

In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate/Revisional Jurisdiction)

Bench:

Mr. Justice Mohammad Abdul Hafiz
and
Mr. Justice Md. Ruhul Quddus

Criminal Appeal No. 2347 of 2001

Mojibor Rahman and others

í Appellants

-Versus-

The State

... Respondent

with

Criminal Miscellaneous Case No.3955 of 2005

Khairul alias Kharual

í Petitioner

-Versus-

The State

... Opposite Party

Mr. Fazlul Huq Khan Farid with Mr. Mohammad
Harunor Rashid, Advocates

... for the appellants/petitioner

Mr. Md. Masud Hasan Chowdhury, Deputy Attorney
General

í for the respondent/opposite party

Judgment on 07.11.2013

Md. Ruhul Quddus, J:

The above criminal appeal under section 24 (2) of the Jananirapatta (Bishesh Bidhan) Ain, 2000 (Act VII of 2000) and the criminal miscellaneous case under section 561A of the Code of Criminal Procedure arising out of a common judgment and involving common facts have been heard together and are being disposed of by this single judgment.

The criminal appeal at the instance of ten accused and the criminal miscellaneous case at the instance of another co-accused were filed

challenging the judgment and order dated 06.06.2001 passed by the Judge, Jananirapatta Bighnakari Aporadh Daman Tribunal, Mymensing in Jananirapatta Case No.15 of 2000 convicting the appellants in the criminal appeal and petitioner in the criminal miscellaneous case with three others under section 9 of the Act VII of 2000 and sentencing each of them to suffer rigorous imprisonment for seven years with a fine of taka 1000/= in default to suffer rigorous imprisonment for six months more.

One Md. Yakub Ali Master lodged an *ejahar* with Nandail Police Station, Mymensingh on 02.09.2000 alleging, *inter alia*, that at the previous night his son Md. Iqbal Hossain along with his companions, namely, Shah Alam, Shahed Ali, Kasom Ali and Abdul Ali was coming back home from Balipara Bazar. After crossing the river Bramhaputra while they were passing through the sands at about 10 p.m., 10-12 unknown miscreants attacked them and caught hold of Iqbal, assaulted him and fled away towards the south taking him captive. His (Iqbal's) companions, however, ran away. The people staying on the ferry-ghat raised hue and cry to which the miscreants made three gun shots. On receipt of the information by his neighbour Abu Taher, the informant along with his relations and neighbours searched for the victim around the place of occurrence, but failed.

It was further stated that earlier on 26.04.2000 one of his (informant's) neighbours Alauddin informed him that accused Abdur Rashid and Shahid (appellants 2 and 7 respectively) had hatched up a conspiracy to kill his son Iqbal. On receipt of the news, the informant prohibited his son Iqbal from coming home that night. Iqbal had enmity with accused Nabi Newaz Khan, Head Master of Charlaxmidia Primary School over the previous election of its Managing Committee and as such he suspected that under instruction of the said Nabi Newaz Khan the accused persons namely Shahidullah, Masud Khan, Aslam Khan, Abdur Rashid, Monayem, Idris, Kairul along with their accomplices had kidnapped his son with a motive to kill him.

On lodgment of the first information report Nandail Police Station Case No. 5 (9) 2000 was started and the police after investigation submitted charge sheet on 16.10.2000 under sections 4 and 9 of the Act VII of 2000 against twenty-three accused including the appellants and the petitioner. During investigation the accused Abu Sayed made a statement under section 164 of the Code of Criminal Procedure. The victim and some of the witnesses also made statements under section 164 of the Code and section 14 of the Act VII of 2000.

The case after being ready for trail was sent to the Jananirapatta Bignakari Aparadh Damon Tribunal, Mymensingh and was registered as Jananirapatta Case No. 15 of 2000. The learned Judge of the Tribunal by his order dated 17.01.2001 framed charge against twenty-two accused persons under sections 4 and 9 of the Act VII of 2000, to which they pleaded not guilty and claimed to be tried. The learned Judge of the Tribunal however discharged co-accused Sahera Khatun.

