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Criminal Misc Case No. 20550 of 2014 (Arising out of G.R. Case No. 205 of 2009(Gobindagonj) arising out of Gobindagonj **Police Station Case No. 22 dated 11.05.2009 (At present Sessions Case No. 372 of 2012)** now pending in the Court of learned **Sessions Judge, Gaibandha**).

Md. Aynul Hoque aliaa Abdul Mannan son of late Hafizur Rahman Sarkar, of Village-Buraburi, Police Station-Gobindagonj, District-Gaibandha.....Accused-Petitioner.

=VERSUS=

The State and others.....opposite party.

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

Present:

Mr. Justice Md. Rezaul Haque

And

Mr. Justice Muhammad Khurshid Alam Sarkar

Criminal Miscellaneous Case No. 20550 of 2014

Md. Aynul Haque alias Abdul Mannan
--- Informant-**Petitioner**

-Versus-

The State and another
---**Opposite-Parties**

Mr. Sarwar Ahmed, Advocate
.... For the petitioner

Mr. Md. Sultan Mahmud, Advocate
.....For the opposite party no. 2

Mr. Md. Khurshedul Alam, D.A.G
.....For the State

Heard and Judgment on 15.02.2018.

Muhammad Khurshid Alam Sarkar, J:

At the instance of the above named informant-Naraji applicant-petitioner (hereinafter referred to either as the informant or the complainant or the petitioner), this application has been

Correct reproduction of the original
Md. Mozammel Haq
Assistant Bench Officer
Supreme Court of Bangladesh
High Court Division, Dhaka.

filed by invoking this Court's power of quashment under Section 561A of the Code of Criminal Procedure, 1898 (CrPC) in an expectation to set aside the Judgment and Order dated 09.01.2014 passed by the learned Senior Sessions Judge, Gaibandha in Criminal Revision No. 271 of 2012 and, also, the Judgment and Order dated 24.07.2012 passed by the learned Senior Judicial Magistrate, Gaibandha in G.R. Case No. 205 of 2009 (Gobindagonj) arising out of Gobindagonj Police Station Case No. 22 dated 11.05.2009 (presently Sessions Case No. 372 of 2012) taking cognizance against the charge-sheeted accused persons under Sections 302/201/34 of the Penal Code and discharging the four FIR-named accused persons after holding Judicial Enquiry.

The background of issuance of this Rule, in short, is that one Md. Aynul Hoque alias Abdul Mannan, as the informant, lodged an FIR alleging, *inter-alia*, that on 10.05.2009 at about 08.30 hours his son Ahsan Habib Pinu (hereinafter referred to as the victim) went to the local Bazar and when the victim was not returning home, the informant and other relatives rushed to every possible places and, eventually, a 12-year old minor boy, who is a distant grandson of the informant, found the head of the victim

floating in the latrine of one Md. Liaqat Ali and therefrom they pulled out the dead body of the victim. The informant alleged in the FIR that there was a long-standing dispute over establishment of an educational institution between the informant and Liakat Ali and, for which, the informant suspects that (1) Md. Liakat Ali along with (2) Md Bablu Mia, (3) Md. Manik Mia, (4) Md Ruhul Amin and (5) Md Rakibul Islam killed his son and hid the dead body in the latrine. Upon receiving the above FIR, the police investigated the matter and submitted charge-sheet on 29.03.2010 under Sections 302/201/34 of the Penal Code against Md. Babul Mia and Harunur Rashid and, at the same time, final report was presented in favour of four FIR-named accused, including Md. Liakat Ali, which prompted the informant to file a Naraji Petition. On considering the averments of the said Naraji Petition, the Court on 02.08.2010 ordered for conducting a Judicial Enquiry by a Judicial Magistrate. Accordingly, a Judicial Magistrate from the judicial magistracy at the District of Gaibandha (hereinafter referred to as the Enquiring Magistrate), after conducting the Judicial Enquiry, on 30.11.2011 came up with the same findings as were recorded by the police and, then, the learned Senior Judicial Magistrate, Gaibandha (hereinafter referred to as the

cognizance-taking Magistrate) took cognizance against 2 (two) charge-sheeted accused persons and discharged the other not-sent-up four accused persons vide his order dated 24.07.2012. Being aggrieved by and dissatisfied with the same, the informant filed a revisional application before the Senior Sessions Judge, Gaibandha who dismissed the revisional application upholding the Order passed by the Senior Judicial Magistrate, Gaibandha. Challenging the legality and propriety of the above two Orders, the informant-petitioner approached this Court under Section 561A of the CrPC and hence the Rule.

Mr. Sarwar Ahmed, the learned Advocate appearing on behalf of the informant-petitioner, takes us through the FIR and, side by side, the statements made by the Judicial Witnesses (JWs) and submits that while the FIR merely contains the suspicion by the informant against Md. Liakat Ali, Md. Babul Miah, Md. Manik Miah, Md. Ruhul Amin and Raqibul Islam, the statements of JWs clearly suggest that they were involved in the murder. He, then, draws our attention to the report prepared by the Enquiring Magistrate and submits that the Enquiring Magistrate, having not judiciously evaluated the statements of the JWs and having come

