of imprisonment in case of sentence for offence punishable with death or imprisonment for life both against a child and the person who crossed childhood during trial or detention. They were generous to appear and make their valued submissions on the law points involved.

Facts of the case in brief are that the informant Md. Siddikur Rahman (PW 1) lodged a first information report (FIR) with Kalmakanda Police Station, Netrokona on 16.02.2010 against accused Oli, Sabuz Miah, Tapash Chandra

Saha, Feroz Miah, Rafiqul, Emdadul and Farid Miah bringing allegations of kidnapping and murder of his son Saikat, a boy of 7 years of age. It was stated in the FIR that the informant had long pending enmity with accused Oli and Farid Miah. Before 20/25 days of the occurrence, accused Oli asked him to give Taka one lac as he was intending to contest the Students Union election in the college he was studying. As the informant refused, Oli mounted pressure on him and at one stage on 10.02.2010 threatened his wife of dire consequences. Two days thereafter, Oli made a phone call to him (informant) at 7:00 am on 12.12.2010 threatening that he would see the result of the refusal within 12 hours. At about 5:00 pm on that day his son Saikat (7) went to play outside, but did not return home. Despite exhaustive search, they could not trace him out and subsequently recorded a general diary (GD) with the local police station. On the following day the accused persons repeatedly called him from cellular 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. On the hope of getting his son alive, the informant agreed to pay the money. According to their instruction he went along with the money 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 him that he would get back his son within an hour. Other accused persons 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 house situated at the eastern side of his house. Then and there 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 the face was injured and right eye was injured by burn.

Police took up the case and after completion of investigation submitted a charge sheet under sections 7, 8 and 30 of the Ain, 2000 read with sections 302, 201 and 34 of the Penal Code against nine including the appellant Anis Miah, a juvenile offender and cousin of the victim, whose age was mentioned 18 years in the charge sheet. During investigation, the police arrested the juvenile offender on 21.02.2010 and on the following day produced him before the Magistrate, where

he made a confession purportedly under section 164 of the Code of Criminal Procedure (hereinafter referred to the CrPC).

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 Ain, 2000 read with sections 302, 201 and 34 of the Penal Code against the charge sheeted accused including the juvenile offender 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 on a notification in official gazette. The case was fixed for framing of charge on 15.02.2011, when the juvenile offender filed an application for holding his trial by the Juvenile Court. The application was accompanied by his birth certificate and school registration card showing his date of birth 01.07.1995, on which count his age was 15 years 7 months on that day. Learned Judge of the Tribunal allowed the application by order dated 15.02.2011, but without sending the case to the Juvenile Court assumed its jurisdiction on his own motion, split the record and registered the present case as Juvenile Case No. 01 of 2011.

Learned Judge, thereafter, framed charge against the appellant under sections 7 and 8 of the Act VIII of 2000 read with sections 302, 201 and 109 of the Penal Code on the same day. The charge was read over to him, to which he pleaded not guilty and claimed justice.

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 the confession of the juvenile offender.

PW 1 Md. Siddiqur Rahman, the informant stated that in the afternoon on 12.02.2010 his son Saikat went outside to play, but did not return home. He unsuccessfully searched for him everywhere. In the next morning at about 9:00/9:30 o'clock some kidnappers informed him over a phone call that Saikat was under their custody, demanded ransom of Taka one lac and threatened him of killing Saikat in case of failure. The informant wanted for proof that Saikat was really under their custody. In response thereto they made another phone call at about 12:00 o'clock and connected Saikat to talk to him. Getting no way, the informant arranged the money and got

ready to hand it over to the kidnappers. At 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 the 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 eastern bank of river Vogai with the money and a gas lighter in hand. Accordingly, he went there, when accused Sabuz took position at his right side and Tapash at the left. Then accused Oli appeared in his front and took the money while accused Farid, Rakibul, Emdadul and Asad were standing at a distance. The informant asked them the whereabouts of his son, when they replied that he would get his son after an hour. After an hour, the kidnappers asked him over cell phone to go to his abandoned homestead adjacent to his present house and get his son there covered by 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 caused by cigarette on his person. 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. The defence declined to cross-examine him (PW 1).

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 (Primary Teachers Training Institute), Netrokna. On receipt of the news of occurrence, he came home. Before that the dead body was recovered. He was in contact with home and learnt the missing news of Saikat over cellular phone. Then he narrated the prosecution case in brief and further stated that the Police had arrested his cousin Anis, who made a confession stating that the accused persons had kidnapped Saikat and killed him after payment of ransom.

In cross-examination PW 2 stated that Ichhar Uddin (PW 5) was his father and Shahin (PW 3) and Molim were brothers. He came home on 15.02.2010 at quarter to 11:00 pm.

After staying one day at home, he went back to join the training. He denied the defence suggestion that out of jealousness to their property, the appellant was falsely implicated or that he deposed falsely.

PW 3 Shahin stated that Saikat was his cousin. He (Saikat) went missing at 5:00 pm on 12.02.2010. On the following day his uncle Salauddin made a GD entry with the local police station. The accused persons made phone call to his uncle Siddiqur Rahman (PW 1), demanded ransom of Taka one lac disclosing the occurrence of kidnapping, and threatened him of killing Saikat in case of failure. As his uncle agreed, they asked him to bring the money alone on 14.02.2010 at the machine room near to their house. They (PW 3 and his companions) planned to follow his uncle and apprehend the kidnappers. Since accused Farid 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 phone call to the informant again and asked him to hand over the money within the day; otherwise, to face dire consequence. They asked his uncle to carry a *hariken* in hand and go to the place as they would instruct instantly. 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 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 him 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 covered by 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 cigarette. On receipt of the information, the police came and prepared an inquest report. They seized the nylon cord under a seizure list and took his signature there. Subsequently the police arrested his cousin Anis (appellant herein) with a mobile phone set and seized the phone under another seizure list, which he also signed. PW 3 proved his signatures on the seizure lists and also proved the seized article as material exhibit. The defence declined to cross-examine him.

PW 4 Md. Salauddin stated that on 12.02.2010 at about 5 pm Saikat went outside to play, but did not return home. As they could not trace him out, he (PW 4) had recorded a GD with the local police station. Oli made a phone call to the informant on 13.02.2010 at about 9:00 am and demanded ransom of Taka one lac disclosing that he and his accomplices had kidnapped Saikat. They also threatened the informant of killing Saikat in case of failure in payment of the ransom. The informant had to agree and according to their instruction got ready to hand over the money on 14.02.2010 in the evening, when Oli's brother accused Farid came to their house and observed the situation. After the informant party left the house towards the designated place for handing over the money, Farid alerted the kidnappers to the possibility of their apprehension, if they would come to receive the money. As a result the kidnappers did not come. Oli called the informant again on 15.02.2010 at the noontime and asked him to give 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 received the money while

Farid, Emdadul and Rakibul were standing nearby. Oli told him that he would get his son 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 of Saikat. 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 under a seizure list and took his signature there.