The prosecution in order to prove its case examined as many as twenty witnesses, of whom P.W.1 Md. Yakub Ali was the informant and father of the victim, P.W.2 Iqbal Hossain was the victim himself, P.Ws.3-8 Maizuddin, Suruj Ali, Abdul Ali, Md. Abdul Mannan, Khoda Baksh and Kasom Ali were local witnesses; P.Ws.9-10 Md. Mofazzal Hossain and Abdul Matin were villagers of Dhalanamapara where the victim was confined, P.Ws.11-15 Sharafat Ali, A. Latif, Moklesur Rahman, Md. Shahed Ali and Shah Alam were also local witnesses, P.W.16 Khondakar Zahidul Islam was the Officer-in-charge of Nandail Police Station at the relevant time, P.W.17 Mohammad Ali was a Sub-Inspector of Police and the Investigating Officer, P.W.18 Begum Shahanara Banu was the Magistrate who recorded the statement of accused Abu Sayed under section 164 of the Code of Criminal Procedure, P.W. 19 Manjur Hasan Bhuiyan was another Magistrate who recorded statements of three witnesses, namely, Maizuddin, Abdul Mannan and Sharafat Ali under section 164 of the Code, P.W.20 A. K. M. Didarul Islam was also a Magistrate who recorded the statements of

two other witnesses A. Matin and Md. Tofazzal Hossain under section 14 of the Act VII of 2000.

P. W. 1 informant Yakub Ali stated that on 01.09.2000 at about 11 p.m his neighbour Taher Ali informed him that some dacoits had kidnapped Iqbal at 10 p.m . He (victim Iqbal) was being accompanied by Kasom Ali, Abdul Ali, Shahed Ali, Shah Alam and some others. Thereafter, he saw Iqbal at Balipara Bazar on 05.09.2000, when he disclosed that accused Shahidullah, Mojibor, Masud Khan, Tafazzal Kah, Rashid, Jalil, Shafik, Satter, Shahid and others had kidnapped him. He (victim Iqbal) further disclosed that they had confined him at the house of Islam and Idris in village Dhalanamapara and claimed ransom of taka six lac. In cross-examination he stated that Taher Ali did not disclose the names of the kidnappers and that he himself did not write the *ejahar*.

P.W.2 victim Iqbal Hossain stated that the occurrence took place on 01.09.2000 at 10 p.m. After passing over fifty yards from the ferry-ghat, 20-25 dacoits had caught hold of him and took him away to the house of Islam and Idris at village Namapara where he was confined blindfolded for four days. The dacoits asked him to write to his father for a ransom of taka six lac. He, however, managed to escape on 05.09.2000. On the way to escape he took shelter at the house of an unknown woman. Her two sons helped him going back home. After being released from confinement he came back home then said that he went to Bazar first and met Abdul Mannan (P.W.6), Maizuddin (P.W.3) and Khoda Bakhsh (P.W.7) there. He also narrated the occurrence to the said witnesses. Thereafter, he stated that accused Shahid fired with a gun, while accused Mojibor, Rashid, Jalil, Shafiqul, Satter, Masud and Tafazzal dragged him. In cross-examination he stated that immediately after he was caught, the dacoits blindfolded him. Earlier he was defeated in the election of Managing Committee of Charlaxmidia School. He, however, denied enmity with the Headmaster of the school on rigging in the said election and further stated that he escaped by breaking door of the room where he was confined but the person guarding him was asleep and could not notice his escape.