to the conclusion that nothing was found against Md. Liakat Ali and his 3 cohorts, committed a serious illegality. He next submits that the cognizance-taking Magistrate utterly failed to perform his duty in having his own satisfaction and to independently decide as to whether cognizance should be taken against the non-proposed accused. In support of his above count of submissions, he refers to the cases of Anwaruddin Molla Vs Hamid Molla 18 DLR 295 and Md. Akbar Hossain Vs Hasanul Hoque Inu 11 BLT (AD) 166. Mr. Sarwar Ahmed, thereafter, takes us through the Judgment passed by the learned Sessions Judge in disposing of the revisional application and submits that the revisional application was disposed of in a perfunctory manner without applying his judicial mind and comments that it is simply unbefitting for a Senior Sessions Judge to write such a Judgment, given that the same is nothing but a mere replication of the Order passed by the learned Magistrate. Mr. Sarwar Ahmed submits that since, in this case, anyone with ordinary prudence upon considering the JWs' statements would be of the view that there is *a prima facie* case against the FIR-named suspected persons, this Court, instead of remanding the case to the cognizance-taking Magistrate for further enquiry, should direct the Magistrate to take cognizance against

all the suspected persons straightaway. In response to a query made by this Court as to whether this Court is competent to direct the Magistrate to take cognizance, he professes that since the present appiication is not under Section 436 of the CrPC but under Section 561A of the CrPC, this is a unique case where this Court is amply empowered to straightaway direct the Magistrate concerned to take cognizance of the offence against the not-sent-up accused.

By making the above submissions, the learned Advocate for the petitioner prays for setting aside the Judgment and Order dated 09.01.2014 passed by the learned Senior Sessions Judge, Gaibandha in Criminal Revision No. 271 of 2012 and, also, the Judgment and Order dated 24.07.2012 passed by the learned Senior Judicial Magistrate, Gaibandha in G.R. Case No. 205 of 2009 (Gobindagonj) arising out of Gobindagonj Police Station Case No. 22 dated 11.05.2009 which presently is pending before the Court of learned Sessions Judge bearing Sessions Case No. 372 of 2012.

Per contra, Mr. Md. Sultan Mahmud, the learned Advocate appearing on behalf of the opposite party no. 2, takes us through

the Final Report as well as the Judicial Enquiry Report and submits that since the investigation carried out by the police department tallies with the outcome of the Judicial Enquiry, this Court should not interfere with the Orders passed by the learned cognizance-taking Magistrate and the learned Senior Sessions Judges. He, then, submits that while in a fit and proper case, this Court sometimes orders for further enquiry, but this is not a case of that kind warranting further enquiry by the Magistrate or police. He submits that it is the settled principle of our jurisdiction that the High Court Division is not competent to pass any direction upon the Magistrate to take cognizance of the offences alleged. In support of his submissions, he refers to the cases of Bangladesh Vs Yakub Sardar 40 DLR (AD) 246 and Yousuf A Hossain Vs KM Rezaul Firdous 48 DLR (AD) 53.

After hearing the submissions of both the sides, having perused the application together with its annexures (FIR, charge-sheet, Naraji application, statements of the JWs, report of the Enquiring Magistrate, Order of taking cognizance by the Magistrate and the Order passed by the Senior Sessions Judge in criminal revision) and upon reading the relevant laws and

decisions, it appears to us that this Court is required to adjudicate upon the following legal issues, namely, (i) whether the Enquiring Magistrate carried out the Judicial Enquiry properly and, then, prepared a Judicial Enquiry report appropriately, (ii) whether the Magistrate dealt with the issue of taking cognizance accurately and (iii) whether this Court is empowered to direct the Magistrate to take cognizance, if the impugned Orders are quashed/set aside by us.

Let us take up the first issue, namely, whether the Enquiring Magistrate carried out the Judicial Enquiry properly and, then, prepared a Judicial Enquiry report appropriately. It would be profitable for adjudication upon this issue, if we try to be acquainted with the terms 'Enquiry' and 'Judicial Enquiry', at first. While the definition of the term 'enquiry' is available, having been provided in Section 4(1)(k) of the CrPC in the following wordings *"every enquiry other than a trial conducted under this Code by a Magistrate or Court"*, there is no such statutory definition of the phraseology "Judicial Enquiry". The Black's Law Dictionary inscribes the meaning of the phraseology "Judicial Enquiry" in the following wordings *"an official in-Court*

investigation of events, facts and actions to address a question of law and render an opinion". Commonly, Judicial Enquiry is known to be an enquiry, of any accident or crime, carried out by a Judge or Judicial Magistrate upon being directed by a Court of law/by the President of the Country/by the Parliament/by the Cabinet/by the Prime Minister. While for carrying out investigation by the police officers, there are prescribed provisions in the CrPC and the Police Regulations of Bengal, 1943, there is no such statutory procedural provisions or Apex Court's guidelines in place for conducting a Judicial Enquiry. From the perspective of criminal proceedings, while the statutory source of commencing a Judicial Enquiry is Section 202 of the CrPC, Section 539B of the CrPC provides the extent of activities of a Judicial Enquiry. Therefore, Judicial Enquiry in connection with criminal proceedings means an enquiry of complaint of any offence ordered by a Judicial Magistrate to be carried out by the same Judicial Magistrate or by another Judicial Magistrate for the purpose of ascertaining the truth or falsehood of the complaint and, in ascertaining the truth or falsehood of the complaint, the Enquiring Magistrate may do anything which s/he considers to be relevant and appropriate, including taking evidence of witnesses

on oath under Section 202(2A) CrPC and visiting/inspecting the crime spot and other place/s, as mandated by Section 539B of the CrPC.