PW 4 further stated that after Saikat was missing, he recorded a GD being No. 420 dated 13.02.2010 with Kalmakanda police station. He proved his signature on the GD. He also proved his signatures on the inquest report and seizure lists.

In cross-examination PW 4 could not say the IME number of the phone recovered from the appellant, and stated that he was at Netrokona when the appellant was arrested. He came on the following day of his arrest. He denied the defence suggestions that he did not go to police station, or that he did

not sign the seizure list but signed it without going through its content.

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. The kidnappers called the informant on the next day at about 8:00/8:30 am and demanded ransom of Taka one lac. They threatened him of killing Saikat in case of failure in payment of the ransom. They arranged the money and went to the machine room situated in the field to the south of their house. But the kidnappers did not come to receive the money, but said 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 the 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, Tapash and Oli. Then he (PW 5) gave description of recovery of the dead body with injuries found thereon, arrival of police, making of inquest report and seizure of the nylon cord in the

similar manner as stated by PWs 1-4. He proved his signatures on the inquest report and seizure list.

In cross-examination PW 5 stated that they were five brothers including him. They lived in the same homestead having 15 separate rooms. At the time of occurrence Bazlu (PW 2) was staying at Netrokona. He denied the defence suggestion that the case was brought only for harassment of the accused persons.

PW 6 Idris Ali stated that the informant and he went to mosque together on 12.02.2010 at evening. The informant told him that Saikat was missing. On the next day at about 8:00/8:30 pm he (PW 6) went to the informant's house and came to know that some terrorists had kidnapped Saikat and demanded ransom. Then he 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 have been involved in the occurrence. In cross-examination he (PW 6) denied that Anis did not confess his guilt or that he deposed as a tutored witness.

PW 7 Md. Hazrat Ali, a Constable of Police stated that on 15.02.2010 at about 10:30/11:00 pm they (he and another

police personal) went to the informant's house at Panch Bagajan. Sub-Inspector Khayer (PW 12) 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.

PWs 8 and 10 Mofazzal Hossain and Golam Mostafa respectively were tendered by the prosecution and the defence declined to cross-examine them.

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 the right 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 the dorsum and third and fourth toes. His (victim's) right eye ball was partially protruded and left eye was reddish with ecchymosis on the upper eye lid.

PW 9 opined that the death was due to asphyxia from strangulation resulted in the injury No.6 (ligature mark) as mentioned in the postmortem report. 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 degree in 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 out of biting by dog and foxes, those injuries were caused or that the victim died of accidental wringing of 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 (PW 11) recorded his confession following the provisions of sections 164 and 364 of the CrPC. Before that the confessing accused was given three hours time for reflection. After recording the confession, its content was read over to him and as it was correctly recorded, he put his

signature there. PW 11 identified the offender on dock, proved the confession, his signatures there and that of the juvenile offender.

In cross-examination PW 11 stated that he did not notice any mark of injury on the person of the confessing offender. His age was written 18 years on the document. The confession was true and voluntary. He (PW 11) denied the defence suggestion that the offender was much younger, but was shown older on the document. He further denied that the Investigating Officer (IO) had actually written the statement and supplied it to him.

PW 12 Abul Khayer, the first IO of the case stated that he was the Duty Officer at police station on the day of lodging the FIR. He went to the spot at about 11:00 pm under GD No.482 dated 15.02.2010 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. As he was in charge of the police station, he filled in the form of FIR and recorded it. He himself 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 CrPC.

PW 12 further stated that during investigation he had collected eleven call lists, arrested Anis and recovered a silver coloured mobile phone set from his possession. Its IME number was 35492902730244 and SIM number was 01820843851. He seized the phone set under a seizure list. Anis made a confession under section 164 of the CrPC before the Magistrate. On transfer, he handed over the case docket. He proved the inquest report, seizure list, mobile call lists, his signatures on different documents and also proved the seized articles as material exhibits.

In cross-examination PW 12 corrected himself stating that the IME number of the seized phone number was 354929027302449. He did not seize the call lists under any seizure list and those were not bearing the signature or seal of the authority concern. He did not collect the call list of 12.02.2010 against the aforesaid phone number. No call was made on 13.02.2010 from that number to the informant. IME number of the phone set, wherefrom call was made to the

informant, was 354929027302440. He denied the defence suggestion that he had extracted confession from Anis on threat and coercion.

PW 13 Md. Abdul Karim, the then Officer-in-charge of Kalmakanda police station and second IO of the case stated that he had received the case docket on 20.03.2010. He found the sketch map and index prepared by the first IO to be correct. He (PW 13) himself prepared another sketch map of the place, wherefrom the victim was kidnapped. During investigation, he seized a cut piece of half pant produced by Constable Hazrat Ali under a seizure list and recorded statements of 7/8 witnesses under section 161 of the CrPC. 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 that he had not examined the offender's age by any doctor or collected his birth certificate. No phone call was made to the informant from his (Anis's) number. The last three digits of the IME number of Anis's phone set were 449, but that of the set, wherefrom call was made to the informant, were 440. There was also no proof that Anis talked to the informant by his phone within

12-15.02.2010. He (PW 13) denied the defence suggestion that the offender Anis was not an adult.

After closing the prosecution evidence, learned trial Judge examined the appellant under section 342 of the CrPC, to which he did not make any explanation, or examine any witness in defence.

On conclusion of trial, learned Judge found the juvenile offender guilty and awarded him punishment by the impugned judgment and order as stated above, challenging which the appellant moved in this Court with the present criminal appeal, obtained bail and has been enjoying its privilege till today.

Mr. SM Shajahan, learned Advocate for the appellant at the very outset submits that the impugned judgment and order is without jurisdiction inasmuch as admittedly the appellant was a child under the age of 16 years at the time of commission of the occurrence as well as of framing of the charge and he could only be tried by a Juvenile Court constituted under the Act, 1974 that was in force at the material time. The Druto Bichar Tribunal No.4, Dhaka *suo motu* assumed the jurisdiction of Juvenile Court and proceeded with trial of the case, which was unknown to law.

