State v Sukur Ali: The Story of Miscarriage of Justice

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Abstract

Offences committed against women and children in Bangladesh are now tried under Nari-O-Shishu Nirjatan Daman Ain 2000. What will happen if a child under the age of sixteen years commits a crime punishable under the said Act of 2000? A similar question was raised before the Bishesh Adalat, established under s 6(2) of the then Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995, in *State v Sukur Ali.* Despite having many judgments upon separate trial of juvenile from adults, the Bishesh Adalat of Manikganj continued the trial of juvenile Sukur Ali and convicted him with death penalty. Affirming Sukur Ali's death penalty, the High Court Division stated that section 3 of the 1995 Act was a 'non-obstante clause' and had an overriding effect and the provisions of said Act of 1995 would prevail over the Children Act 1974. Although Appellate Division commuted his death sentence to imprisonment for life but it is a major question that whether the trial of Sukur Ali has been in accordance with law. As such, this paper attempts to dissect and analyse the whole trial from Bishesh Adalat to AD and addresses whether Sukur Ali's trial appreciates the true spirit of article 31 of the Constitution, whether Sukur Ali's trial before the Bishesh Adalat was justified. Accordingly, this article made a comparative analysis of Sukur Ali's trial with the established legal doctrines relating to the juvenile justice system. Finally the paper aims at assessing the legality of Sukur Ali's trial before the Bishesh Adalat, suggesting an approach that may be adopted by the judiciary while trying a juvenile.

Keywords: Juvenile, Juvenile Justice System, Death Penalty, Best Interest of Child, Bangladesh.

1. Introduction

The existing juvenile justice system in Bangladesh is approximately one hundred and seventy years old since the Apprentices Act was passed in

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1850.[2] Although juvenile justice system has experienced major transformations during the last decades worldwide, however, in Bangladesh the judiciary has fizzled to operate the juvenile justice as a system separate from the traditional criminal justice. The juvenile justice system was designed to have jurisdiction over any offence committed by a 'child' within the meaning of the Children Act 2013[3] replacing the Children Act 1974.

The case of *State v Sukur Ali*[4] is a good example to understand the not-so-bright side of the juvenile justice system of Bangladesh in practice. Sukur Ali was charged and arrested for committing the offence of rape and murder under s 6(2) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995 (hereafter referred to as the Act of 1995). The Nari-O-Shishu Nirjatan Daman Bishesh Adalat (hereafter referred to as the Bishesh Adalat),[5] convicted the accused juvenile Sukur Ali with death penalty, which was also confirmed by the High Court Division (hereafter referred to as the HCD). Sukur Ali appealed challenging the verdict but the Appellate Division (hereafter referred to as the AD) rejected the appeal and upheld the HCD's verdict. A review petition to the AD was also rejected. Later writ petition in the HCD was filed by BLAST and Sukur Ali, challenging the constitutional validity of mandatory death sentence under s 6(2) of the said Act of 1995. Although HCD declared s 6(2) of the Act as 'unconstitutional' but upheld the verdict and stayed the execution for two months to allow an appeal to the AD.[6] Finally the AD commuted Sukur Ali's death sentence to 'imprisonment for life till natural death'.[7]

With this backdrop, this article will undertake a comparative analysis of Sukur Ali's trial with the established legal doctrines relating to the juvenile justice system. Accordingly, the article aims at assessing the legality of Sukur Ali's trial before the Bishesh Adalat, suggesting an approach that may be adopted by the judiciary while trying a juvenile.

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2 This was the first juvenile legislation in the Indian sub-continent to deal with children. Furthermore the Reformatory School Act of 1876 was the landmark law in dealing with juvenile delinquents in the Indian sub-continent.

3 S 4 of the Children Act 2013 reads: 'Notwithstanding anything contained in any other law existing, for all purposes of this Act, all persons shall be considered as children up to the age of 18 (eighteen) years'.

4 9 BLC (2004) 238; hereafter referred to as simply — 'the Sukur Ali case'.

5 The Bishesh Adalat was formed under s 6(2) of the then Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995.

6 *BLAST and another v Bangladesh and others*. However after the verdict of AD the reference is now 68 DLR (2016) AD 1.

7 *State v Sukur Ali*, 68 DLR (2016) AD 1.

This article starts discussing the approach adopted by the judiciary while conducting Sukur Ali's trial. Then it goes to inquire: *firstly*, whether Sukur Ali's trial before the Bishesh Adalat was justified; *secondly*, whether the approach adopted by the judiciary in interpretation of the two 'constitutional statutes'[8] was consistent with the established principles of interpretation; *thirdly*, whether the particular courts trying the seating have violated its obligations under international law; and *finally*, whether Sukur Ali's trial was conducted violating art 31 of the Constitution.

In the end it is argued that, Sukur Ali's trial before the Bishesh Adalat was *void ab-initio* and inconsistent with the legal principle 'best interests of the child' established as a customary principle relating to the juvenile justice system. It is also argued that the interpretation adopted by the judiciary is inconsistent with the principles of harmonious construction and principle of mischief, the well-established principles of interpretation of statute. Furthermore, it is also argued that the judicial system, from judges to prosecution, has failed in this instant case to ensure that Sukur Ali is tried according to law and only according to the law as ensured under art 31 of the Constitution which resulted in a gross miscarriage of justice.

2. Fact of the Case

In 1999 Sukur Ali, a minor boy, was charged and arrested with committing the offence of rape and murder of Sumi Akhter, a minor girl aged about 7 years. Sukur Ali was 14 years old at the time of occurrence and 16 years at the time of trial. In contravention of the non-obstante clause under Children Act 1974, that provided separate trial for juveniles, Sukur Ali was jointly tried with adult offenders. While the case was under trial, the Act of 1995 was repealed and another piece of legislation on the same subject matter has surfaced namely Nari-O-Shishu Nirjatan Daman Ain 2000. According to s 34(2) of the new legislation, the pending cases initiated under the Act of 1995 'will be conducted and disposed of in such a way that the said Act was not repealed'.[9] But on 12 July 2001, Sukur Ali was convicted under s 6(2) of the 1995 Act by the Nari-o-Shishu Nirjatan Bishesh Adalat, Manikganj (a special tribunal) and was sentenced to death. On 25 February 2004, the HCD confirmed the death sentence.