The Enquiring Magistrate, at the end of carrying out a Judicial Enquiry, is required to prepare a Judicial Enquiry Report on the basis of the statements made by the JWs together with their remarks/comments about the demeanour of the JWs, if any demeanour is ever noticed by the Enquiring Magistrate, as well as the findings and observations on other step/s taken by the Enquiring Magistrate, such as visiting the place of occurrence under Section 539B of the CrPC, taking snaps of the place of occurrence and the injury on the body, etc. In course of preparation of a Judicial Enquiry Report, the Enquiring Magistrate should seek to form her/his own opinion without being influenced by the findings and proposals made by the IO in the report submitted under Section 173 of the CrPC and the same should be forwarded to the Chief Metropolitan/Judicial Magistrate who, then her/himself, or any other Magistrate assigned by the CMM/CJM, would independently consider the issue of taking cognizance under Section 190 CrPC or dismissal of the complaint under

Section 203 CrPC upon examining all the materials of the police report, namely, FIR, sketch map, index, seizure list, medical certificate, post-mortem report & inquest report (in case of any homicidal offence), the statements made by the witnesses under Sections 161 & 164 of the CrPC, the statements/confessions made by the accused under Section 164 of the CrPC, case diary, for, the police report under Section 190 (1)(b) of the CrPC does not mean only the report prepared by the IO, but it also includes all the materials mentioned above, and, also, upon examining all the materials of the Judicial Enquiry Report, which includes the statements of the JWS, together with the remarks on the demeanour of the JWs, findings and observations on the seized goods/articles seen by the own eyes of the Enquiring Magistrate, on the crime spot/other places visited and inspected under Section 539B CrPC and other incriminating materials.

Now, let us look at the facts of this case. From a minute perusal of the annexed papers, it transpires that the FIR was lodged on 11.05.2009 under Sections 302/201/34 of the Penal Code against 5 (five) suspected persons namely, (i) Md. Liakat Ali (ii) Md. Bablu Mia (iii) Md. Manik Mia (iv) Md. Ruhul Amin and

(v) Md. Rakibul Islam and, after the investigation, the Investigating Officer (IO) on 29.03.2010 while proposing to prosecute Md. Babul Mia and another person, named, Md. Harun Ur Rashid who was not named in the FIR, recommended to release other 4 suspected persons. When the informant filed a Naraji application, the learned Magistrate vide his Order dated 02.08.2010 ordered a Judicial Enquiry. Upon skimming through the materials of the Judicial Enquiry, it appears that the learned Enquiring Magistrate did not visit and inspect the place of occurrence or did not make any effort to take evidence from any witnesses other than those witnesses whose names were furnished by the complainant. Names of four witnesses were furnished by the complainant and their statements were taken on oath by the Enquiring Magistrate. JW1 is the informant himself, JW2 is the brother of the informant and JW3 & JW4 appear to us to be neutral witnesses. All these 4 (four) JWs made their statements between 02.09.2010 to 19.09.2010. The statements of two neutral witnesses, namely, the JW3 & JW4 are quoted below respectively:

"গত ১১/৫/২০০৯ ইং তারিখ সকাল অনুমান ৮/৯ টার দিকে মেথর পিনুর লাশ উঠাইতেছিল। লিয়াকতের লেট্রিন এর ভিতর হতে। আমি সেসময় উপস্থিত ছিলাম। তার আগের দিন ১০/৫/২০০৯ ইং তারিখ অনুমান ২০/১০-৩০ টার দিকে লিয়াকত, রুহুল, রফিকুল, মানিক ও

বাবুল মিলে পিনুকে টেনে নিয়ে যাইতে দেখি। পিনুকে গলা টিপে ধরে নিয়ে যাইতেছিল। পিনুর পিতাকে আমি এ কথা বলিনি। আমার শ্বশুর বাড়ী কলাকাটা হামস্থাপুর হতে আসার পথে আমি তা দেখেছিলাম। তবে আমি পিনুকে হত্যা করা দেখিনি। এই আমার জবানবন্দি।"

"গত ১১/৫/২০০৯ ইং তারিখ সকাল ৮/৮.৩০ টার দিকে পিনুর লাশ উঠানো দেখি। লাশ উঠানো হয় লিয়াকত এর বাড়ীর পায়খানার ভিতর হতে। পুলিশ ও অনেক লোক ছিল। ২ জন মেথর উঠাইয়া ছিল। তার আগের দিন রাত ৮/৮.৩০ টার দিকে বুড়াবুড়ি জাংলা বাজার হতে বাজার করে বাড়ী যাওয়ার পথে বুড়াবুড়ি হাইস্কুল মাঠের পশ্চিমে পিনুসহ রুহুল আমিন, (লেখাপড়া করে) রফিকুল ইসলাম (লেখাপড়া করে) বাবুল (ক্যাসেট মেকার) মানিক (সংসারী করে) ও লিয়াকত মাস্টারকে দেখি। এর বেশী কিছু দেখিনি বা জানিনা। সেদিন বৃষ্টি হচ্ছিল গুড়িগুড়ি করে। এই আমার জবানবন্দি।"

Even if it is presumed that the learned Enquiring Magistrate did not consider it handy to visit the crime-spot or any other place and also did not feel beneficial to take evidence from any person other than the witnesses cited in the petition of complaint, let us vet whether the findings and observations made by the Enquiring Magistrate reflect the statements made by the JWs. The learned Enquiring Magistrate's report dated 30.10.2011 contains the following findings and observations:

"In view of the Order dated 02.08.2010, this Court issued notice upon JWs and after examining them it appears to this Court that the two sent-up accused mentioned in the police report have overt acts and there is no direct and substantive intelligence against the not-sent-up accused. For taking cognizance or any necessary order, this report along with the statements of JWs is sent accordingly" (the

underlined word "intelligence" is, perhaps, meant to be involvement/participation/abetment).