Mr. Shajahan further submits that the confession made by a child purportedly under section 164 of the CrPC is also unknown to law and as such not admissible in evidence. More so, the confession was retracted by filing a written application, where it was clearly stated that it was extracted on physical torture and threat. It thus appears that the confession was not at all voluntary. Further, if the contents of the confession are critically analyzed, it would be found to be exculpatory in nature, upon which no conviction can be passed. The persons, who threatened and lured the juvenile offender, were rather liable to be prosecuted under section 34 of the Act, not the juvenile offender.

Mr. Shajahan lastly submits that the circumstantial witnesses and the witnesses of facts stated nothing, on which the appellant's involvement in the alleged occurrence could be factually inferred. It was rather established by the evidence of two Investigating Officers (PWs 12 and 13) that neither his SIM number nor the phone set allegedly recovered from him had been used to call the informant. The informant's call list was not collected, and the call lists (exhibit-15 series) which were collected by the IO had no signature of any employee and

seal of the mobile phone operating company, and not seized under any seizure list. The employee of the phone operating company, who printed out the call lists or supplied it to the IO was also not examined to prove its authenticity. Being private documents, the call lists as such were not admissible in evidence. On all the counts, the impugned judgment and order is without jurisdiction, illegal, not based on legal evidence and as such liable to be set aside.

Mr. Md. Moniruzzaman, learned Deputy Attorney General appeared for the State 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 submits that in view of sub-sections (2) and (5) of section 5 of the Act, 1974 a Sessions Judge is competent to exercise the power of a juvenile Court. Learned Judge of the Druto Bichar Tribunal being a Judicial Officer equivalent to a Sessions Judge

is quite competent to assume the jurisdiction of the Juvenile Court. Besides, an overriding power is given to the Druto Bichar Tribunal by sections 2 and 5 of the Ain, 2002 to try all cases which are transferred to it. The present juvenile case originated from Kamlakanda Police Station Case No.12 dated 16.02.2010, which was notified under sections 5 and 6 of the Ain, 2002 and published in Bangladesh Gazette extra-ordinary dated 14.10.2010. It, therefore, cannot be said that the learned trial Judge *suo motu* and illegally assumed the jurisdiction of Juvenile Court.

Mr. Moniruzzaman further submits that it is a well settled principle of the law of evidence 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. There is no bar in recording confession of a child in the Act, 1974 and section 18 thereof makes the CrPC applicable in trial of a juvenile case except the procedures which are provided in the Act itself. The confession made by the juvenile offender is thus admissible in evidence. It was voluntarily recorded by the juvenile offender and the trial Court rightly used 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, submits that the confession was reaffirmed on oath by the recording Magistrate, who deposed that no mark of injury was found on the person of the offender, he was given time for three hours for reflection and all legal procedures as mentioned in sections 164 and 364 of the CrPC were strictly observed. The content of the recorded confession was read over to the confessing offender, and on clear understanding of its correct reproduction, he put his signature there. The confession was thus true and voluntary. Such a flawless confession itself is sufficient to pass an order of conviction against its maker. The evidence of the prosecution witnesses especially that of PWs 1-6 read with the seizure of nylon cord and dried leafs from the place of occurrence, and phone set from the juvenile offender are corroborated by the confessional statements in material particulars. In *State vs Sukur Ali* 9 BLC 238, the High Court Division confirmed the death sentence of a child on the basis of his confession. It has also been held there that because of the non-obstante clause in section 3 of the Ain, 2000, the Tribunal constituted thereunder had jurisdiction to try a case where a child was charged with a

criminal offence. The Appellate Division upheld the said decision by its judgment and order dated 23.02.2005 passed in Jail Petition No. 8 of 2004 (*Md. Shukur Ali vs The State*). Learned Judge of the Tribunal-cum-Juvenile Court did not commit any illegality in passing the impugned order of conviction and as such the criminal appeal is liable to be dismissed. Learned Deputy Attorney General also refers to the case of *Mona alias Zillur Rahman vs The State*, 23 BLD (AD) 187 to substantiate his submission that a child can be punished for more than ten years in cases of offences punishable with death or life term imprisonment.

Mr. Khandker Mahbub Hossain submits that although no specific provision of recording confessional statement of the Children is provided in the Act, 1974, confession of a child can be recorded under section 164 of the CrPC by virtue of section 18 of the Act. It has, however, been established by plethora of judicial decisions that extra care and cautions should be given in recording confessions of the children including presence of their parents, guardians or custodians. The evidentiary value of the confession of a child would depend on absolute truthfulness and voluntariness of it. In support of this part of his

submissions, Mr. Hossain refers to the cases of *Jaibar Ali Fakir vs The State* 61 DLR 208=28 BLD 627 and *Bangladesh Legal Aid and Services Trust and another vs Bangladesh and others*, 22 BLD 206.

Mr. Hossain on the next point submits that only a Juvenile Court established under the provisions of the Act, 1974 shall have the jurisdiction to try the juvenile cases. In absence of Juvenile Court constituted under section 3 of the Act, the Courts mentioned in section 4 and empowered by section 5 (2) thereof shall exercise the powers, but a Tribunal constituted under any special law for special purpose of trial of a particular type of cases is not a Court within the scope of section 4 of the Act. If the Tribunal other than a Court mentioned in section 4 of the Act is allowed to assume the jurisdiction of Juvenile Court, wisdom of the legislature would be seriously undermined. The Druto Bichar Tribunal constituted under the Ain, 2002 does not fall within the definition of Juvenile Court, nor can it assume the jurisdiction on its own motion. Mr. Hossain refers to the cases of *The State vs Md. Raushan Mondal alias Hashem*, 59 DLR 72= 18 MLR

(HCD) 195 and *Rahmatullah (Md) and another vs State*, 59 DLR 520.

Mr. Hossain, on the point of maximum term of imprisonment to be imposed on a juvenile offender who crosses childhood during the trial or detention, lastly submits that the age old principle of criminal jurisprudence states that punishment should be imposed on an offender in proportionate to the gravity of offence, manner of occurrence, his mental condition and circumstances under which he committed the offence. Another most important basis of punishment is the date of occurrence, and the law that was in force on that date. Attaining majority during trial does not bear any relevance with the alleged offence and also with imposition of punishment.

