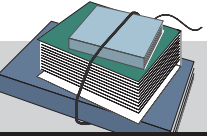




Star LAW report



LAW lexicon



Conviction under section 302 of Penal Code without right to defend is illegal

High Court Division (Criminal Jurisdiction)
The Supreme Court of Bangladesh
Criminal Appeal No. 2388 of 1997
Babu Khan
Vs
The State
Before Mr. Justice Mr. Amirul Kabir Chowdhury and Mr. Justice AFM Ali Asgar
Date of Judgement: June 30, 2003-08-22
Result: Appeal allowed

Amirul Kabir Chowdhury, J: At the instance of the accused appellant Babu Khan this appeal has been directed against judgement and order dated 28.01.1986 passed by the learned Sessions Judge, Rajbari in Sessions Case No. 75 of 1985 convicting the accused appellant under section 302 of the Penal Code and sentencing him thereunder to imprisonment for life.

Fact in brief

Prosecution case in brief is that on 20-9-1984 at night accused appellant Babu Khan entered the house of one Alauddin Khan and while it was detected he along with his wife caught hold of accused Babu Khan and then Babu Khan assaulted them indiscriminately with dagger and fled away. Jarina, Khatun wife of Alauddin Khan could recognise Babu Khan in the light of Kupi bati and the victims Alauddin Khan and his wife were taken to hospital for treatment. Alauddin Khan on 22-9-1984 succumbed to the injuries. Abdur Rajjak neighbour of the victims lodged the First Information Report (FIR) on 21-9-1984. After investigation the Police submitted charge against Khan on 29-11-1984 under section 380/5/11/459/326/302 of the Penal Code and that the case thereafter was sent to the Court of Sessions for trial. The learned Sessions Judge on 7-1-1986 framed charge against the accused appellant under section 302/326 of the Penal Code in his absence and by the impugned judgement and order convicted the appellant as already mentioned above. Hence is this appeal.

Deliberation

In support of the appeal the learned Advocate for the accused appellant has taken us through the order sheets of the Court below and also the impugned judgement. He submits that accused appellant has been charged and tried under sections 302/326 of the Penal Code and has been accordingly convicted under section 302 of the Penal Code. As the accused admittedly being in absconded he ought to have been defended by a lawyer at the cost of the State under Chapter XII of the Legal Remembrance Manual. Since there being no such appointment of any lawyer the trial from the beginning the trial has been absolutely illegal and hence the impugned judgement and order cannot sustain in the eye of law. He further submits that the accused appellant was not aware of the proceeding or of the impugned judgement and that being arrested on 29-4-1995 he came to know of the judgement for the first time and hence got the appeal filed. The learned Advocate further submits that there is not cogent evidence to warrant conviction against the accused appellant and as such the appeal may be allowed acquitting the accused appellant.

Mr. Golam Kibria, the learned Deputy Attorney General was candid enough to submit that every accused charged under section 302 of the Penal Code punishable with death has got right to be defended by a lawyer. The absconding accused should not deprive of such chance to be represented by lawyer. And in this vice of the matter the learned Deputy Attorney

General finds it difficult to support the impugned judgement and order since from the record it is apparent that the accused was not represented by any lawyer at any stage of the trial.

We have considered the submissions made at the Bar and perused the materials on record. Rule 1 of Chapter XII of the Legal Remembrances' Manual, 1960 reads as follows:

"Pauper accused punishable with capital sentence to be given legal assistance. Every person charged with committing an offence punishable with death shall have legal assistance at his trial and the Court should provide advocate or pleaders for the defence unless they certify that the accused can afford to do so."

In this connection we may also quote section 340 of the Code of Criminal Procedure which runs as follows:

"340-(1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader."

Thus under section 340 of the Code of Criminal Procedure and Article 33 of our Constitution the right to consult and to be defended by a legal practitioner has been guaranteed.