P.W.3 Maizuddin, a chance witness stated that he was returning home on 01.09.2000 from Balipara Bazar by a ferry-boat. While passing through the sands at 10 p.m. he heard a cry and saw accused Shahid, Mojibor, Masud, Khairul, Monayem, Rashid, Enayet and Shafiq to capture Iqbal throwing light from his torch. In cross-examination he stated that on the date of occurrence he was returning home from Dhaka through Balipara Bazar. He denied that because of business rivalry with some of the accused he had falsely deposed and that the informant was his cousin, but admitted him (informant) as his neighbour.

P.W.4 Suruz Ali, a boatman of Balipara ferry-ghat stated that he knew the victim Iqbal. He was plying boat at about 10 p.m on the date of occurrence, when Maizuddin (P.W.3) rushed and told him that Iqbal was taken captive, but did not disclose the names of the accused. In cross-examination he stated that Maizuddin was Iqbal's uncle. He further stated that the persons who crossed the river by his ferry-boat did not tell him anything about the occurrence.

P.W.5 Abdul Ali, another boatman stated that he knew Iqbal. Before five months, the said Iqbal and Shah Alam with some others had crossed the river by his ferry-boat. Thereafter, he met Iqbal several times, but he did not tell him anything about the occurrence. He did not hear anything about the occurrence.

P.W.6 Abdul Mannan deposed in similar line of P.W.3. He, however, added that after five days Iqbal returned home and told him that the dacoits had demanded him to pay ransom of taka six lac. In cross-examination he denied any relationship with the informant, but admitted him as a neighbour. In the night of occurrence he and Sharafat had crossed the river by the same boat and Maizuddin crossed that by a different boat.

P.W.7 Khoda Bokhsh stated that on 01.09.2000 he was staying home at Balipara Bazar. At 10 p.m he heard three gun shots and rushed to the ferry-ghat. After 20-25 minutes the witnesses, namely, Mannan, Sharafat, Nurul Amin appeared there and disclosed that accused Shahid, Mojibor,

Tafazzal, Masud, Rashid, Monayem, Satter and Shafik caught hold of Iqbal and took him away.

P.W.8 Kasom Ali, a boatman stated that on the day and time of occurrence he heard three gun shots. Shahed Ali, Motaleb and Hosaiin Ali came to him and told that Iqbal was taken captive. After five days he met Iqbal, who told him that he was asked to pay taka six lac, but did not mention the name of any accused. In cross-examination he stated that immediately after the occurrence he met some witnesses namely, Maizuddin (P.W.3) and Khoda Bakhsh (P.W.7), but they did not disclose anything to him. He further stated that the Informant was his brother, but immediately after he changed his statement and said actually neighbour.

P.W. 9 Md. Mofazzal Hossain, a resident of village Dhalanamapara stated that on 05.09.2000 at 2 p. m. he was staying at home, when he heard a cry and saw a man (indicating the victim) swimming on a nearby pond. He was seeking help to save his life. After rising from the pond he asked to know the way of Balipara and disclosed that he had been captive by some kidnapers. He denied the suggestion that out of enmity with Islam he falsely deposed. In cross-examination he stated that Tafazzal was his full brother and Matin (P.W.10) was his cousin.

P.W.10 A. Matin, another resident of village Dhalanamapara stated that a few months back he was staying at home. At about 3 p.m he heard a cry and came out of his house, then saw a man to run away from the house of Islam and jump in a pond. He raised alarm to save his life. After rising from the pond he disclosed that he had been captive by some kidnapers who asked him to pay taka six lac.

P.W.11 Sharafat Ali stated that on 01.09.2000 at 10 p.m he was returning home from Balipara Bazar. After passing 20-30 cubits through the sands, he heard an alarm raised by Iqbal and saw 15-20 persons to kidnap him. Amongst them, he recognized accused Shahid, Shafikul, Khairul and Monayem in the light thrown from his torch. In cross-examination he stated that earlier he was made accused in a criminal case under Nari-o-Shishu

Nirjatan Damon Ain, but denied that some of the accused had initiated the said criminal case against him.