Sukur Ali appealed, challenging the verdict on several grounds, and on 23 February 2005 the AD rejected the appeal and upheld the HCD verdict. A

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8 *Thoburn v Sunderland City Council*, [2003] QB 151.

9 S 34(2) read as follows:, 'Immediately before such repeal, an appeal pending against the order, verdict or sentence given in the case related to the pending case under the said tribunal and in a similar case, will be conducted and disposed of in such a way that the said act was not repealed'.

review petition to the AD was also rejected on 4 May 2005. Subsequently, BLAST and Sukur Ali filed a writ petition in the HCD challenging the constitutional validity of mandatory death sentence under s 6(2) of the said Act of 1995. On 2 March 2010, the HCD delivered its judgment declaring, 'section 6(2) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995, now repealed, was unconstitutional'. Furthermore, the HCD has upheld the verdict, but stayed the execution for two months to allow an appeal to the AD and gave a certificate to that effect.[10] In August 2015, the AD commuted Sukur Ali's death sentence to imprisonment for life till his natural death.[11]

Acknowledging the principle of *generalia specialibus non-degrogant*, the HCD opined that 'section 3 of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain has an overriding effect over other laws and this provision will prevail over other laws including the Children Act.[12] Furthermore, the HCD stated that, 'the Law, Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995 has defined child as a victim and has used 'any person' to address the accused person, thus, 'any person' includes 'child' as well'.[13]

Therefore, despite fulfilling the prerequisite to be a child under Children Act 1974, Sukur Ali was tried as an adult jointly with the co-adult offenders under the 1995 Act in the Bishesh Adalat.

3. Sukur Ali's Trial before the Bishesh Adalat: Justified or Not?

In 1999 when Sukur Ali was charged and arrested for committing the offence of rape and murder under s 6(2) of the 1995 Act, he was admittedly fourteen-year-old. The HCD has also affirmed it by stating that 'we have no reason to doubt that the condemned prisoner is barely a boy of 14 years of age at the time of occurrence and 16 years old at the time of trial of the case and therefore, he is a minor'.[14] However, despite confirming Sukur Ali's age, the HCD did not declare the trial by the Bishesh Adalat as 'without jurisdiction'. By doing this, the HCD has

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10 <www.blast.org.bd/content/laws/Sukur-Ali-CaseWebsite-Summary.pdf> accessed 12 March 2018.

11 *State v Sukur Ali*, 68 DLR (2016) AD 1; *See also*, CRIN, 'BANGLADESH: Mandatory death penalty declared void after 14-year legal battle' <www.crin.org/sites/default/files/bangladesh_mandatory_death_sentences.pdf> accessed 12 March 2018.

12 Sukur Ali case [37].

13 ibid.

14 ibid [40].

ignored its own precedent[15] set in 1989 where it was held that 'the trial of child along with adult is forbidden by law'.

A similar view was again taken by the Division in 1992 in the case of *State v Deputy Commissioner, Satkhira and others*,[16] where the Court held that:

> No child is to be charged with or tried for any offence together with an adult. The child must be tried in the Juvenile Court and not in the ordinary Court. Only the adult can be committed to the Court of Session and the Juvenile Court will take cognizance of juvenile offenders.

This approach of the court got furthered uttered in 1995 in *Bakhtiar Hossain v the State*,[17] where it was stated that, 'once a child offender crosses age of 16 years and then charged with an offence or tried for the same the statutory requirement of the child being tried by the Juvenile Court comes to an end'. This suggests that a child offender aged within 16 years shall be tried only by the Juvenile Court. In this regard we can also take support from *Shiplu and another v State*[18] and *Md. Shamim v the State*[19].

The critical and significant question that raises here is, *firstly*, whether the issue of age was brought before the trial court in Sukur Ali's case; *secondly*, whether the issue of jurisdiction of the Bishesh Adalat was brought before the court. According to the death reference judgment of Sukur Ali, the issue regarding age was raised before the HCD for the first time. This indicates that, neither the defence lawyer nor, the prosecution has put light on the issue during the trial. Here, it is imperative to analyse whether any duty lies upon the trial court to conduct an inquiry as to the age of accused, when it appears to the court that the accused is a child, to determine the jurisdiction over the person of the accused.

In *Bakhtiar Hossain*[20] and *Shiplu*,[21] the HCD observed that 'whenever a person, whether charged with an offence or not, is brought before any court and it appears to the Court that he is a child, the Court shall make an

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15 *Nasir Ahmed v State*, 9 BLD (HCD) 502.

16 45 DLR (HCD) 643; *See also* a few later decisions likely *Md. Shamim v the State*, 19 BLD (HCD) 542, *Md. Monir Hossain v the State*, 21 BLD (HCD) 511, *Bangladesh Legal Aid and Services Trust and another v Bangladesh and others*, 7 BLC 85, *Bimal Das v State*, [1994] DLR 460 (HCD).

17 14 BLD (HCD) (1994) 381; *See also* 47 DLR (1995) 542.

18 49 DLR (1997) 53.

19 19 BLD (HCD) (1999) 542.

20 47 DLR (1995) 542.

21 49 DLR (1997) 53.

inquiry as to the age of that person'.[22] So, it appears for the simple reading of the judgment that, the trial court should apply its judicial mind as to the age of accused. In spite of such directives, the trial court has not conducted any such inquiry during the trial and concluded trial by awarding death sentence. This clearly indicates that the learned judge did not exercise his judicial mind.