In this connection the decision in the case of State Vs. Imdad Ali Bepary in 36 DLR (HCD) 333 may be referred to wherein their Lordships held:

"In this case it appears that no lawyer on behalf of the accused was present in Court below, before proceeding with the case ought to have appointed an Advocate to defend the accused. In that view of the said illegality the conviction and sentence of the condemned prisoner under section 302 is not maintainable and therefore set aside. And the case is sent back for re-trial to the court below after appointing an Advocate to represent the accused and give him chance to cross-examine the witnesses adduced in the case."

In agreement with the principles of law laid down above and in consonance with section 340 of the Code of Criminal Procedure, and Rule 1 of Chapter XII of the Legal Remembrance's Manual we hold that right of an accused to be defended by a lawyer in a case charged under section 302 of the Penal Code, being punishable with death, is, an inalienable right guaranteed in the law of our land and if any trial takes place in refusing such fundamental right the trial is a misnomer and the judgement passed in such trial convicting an accused is no judgement in the eye of law.

Decision

On perusal of Order No. 1 dated 12.11.1985 and Order No. 4 dated 7.1.1986 it appears that the learned Sessions Judge himself found that the accused was absconding and by Order No. 4 he framed charge against the absconding accused under section 302/326 of the Penal Code. Section 302 of the Penal Code prescribes capital punishment and as such we are of the view that it was the duty of the learned Sessions Judge to take step or himself appoint a competent Advocate to represent the absconding accused. Failure of the learned Judge to make such appointment and arrange defence of the accused through a lawyer has vitiated the entire trial and as such the impugned judgement and order complained of couldn't be maintainable.



It is unfortunate that a senior Judge, in the instant case, a Sessions Judge convicted the appellant under section 302 of the Penal Code being oblivious to such clearly settled law.

In view of our discussion made above we find substance in the submission made by the learned Advocate appearing for the appellant. Since we decide to send the case on remand for fresh trial according to law we do not like to make any comment at this stage as to merits of the case. On the reasoning aforesaid the appeal succeeds.

The appeal is allowed.

Mr. MD. Ashraf-uz-Zaman Khan with Mr. Md. Rezaul Haque, for the appellant and Mr. Golam Kabria, DAG with Mr. Md. Ferozur Rahman, AAG for the State.

READERqueries



Your Advocate



This week your advocate is M. Moazzam Husain of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

Q: One summer vacation I went to my parent's house in my home district. Only one of my brother lived here with his family. I got involved in an altercation with my brother over some money which my father gave him for business purpose. Later my brothers brother-in-law, a local BNP leader complained against me local police station and tried to force the OC of PS to arrest me on the plea that I have broken all the valuable things of his sister. As the did not comply with his direction that leader became very angry with the OC and by using political influence posted that OC in remote area. After that incident, I along with my parents came back to Dhaka. By this time new OC joined in that PS and that political leader used him to made false GD on his self-made complain. After my post-graduation I applied five times in different govt organisations and was selected. But in every case my police report came negative. By this way my career has been ruined totally. My question is (a) What legal action can be taken against that leader/political person due to his this type of heinous act? (b) Is there any legal way so that the criminal record which has been lodged against me could be void? (c) What is the legal basis upon which employers (govt/private) can overlook this false allegation recorded against me? (d) What is the legal step to stop this heinous act done by the political leaders forever, so that none can dare to do this type of act and ruin any body's career? (e) Is it legal on the part of police to consider family matter as criminal offense? Please advice.

M. Zaman, Tejgaon, Dhaka.

Your Advocate: I have carefully examined your problem. Whatever has happened between your brother and your family comes within the ambit of 'family matter' as it is usually said. Causing little damage to households at the spur of the moment should not be the concern of law or of any outsider. But that goes scale wise. If the scale of damage is substantial law may take its course. Any way, your personal case is unfortunate. You have raised several questions. It is really difficult to answer them to your satisfaction from exclusively legal point of view in that they involve a blend of social, political and legal questions to be adequately addressed. You cannot take any action, in the circumstances, against the political leader. The Govt. and the NGO's as of practice make recruitment subject to police report. Govt. can, if so wants, verify the police dossier but the NGO's do not have any mechanism to do so. As for your last question, police is not empowered to interfere with anybody's family problem unless the same constitutes an offence made cognizable by law.