From a bare reading of the above statements made by the JW3 & JW4, it is evident that the victim was last seen with the FIR-named suspected persons near the place of occurrence, but it appears to us that the Enquiring Magistrate utterly failed to notice the said crucial event and did not record the said important aspect in his findings. It further appears to us from the above report submitted by the Enquiring Magistrate that he tagged up and relied on the findings of the police in preparing the Judicial Enquiry Report. Therefore, we hold that the Judicial Enquiry was not carried out properly, and the Judicial Enquiry Report was not prepared appropriately. However, our above findings are not capable of vitiating the Judicial Enquiry, for, inspection of the place of occurrence was a discretionary step for the Enquiring Magistrate and, also, the failure to prepare an appropriate Judicial Enquiry Report is a mere irregularity, which always can be cured at the stage of consideration of the same by the cognizance-taking Magistrate.

Now, let us see whether the cognizance-taking Magistrate dealt with the matter of taking cognizance accurately. On

24.07.2012, the learned Senior Judicial Magistrate (cognizance-taking Magistrate) in taking cognizance passed the following Order:

> Seen. In view of the Judicial Enquiry Report, cognizance u/s 302/201/34 of the Penal Code is taken against the sent-up in c/s accused. Not-sent-up in c/s accused are discharged. The case is ready for trial, hence the same is sent to learned Sessions Court for necessary step. Next date 28.08.12.

A mere perusal of the above Order gives this Court an understanding that the learned Magistrate was entrusted with the duty of cognizance-taking Court before being sufficiently seasoned by gaining experiences in magisterial functions. The function of taking cognizance by a Judicial Magistrate is an important step in our criminal justice system and, in taking cognizance, while, in a CR case, a Judicial Magistrate is duty bound to examine and consider the complaint petition, statements, made by the complainant under Section 200 CrPC and if there is a Judicial Enquiry, then, the Judicial Enquiry Report and, likewise, in the GR case, the FIR, the statements made by the witnesses under Sections 161 & 164 CrPC, the statements made by the accused under Section 164 CrPC, the police report and the other incriminating materials, but s/he is not bound by the findings and

recommendations of the police report or the Judicial Enquiry Report, for, the law envisages that the cognizance-taking Magistrate shall be completely independent in having the primary satisfaction as to whether there is any *prima facie* evidence of commission of offence by any accused for taking cognizance.

In other words, when a criminal case is filed in the Police Station by lodging an FIR and, after investigation of the said case, the Investigating Officer (IO) submits a police report recommending for prosecuting or discharging any accused person, the Magistrate is not bound by the recommendation made by the IO for discharging any accused; rather the Magistrate is at liberty to take cognizance of any offence against any person either on the basis of the materials available before the Magistrate, such as, the police report or on the basis of his own knowledge/suspicion or information received from any person other than a police officer under Section 190 (1)(b) or under Section 190 (1)(c) of the CrPC, as the case may be. And, when a criminal case is filed through Court by presenting a petition of complaint/oral complaint before a Magistrate, the Magistrate is at liberty either to take cognizance directly under Section 190 (1)(a) of the CrPC on the basis of the

statements made by the complainant under Section 200 CrPC or, in the event that the complaint is sent for Judicial Enquiry, on the basis of Judicial Enquiry Report.

However, in a GR case, after submission of the police report by the IO when a Naraji petition (complaint petition) is filed and the Magistrate directs for Judicial Enquiry, then, upon receiving the Judicial Enquiry Report, the Magistrate is at liberty to take cognizance either on the basis of the Judicial Enquiry Report, treating the same as *'information received from any person other than a police officer'* under Section 190 (1)(c) of the CrPC or on the basis of his own knowledge/suspicion under Section 190 of the CrPC or on the basis of the police report under Section 190 (1)(b) of the CrPC or on the basis of complaint (Naraji petition) under Section 190 (1)(a) of the CrPC following finding *prima-facie* truthfulness as to the allegation made in the complaint petition through carrying out Judicial Enquiry. It is to be borne in mind by the learned cognizance-taking Magistrates of the land that the only source of the power of taking cognizance of any offence by the Magistrates of Bangladesh is Section 190 of the CrPC and, therefore, at the time of taking cognizance, it is a

pivotal duty for a Magistrate to see whether taking cognizance of any offence fits into or relates to any of the clauses of sub-Section (1) of Section 190 of the CrPC. Thus, a Judicial Magistrate or an Executive Magistrate having been empowered to take cognizance by the Government under Section 190(4) of the CrPC is competent to take cognizance of any offence against any person in addition to the person recommended by the IO and/or the Enquiring Magistrate resorting to any of the provisions which are enumerated under sub-Section (1) of Section 190 of the CrPC.

In this case, the learned Magistrate took cognizance of the offence under Sections 302/201/34 of the Penal Code only against two persons and discharged others simply saying that *"in view of the Judicial Enquiry Report cognizance under Sections 302/201/34 of the Penal Code is taken against the sent-up accused in c/s"*. Evidently, the learned Magistrate did a stereotyped job, for, there is no effort on his part to assess the statements of the JWs by himself independently and thereby form his own view as to whether any statements have been made by the JWs implicating the persons who have been named in the petition of complaint.