Mr. M I Farooqui canvasses the development of law relating to juvenile justice system and the historical percepts of Juvenile Courts with reference to The Reformatory Schools Act, 1897; The Bengal Children Act, 1922; The Children Act, 1974 and The Shishu Ain, 2013 and submits that in view of the spirit and purpose of law to favour the children, any provision of the Act, 1974 should not be literally interpreted to the

detriment of the children's interest. The literal meaning of words used in the Act must be read with its spirit and purpose. So, any provision thereof is to be interpreted in a manner consistent with its purpose, which is called 'the rule of purposive interpretation'. Most of the commonwealth countries traditionally follow the principle of common law or legal positivism in interpreting Constitutions. Bangladesh is also one of them. Of late Australia, Canada and South Africa along with Israel and Germany have switched over to 'purposive interpretation' while expounding Bills or Charters of Rights, or basic human rights. India has also joined this school. The purposive interpretation has its root in the Latin maxim '*falsa demonstratio*' meaning to keep the primary function intact in interpreting the Constitutions and ignore the rest as false demonstration with the change of time, situation and eventualities. This rule has virtually superseded the rule of 'literal interpretation'. In view of the development and spirit of the law, the purposive interpretation would require a child to be absolved of the ordeal of the process of confession under section 164 of the CrPC. For better appreciation of purposive interpretation, Mr. Farooqui refers to *Government of NCT of*

Delhi vs Union of India and another, CDJ 2018 SC 705; *R v Ven Der Peet* (1996) 2 SCR 507 from Canadian jurisdiction and an article titled *Interpreting Constitution: A Comparative Study* by Professor S P Sathe published by Oxford University Press in 2013.

Referring to article 3 of the UN Convention on the Rights of the Child, 1990 Mr. Farooqui further submits that the best interests of the children shall be the primary consideration in undertaking any actions concerning the children by the Courts of law, administrative authorities or legislative bodies. Bangladesh has ratified the above mentioned UN Convention and article 25 (1) of its Constitution casts an obligation to respect the International law and the principles enunciated in the UN Charter and Conventions. So, this is a constitutional mandate as well. Mr. Farooqui also refers to *Hussain Mohammad Ershad vs Bangladesh and others,* 21 BLD (AD) 69 and submits that our Courts should not ignore the international instruments and should draw upon the principles incorporated therein.

Regarding jurisdiction of the Juvenile Court, Mr. Farooqui submits that no Court or Tribunal established under

any other law irrespective of the period of its enactment/enforcement other than a Juvenile Court can try any case, where a child is charged with a criminal offence. In the present case the Druto Bichar Tribunal assumed the jurisdiction of Juvenile Court presumably under section 4 of the Act, 1974 as a Court of Sessions Judge inasmuch as the alleged offence was triable by a Court of Session in accordance with the second schedule of the CrPC. But a Juvenile Court was already established in Dhaka under section 3 with powers under section 5 of the Act. The powers conferred on the Juvenile Courts are also exercisable by the High Court Division, Court of Session, Court of Additional Sessions Judge and Assistant Sessions Judge, and Magistrate of First Class under section 4 of the Act, but the Courts under sections 3 and 4 have no co-ordinate or concurrent jurisdiction to assume it alternatively and to override the exclusive jurisdiction of the Juvenile Court. It was, therefore, incumbent upon the Druto Bichar Tribunal to transfer the case to the Juvenile Court for trial. The trial held by the Druto Bichar Tribunal itself was without jurisdiction, Mr. Farooqui concludes.

Mr. Shahdeen Malik submits that the Juvenile Courts are established for the explicit purpose of creating a non-adversarial, non-intimidating and friendly settings and surroundings for trying the children in conflict with law. These are essential for ensuring and facilitating reform, reintegration and rehabilitation of the children, which in turn, stem from the general propositions of all spheres of law that a child is fundamentally unable to comprehend or understand the legal consequence of his acts or omissions. Law, be it contract, or property, civil and political rights, conferring licenses or permissions, do not generally recognize the children as their subject. Hence the law does not recognize or ascribe any consequence to any act done by a child. A child cannot be a subject of labour and service laws, except only as an apprentice or trainee in limited circumstances. Such example may be catalogued from several areas of laws. Therefore, a child cannot be subjected to the rigors of a formal and adversarial justice system in the settings of regular Court or Tribunal constituted under any general/special law other than the Children Act. A confession under section 164 of the CrPC and its use against an accused being part of the formal and adversarial structure of our

criminal justice system is quite non-applicable for a child in conflict with law. The legally recognized immaturity and lack of proper understanding of the consequence of his purported confession cannot be taken into consideration in adjudicating his act or omission.

Mr. Malik further submits that after enactment of the Children Act and its coming into force all over the Country by the year 1980 through gazette notifications, trial of child below the age of 16 years (now 18) must be held by the Juvenile Court established under the Children Act not by a regular Criminal Court or Tribunal established by any other law. The non-obstante clauses, namely, section 3 of the Ain, 2000 or section 26 of the Special Powers Act, 1974 shall not oust the jurisdiction of Juvenile Court. The Druto Bichar Tribunal has jurisdiction to try only the cases, which are transferred to it through a notification published under sections 5 and 6 of the Ain, 2002. The Tribunal by itself cannot take up any case for adjudication. Apart from the legal point of exclusive jurisdiction of the Juvenile Court to try a juvenile case, a Tribunal constituted under the Ain, 2002 cannot assume the jurisdiction of the Juvenile Court in any manner whatsoever.

Mr. Malik, referring to article 35 (1) of the Constitution, submits that the constitutional protection to a person in respect of trial is also to be complied with in awarding punishment on him. Punishment cannot be imposed on a person, which is greater than what was prescribed at the time of commission of the offence. There is no scope to award punishment upon a child more than what is prescribed in section 52 of the Act, 1974 or section 34 of the Ain, 2013.

We have considered the submissions of the learned Advocates of both the sides as well as of the Amici Curiae, examined the evidence and other materials on record, gone through the decisions cited and consulted the relevant laws.

It appears that the police arrested the juvenile offender on 21.02.2010 and produced him alone before the Senior Judicial Magistrate on the next day. The Magistrate recorded his confession purportedly under section 164 of the CrPC, where he narrated the entire prosecution case in similar line of FIR as well as of the evidence of PW 1 and confessed in brief that on 12.02.2010 at about 5:30 pm he was working in their agro field, when accused Oli and an unknown person called him at Oli's

house, where some other persons asked him to be with them in a threatening tone and also lured him into a portion of the money, if any, they could realize from the informant. They kept his mobile phone and gave him another one. They asked him to go home and pass information therefrom. Subsequently he accompanied accused Farid, when he alerted the accused not to come to the machine room to receive the ransom. This was the material part of his confession, which involved him in the occurrence. The other part was huge and virtually it was the reproduction of the entire prosecution case.