LAWweek

The Divisional Speedy Trial Tribunal, Chittagong, has handed down the jail term for seven years to former Awami League (AL) lawmaker and allegedly godfather of an organised criminals' network in Feni Joyanal Abedin Hazari in his absence for illegally possessing ammunition. The verdict will take effect from the day police arrests Hazari or he surrenders. Hazari has been hiding since the take-over of the caretaker government in 2001. Earlier on August 10, a court in Feni sentenced Hazari and one of his aides to life imprisonment in another arms case. Moreover, there are 16 cases still pending against Hazari. However, the joint forces in a raid on Hazari's office at his Love Market in Feni on August 17, 2001 recovered five .303 rifle bullets, two 7.62mm rifle bullets, three pistol bullets, eight gun cartridges and four fire pins. And the case was lodged on the same day following recovery of the ammunition.

-Jugantar, 29 September.

Defamation charge against editor

A Dhaka court has framed charges against the editor and the publisher of the daily Jugantar in the defamation case filed by Housing and Public Works Minister Mirza Abbas in the last year. The defendants are Golam Sarwar, editor of the newspaper, publisher Advocate Salma Islam and chairman of the group, Nurul Islam Babul. Metropolitan Magistrate Khondaker Fatema Begum frames charges against the defendants in their presence. The court fixed October 26 for trial of the case. -Jugantar, 29 September.

Five kids rescued from traffickers

Four children abducted from Muktagacha have been rescued from Trishal bus stand in the district town by local people. The rescued children are Shokkuri, 9, Sagar, 7, Mintee, 5 and Sirajul 3, all children of one Chan Miah of Elachhai village in Muktagacha upazila. Police reveals that people at the bus stand see the five children weeping and approaches them. They tell the people that they were going to their father at Nutun Bazar at Muktagacha upazila headquarters from their village home. On the way, two persons offered them biscuits and brought them to Mymensingh town. Seeing the unknown place, they started weeping. At this the two persons left them. The children have been handed over to Kotwali police. -The Daily Star, 28 September.

Publication of PSC result stayed

An High Court (HC) Division bench composed of justices Md Mozammel Hossain and Md Mizanur Rahman Bhuiyan has stayed the results of the September 26 preliminary test for recruitment of sub-registrars for two months. It has also issued a rule asking the Public Service Commission (PSC) that arranged the test and the establishment secretary to explain why the preliminary test by cancelling the registration of the petitioner, who challenged the test in a writ, should not be declared unlawful and null and void. Mohammed Abdul Halim, an applicant for the sub-registrar post, files the writ with the HC asking for declaration of the examination illegal and holding of the examinations afresh as he was not issued with an admit card. The government is to reply to the HC rule by six weeks. In the preliminary examinations, some 13,000 of the 38,000 applicants did not get admit cards. It is argued that the petitioner applied properly for the post but the PSC arbitrarily cancelled his registration and issued no admit card in his favour. It is a clear violation of the fundamental rights. -Ajker Kagoj, 30 September.

Taxmen and Police tops corruption list

The Bangladesh chapter of Berlin-based Transparency International has reported that the police are the most corrupt institution in Bangladesh whose chronic graft problems have not been improving. In terms of financial loss - including an estimated one-fifth of the one billion dollars of international aid

each year -- the tax and customs departments were the most corrupt. The database of the TIB shows corruption in financial sector as 37.3 percent, police 22.4 in terms of number of corruption incidents, 12.9 in education sector and 10.1 per cent in local government. In 35.9 percent cases, government officials and employees were found indulged in corruption.

The TIB observes that "political will" is needed first for removing corruption. The watchdog also suggests independent anti-corruption commission, appointment of ombudsmen, speedy trial of corrupt people, press freedom, separation of the judiciary and administrative reforms as the remedies. -Ittefaq, 30 September.