Sukur Ali's trial becomes more antithetical when, despite confirming Sukur Ali's age, HCD has affirmed his death reference. Though, in many of its decisions, the HCD has either sent on remand for trial by the Juvenile Court upon an assessment of age or judgments have been set aside due to lack of jurisdiction of the court other than the Juvenile Court trying the accused child. However, in Sukur Ali's trials, the Division has taken a different approach[23] by affirming the death sentence.

Although the HCD has affirmed Sukur Ali's death reference, however, in 2007 in the case of *Md. Rahamat Ullah and another v the State*,[24] the Division has declared the trial by the Speedy Trial Tribunal as *void ab initio* on the ground that Rahamat Ullah was a minor and should have been tried by the Juvenile Court. In this case the Division held that [T]he Speedy Trial Tribunal cannot take away the rights given to the child accused known as youthful offender under the Children Act 1974, since those rights were given under the provision of art 28(4) of the Constitution'. A similar view was also taken by the Division in the *Roushan Mondal*.[25]

Since the Children Act 1974 came into force there are numerous decisions of the HCD, where the Division has constantly stated that 'once the accused is found to be a child the ordinary criminal Court,[26] even the Special Tribunal[27] loses its jurisdiction to try the accused'. Despite all these precedents set by the HCD since 1989, the learned Judge of the Bishesh Adalat has continued Sukur Ali's trial and the Division concluded by affirming the death reference. This clearly indicates that Sukur Ali's trial is paradoxical with the existing juvenile justice system.

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22 *See also*, the Children Act 1974, s 66(1).

23 *The State v Md. Roushan* Mondal, 59 DLR 72.

24 27 BLD HCD 390; 59 DLR (2007) 520.

25 ibid (n 23).

26 *Md. Monir Hossain v the State*, 21 BLD (HCD) 511.

27 *Md. Shamim* (n 19).

4. Joint Trial of Sukur Ali before the Nari-o-Shishu Nirjatan Daman Bishesh Adalat: Justified or Not?

Section 6 of the Children Act of 1974 has an overriding effect.[28] There are also many decisions of HCD and AD stating that a juvenile cannot be tried jointly with the adults.[29] In 1990 the HCD in *Kadu and Ors v the State*,[30] declaring the trial of accused Sunil as 'illegal' stated that [I]t is evident that appellant Sunil was under the age of 15 years at the time of trial and we are thus of the view that the joint trial of appellant Sunil with three other adult appellants was illegal in view of the provisions of sub-section (1) of section 6 of the Children Act'. A similar view was taken by the Division in 1994 in the case of *Kawsarun Nessa and another v the State*.[31]

Referring the Children Act 1974, the HCD in the case of *State v Deputy Commissioner, Satkhira and others*,[32] held that:

> Section 6 provides that there can be no joint trial of the child and the adult and as such no child is to be charged with or tried for any offence together with an adult. The child must be tried separately in the juvenile Court and not in the ordinary Court. Only the Juvenile Court is competent to take cognizance against the juvenile offenders.

Thus it appears that under our laws there is no chance of joint trials of a youthful offender and an adult. No matter what offence is alleged, irrespective of the seriousness of the act, a juvenile is to be tried separately from an adult in accordance with provisions of the Act.[33] Although, it is an established principle of law,[34] however, the learned trial judge has not

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[28] Section 6 read as follows:

6. No joint trial of child and adult:

(1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for any offence together with an adult.

(2) If a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but for the provisions of sub section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the child and the adult.

[29] *Bangladesh Legal Aid and Services Trust v Bangladesh and Others*, 57 DLR 11; See also *Saifullah @ Saiful Islam v the State*, 2 BLC 297.

[30] 43 DLR (1991) 163.

[31] 48 DLR (1996) 196.

[32] 45 DLR (HCD) 643.

[33] *Md. Rahamat Ullah and another v the State*, 27 BLD (HCD) 390; 59 DLR (2007) 520; See also *Ismail Howlader and others v the State*, 15 BLD 21.

[34] *State v Deputy Commissioner, Satkhira and others*, 45 DLR (HCD) 643.

adhered to the judgments of the HCD in Sukur Ali's, violating article 111[35] of the Constitution of Bangladesh.

Interestingly, despite such directives from the Division, in Sukur Ali's case, the legal representative, who plays a vital role to guide the court towards justice, has not brought the issue before the court in any stage. Neither the defence, nor the prosecution has raised the issue. This raises question on the efficiency and dedication of the legal representatives in our judicial system. Though it is the duty of the prosecution to act as 'neutral advocates of justice', however, Sukur Ali's case indicates that our prosecutors have adopted a 'conviction psychology' rather than internalizing the 'do justice standard'.

When we analyse the term 'do justice standard',[36] the very first question to be ascertained is, the extension of the power of judges, since they take on the utmost responsibility to do justice. But, does justice means only victim's satisfaction? Sukur Ali's case clearly indicates towards the 'conviction psychology'[37] of the concerned persons or authorities of our judicial system. Similarly, it also put light on the presence of inconsistency in approach of our judicial system towards the juvenile justice system.

5. Consistency of the Trial under International Law

Bangladesh ratified the Convention on the Rights of the Child (UNCRC) in August 1990. In addition to the UNCRC, Bangladesh has also adopted some international documents, namely: ICCPR, the Beijing Rules, the Riyadh Guidelines and the Havana Rules, which are expressly dealing with the children coming into conflict with the law. Prior to the adoption of these entire international legal instruments, the legal system of Bangladesh[38] has inherently seen children and adolescents different from adults.