P.W.12 Abdul Latif, an owner of a shop situated at the ferry-ghat stated that on 01.09.2010 at 10 p.m he was returning to home. While passing through the sands he heard an alarm raised by Iqbal, in response to which he along with others moved forward, when the kidnapers made three gun shots. Throwing light from his torch he saw accused Shahid, Mojibor, Khairul, Masud, Tofazzal, Shafiqul, Monayem and 20-25 others to kidnap Iqbal. In cross-examination he stated that he was made accused in a case under Nari-o-Shishu Nirjatan Ain, but denied the accused to be interested in prosecution of that case.

P.W.13 Moklesur Rahman, a businessman of Balipara Bazar stated that on 01.09.2000 at 10 p.m he was having his meal at home situated on the bank of the river. Hearing three gun shots he rushed to the ferry-ghat, when Sharafat (P.W.11) told him that accused Shahid, Khairul, Satter, Jalil, Rashid and Shafiq had taken Iqbal away. After five days Iqbal came back to Balipara Bazar and told him that he was taken captive at Dholanamapara and the kidnapers demanded him to pay taka six lac.

P.W. 14 Md. Shahed Ali, an *ejahar* named witness and also named in the evidence of the victim, was tendered by the prosecution. However, in cross-examination by the defense he stated that he was accompanying the victim Iqbal in same boat. While they were passing through the sands, all on a sudden Iqbal fled away raising an alarm. In fact nobody had kidnapped him.

P.W.15 Shah Alam, another *ejahar* named witness stated that he along with Iqbal and some others was returning to home through the sands. After passing over 100 cubits Iqbal raised an alarm and ran away. At this stage he was declared hostile and cross-examined by the prosecution.

P.W.16 Kahondker Zahidul Islam was the Officer-in-charge of Nandail Police Station at the relevant time. He recorded the *ejahar* and assigned a Sub-Inspector to investigate the case.

P.W.17 Mohammad Ali was the Investigating Officer who submitted charge sheet in the case. He deposed regarding procedure of holding the investigation and exhibited the draft sketch, index and also the torches seized from the witnesses as material exhibits. In cross-examination he stated that Mannan (P.W.6), A. Latif (P.W.12) and Moklesur Raman (P.W.13) did not make any statement to him whether accused Shahid, Khairul, Satter, Shafiqul and Bachchu had chased him. He further stated that Mofazzal (P.W.9) and A. Matin (P.W.10) did also not state that they saw the victim to cry and swim on the pond, or that they had told him about Iqbal's confinement at Islam's house and the demand of ransom.

P.W.18 Begum Shahan Ara Banu, a Magistrate stated that on 19.09.2000 she had recorded the confessional statement made by accused Abu Sayed. She proved the statement and her signature thereon.

P.W.19 Manjur Hasan Bhuiyan, another Magistrate stated that he had recorded the statements of three witnesses, namely, Maizuddin; A. Mannan and Kari Mohammad Sharafat Ali. He proved their respective statements and his signatures thereon.

P.W. 20 A K M Didarul Islam, Magistrate stated that he had recorded the statements of two witnesses, namely, A. Matin and Md. Mofazzal Hossain. He proved their statements and his signatures thereon.

After closing the evidence, the accused were examined under section 342 of the Code of Criminal Procedure to which they reiterated their innocence but did not examine any witness in defense.

The defense case as it appears from the trend of cross-examinations that actually no occurrence took place. The accused were falsely indicted in the case because of enmity between the parties arising out of the previous election of the Managing Committee of Charlaxmidia School and lease of the ferry-ghat. Most of the local witnesses were relations of the informant and hostile to the accused because of initiation of a criminal case under Nari-o-Shishu Nirjatan Ain against some of them.