Kolkata HC bans rallies on working days

The Kolkata High Court in a judgement has banned processions and public meetings in the city on working days. The judgement says, "people suffer much due to processions and Public Meeting on working days." Few days ago Justice Laia himself had been delayed by several hours to reach the court due to processions in the city that created acute traffic congestion, on the same day the judge summoned the opinion of the police to justify their permission to allow processions and public meetings on working days. Members of the civil society have welcomed this verdict but political parties are disappointed of the ruling. -Independent, 30 September.

Lawyers' court boycotts

Lawyers boycott courts countrywide on October 1 to press their six-point demand, including repeal of the amended Civil Procedure Code, bringing judicial activities to a near-stop. The demonstrators, grouped in the Six-point Demand Implementation Committee, also call for independence of the judiciary, rescinding of the rule on compulsory filing of income tax returns and trade licences, transparency in appointment of judges and recruitment of efficient judges. This boycott is the second since August 6, the day that saw a country-wide court boycott by the same lawyers on the same demands.

Vice-chairman of Bangladesh Bar Council and convener of the demand implementation committee Barister Amir-Ul Islam urges the lawyers to join a human chain on October 8, stage a token hunger strike on October 15 and make the October 24 rally a success. The Supreme Court vacation benches pass the day virtually without work because of the absence of pro-boycott lawyers. -Sanbad, 2 October.

Top terror Liakot arrested

At last one of the most wanted criminals Liakot Hossain Howlader has been arrested. Members of the Rapid Action Team (Rat) plant themselves near the Road No 32 bridge and ambush a private car carrying Liakot, one of the 23 most wanted and listed criminals in Dhaka. The team also arrests Liakot's bodyguard Shohag Sardar and driver Badal Hawlader in the spot. Earlier the home ministry announced a reward of Tk 1 lakh for his arrest. Liakot fled to India immediately after the announcement. Liakot has nine cases and four GD entries against him in Motijheel, Tejgaon, Dhanmondi, Mohammadpur and Gulshan police stations. He is one of the accused in the armed attack on a procession at the Malibagh intersection on February 13, 2001 in which four people were killed. He is also an accused in one attempt-to-murder case, two arms cases and four cases of robbery. -Bhorer Kagoj, 2 October.

Jail killing trial restarts Oct 20

The trial of the Jail Killing Case is resuming on October 20 after an eight-month stay. Judge of the Court of Metropolitan Sessions Judge, Dhaka, has fixed the date. The High Court (HC) Division on January 26 stayed all proceedings of the Jail Killing Case and issued a rule asking the government to explain why the case should not be heard by the HC itself. The rule came after Zohra Tajuddin filed a petition with the HC for holding trial of the case in the court instead of the lower court. In the petition, she raised the apprehension of not getting justice in the lower court. After hearing, an HC division bench rejected the petition on August 25. The HC observed that there was no need to transfer the case from the lower court. Following the observation, the case is getting a fresh start in the

NCND Agreement

An international trade instrument; "non circumvention/non disclosure agreement" used in the preliminary stages of a business transaction where the Seller and Buyer do not know each other, but are brought into contact with each other by one or more intermediaries (also known as brokers or middlemen), to fulfill the transaction. Non Circumvention/Non Disclosure Agreements ensure that the intermediaries in the transaction are not circumvented and excluded from the transaction by the Buyer and/or Seller and/or the other intermediaries. Many trade transactions are chain-like. Product flows like this: seller-broker-broker-buyer. The brokers in the middle use NCNDs to ensure that they are not circumvented by anyone else in the chain; also, to ensure that information on the other parties in the chain is not disclosed to outside parties. They are valid for a specified term; usually two years.

Negligence

Not only are people responsible for the intentional harm they cause, but their failure to act as a reasonable person would be expected to act in similar circumstances (i.e. "negligence") will also give rise to compensation. Negligence, if it causes injury to another, can give rise to a liability suit under tort. Negligence is always assessed having regards to the circumstances and to the standard of care which would reasonably be expected of a person in similar circumstances. Everybody has a duty to ensure that their actions do not cause harm to others. Between negligence and the intentional act there lies yet another, more serious type of negligence which is called gross negligence. Gross negligence is any action or an omission in reckless disregard of the consequences to the safety or property of another. See also contributory negligence and comparative negligence.