In addition, ratifying and being a signatory to the conventions and the other international documents regarding juvenile justice system has provided double protection to the rights of juvenile offenders. Hence, in

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35 The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

36 F C Zacharias, 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?' (1991) 44 (1) Vanderbilt Law Review 45, 48.

37 Steven K. Berenson, 'Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?' (2000) 41 (1) Boston College Law Review 789, 792-794.

38 We can refer s 29 B of the Code of Criminal Procedure 1898 and the Children Act 1974.

2013 Bangladesh has replaced the Children Act 1974 with the Children Act 2013, meeting the obligations under the international law. The emerging question is, whether the judicial system of Bangladesh was bound to perform its obligations under UNCRC, ICCPR, the Beijing Rules, the Riyadh Guidelines and the Havana Rules prior to 2013.

Bangladesh ratified UNCRC in August 1990 and ICCPR in 2000. Being a member of United Nations since 1974, Bangladesh has also adopted UN General Assembly Resolutions such as the Beijing Rules, the Havana Rules and the Riyadh Guidelines in 1985, 1989, and 1991 respectively. Hence prior to Sukur Ali's trial it appears that Bangladesh has accepted international obligations to ensure the rights of the juvenile offenders. Now, in order to apprehend the binding effect of these international laws it is important to know whether mere ratification or signing of CRC and United Nations documents can create a binding legal regime for Bangladesh.

Though, the domestic Courts are not explicitly empowered to apply provisions of international law, however, they are not barred from applying the provisions of international law, provided there is no conflict with domestic laws.[39] It is an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.[40] The judiciary of Bangladesh has also considered various provisions of international law in many cases.[41]

Referring the obligations taken by the country under international law the AD remarked, 'the national courts should not, straightway ignore the international obligations, which a country undertakes'.[42] However, despite ratifying UNCRC, ICCPR and other United Nations documents the obligations under respective provisions of these international legal instruments were never brought before the Court in Sukur Ali's case.[43] Here, a critical and significant question rises whether our courts are bound

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39 M. Shah Alam, 'Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study' (2006) Netherlands International Law Review 399, 425; *See also* Muhammad Ekramul Haque, 'The Bangladesh Constitutional Framework and Human Rights', (2011) 22 (1) Dhaka University Law Journal 55.

40 *BNWLA v Bangladesh*, 14 BLC (2009) 694.

41 We can see for example *M Saleem Ullah v Bangladesh*, 47 DLR (1995) 218, Locus Standi Case, 49 DLR (AD) 1, *Professor Nurul Islam v Bangladesh*, 52 DLR 413, *Hussain Mohamman Ershad v Bangladesh*, 21 BLD (AD) 69, *BNWLA v Bangladesh*, 14 BLC (2009) 694.

42 *Hussein Mohammad Ershad v Bangladesh and Others*, 21 BLD (AD).

43 ibid 69; See also, *Anika Ali v Rezwanul Ahsan*, 17 MLR (AD) 49.

to consider any international legal instruments for a trial unless such are directly related with the matter.

The application of international instruments in the domestic arena has been discussed in *BNWLA v Government of Bangladesh and others*[44] where the Division stated that:

> It has now been settled by several decisions of this subcontinent that when there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until the national legislature enacts laws in this regard.

ICCPR has emphasised on ensuring a separate trial system for the juvenile offenders, by referring that juvenile offenders must be separate from the adult offenders from the time of their apprehension, during the trial and during confinement. Similarly r 13.5 of the Beijing Rules pointed out that 'the danger to juveniles of 'criminal contamination' while in detention pending trial must not be underestimated' stressing the need for alternative measures. Referring to UDHR, ICCPR, ICESCR and other conventions and covenants the Division in the case of *BNWLA*[45] held that:

> The Court can look into UDHR, ICCPR, ICESCR and other conventions and covenants as an aid to interpretation of provisions of Part II, particularly to determine the rights implicit in the rights like the right to life and the right to liberty but not enumerated in the Constitution. The Court found non-compliance with the provisions of UDHR is a violation of the obligation of the international obligation of member states.

The international legal instruments which expressly deals juvenile justice acts as a double protection for the rights of juvenile offenders. These instruments had nexus with Sukur Ali's case. However, the defence had never brought the obligations under these instruments before the trial court nor before the Higher Courts in Sukur Ali's case.

In the *State v Md. Roushan Mondal*[46] as well as in the *State v Metropolitan Police Commissioner*,[47] obligations under these instruments were also neither brought before the trial court nor before the Higher Courts. Indeed, the Court has addressed the obligations in these cases. In the aforesaid *Metropolitan Police Commissioner*, the Division held that:

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44 *BNWLA v Government of Bangladesh and others*, 40 CLC (2001) HCD.

45 14 BLC (2009) 694.

46 59 DLR 72.

47 60 DLR 660.

> Bangladesh was one of the first signatories to the Convention and is bound to take steps for implementing the provisions thereof. Being signatory we cannot ignore, rather we should, so far as possible, implement the aims and goals of the UNCRC.

A similar approach was taken by the Division in the *State v Secretary, Ministry of Law, Justice and Parliamentary Affairs and Others*[48] where it was stated that [T]he beneficial provisions of the international instruments especially the UNCRC are not in conflict with our domestic laws and therefore, they should be implemented for the benefit and greater interest of the children. Furthermore, in *Anika Ali v Reawanul Ahsan*,[49] the Appellate Division stated that 'unless provisions of international instruments are contrary to our domestic laws, the beneficial provisions may profitably be referred to and implemented in appropriate cases'.

Despite the judgement of *Anika Ali* in 2011, the obligations under international laws were not brought before the court. As a result, by not invoking the inherent power of the AD to do complete justice under art 104 of the constitution of Bangladesh, in August 2015 the Division commuted Sukur Ali's death sentence 'to imprisonment for life till natural death'.