The learned Judge of the Tribunal after conclusion of trial pronounced his judgment and order dated 06.06.2001 convicting and sentencing fourteen accused as stated above while acquitted six. Challenging the said judgment and order of conviction and sentence ten accused, namely, Mojibor Rahman, Abdur Rashid, Abdul Jalil, Shariful alias Safiqul Islam, Sattar, Taffazzal, Shahid alias Shahidul, Idris, Monayem alias Monam and Enayet alias Anto preferred the instant criminal appeal, while co-accused Khairul alias Kharual filed the criminal miscellaneous case for quashment of the judgment and order as he was convicted in absentia and could not prefer appeal within time. All of them were granted bail by this Court and have been enjoying the privilege of bail till today.

Mr. Fazlul Huq Khan Farid, learned Advocate for the appellants as well as the petitioner submits that the allegations made in the first information report itself is contradictory and not believable. According to the *ejahar* the persons who kidnapped the victim Iqbal were unknown and the informant was not an eyewitness to the occurrence. The prosecution case has not been proved by any independent witness and the witnesses who supported the prosecution case were relations to the informant and interested in the prosecution. Their depositions are also contradictory and inconsistent upon which an order of conviction cannot be passed. The prosecution case having not been proved beyond reasonable doubt, the impugned judgment and order is liable to be set aside.

Mr. Md. Masud Hasan Chowdhury, learned Deputy Attorney General submits that the prosecution having been able to prove the allegation of kidnapping the victim Iqbal Hossain and the demand of ransom by so many eyewitnesses, the learned Judge of the Tribunal rightly convicted and sentenced the accused. The appeal is therefore liable to be dismissed. He further submits that the scope under section 561A of the Code to quash a judgment and order of conviction is very narrow. There is nothing to show that the impugned judgment and order of conviction has been passed by a Tribunal having no jurisdiction or that it suffers from quorum non-judice or

that it based on no evidence. The Rule in the miscellaneous case is also liable to be discharged.

On a careful scrutiny of the evidence on record it appears that P.W.1, the informant was not present at the place of occurrence. He knew it from his neighbour Taher Ali, who was not examined. It was also not disclosed as to how Taher Ali came to know about the occurrence. In his *ejahar* the informant suspected some of the accused namely Nabi Newaj Khan, Shahidullah, Masud Kha, Alal Khan, A. Rashid, Monayem, Idris and Khairul to be connected with the occurrence, but any reason of such suspicion was not disclosed except in the case of Nabi Newaj Khan, who was not sent up.

In the first part of his examination-in-chief P.W.2, victim Iqbal narrated the occurrence without mentioning the names of the accused wherefrom it is presumed that he could not recognize them. In the concluding part he stated that accused Shahid fired with a gun, while accused Mojibor, Rashid, Jalil, Shafiqul, Satter, Masud and Tafazzal dragged him, but without proper context. In cross-examination he stated that immediately after securing his capture, the kidnappers blindfolded him. If so, it was not possible for him to see or recognize the kidnappers. After being released from illegal confinement, the victim was seen abruptly at Balipara Bazar. He did not rush to his home or to the police station, which is very unusual.

In his statement made under section 164 of the Code P.W.2 stated that at the first instance two dacoits appeared from his front side and asked him to remain silent. He also stated that at the time of his escape, some women raised cry terming him mad. He, however, had convinced one woman to help him by kissing her thrice. Two boys escorted him up to one kilometer and handed him over to one Abdul Quddus, a businessman.

The above part of his statements is contradictory with his evidence on dock and that the story of convincing a woman giving her kisses by an unknown man is quite unbelievable in our social context.

In his statement under section 164 of the Code P.W.3 Maizudin stated that the ferry-boat by which he crossed the river was of Abdul Ali. After boarding on the ferry-boat, he saw victim Iqbal on the same. As he threw light on the kidnappers, they chased him for which he jumped in the river. This part of his statement is not incorporated in his evidence on dock and also not corroborated by the victim Iqbal (P.W.2) or the boatman Abdul Ali (P.W.5).