The evidence of thirteen prosecution witnesses has already been discussed. Of them PW 1 Md. Siddikur Rahman was the star witness who directly implicated the accused except the juvenile offender. PW 2 was a hearsay witness and stated that the police had arrested Anis, who recorded a confession involving the accused persons. In cross-examination he denied the defence suggestion that out of jealousness to property, the appellant was falsely implicated. PWs 3-5 were circumstantial witnesses, who did not utter a single word against the juvenile offender. PW 6, another circumstantial witness also did not state anything against him, but in cross-examination denied the

unnecessary defence suggestion that the juvenile offender did not confess the guilt. He was not a relevant witness in any way to prove or disprove the confession. PW 7 was a formal witness who carried the dead body of the victim for holding autopsy. PW 9 Dr. AKM Abdur Rab was an expert witness who conducted autopsy on the dead body. He gave description of injuries, opined about the cause of death and proved the autopsy report. The only prosecution witness deposed against the juvenile offender was PW 11 Md. Aminul Haque, the Senior Judicial Magistrate who had recorded his confession purportedly under section 164 of the CrPC. He stated that the confession was true and voluntary and affirmed the procedural correctness of recording the same.

PW 12 Abul Khayer, the first Investigating Officer stated that he had collected eleven call lists, arrested the juvenile offender and recovered a phone set from his possession. Its IME number was 35492902730244 and SIM number was 0182084385. He made a confession before the Magistrate under section 164 of the CrPC. PW 12 proved the seizure list and call lists, and also proved the seized phone set. In cross-examination he stated that he had not seized the call lists under any seizure

list and those were not bearing any signature and seal. He did not collect the list of calls made on 12.02.2010 against the said phone number and there was no call to the informant's number on 13.02.2010.

PW 13 Md. Abdul Karim, the second Investigating Officer who submitted charge sheet stated in cross-examination that there was no phone call from Anis's number to the informant. The last three digits of the IME number of his phone set were 449, but that of the set, wherefrom call was made to the informant were 440. There was no proof that any call was made to the informant through his phone within 12-15.02.2010.

The evidence of PWs 12 and 13 as referred to above, makes it clear that the phone set or the SIM recovered from the juvenile offender was not used to make phone call to the informant.

According to the FIR, there was enmity pending between the parties, accused Oli demanded Taka one lac prior to the kidnap and as the informant declined, he threatened him of facing dire consequences within twelve hours and on the following day of kidnap, he made a phone call to the informant

at 7:35 am. It was quite natural that a strong suspicion against Oli would take place in the General Diary, which was recorded at some point of time on 13.02.2010, the next day of missing of the victim, but we do not find any such statement there. The inquest report prepared on 15.02.2010 at about 11:00 pm, when the informant was equipped with all material facts, was likely to contain a statement regarding involvement of the accused persons. The way the principal accused Oli demanded the ransom without hiding his identity is also against criminal psychology as well as 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, they would allow his full brother Farid to come to their house and leak information therefrom to the kidnappers. All these circumstances make the prosecution case seriously doubtful.

Let us discuss the issues on jurisdiction of Juvenile Court constituted under the Act, 1974 and that of the Druto Bichar Tribunal constituted under the Ain, 2002; maximum term of punishment that can be awarded on a child or a person who crossed childhood during trial or detention in offences

punishable with death or life term imprisonment; and legal implication of confession made by a juvenile offender, upon which legal validity of the impugned judgment and order would finally depend.

The Children Act, 1974 in its definition clause of section 2 (f) defines a 'child' as a person under the age of sixteen years, and in the Shishu Ain, 2013 it is 18 years. Section 3 of the Act specifically provides with a non-obstante clause that the Government may establish one or more Juvenile Courts for any local area. Section 4 of the Act empowers the High Court Division, Court of Session, Court of Additional Sessions Judge or Assistant Sessions Judge, and Magistrate of First Class to exercise the powers in absence of any Juvenile Court and section 5 (1) thereof says that when a Juvenile Court has been established for any local area, such Court shall try all cases in which a child is charged with the commission of an offence. According to section 5 (2) of the Act when a Juvenile Court has not been established for any local area, no Court other than a Court empowered under section 4 shall have power to try any case where a child is charged with an offence. Joint trial of a child with an adult is strictly prohibited by section 6 of the Act

while sections 7-18, 48, 51-63, 66, 69-71 and 73 provides the detail procedure of inquiry/investigation and conducting trial of a criminal case against the youthful offenders in a friendly and comfortable environment. It is quite impossible for any other Court except a Juvenile Court or the Courts empowered by section 4 of the Act to ensure the child friendly environment and other legal requirements of a child trial. All the learned Amici Curiae expressed their views in one voice that no Court or Tribunal constituted under any other law irrespective of the period of legislation other than the Juvenile Court constituted under the Act, 1974 now substituted by the Ain, 2013 has jurisdiction to try any case where a child is charged with an offence.

In the case of *State vs Md. Roushan Mondal alias Hashem* 59 DLR 72, the juvenile offender Roushan Mondal, a boy of fifteen years plus was tried by the Nari-o-Shishu Nirjatan Daman Bishesh Adalat and Additional Sessions Judge, Jhenaidah who assumed the role of Juvenile Court and awarded sentence of death upon the alleged offender. The same question of assuming jurisdiction, as in the present case, was raised there. In replying the question, Md. Imman Ali, J (as his

lordship then was) speaking for a Division Bench of the High Court discussed almost all the cases of our jurisdiction including *State vs Sukur Ali,* 9 BLC 238 and finally held:

> "…. *When the Children Act came into force the Special Powers Act and the Arms Act, for example, were already in force. But the legislature did not exclude the jurisdiction of the Juvenile Court in respect of offences under these two enactments, as it did for exclusively Sessions triable cases in section 5(3), although the Special Powers Act contains a non-obstante clause in section 26. Hence, we are of the view that since the jurisdiction over the offences contained in the special laws are not specifically excluded by inclusion in section 5(3) of the Children Act, jurisdiction over offences committed by youthful offenders will be exercised by the Juvenile Court. Had the legislature intended otherwise an amendment could easily have been incorporated in section 5(3) giving jurisdiction over offences under the special laws to the respective Tribunals set up under those laws. This not having been done, we are of the view that the Children Act, being a special law in respect of,*

inter alia, trial of youthful offenders, preserves the jurisdiction over them in respect of all offences under any law, unless specifically excluded. (paragraph 55)

" … *We are, therefore, of the view that jurisdiction over the offence is a secondary consideration, the first consideration being the jurisdiction over the person of the accused. When jurisdiction over person is established then no other Court has power to try a child below the age of 16 years."* (paragraph 73)

In the above cited case of *Roushan Mondal* this Division held the trial by Nari-o-Shishu Nirjatan Daman Tribunal without jurisdiction and allowed his appeal rejecting the death reference. The High Court Division consistently held this view in the cases of *Bangladesh Legal Aid and Services Trust vs Bangladesh and others*, 57 DLR 11; *Shiplu and another vs State,* 49 DLR 53; *State vs Deputy Commissioner, Satkhira and others*, 45 DLR 643 and *Bangladesh Legal Aid and Services Trust and another vs Bangladesh and others*, 22 BLD 206 = XII BLT 334.