6. Consistency of Sukur Ali's Trial with 'Best Interest of the Child'

Even if our judicial system has ignored the obligations under UNCRC and other international documents on the subject, it cannot ignore its obligations under the customary principle 'best interests of the child'.[50] The concept of addressing the 'best interest of the child' emerged in 1899 as Jane Addams advocated for the establishment of the country's first juvenile court in Chicago.[51] Since then, the principle is applied to all actions and decisions that affect children either directly or indirectly.[52] With time the principle has now gained the status of customary

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48 29 BLD (HCD) 656.

49 17 MLR (AD) 49.

50 UN General Assembly, *Convention on the Rights of the Child* (20 November 1989) 1577 United Nations Treaty Series 3, Article 3; <www.refworld.org/docid/3ae6b38f0.html> accessed 27 March 2018.

51 Brooks, C. C. & Roush, D. W. 'Transformation in the justice system' (2014 Spring) 23 (1) Reclaiming Children and Youth 42-46.

52 Dina Imam Supaat, 'Establishing the Best Interests of the Child Rule as an International Custom, International Journal of Business' 5 (4) Economics and Law.

international law by fulfilling the requirement of 'a settled practice' together with 'opinio juris'.[53]

Acknowledging the binding effect of the customary principle 'best interests of the child', in the *Metropolitan Police Commissioner,* the HCD held that, 'The Court, in all circumstances, must ensure the best interests of the child'.

The approach was further strengthened in *Fahima Nasir v Bangladesh*,[54] where the Division stated that:

> To even consider any form of retributive or deterrent punishment in the guise of protection of society would be a regressive step shutting our eyes to our obligation to provide a congenial environment in which our children may grow and flourish into worthy citizens. The Court stressed that at all times the welfare and the best interest of the child must be kept in the mind.

Putting stress on the mandate of art 3 of the UNCRC, best interest of the children the Division held in *State v Secretary, Ministry of Law, Justice and Parliamentary Affairs and Others*[55] that:

> We note that when it comes to children committing more serious crimes, they are tried effectively as adults and the best interest of child takes back-stage as a mere slogan. This is in spite of the clear mandate in Article 3 of the UNCRC for state parties to ensure that in all actions concerning children taken by institutions, including Courts of law, the best interest of the child shall be a primary consideration. The age old attitude of demonizing children who commit serious crimes is to be deplored. Courts should at all times consider the reasons behind the deviant behavior of the child and after taking into account all the attending facts and circumstances, decide what treatment would be in the best interest of the child.

As can be seen from the precedents just summarized, the 'best interests of the child' principle applies collectively to juvenile offenders[56] and there is a paradox among the judiciary in applying the principle. Although 'best interests of the child' is universally acknowledged as the paramount

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53 North Sea Continental Shelf Cases (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*) , I.C.J. Reports 1969, p.3, ICJ, 20 February 1969.

54 61 DLR 232; See also *The State v Secretary, Ministry of Law, Justice and Parliamentary Affairs and Others*, 29 BLD (HCD) 656.

55 29 BLD (HCD) 656.

56 Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child* (2007) 36-37.

standard for the determination of all issues affecting children, it was not argued before the Court at any stage in Sukur Ali's case.

This draws us to the conclusion that Sukur Ali's case is a case where the stakeholders of the judicial system have adopted a 'conviction psychology' and have denied the juvenile justice system.

7. The Interpretative Approach adopted by the Judiciary of the two 'Constitutional Statutes': Justified or Not?

Analysing Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995 in Sukur Ali's case, the HCD made two observations, *firstly,* s 3 of the aforesaid Act of 1995 is a 'non-obstante clause' and has an overriding effect over any other law; and *secondly,* the said Act has defined child as a victim and has used 'any person' to address the accused person, thus, 'any person' includes 'child' as well.[57]

'Non-obstante Clause' is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in any other provision or law.[58] While interpreting a 'non-obstante clause' it is important to determine the intention of the legislature and then construct the clause accordingly.[59] Sometimes conflict between two enactments operating in the same field or different and each containing a non-obstante clause might arise. In such cases, it is important to see, *firstly*, whether the enactments are special law and *secondly*, the field in which the enactment will operate. When both statutes contain non-obstante clause and both are special statutes then later statute shall prevail.[60] However, in case both the law operates in a different field then, any conflict should be tried to be resolved by interpretation on the consideration of the purpose and policy underlying each enactment and the language used.[61]

When judges interpret legislation, they purport to discover and give effect to the intention of the legislature. That is, by reading the language of the text supplemented by the rules of statutory interpretation.[62] There are many

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57 Sukur Ali case.

58 *New Ideal Engineering Works v Bangladesh Shilpa Bank*, 42 DLR (AD) 221; *See also* Mahmudul Islam, *Interpretation of Statues and Documents* (Mullick Brothers 2009) 84-89.

59 *Mahadeolal v Adminstrator General*, AIR 1960 SC 936; *See also* Islam (n 58) 84-89.

60 *Maharashtra Tubes v SIJC of India*, JT 1993 (1) SC 310; *Allahabad Bank v Canara Bank*, AIR 1991 SC 855; Islam (n 58) 84-89.

61 *Sarwan Singh v Kasturilal*, AIR 1977 SC 265; Islam (n 58) 84-89.

62 Ruth Sullivan, *Statutory Interpretation, 2/E (Essentials of Canadian Law)* (2nd edn, Irwin Law Inc 2007).

rules for the judiciary to adhere to during the interpretation of statutes. The rule of harmonious construction and the mischief rule are most popular. The rule of harmonious construction is adopted when there is a conflict between two or more statues or between the parts or provisions of the statues;[63] alike the conflict between Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995 and the Children Act 1974 in Sukur Ali's case.