The proposition of law, as emanates from our research, that after receiving the Judicial Enquiry Report, when the Magistrate is going to pass an order on taking cognizance of any offence against any person/s under Section 190 (1) of the CrPC or dismissal of the complaint under Section 203 of the CrPC, it is incumbent upon the Magistrate to examine and consider the nitty-gritty of the Judicial Enquiry Report. In other words, to meticulously look at the statements of JWs and the comments on the demeanour of the JWs, findings and observations on other steps taken by the Enquiring Magistrate and, then, upon considering the above materials, if the Magistrate is *prime-facie* satisfied that the report prepared by the Enquiring Magistrate, recommending for prosecuting all the accused named in the complaint petition or opining to prosecute a few and discharge others or proposing for discharge of all the accused, is entirely acceptable, s/he may either accept the same in toto or may take cognizance against the not-sent-up accused together with the sent-up accused upon recording her/his own opinion on the Judicial Enquiry Report so as to be evident on record that the Magistrate did not seek to stereotypically agree or disagree with the comments/remarks /findings/observations made or the views expressed by the

Enquiring Magistrate and, thereby, the cognizance-taking Magistrate has independently formed her/his own opinion in taking cognizance of the offence or dismissing the petition of complaint.

Applying the above *'ratio'* of the law laid down by us hereinbefore in examining the legality and propriety of the Judicial Enquiry Report, it appears to us that the cognizance-taking Magistrate failed to deal with the issue of taking cognizance as per the provisions of law and, accordingly, the Order passed by the Magistrate dated 24.07.2012 in taking cognizance of the offence only against two persons upon dropping off the names of four accused is liable to be quashed.

With our above findings and decision on the impugned Order dated 24.07.2012 passed by the learned Senior Judicial Magistrate, Gaibandha (cognizance-taking Magistrate), the other impugned Order dated 09.01.2014 passed by the learned Senior Sessions Judge, Gaibandha in Criminal Revision No. 271 of 2012 is also destined to be quashed. It is pertinent to record here that when this Court had asked the learned Advocate for the informant-petitioner for not taking any step for disposal of the

Rule, in reply thereto, it was contended that the petitioner was reluctant to proceed with the enquiry and trial of this case during the period the learned Senior Sessions Judge is stationed at Gaibandha Judgeship, for, he was simply counting his time to go on retirement and was not conscientiously performing his duties. Some other derogatory comments about the quality of his performance, which had been performed just before his retirement, were also heard from the Bar, but those are ignored to register here. It transpires from the annexed papers that the learned Sessions Judge took two years to dispose of this revisional application against an Order of a Magistrate, albeit the issue of adjudication was very petty in nature. More so, from the manner and style of handing down this impugned Judgment by none other than a Senior Sessions Judge of the State, this Court puts it on record that the performance he has demonstrated in dealing with this petty matter is below the quality that this State deserves from a judicial officer who is at the helm of the judicial functions of a District, for, the Judgment and Order passed by him is merely a replication of the Order passed by the cognizance-taking Magistrate and there was not even a minimum effort from his part to scrutinize as to whether the cognizance-taking Magistrate

assessed the statements of the JWs independently of the Enquiring Magistrate's view, let alone examining the aspect of accuracy of the Judicial Enquiry conducted by the Enquiring Magistrate or appropriateness of preparation of Judicial Enquiry Report by the Enquiring Magistrate.

Now, following resolution of this Court that both the impugned Orders are liable to be quashed, what becomes the present status of this case and what is the next course of action to be taken by the Court below; (i) should there be an order by this Court to conduct further enquiry under Section 436 of the CrPC or (ii) by exercising the power of this Court under Section 561A CrPC, should it be sent back to the learned CJM to consider afresh the Judicial Enquiry Report upon independently analyzing the statements of the JWs or (iii) should this Court direct the cognizance-taking Magistrate to take cognizance against the persons whose complicity in the alleged offence is apparent from the JWs, exercising its inherent power under Section 561A of the CrPC?

Section 436 of the CrPC is placed within Chapter XXXII, which mainly consists of Sections 435, 436, 439 & 439A, under

the caption "Of Reference and Revision". Had this petition been filed directly before this Court, bypassing the Court of Sessions Judge's revisional forum, for revising the order passed by the Magistrate with a prayer *"to direct the CJM to make further enquiry into the informant/complainant's complaint, part of which has been dismissed under Section 203 of the CrPC"* (wordings employed in Section 436 of the CrPC), then, in view of the dismissal of complaint against some of the accused without recording independent findings and reasonings by the Magistrate, it would have been incumbent upon this Court to allow the prayer requiring the CJM of Gaibandha to make further enquiry into the complaint. Evidently, this application has not been filed before this Court for revision. Due to the prohibition imposed upon this Court by Section 439(4) of the CrPC, this Court cannot entertain a second revision against the Order of the revisional Court.