Negotiate

To communicate on a matter of disagreement between two parties, with a view to first listen to the other party's perspective and to then attempt to arrive at a resolution by consensus.

Nemo judex in parte sua

Latin and a fundamental principle of natural justice which states that no person can judge a case in which he or she is party. May also be called nemo judex in sua causa or nemo debet esse judex in propria causa.

Next of kin

The nearest blood relative of a deceased. The expression has come to describe those persons most related to a dead person and therefore set to inherit the deceased's property.

Nolo contendere

Latin for "I will not defend it." Used primarily in criminal proceedings whereby the defendant declines to refute the evidence of the prosecution. In some jurisdictions, this response by the defendant has same effect as a plea of guilty.

Non est factum

Latin for "not his deed" and a special defense in contract law to allow a person to avoid having to respect a contract that she or he signed because of certain reasons such as a mistake as to the kind of contract. For example, a person who signs away the deed to a house, thinking that the document signed was only a guarantee for another person's debt, might be able to plead non est factum in a court and on that basis get the court to void the contract.

Non-joinder

When a person who should have been made a party to a legal proceedings has been forgotten or omitted. This is usually addressed by asking the court to amend documents and including the forgotten party to the proceedings. It is the opposite of mis-joinder.

lower court. -The Daily Star, 2 October.

Over 1,000 raped in last 9 months

1,021 women and children raped has been raped in the last nine month all over the country. This was revealed by Odhikar, a coalition for human rights. Twelve traumatised rape victims committed suicide. The report based press reports and Odhikar's own sources also said 278 women were victims of dowry during the same period. Of them, 184 were killed, 20 committed suicide, 67 were physically tortured, 11 sustained injuries from acid attack and two were divorced. During nine months from January to September, law enforcers killed 56 people while 61 others died in their custody. The report also mentioned that casualties from political violence included 306 dead and 4,779 injured; 1,885 were arrested on political grounds. Incidents of human rights violation in the hill tracts accounted for 28 cases of murder and 85 abductions. Twenty women and children were also raped and 84 people sustained injuries in different incidents. Child victims of violence numbered 1,212 - 339 were killed, 257 injured, 383 raped, 85 committed suicide, 49 sustained acid burns and 99 fell victims of trafficking. -The Daily Star, 1 October.

Nurul Islam murder case free for trial

The Appellate Division of the Supreme Court has stayed the order of the High Court Division on Advocate Nurul Islam Murder case for three months. The Order came on a petition submitted by the Government against the High Court Division order. Following the order of the chamber judge of the Appellate Division, the trial of the case will continue. The case is now pending with the Divisional Speedy Trial Tribunal, Chittagong. On September 22, the High Court Division stayed the proceedings of the trial court in the case on hearing of a writ petition filed by accused Md Abu Taher, his wife and three others with the High Court Division. -The Daily Star, 25 September.

Cabinet Okays amendment to CPC

The cabinet has approved the draft of the amendment to the amended Civil Procedure Code Ordinance, 2003. The amended CPC was scheduled to take effect 01 October but with the presidential promulgation of the ordinance, it will be put on hold indefinitely. However, lawyers have made it clear that they will accept nothing short of a total repeal of the amended CPC, excepting for its Section 115, and are set to boycott courts across the country tomorrow. -Law Desk.

Muslim teacher wins fight over headscarf

Ultimately the highest court in Germany has ruled that a Muslim teacher has the right to wear a headscarf in class. Thirty-one year-old Fereshtha Ludin was denied a job in the state of Baden-Wuerttemberg in 1998 because she insisted on keeping her head covered in school. The State said her headscarf would contravene Germany's constitutional religious neutrality, an argument that was upheld by a lower federal court last year. Ludin argued that the Constitution guaranteed religious freedom. The German Constitutional Court has now ruled by five votes to three votes that, under current law, she can wear the scarf. However, the Court says that German states should seek to find an acceptable balance in law between religious freedom and neutrality in schools. -The Daily Star, 25 September.

Corresponding Law Desk

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