As per this doctrine the courts try to avoid conflicts between the provisions of the statutes by following a very simple rule that is 'every statute has made for a purpose and specific intent as per law and it should be read as a whole and interpreted accordingly in such a manner as to give effect to both by harmonising them with each other'.[64] However, in Sukur Ali's case, the HCD has analysed the Act of 1995 but has restraint itself from analysing the Children Act 1974. Hence, the HCD held that [S]ection 3 of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995 is a 'non-obstante clause' and has an overriding effect over any other law including the Children Act, 1974.[65] However, the Division has not acknowledged s 6 of the Children Act 1974, which is also a 'non-obstante clause' and has an overriding effect too over any case where the accused is a juvenile.

The rule of interpretation suggests in a situation where both the statues contain 'non-obstante clause' the duty of the Court would be to harmonize the apparently conflicting statutes to give effect to both.[66] So that, along with the victim the inalienable rights of a juvenile offender are also ensured. However, in Sukur Ali's case the legal representatives never brought s 6 of the Children Act 1974 before the court.

Furthermore, in Sukur Ali's case the HCD has rightly held that in Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain 1995 the word 'child' is used 'as a victim'. However, the Division didn't consider that the same word is used as 'an offender' in the Children Act 1974. This indicates that the word 'child' is used in different context in both the statute. As stated in *Md. Ebadal Ali v Ismail Hossain Akhand & ors*,[67] [W]hen there is doubt about their meaning, words of a statute are to be understood in the sense in

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63 *Iridium India Telecom Ltd. v Motorola Inc*, 2 SCC (2005) 145.

64 Ishani Acharya and Rahul Das, 'The Doctrine of Harmonious Construction in the Interpretation and Construction of Statutes' (2014) International Journal of Law and Legal Jurisprudence Studies <http://ijlljs.in/wp-content/uploads/2014/06/Harmonious-Construction.pdf> accessed 27 March 2018.

65 ibid

66 *Md. Abul Kashem v Mahmudul Hasan*, 10 ADC (2013) 519, 33 BLD (AD) 85; See also, *Phipps v Liddle*, [2004], 267 Va. 344, 593 S.E.2d 193.

67 *Md. Ebadal Ali v Ismail Hossain Akhand & ors*, 9 BLD (1989) HCD 304; See also *A.K.M. Ruhul Amin v District Judge and Appellate Election Tribunal, Bhola and ors.*, 38 DLR (AD) 172; 6 DLR (FC) 54, 11 DLR (SC) 200.

which they best harmonise with the object of the enactment. When there is ambiguity the interpretation which is inconsonance with equity shall be preferred. A similar stand was taken by the AD in *Shafiqur Rahman v Idris Ali*.[68] However, in Sukur Ali's case the objects of the relevant laws where never brought before the court by the legal representatives.

While interpreting a statute 'considerable attention was devoted as to which of the rules of interpretation should be applied'.[69] Considering the conflict between the meanings of the word 'child', mischief rule was considered as appropriate by the HCD. Mischief rule is applicable where the language is capable of more than one meaning.[70] Hence, the HCD has considered the mischief rule and held that 'law has defined child as a victim and has used 'any person' to address the accused person, thus, 'any person' includes 'child' as well'.[71] Commenting on the HCD's this approach towards the case, Justice Md. Imman Ali stated that [E]ven if the mischief rule is considered, i.e., the purpose for which the law was enacted, then one cannot avoid the conclusion that where the allegation involves a child in conflict with the law then the provisions of the Children Act will prevail.[72]

In *Sukur Ali* case, the relevant provisions where interpreted ignoring the intention of the legislature and purpose of both the enactment. The preamble of the Children Act 1974 stated that [W]hereas it is expedient to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders. That is, the Children Act establishes a different regime for the treatment of the child offenders which is separate and different from the treatment of adult criminals under the criminal justice system of the Code of Criminal Procedure of 1898 and the Penal Code of 1860. The same observation was held by the HCD in the *Md. Roushan Mondal*.[73] Although the function of the court is to interpret a statute according to the intent of them who made it,[74] it was overlooked in Sukur Ali's case.

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68 38 DLR (AD) 71.

69 *Bangladesh v Abdul Gani Biswas and Ors.*, 32 DLR (AD) 233.

70 *Parayan Kandiyal v K. Devi*, AIR 1996 SC 1963.

71 Sukur Ali case.

72 M. Imman Ali, 'Fundamental rights of children: Rights of youthful offenders are ensured by the Constitution' *HRPB*; <www.hrpb.org.bd/images/PDF_File_%20RPB/Justice%20Md.%20Imman%20Ali.pdf> accessed 27 March 2018.

73 59 DLR 72.

74 *Badrul Haq v Election Tribunal*, 17 DLR 545.

Considering the observation made by the High Court Division itself in *Md. Rahamat Ullah*[75] and *Md. Shamim*,[76] this observation made by the HCD in Sukur Ali's case indicates strong disparities among the stakeholders of the judiciary. If we closely analyse both the decisions it would be visible that the Special Powers Act 1974 and the Arms Act were already in force when the Children Act came into force. Indeed, the Court stated, 'the legislature did not exclude the jurisdiction of the Juvenile Court in respect of offences under these enactments,[77] though these enactments did not define 'child'.

Absurdly, no appeal was made on the ground of misinterpretation of law in Sukur Ali's case. This indicates the reluctance of the stakeholders of our judicial system towards juvenile justice system.

8. Constitutionality of Sukur Ali's Trial

According to art 31 of our Constitution, 'to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen'. Accordingly, the phrase 'to be treated in accordance with law and only in accordance with law' appears to be self-explanatory.

Referring art 31 of our Constitution in *Dr. Mohiuddin Farooque v Bangladesh and others*,[78] the AD held that, 'in particular it guarantees that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law'. This indicates the vast responsibility imposed on the judiciary to ensure that every citizen of Bangladesh is treated in accordance with law, and only in accordance with law.