It has been submitted by the learned Advocate for the accused that the High Court Division or the Sessions Judge is not competent to direct the Magistrate to take cognizance and, at best, this Court may direct the Magistrate to make further enquiry in a fit case, but the present case is not a fit case to order so. In an

effort to substantiate the above submissions, the cases of Bangladesh Vs Yakub Sardar 40 DLR (AD) 246 and Yousuf A Hossain Vs KM Rezaul Firdous 48 DLR (AD) 53 have been referred to by the learned Advocate for the accused. Let us discuss the facts and legal issues of the cited cases. In the case of Yusuf A. Hasan Vs Rezaul Firdous 48 DLR(AD) 53, the accused was a Government servant and when he had written about the complainant's corruption to his higher authority, the complainant filed a defamation case under Section 500 of the Penal Code. Since the accused had done it in his official capacity, the law requires that the complainant must obtain approval from the Government for filing this kind of case. Thus, there was no scope for the Magistrate to take cognizance against the accused without, first, seeing the Government's sanction to prosecute the accused and, consequently, the complaint was dismissed and, in course of adjudication of the matter by the Appellate Division, the Apex Court, while upholding the order of dismissal of the complaint petition did not order for further enquiry into the complaint, made an observation that neither the Sessions Judge nor the High Court Division can direct the Magistrate to take cognizance of an offence. In the other referred case, namely, Bangladesh Vs Yakub

Sarder 40 DLR(AD) 246, the issue before the Apex Court was, whether the Sessions Judge is empowered to direct a Magistrate to send the case to him for trial when the Magistrate dismissed the complaint under Section 203 of the CrPC. In disposing of the case, while the Apex Court found it a proper case to direct for further enquiry into the complaint, however, in Paragraph 8 of this Judgment, the Apex Court indicated that had the High Court Division exercised its inherent power, there would have an occasion to examine the issue as to whether the High Court Division is competent to direct the Magistrate to issue summon against the accused towards sending the accused to the trial Court. Thus, the facts of the afore-referred cases being different from the facts of this case and, more importantly, the issues taken up by the Apex Court for adjudication in the afore-cited cases being not similar, the '*ratio*' laid down therein is not applicable in this case.

While it is a settled principle of law, which is being consistently followed by us, that in an appropriate criminal revisional application, direction of further enquiry should be made by the Sessions Judge or the High Court Division upon receiving an application under Section 436 of the CrPC into any complaint

which has been dismissed under Section 203 or 204(3) of the CrPC, or into the case of any person who has been discharged from an offence, however, in this case, since the informant/complainant did not have the scope of approaching this Court invoking its revisional jurisdiction for revising the Order passed by the Magistrate, does he deserve an order of further enquiry into his complaint under Section 561A of the CrPC? The answer thereto now requires to be searched, for, the present application, has been filed under Section 561A of the CrPC and the same being maintainable, as has been held in the case of Syed Ehsan Abdullah Vs State 2017(1) L&J 135 by this Court after revisiting scores of case-laws of our jurisdiction and that of the sub-continent, the inherent power of this Court may well be invoked for securing the ends of justice, either to order for further enquiry or for fresh consideration of the materials available before the Magistrate or for directing to take cognizance of the offence against the accused who have not been proposed to be prosecuted by the IO and also by the Enquiring Magistrate.

Now, let us see what types of ends of justice would be met if this Court directs for further enquiry. Since it would be unfair to

direct further enquiry by any police officer after carrying out a Judicial Enquiry, logically, there may be a further Judicial Enquiry by a different Enquiring Magistrate. What are the steps the new Enquiring Magistrate would take; presumably s/he may visit the relevant places and may take additional evidence from some more witnesses. However, it is unlikely that by visiting the relevant place/s after 9 (nine) years of the occurrence, the new Enquiring Magistrate is going to obtain any useful information and also any additional witnesses. Therefore, it would be a futile exercise to carry out a further Judicial Enquiry. It follows that there may be an order by this Court to the CJM for consideration of the statements of the JWs afresh in an expectation to judiciously assess the said statements and thereby independently pass an order, either, of taking cognizance of the offence against the persons named in the police report & Judicial Enquiry Report together with the persons named in the petition of complaint, or, of being in agreement with the recommendations made by the IO and the Enquiring Magistrate dropping off the names of the four accused.

Now, a pertinent question comes up for consideration by this Court as to what would happen if the new cognizance-taking Magistrate passes the same order which was passed by the previous cognizance-taking Magistrate. The answer is that the informant is to approach this Court again and, pursuant thereto, this Court also would pass the same order again. So, ultimately, there would be repeated exercise at the cost of putting the informant at harassments. With the above hypothetical scenario, the question that pops-up is that is this Court helpless in this kind of situation to direct the Magistrate to take cognizance against the persons whose complicity in the alleged murder is apparently evident in the statements of the JWs or the statements made by the witnesses under Sections 161 & 164 of the CrPC or by the accused under Section 164 of the CrPC or in any other prosecution materials?

The power of taking cognizance of an offence against any accused is vested in the Magistrates by the Legislature vide Section 190 of the CrPC and, therefore, it is the Magistrate who should be satisfied as to whether cognizance is to be taken or not against any person, be s/he is recommended by the IO/Enquiring

Magistrate or not and, thus, the function of taking cognizance being the exclusive business of the Magistrates, passing an order of direction upon the Magistrate to take cognizance is beyond the competence of the Sessions Judge and High Court Division in exercising their appellate or revisional jurisdiction. However, by exercising the power under Section 561A of the CrPC, in a fit and proper case, which may be found in the rarest of rare cases, the High Court Division is well competent to direct the Magistrate to take cognizance towards securing the ends of justice. For example, from the prosecution materials when any one with ordinary prudence would be able to sum up that 1+1 becomes 2, making the above result to be 1.50 or 2.50 by a Magistrate would be a perverse decision and, in that scenario, interference by the High Court Division exercising its inherent power would be quite justified. Similarly, when it is vividly discernible from the evidence available before the Magistrate that s/he did not have any option other than to take cognizance of an offence against any accused, passing an order of non-prosecuting the said accused will be a perverse one.