Names of four witnesses namely, Abdul Ali (P.W.5), Kasom Ali (P.W.8), Shahed Ali (P.W.14) and Shah Alam (P.W.15) were mentioned in the *ejahar*, but in their evidences P.Ws.14-15 did not support the prosecution case and stated that they were accompanying victim Iqbal in same boat. After landing from the boat while they were passing through the sands, Iqbal himself fled away raising an alarm. P.W.5 Abdul Ali also did not support the prosecution case and stated that he did not hear anything about the occurrence and subsequently met Iqbal several times, but he did not tell him anything. P.W.8 Kasom Ali though stated that he heard the hue and cry and the sounds of three gun shots, did not mention any specific accused. In cross-examination he stated that immediately after the occurrence he met Maizuddin (P.W.3) and Khoda Bakhsh (P.W.7), but they did not disclose anything to him. After five days Iqbal disclosed that the kidnappers demanded ransom of taka 6 lac, but did not disclose their names.

The prosecution witnesses namely, P.Ws.1-3, 6-7 and P. Ws.11-13 who were not named in the *ejahar* but deposed as chance witnesses, mentioned the date and time of occurrence as 01.09.2000 at 10 p.m. and some of them who claimed to recognize the accused stated in a parrot like tone that they recognized the accused in the light thrown from their respective torches. There was no usual variation in stating the date, time and the way of recognizing the dacoits, which indicates that these witnesses were heavily tutored.

It appears that the statement of accused Abu Sayed made under section 164 of the Code was exculpatory in nature and no name except Nurul

Islam was disclosed therein, whereas the learned Judge of the Tribunal in convicting the appellants and the petitioner relied upon the said statement, but acquitted the said Abu Sayed.

Moreover, demand or realization of ransom is an essential ingredient of the offence under section 9 of the Act VII of 2000. In the present case victim Iqbal stated that the dacoits asked him to write to his father for giving them taka six lac, but it was not stated whether the victim wrote his father about the demand of ransom. If he did not write to his father about the demand, the act of demanding ransom was not completed. In this regard the evidence of Abdul Ali (P.W.5), Abdul Mannan (P. W. 6), Kasom Ali (P.W. 8), A. Matin (P. W. 10) and P.W. 13 Moklesur Rahman) also contradict each other. So the offence of demanding ransom having not been proved, the conviction under section 9 of the Act VII of 2000 was not justified.

In view of the above it does not appear that the prosecution has been able to prove the case against any of the accused beyond all reasonable doubts. In the back ground of typical village enmity between the parties, the possibility of concocting the case and indicting the accused falsely therein on the part of the informant party cannot be overruled. The accused are, therefore, entitled to benefit of doubt.

In the result, the criminal appeal is allowed. The impugned judgment and order of conviction and sentence dated 06.06.2001 passed by the Jananirapatta Bighnakari Aporadh Damon Tribunal, Mymensingh in Jananirapatta Case No. 15 of 2000 is set aside. The appellants Mojibor Rahman, Abdur Rashid, Abdul Jalil, Shariful alias Safiqul Islam, Sattar, Taffazzal, Shahid alias Shahidul, Idris, Monayem alias Monam and Enayet alias Anto are acquitted. The said appellants are released from their bail bonds. It does not transpire from the lower court's record that any other criminal appeal or case was filed challenging the impugned judgment and order of conviction. The non-appealing accused who stand on same footing with the appellants should also get benefit of this judgment to meet the ends

of justice and as such the non-appealing accused namely Shahid alias Shahidullah, Masud, Akkas Mia and Khairul alias Kharual are acquitted.

Since the petitioner in Criminal Miscellaneous Case No. 3955 of 2005 Khairul alias Kharual has already been acquitted in the connected criminal appeal, there is no necessity to give a decision in the miscellaneous case on the point of law raised by the learned Deputy Attorney General. The said Khairul alias Kharual is also released from his bail bond. Accordingly, the criminal miscellaneous case is disposed of.

Muhammad Abdul Hafiz, J:

I agree.