Our criminal justice system has treated juvenile offenders in a different manner which is quite visible by analysing section 29B of the Criminal Procedure Code[79] and s 82 of the Penal Code[80]. The primary legislation that deals with children coming into contact with the justice system in Bangladesh is the Children Act 1974,[81] which was repealed by the

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75 27 BLD (HCD) 390; 59 DLR (2007) 520.

76 19 BLD 542.

77 *Md. Rahamat Ullah* (n 75).

78 55 DLR (2003) 69.

79 Section 29B of the Criminal Procedure Code reads:

80 Section 82 of the Penal Code reads: 'Nothing is an offence which is done by a child under nine years of age'.

81 M. Imman Ali, *Towards a Justice Delivery System for Children in Bangladesh: A Guide and Case Law on Children in Conflict with the Law* (UNICEF Bangladesh, Dhaka 2010) 52.

Children Act 2013. This was a very forward-thinking piece of legislation, which realized correctly that children who come into contact with the justice system should be treated differently.[82] A child for the purpose of this law is defined a person under the age of sixteen years,[83] and shall be tried in the Juvenile Court established under the Act. Keeping that as aim, Juvenile Courts are created in recognition of special needs of the young offenders so that a child appearing before the court does not come into contact with adult offenders or come out of the trial with unnecessary and avoidable stigma to his name or does not pass through the trauma and exposure of a public trial. This becomes apparent from the fact that the Act deals in detail how the trial of an offender below 16 years of age shall be held under special circumstances.[84]

Despite having a different law for the trial of offenders below 16 years of age, Sukur Ali was not tried nor treated according to the applicable law, which indicates towards a clear violation of art 31 of our Constitution.

Furthermore, despite having many judgements[85] of the Higher Courts, Bishesh Adalat continued the trial of a juvenile, it can be said to be a clear violation of the constitutional mandate by the learned Judges of the sub-ordinate courts. What the trial court did being a sub-ordinate court, like Nari-O-Shishu Nirjatan Daman Bishesh Adalat, can be said to be an 'arbitrary use of power'.

9. Quashing Sukur Ali's Trial and the Duty of Legal Representatives

The Higher Courts have the power to quash the proceedings of its subordinate's court. Although in the case of *Md. Roushan Mondal*,[86] the HCD held that the Nari-O-Shishu Nirjatan Daman Bishesh Adalat is 'without jurisdiction' to try 'an accused below the age of 16 years', the defence lawyer in Sukur Ali's case didn't file any application under

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82 Najrana Imman, *Justice for Children in Bangladesh: An Analysis of Recent Case Report* (Save the Children, Dhaka 2012).

83 The Children Act 1974, s 2 (f).

84 *Baktiar Hossain v the State*, 14 BLD (1994) HCD 381; 47 DLR (1995) 542.

85 *Bimal Das v the State*, 46 DLR (1994) 460; *Md. Nasir @ nasir @ Nasir Ahmed v State*, 9 BLD (HCD) (1989) 502; *State v Deputy Commissioner, Satkhira and others*, 45 DLR (HCD) 643; *Baktiar Hossain v the State*, 14 BLD (1994) (HCD) 381; 47 DLR (1995) 542; *Shiplu and another v State*, 49 DLR (1997) 53; *Md. Shamim v the State*, 19 BLD (1999) (HCD) 542; *the State v Md. Roushan Mondal @ Hashem*, 59 DLR 72; *Md. Rahamat Ullah and another v the State*, 27 BLD (2007) HCD 390; 59 DLR (2007) 520; *Md. Monir Hossain alias Monir Hossain v the State* 21BLD (2001) HCD 511; *Kawsarun Nessa and another v the State*, 48 DLR (1996) 196; *Ismail Howlader and others v the State*, 15 BLD (1995) 21.

86 59 DLR 72.

section 561A of the Criminal Procedure Code for quashing the proceedings of the trial court.

Legal representatives owe a duty to the administration of justice. This duty manifests itself in various ways. For instance, lawyers must not engage in conduct that is illegal or that is prejudicial to the administration of justice.[87] However, Sukur Ali's case demonstrates how death penalty can be imposed upon those who have the misfortune to be assigned the worst lawyers. Sukur Ali's case is an example of the quality the legal representations and the approach taken by the legal representations; both prosecution and defence. In one hand, it demonstrates the ignorance and inefficiency of the defence lawyer, on the other, it shows how prosecution ignores its duty to guide and help the court to ensure justice not only for the victim but also for the offender. Insisting on the death penalty until the end, by the prosecution demonstrates convicting approach of the prosecution; however, they should guide the court towards justice.

After Sukur Ali's confirmation of death penalty by the HCD, the Division has discussed Sukur Ali's case in *Md. Roushan Mondal*[88] and remarked by stating that 'in Sukur Ali's trials, the Division has taken a different approach'.

A similar approach was taken in *Md. Monir Hossain v the State*,[89] where the HCD stated, 'once the accused is found to be a child the ordinary criminal court loses its jurisdiction to try him'. In 2007 in the case of *Md. Rahamat Ullah*,[90] the HCD has declared the trial by the Speedy Trial Tribunal as '*void ab initio*'[91] on the ground that Rahamat Ullah was a minor. The different approach acquired by the Higher Courts in the above mentioned cases raises question on Sukur Ali's trials. Although the paramount duty of the Court is to 'secure the ends of justice', yet, the AD rejected the appeal and upheld the HCD's verdict. A review petition to the Appellate Division was also rejected on 4 May 2005. The critical and significant question that raises here is, whether the Higher Courts will shift from its paramount duty to 'secure the ends of justice' due to negligence and inefficiency of the legal representatives.

Although, the most obvious aspect of the duty to the administration of justice is the duty that lawyers owe to the courts, tribunals and

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87 Gino Dal Pont, *Lawyers' Professional Responsibility* (3rd edn, Law book Co. 2006) 25, 423.