After carrying out careful examination of the provisions of Sections 190, 200, 202, 203, 204, 435, 436, 439, 439A and 561A of the CrPC, we are of the view that upon receiving the Naraji petition against the police report if a Judicial Enquiry is conducted and on consideration of the police report, Judicial Enquiry Report and other prosecution materials, the Magistrate does not take cognizance of an offence against any accused by dismissing the Naraji petition (complaint) wholly/partly under Section 203 of the CrPC and the informant-complainant seeks to revise the order directly from the High Court Division without preferring a revision before the Court of Sessions Judge, the High Court Division's proper order would be to direct further enquiry. But when the informant-complainant takes recourse to the inherent power under Section 561A of the CrPC, irrespective of the fact whether the petitioner invoked the inherent power directly or after exhausting the revisional forum of the Court of Sessions Judge, on the ground that there is no need for further enquiry in the backdrop of availability of the evidence already obtained through Judicial Enquiry, the High Court Division is not powerless to direct the CJM or the concerned Magistrate to take cognizance of an offence against any accused against whom *prima facie*

evidence is very much evident in the Judicial Enquiry Report subject to the condition that the High Court Division is satisfied that the order of the Magistrate in dismissing the Naraji (complaint) entirely/partly was perverse or ex-facie wrong being manifestly at variance with the evidence which the Enquiring Magistrate obtained. The rationale behind holding the above view is that when the informant, upon disagreeing with the outcome of the investigation by the police, opts for Judicial Enquiry and the Judicial Enquiry reveals commission of an offence against the accused named in the complaint petition, but the Magistrate does not take cognizance, there is no need to conduct further enquiry as the informant-complainant is not raising grievance against the Judicial Enquiry; the complainant's grievance in the said situation is only against the Order of the cognizance-taking Magistrate. And when the CJM/the concerned Magistrate would be asked to consider the Judicial Enquiry Report afresh and, pursuant thereto, if the Magistrate passes the self-same order, sending back the matter to the CJM/concerned Magistrate would turn to be an exercise in futility.

However, in this case, we are not passing any order directing the CJM or the concerned Magistrate to take cognizance, for, we are of the view that ends of justice would be met if we direct the CJM to hear the issue of taking cognizance upon judiciously evaluating the evidence available in the file, in particular, the statements of the JWs and, thereby, pass an appropriate order of taking cognizance of the alleged offences against all the accused or a few, either under Section 190(1) of the CrPC or dismiss the Naraji petition (complaint) wholly/party under Section 203 of the CrPC.

Before parting with this Judgment, this Court finds it to be its Constitutional duty under Article 109 of the Constitution to set down some guidelines for the learned Sessions Judges who deal with the criminal revision applications against the Orders and, also, for the learned Magistrates assigned as Enquiring Magistrates and cognizance-taking Magistrates with an expectation that they would endeavour to be accurate in passing Judicial Orders and help the Judiciary to save invaluable working hours, which are being spent in dealing with Revisional and

Miscellaneous matters and, thereby, establish and uphold the majesty and magnanimity of the Judiciary.

Guidelines for the learned Sessions Judges:

(i) In exercising the criminal revisional power bestowed upon the learned Sessions Judges, they should not shrug off their duty and responsibility of revising the impugned Judgment/Order by simply agreeing or disagreeing with the lower Court's Judgment/Order.

(ii) They are statutorily obligated to delve deep into the question of law in the context of the given facts of the concerned case and, then, record their own view/s reflecting their independent performance and competence.

(iii) They must be judicious and quick in disposing of the revisional matters filed against any Order so that the general people cannot blame the judiciary that the enquiry or trial of a case is delayed due to the poor and slow performance of the Courts.

(iv) Immediately before retirement from service, while many of the Government servants of this country possess a tendency to be in dereliction of their respective duties and work in a cavalier fashion, the learned District and Sessions Judges must not hold the aforesaid mentality; rather they should be more serious in performing their duties at such juncture of their service, so that their junior colleagues, the Supreme Court, the Advocates and the Court-staff remember them forever with admiration.

(v) They should put in their best efforts to earn recognition from the citizenry that the Judiciary is the most dynamic and patriotic organ of the State, being manned and run by honest, brilliant, vigilant and skilled officers.

(vi) In collaboration with the CMM/CJM, they shall hold, at least once in a month, a Judicial conference with all the Judges and Magistrates at the office of the District/Metropolitan Sessions Judge with a view to knowing the hurdles/problems they are facing in carrying out their performance and, then, seek to find solution in the light of the provisions of (1) Civil Rules

and Orders and (2) Criminal Rules and Orders. There should be a special session in the conference, where the Sessions Judges and CMM/CJM shall share the interpretations on the provisions of procedural laws of the land (namely, CPC& CrPC) settled by the Apex Court.

Guidelines for the learned Magistrates who would be assigned for conducting Judicial Enquiry:

i) While the primary duty of an Enquiring Magistrate is to take statements from the witnesses whose names are cited in the petition of complaint/Naraji petition, s/he should also take statements from the persons who appear to the Enquiring Magistrate to be relevant witnesses.

ii) An Enquiring Magistrate should endeavour to visit and inspect the place of occurrence, if it transpires to her/him to be useful for the purpose of ascertaining the veracity of the allegations made in the complaint/Naraji petition.

iii) In preparation of the Judicial Enquiry Report, an Enquiring Magistrate should record the demeanour of the JWs, if there was something noticeable, in addition to stating

her/his own findings and opinion on the works done by her/him.

iv) An Enquiring officer must try to complete the judicial enquiry within the shortest possible time.