In *Sheela Barse and others vs Union of India and others*, AIR 1986 SC 1773, a well famed public interest litigant Sheela Barse along with others brought a *pro bono* writ petition, where the Indian Supreme Court held that "*the trial of Children must take place in the Juvenile Courts and not in the regular criminal courts"* and directed the State Governments to set up Juvenile Courts, one in each district, and appoint special cadre of Magistrates who would be suitably trained for dealing with cases against children.

In view of the foregoing discussions and the ratio decided in the above cited cases, it may be concluded without any further ambiguity that despite the Druto Bichar Tribunal Ain, 2002 was enacted after the Children Act, 1974 the overriding clause in section 2 of the Ain shall not in any way take away the jurisdiction of the Juvenile Court and confer the same on the Druto Bichar Tribunal constituted under the Ain to try any notified case, where a youthful offender is charged with criminal offence. Even in absence of any Juvenile Court in any particular territorial jurisdiction, a Druto Bichar Tribunal has no jurisdiction to try any case where a child is charged.

According to section 66 of the Act, 1974 whenever a person, whether charged with an offence or not, is brought before a criminal Court otherwise than as a witness and he appears to be a child, it is incumbent upon the Judge to make an inquiry for determination of his age. In a cognizable offence, a person allegedly involved in commission of the offence, may be arrested on lodging of the FIR. The words “person … charged with an offence” as used in section 66 of the Act, therefore, includes a child as well against whom allegation of offence is brought in the FIR. This is not the mandate of law that the Court would wait till submission of charge sheet and framing of charge to determine his age on that day. Article 35 (1) of the Constitution says that punishment cannot be imposed on a person, which is greater than what was prescribed at the time of commission of the offence. The constitutional protection to a person that includes a child as well must be maintained in awarding punishment on him. Sections 5, 51 and 52 of the Act, 1974 are to be read with article 35 (1) of the Constitution and also with the whole scheme and purpose of the Act. Since on the day of occurrence, the juvenile offender was a boy of less than 16 years and imprisonment more than 10 years could not

be imposed upon him on that day, we do not think that with the passage of time consumed for a protracted trial, he could be awarded more punishment. It would violate the constitutional protection regarding punishment as enshrined in article 35 (1) of the Constitution. In that view of the matter, we are in full agreement with the learned Advocate for the appellant and also with the learned Amici Curiae that there is no scope to award punishment upon a child more than what is prescribed in section 52 of the Act. So, a juvenile offender, if found guilty of offence on completion of trial, he cannot be simply put in prison except fulfillment of the conditions as mentioned in preceding section 51 thereof and punishment more than 10 years cannot be awarded on him.

In the case of *Mona alias Zillur Rahman vs The State*, 23 BLD (AD) 187, the Sessions Judge awarded life term imprisonment on the appellant, who claimed to be a child below the age of 16 years and was jointly tried with an adult violating the prohibition of section 6 of the Act. The Appellate Division affirmed the sentence on the ground that there was no material to show that the convict was a child below the age of 16 years at the time of framing charge. In that case, learned trial Judge,

under section 66 of the Act, 1974 did not make any inquiry as to the age of the offender when he was brought to the Court. The reason of not holding the inquiry was not assigned in the judgment. However, in the event of failure of the learned Judge to make such inquiry, it was incumbent upon his parents or the learned Advocate who represented him in trial to take step for determination of his age, which they failed. Learned Advocate though raised the issue of his minor age at the appellate stage before the High Court Division, also failed to take step for determination of his age and argue the case on his protection under article 35 (1) of the Constitution.

In view of the distinguishable facts and circumstances of the above cited case of *Mona alias Zillur Rahman*, there is no scope to argue that despite proof of age of a juvenile offender, he can be punished for more than ten years' detention/imprisonment in case of offences punishable with death or life term imprisonment.

Recording of confession under section 164 of the CrPC is a part of adversarial trial system and formal part of the procedures of the mainstream Courts/Tribunals. Its use against

a juvenile offender is, therefore, contrary to the fundamental notion of juvenile justice system. Research on neuroscience and child psychology suggests that the juveniles/adolescents are not fully capable of comprehending the consequences of their acts and deeds. They can also not control their impulses. In fact, the part of brain that enables impulse control and improves the ability of making a reasoned decision does not fully develop in adolescent age.

Similarly, the children/juveniles are unable to comprehend the legal consequence of confessional statements. In many cases, they take the blame of crime they did not commit just to end the interrogation. It should be borne in mind that the children can easily be influenced and they have tendency to admit guilt for different purposes. Sometimes they falsely confess to have committed an offence if there is possibility of getting some benefits therefrom.