88 59 DLR 72.

89 21BLD (2001) HCD 511.

90 27 BLD HCD 390; 59 DLR (2007) 520.

91 ibid

commissions of inquiry before whom they appear, the Judges paramount duty to 'secure the ends of justice' cannot be overlooked.

10. Ensuring Justice of Sukur Ali

Sukur Ali's case is an example of miscarriage of justice which is still not recognized nor even considered as a miscarriage of justice. The term 'miscarriages of justice' is often understood as wrongful acquittals and wrongful convictions. However, the procedural faults in a case such as the consequence of imperfect procedures of investigation, inefficiency and negligence of the legal representatives, and violation of right to due process are not considered as miscarriage of justice; although it effects the judgement of the case. Hence, it becomes difficult for the people to understand why there is a miscarriage of justice in Sukur Ali's case, who was found guilty and was convicted accordingly to the law. To understand where this miscarriage took place in Sukur Ali's case, it's important to discuss the judgement of Nirbhaya Gangrape Case, also known as 2012 Delhi Gangrape case. In the case, a 23-year-old women, who was later named as 'Nirbhaya' in media, was brutally assaulted and raped by six persons, five adult men and a juvenile, in a moving bus in south Delhi and thrown out of the vehicle with her male friend on the night of December 16, 2012. Later on December 29 that year she died.[92] Nirbhaya Gangrape Case and Sukur Ali's case has two major similarities *firstly*, both are the case of rape and murder and *secondly*, both involve a juvenile offender, Mohammad Afroz and Sukur Ali. However, despite being found as guilty of raping and killing, and 'one of the most brutal' among all the accused who raped Nirbhaya, Mohammad Afroz was not tried jointly with the adults offenders by the trial court. Rather he was sent to a correction home on the orders of the Juvenile Justice Board for three years. After spending three years in the correction home, Mohammad Afroz was released in 2015 and an NGO rehabilitated him.[93]

On the other hand, Sukur Ali's case is a completely opposite. Although there was public outrage, however, it did not influence in the courts

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92 Criminal Appeal Nos. 607-608 of 2017 (arising out of S.L.P. (Criminal) Nos. 3119-3120 of 2014) <www.thehindu.com/news/national/article 18390998.ece/binary/Supreme Courtverdict> accessed 05 February 2020.

93 Faizan Haidar, 'Juvenile in 2012 Delhi gang rape case 'unaware' of verdict, now works as a cook' *Hindustan Times* (05 May 2017) <www.hindustantimes.com/delhi/juvenile-in-2012-delhi-gang-rape-case-unaware-of-verdict-works-as-cook-in-south-india/story-35jbhO8sDu5z8xH3w VbxeN. html> accessed 05 February 2020; SW Staff, 'Nirbhaya's 'Juvenile' Rapist Who Walked Free Last Year Is Reportedly Working As A Cook' *Scoopwhoop* (05 May 2017) <www.scoopwhoop.com/meanwhile-heres-how-the-juvenile-rapist-of-nirbhaya-is-spending-his-life/> accessed 05 February 2020.

procedure. A comparison between the two cases clearly portrays the violation of the right to due process, which is a contributing factor to miscarriage of justice. However, Sukur Ali's right to have a due process and to be tried according to law was never argued before the court. For such a negligent behaviour, a juvenile offender whom we could give a good life is, now, suffering behind the bar.

11. Concluding Remarks

Although after a long battle spanning for almost there are numerous decisions of the HCD along with the AD, the fact remains that, our trial courts along with the higher courts have been dealing with a dilemma regarding juvenile offenders which is quite evident for Sukur Ali's case. Interestingly, in August 2015 the AD has commuted Sukur Ali's death sentence to imprisonment for life 'till natural death',[94] but has not declared the trial as *void ab-inito* nor has considered the obligations under the customary norms. The present article specially wants to offer three important points here.

Firstly, Sukur Ali's trial in the Nari-O- Shishu Nirjatan Daman Bishesh Adalat is '*void ab initio*' and 'illegal' on two grounds, firstly, the court was without jurisdiction and without lawful authority; and secondly, s 6 provides that there can be no joint trial of the child and the adult. Once the accused is found to be a child the ordinary criminal court loses its jurisdiction to try him and the child must be tried separately in the juvenile Court and not in the ordinary Court.

Secondly, according to the prevailing norms of adversarial trial, which Bangladesh follows, it is generally assumed that the onus of presenting relevant factors regarding the accused lies exclusively on the defence. However, in Sukur Ali's case, inefficiency and negligence of the defence lawyer are evident.

Thirdly, Sukur Ali's case has also pointed out the fact the prosecutors have failed to act as 'neutral advocates of justice'. Rather choose to value obtaining and maintain conviction over 'doing justice'. Prosecutors are not only obliged to act not only as advocates enforcing the law but are also entrusted to ensure that justice is met.

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[94] *State v Sukur Ali*, 68 DLR (2016) AD 1; *See also*, CRIN, 'BANGLADESH: Mandatory death penalty declared void after 14-year legal battle' <www.crin.org/sites/default/files/bangladesh_-_mandatory_death_sentences.pdf> accessed 14 March 2018.

Fourthly, Sukur Ali's case demonstrates the discriminative behaviour of the stakeholders of a justice system towards the rights of an accused person during the trial.

The different approach taken by the trial Court along with the HCD and the AD in the Sukur Ali's case is the result of the negligence of the legal representatives to guide the Court towards justice which has affected the juvenile justice system. This indicates that the members of our judicial system have failed to ensure that Sukur Ali is treated in accordance with law, and only in accordance with law as per art 31of our Constitution. Any violation of art 31 of the Constitution results as a gross miscarriage of justice. As a consequence Sukur Ali is still behind the bar.

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