Guidelines for the learned Magistrates who take cognizance:

i) In taking cognizance, a Magistrate must minutely examine all the available prosecution materials, namely, FIR, sketch map, Index, seizure list, medical certificate, post-mortem report & Inquest report (in case of homicidal offence), the statements made by the witnesses under Sections 161 & 164 of the CrPC, the statements/confessions made by the accused under Section 164 of the CrPC, case diary, for, the police report under Section 190 (1)(b) of the CrPC does not mean only the report prepared by the IO, but it also includes all the materials mentioned above. And if there is any Judicial Enquiry, the cognizance-taking Magistrate must examine all the materials of the Judicial Enquiry Report, which include the statements of the JWS, together with the remarks on the demeanour of the JWs, findings and

observations on the seized goods/articles seen by the own eyes of the Enquiring Magistrate, on the crime spot/other places visited and inspected under Section 539B CrPC and other incriminating materials.

ii) In a CR Case, be it based on oral/written petition or Naraji petition, when a Magistrate takes statement under Section 200 CrPC, s/he should precisely record the statements of the complainant from which any one may be able to understand the nature of the allegation.

iii) A Magistrate should be satisfied from the statements made under Section 200 CrPC that there is prime facie ingredient to take cognizance of any offence.

iv) If it is a complaint under Section 138 of the NI, Act, a Magistrate must follow the guidelines laid down in the case of Aleya Vs the State 12 ALR 2018(1) HCD 90.

v) A Magistrate must get satisfaction on his/her own before taking cognizance of an offence against any person. S/he must not confine her/himself to the proposal/recommendation made by the I/O or the Enquiring Magistrate. While s/he is free to take cognizance against any accused not

recommended/proposed by the I/O or the Enquiring Magistrate, s/he is not competent to drop off any person against whom charge-sheet has been filed and/or recommendations have been made by the Enquiring Magistrate.

In the result, the Rule is made absolute and the Judgment and Order 09.01.2014 passed by the learned Senior Sessions Judge, Gaibandha in Criminal Revision No. 271 of 2012 and, also, the Judgment and Order dated 24.07.2012 passed by the learned Senior Judicial Magistrate, Gaibandha in G.R. Case No. 205 of 2009 (Gobindogonj) arising out of Gobindogonj Police Station Case No.22 dated 11.05.2009 (at present Sessions Case No. 372 of 2012) taking cognizance against the charge-sheeted accused persons under Sections 302/201/34 of the Penal Code and discharging the non-sent-up accused persons in the charge-sheet after holding Judicial Enquiry, are hereby set aside.

In view of the fact that this case has run a zigzag course for a period of nearly 9 years, it would be wise for the learned CJM, Gaibandha to have the hearing on the issue of taking cognizance of the alleged offence against the dropped off accused persons on proper evaluation of the evidence of the JWs, by either the CJM

her/himself or by an experienced Judicial Magistrate. The hearing should be aimed at getting *prima facie* satisfaction as to whether there are materials for prosecuting any accused, not for making an assessment of convicting the accused. The Magistrate shall be at liberty to take cognizance of an offence against all of the accused or only against the accused against whom s/he is satisfied that there is/are ingredient/s to prosecute. But it is to be remembered by the Magistrate that s/he is not empowered to drop off the accused against whom the I/O and the Enquiring Magistrate have recommended for prosecution.

The learned District and Sessions Judge, Gaibandha is directed to hold a judicial conference within 15 (fifteen) days of the receipt of this Judgment and Order with all the learned Judges of the Gaibandha Judgeship and the learned Judicial Magistrates of Gaibandha with an aim to educate and instruct them about the guidelines laid down by this Court in this Judgment as well as the guiding principles set out in the Judgment passed by this Court in the case of Aleya Vs the State reported in 12 ALR 2018(1) HCD 90 and, thereafter, submit a compliance report before the Registrar

General of the Supreme Court of Bangladesh within 7 (seven) days of holding the aforesaid judicial conference.

The Office is directed to communicate this Judgment and Order together with a copy of the Judgment passed by this Court in the case of Aleya Vs the State reported in 12 ALR 2018(1) HCD 90 to the learned Sessions Judge of Gaibandha and the learned Chief Judicial Magistrate of Gaibandha, at once.

The Registrar General is directed to disseminate a copy of this Judgment to the all District/Metropolitan and Sessions Judges of the country, either by sending it by registered post or by displaying this Judgment in the website of the Supreme Court of Bangladesh.

Correct reproduction of the original

Md. Mozammel Haq
Assistant Bench Officer
Supreme Court of Bangladesh
High Court Division, Dhaka.

Md. Rezaul Haque, J:

Md. Rezaul Haque

I agree.

Muhammad Khurshid Alam Sarkar

Memo No. 3803 Cril. Dated

Copy of the Court's Order dated **25.01.2018** forwarded to the. 27-5-18

1) **Sessions Judge, Gaibandha.**
2) **Chief Judicial Magistrate, Gaibandha.**
3) **The Registrar General of Bangladesh Supreme Court** for information and necessary action.

By Order

Jahid
24.05.2018

Superintendent

24 MAY 2018

(Begum Sultana)
Assistant Registrar
Phone-9588584-

24 MAY 2018

সোঃ মতিউর রহমান
সুপারিনটেনডেন্ট

24 MAY 2018