In the case of *Bangladesh Legal Aid and Services Trust and another vs Bangladesh and others*, 22 BLD 206, a Nari-o-Shishu Nirjatan Daman Bishesh Adalat imposed life term imprisonment on a juvenile offender on the basis of his confession. The High Court Division sitting in writ jurisdiction

declared the trial without jurisdiction. Touching merit of the case, this Division further observed:

> *"The confession made by a child is of no legal effect. More so, when the child (convict hereof) in his written statement under section 342 Cr.P.C. categorically stated that the confessional statement was procured through coercion, threat and false promise to release him on giving the statement before the Magistrate as tutored by the police as evidenced by Annexure-A to the writ petition. The convict had no maturity to understand the consequences of such confessional statement. The Tribunal considered the confessional statement holding that the confessional statement was recorded on the date the convict was arrested, which is not correct and true. As per case record, statement of the convict under section 342 of the Cr.P.C. (Annexure-A), the convict was produced before the Magistrate for recording his confessional statement after two days of police remand and that confessional statement under no circumstances be voluntary since the accused is mere a child.* (emphasis supplied)

In the case of *Jaibar Ali Fakir vs The State,* 28 BLD 627 a child was found guilty under section 302/109 of the Penal Code solely on the basis of his confessional statement and was sentenced to life term imprisonment by the trial Court. In deciding an appeal preferred by him, the High Court Division observed:

> "*By their nature children are not mature in thought and cannot be expected to have the same level understanding of legal provisions and appreciation of the gravity of situations in which they find themselves. So much so that it is an accepted phenomenon that children will act impetuously and do not always appropriate the consequences of their actions, criminal or otherwise. In a situation when they are under apprehension they are liable to panic and say and do things which, in their estimation, are likely to gain their early release."* (paragraph 14)

In support of the above quoted view, the High Court Division quoted a passage from an Article titled "*But I didn't do it: Protecting the Rights of Juveniles during interrogation*"

by Lisa M Krzewinski. We are tempted to quote the passage that runs as follows:

> *"Juveniles' susceptibility to suggestion, coupled with their inherent naiveties and immature thought processes, raise considerable doubt as to their ability to understand and exercise their Fifth Amendment right against self-incrimination. Furthermore, they are extremely vulnerable to overimplicating themselves in crimes or, even more unfortunate for all involved, confessing to crimes they did not even commit."*

The High Court Division referring to the child witness expert Richard Leo, further quoted:

> "*… Police tactics, including the use of leading questions and the presentation of false evidence, can be extremely persuasive to children, who are naturally susceptible to suggestion. Additionally, false confessions and admissions to inaccurate statements are often a juvenile's reaction to a perceived threat. Children will take the blame for crimes they did not commit just to make the interrogation cease. Finally, inaccurate*

statements may be the result of comparatively "immature" juvenile thought process…"

Despite making the observations and referring to the extracts of the Articles as quoted above, the High Court Division in *Jaibar Ali Fakir's* case arrived at the decision that "*when children are taken to record their confessional statements, they must be accompanied by a parent, guardian, custodian or legal representative".* This decision appears to be a deviation from the discussion and observations made in the judgment itself.

It has not been discussed in the above cited decision that if a child has no competency to enter into a contract or waive his right to remain silent on interrogation, how the presence of his parent, guardian or custodian makes him legally competent to do so. Certainly the parents, guardians or custodians present at the time of making confessions by the children will not dictate the statement or make it on behalf of their children from a mature level of understanding. Their presence will also not develop his mental condition or bring maturity in his thinking process. Then how can it be presumed that only because of presence of the parents, a child will make true and fearless

statement? It, rather, may make him panicky and tensed about the freedom, safety and security of his parents or guardians and raise psychological pressure in his mind to make untrue statement to get them released. It is our experience from media that the police, in some sensitive cases arrests the parents of the accused to trace them out. The minor children living with their parents also read/watch those news in the media, and it certainly causes some psychological reactions in their minds.

Another ground of validating the confession of juvenile offender in *Jaibar Ali Fakir's* case is that in the United States of America and Australia, confessions of the children are permissible if those are recorded in presence of their parents, guardians or custodians. Although the mindset, psychology and thinking process of the children in all the Countries are almost similar, the quality of criminal investigation system, use of scientific evidence in criminal trial, level of governance, standard of policing and ability of the judiciary in the USA and Australia are far better than that of our country. Therefore, the reference of the USA and Australia cannot be mechanically relied on in taking decision related to the points in our country.

After publication of the *Jaibar Ali Fakir's* case and during pendency of the present appeal the Children Act, 1974 has been substituted by the Shishu Ain, 2013, section 47 (1) whereof provides that during investigation, a police-officer assigned to the child-desk may record statement of a juvenile offender, but in presence of his parents/legal guardians/any other member of his extended family and also a probation officer or social welfare officer. Section 25 of the Evidence Act says that no confession made to a police-officer shall be proved as against an accused and section 26 thereof further says that no confession made by any person in custody of police-officer shall be proved as against him. From a combined reading of the said provisions of law it can be inferred that in order to carry out investigation and find out the names of other offenders, if any, a child can be interrogated. But no provision of making confession and using the same against him is provided within the subsequent enactment in 2013.

When the case of *Jaibar Ali Fakir* was already published and before that, the provisions of recording confessional statement by an accused were already there in different laws, the legislature, in the repealing law i.e in the Ain, 2013, could

have easily incorporated the provision of recording such confession by a child in conflict with the law and awarding punishment on him on that basis, but it did not do so. It can be said thus the legislature deliberately omitted to make such law. Every word in a law has a definite meaning and similarly every intentional omission should be given a meaning. The omission in the Ain, 2013 of making confession by a child has also a meaning that a child is not supposed to make a confession. For a clear understanding of the legislative intent and for interpreting the scope of recording confessional statement of a child within the scope of Children Act we may also take recourse to the oft-quoted Latin doctrine, *expressum facit cessare tacitum* meaning express mention of one thing implies exclusion of other. Indian Supreme Court, in number of cases, has applied this doctrine to enunciate the principle that expression precludes implication.

The Act, 1974 in its section 2 (n) defined “youthful offender” as any child who has been found to have committed any offence. Section 71 of the Act prohibited the words “conviction” and “sentence” to be used in relation to the children or youthful offenders. The Act in its entire text did not

use the word “accused” against a youthful offender. Similarly the Shishu Ain, 2013 in its definition clause [section 2 (3)] used the phrase ‘children in conflict with the law’ and prohibited the words ‘guilty’, ‘convicted’ and ‘sentenced’ to indicate any child in conflict with the law. On the other hand, section 164 read with section 364 of the CrPC speaks of confession of “accused” to be made before the Magistrate. In view of the discrepancies of the indicative words in the Children Act/Shishu Ain and the Code of Criminal Procedure, we find it difficult to accept that by virtue of section 18 of the Children Act or section 42 of the Shishu Ain, confession of a child under section 164 of the CrPC can be recorded and used against him.

We have also gone through the judgment passed by the Appellate Division in Jail Petition No. 8 of 2004 (*Md. Shukur Ali vs The State*) as referred to by the learned Deputy Attorney General. The question of recording confession of child or its evidentiary value was not decided even raised or debated there. It is, therefore, difficult to accept the contention of the learned Deputy Attorney General that the Appellate Division already approved the evidentiary value of confession made by a child.

In view of the development and spirit of the law, purpose of legislation of the Children Act, 1974 that was in force at the material time and the subsequent Shishu Ain, 2013, one's constitutional protection from self-incrimination as guaranteed under article 35 (4) and the incompetency of a child to waive this right given to him by the Constitution and also his right to remain silent, use of confession of a child recorded under section 164 of the CrPC against himself is beyond the scope of law.

Recently Bangladesh Institute for Law and International Affairs (BILIA) published a report titled "The Death Penalty Regime in Bangladesh". The said report was based on research study and interviewing a good number of retired District and Sessions Judges, where two of the key findings were:

> "*Most former judges expressed their frustration with the current state of the criminal justice system. In their opinion, different agencies involved with the system- particularly police and prosecution lawyers- are largely inefficient and corrupt. These agencies are doing a great disservice to the criminal justice administration and are*

responsible for many unwarranted convictions and acquittals.

"*Almost all former judges categorically expressed that torture is routinely/regularly/frequently used by the police during investigation, primarily to ensure that the accused makes a confessional statement before a magistrate. It also emerged from the opinion of former judges that there is a lack of judicial vigilance in scrutinizing whether a confession has been extracted by torture. There is a high possibility of an innocent person being wrongfully convicted and facing the death penalty in a system where torture leads to confession and confession leads to a death sentence.*"

In a research based Article titled "*Torture under Police Remand in Bangladesh: A Culture of Impunity for Gross Violation of Human Rights*" published in Asia-Pacific Journal on Human Rights and the Law, 4 (2) two expatriated Bangladeshi Professors M Rafiqul Islam and S M Solaiman gave a picture of police atrocities on accused under remand in Bangladesh. For better appreciation, a part of the concluding paragraph of the said Article is quoted below:

> "*In Bangladesh, the worst atrocities often take place under police remand. None of its laws admits involuntary confession in judicial proceedings. Yet law enforcement agencies have been arbitrarily arresting thousands of innocent citizens for decades, in most cases either for political end or for getting bribes. The empowering magistrates have been ordering remands indiscriminately for extracting confessions, where violence and torture are endemic.*" (page 26)

The Article was published in 2003. Since then more than 16 years have elapsed, but we cannot claim to have achieved any better magistratical administration, and the required standard of integrity and professionalism in our police department till today.

The Appellate Division in *Bangladesh vs Bangladesh Legal Aid and Services Trust (BLAST) and others*, 8 SCOB [2016] AD 1 referred to an uncontroverted survey report published by Ain O Shalish Kendro (ASK), a human rights organization showing alarming number of custodial death and torture in Bangladesh. In the same judgment the Appellate Division observed: *"...deaths in the hands of law enforcing*

agency, abusive exercise of them, torture and other violation of fundamental rights are increasing day by day". In the concluding part, our apex Court further observed:

> "*In our country we find no concern of the police administration about the abusive powers being exercised by its officers and personnel. This department has failed to maintain required standard of integrity and professionalism…"* (paragraph 216)

Nowadays we experience in some cases that after passing of conviction and awarding sentence even on an adult on the basis of his confession, subsequent reveal of facts proves him innocent. We can also cite the burning example of the case of mass killing by grenade attack in Dhaka on 21 August, 2004, where a person, not involved in the occurrence, named Juz Mian was arrested and was compelled to make confession for camouflaging the occurrence, but under changed administrative set up he revealed the truth by another confessional statement, which was completely different from his earlier statement.

While these are the scenarios about police remand, custodial torture and confessional statement of the adults, situations of the children can easily be presumed as to how safe

they are under police custody even in presence of their parents, guardians or custodians. When the recording Magistrates, who are responsible officers fully equipped with judicial powers, cannot ensure voluntary confession of an adult without torture, how a helpless common parent or guardian shall ensure the voluntariness and truthfulness of the confession of her/his child.

We have already discussed that the Children Act, 1974 that was in force at the material time did not contain any legal provision of recording child confession. The law of confession was, however, incorporated in the Evidence Act, 1872 and the Code of Criminal Procedure, 1898, the Anti-Terrorism Act, 2009 and some other laws in general for the purpose of disclosure of the manner of offence and names of the offenders by a repenting accused. That is why recording of confession on allurement, false hope, pressure, coercion, physical torture etcetera are strictly prohibited and have no evidentiary value. It is a common attitude of all human beings that they conceal their involvement in any punishable offence. It is equally common that an offender after commission of an offence under whatever circumstances for whatever reasons, tries to escape the liability. So, voluntariness of confession is extremely exceptional in

human nature. Only in rarest of the rare cases, an accused makes confession out of repentance and guilty feelings. In our criminal investigation system, the investigating agencies appear to be more interested in taking an accused on remand and extract confession from him rather than collecting reliable and scientific evidence regarding his involvement in the alleged occurrence. In such a position, if the children are brought within the scope of recording confession, the purpose of punishing the real offender may fail and there is every possibility that innocent children will be victimized. It will also keep the investigating agencies confined to remand, coercion, torture and confession based investigation and would narrow down the thorough investigation focusing on collection of better scientific evidence to bring the real offenders to book. Besides, children are the emotional centers of their parents. In our prevailing standard of policing, legalization of their confessions may also open up the scope of blackmailing their parents for extraction of illegal money. We, therefore, completely disapprove the making of confession by a child and use of the same against himself in a juvenile case.

In view of the discussions made above, our answers to the questions raised in this case are:

(1) Confession of a child in conflict with law recorded under section 164 of the Code of Criminal Procedure has no legal evidentiary value and, therefore, such confession cannot form the basis of finding of guilt against him.

(2) A Juvenile Court constituted under the Children Act, 1974 as was in force before and now under the Shishu Ain, 2013 has got exclusive jurisdiction to try the cases, where children in conflict with law are charged with criminal offences. No other Court or Tribunal constituted under any other special or general law irrespective of its age of legislation has jurisdiction to try such cases unless the jurisdiction of Juvenile Court is expressly excluded there. The Druto Bichar Tribunal constituted under the Druto Bichar Tribunal Ain, 2002 cannot assume the jurisdiction of Juvenile Court in any manner whatsoever.

(3) In imposing punishment for offences punishable with death or imprisonment of life, the maximum term of imprisonment against a juvenile offender, or a person who

crossed childhood during trial or detention, cannot be more than 10 years.

In the result, the appeal is allowed and the impugned judgment and order is set aside. The appellant is discharged from his bail bond. Send down the records.

Md. Shawkat Hossain, J:

I agree.

ASM Abdul Mobin, J:

I agree.