



Star LAW report

Rupture is sufficient proof of rape

The High Court Division,
Supreme Court of Bangladesh
Criminal Appeal No. 473 of 2002

Md. Wasim Mia and another
Vs
The State,
represented by the Deputy Commissioner, Netrokona
Before Mr. Justice A.K. Badrul Huq and
Mr. Justice Syed Mahmud Hossain
Date of judgement : 9.4.2003

Background

A K Badrul Huq J: This case presents an apt illustration how own blood becomes hostile to divulge facts in a court of law of a dehumanising and revolting crime like deflowering a deaf and dumb minor girl aged about fifteen (15) years.

Deaf and dumb minor girl Champa Khatoon was a captive to the altar of Md. Wasim Mia. Md. Wafiz Mia was aide to gratification of libido of Md. Wasim Mia. Champa Khatoon was ravished. Dehumanising incident took place on 12.7.2000 at village Jamati, Police Station and District-Netrokona.

Following the incident, on the following day that is on 13.7.2000, a local shalish was held. Champa Khatoon amongst the people assembled in the shalish pointed her finger at Md. wasim Mia as the rapist and made disclosure of another offender. Champa Khatoon fixed Md. Wasim Mia by beckoning, gesture and hint. She thereafter, also located Md. Wasim Mia at Thakurkona bus stand on her way to Netrokona Hospital.

Law was set on roll by Khodeja Khatoon, mother of Champa Khatoon on presentation of a petition of complaint before Magistrate, First Class, Netrokona on 17.7.2000. Petition of complaint was transmitted to Netrokona Police Station for treating it to be First Information Report and accordingly, Netrokona Police Station Case No. 11 dated 13.8.2000 had been registered.

Investigation commended. Champa Khatoon was examined by a Dr. A.K.M. Rafiqul Islam Khan, Resident Medical Officer, Sadar Hospital, Netrokona. No sign of forceful intercourse was found at the time of examination. Hymen of Champa Khatoon was found ruptured.

Statements of Champa Khatoon and Khodeja Khatoon were recorded by Md. Yousuf Ali, Magistrate, First Class, Netrokona under section 164 of the Code of Criminal Procedure. Statement of Champa Khatoon was noted down by learned Magistrate by means of beckoning, gesture and hints which were explained by her mother Khodeja Khatoon to Magistrate.

Learned Magistrate appeared to have recorded statement under section 164 of the Code and not under section 22 of The Nari-O-Shishu Nirjatan Daman Ain of 2000 (hereinafter referred to as Ain of 2000). Statements were required to be put down under section 22 of Ain of 2000. Nomenclature under which statement was recorded is not at all relevant and statement is required to be treated as recorded under section 22 of Nari-O-Shishu Nirjatan Daman Ain of 2000 which is the proper and correct provision of law.

Accused Md. Wasim Mia and Md Wafiz Mia were put on trial of charge of section 9(1) of Ain of 2000 in Nari-O-Shishu Nirjatan Daman Case No.81 of 2002 before Nari-O-shishu Nirjatan Daman Tribunal. Nari-O-Shishu Nirjatan Daman Case No.89 of 2000 shall be described as Case and Nari-O-Shishu Nirjatan Daman Tribunal for shake of convenience will be known as Tribunal.

Tribunal found accused Md. Wasim Mia and Md. Wafiz Mia guilty of offence under section 9(1) of Ain of 2000 and convicted them thereunder. Following conviction they were sentenced to imprisonment for life and also, to pay a fine of Taka 10,000/- each. In default of payment of fine each of accused person was to suffer rigorous imprisonment for two (2) years more. Fine was treated as compensation to be offered to victim Champa Khatoon and sum was ordered to be recovered from assets of accused persons. Further order recorded was that in the event of non-availability of asset amounting to Taka 10,000/- the said amount would be recoverable from future properties and assets of accused persons.

Tribunal in awarding verdict considered evidences of prosecution Witnesses, fact and circumstances of case and also, ground reality. Tribunal, also, took into stock AIR 1979 SC 1994- 1979 Cr. L.J. (SC) 98. Tribunal found that there were no material variations between the version in petition of complaint and statement made out in course of trial by PW 1 Khodeja Khatoon and that it could not be believed that a reasonable woman would file a false written objection in respect of chastity of her daughter. Tribunal did not find anything to disbelieve prosecution case.

Rafiqul Islam Khan (PW 14) rendered positive decision that rupture of hymen was sufficient proof of rape.

Feeling dissatisfied with verdict of conviction and sentence convicts Md. Wasim Mia and Md. Wafiz Mia as appellants sought setting aside those through a Petition of appeal before this Court.

Deliberation

The contention of accused appellants is that case against accused-appellants is of no evidence and foundation of conviction and sentence upon accused-appellants having been statements made by Informant Khodeja Khatoon (PW 1) and victim Champa Khatoon (PW 10) which were recorded by a Magistrate, First Class under section 164 of the Code and statements having not been substantive evidence, conviction and sentence became unsustainable in law. Support for said contention has been sought to be drawn from Khashru alias Khorshed Vs. The State, 35 DLR HCD 119 and Babloo and another Vs. State, 47 DLR. HCD 537.

Rejoinder has been supplied to above contention in bringing home argument that statement of PW 1 and PW 10 recorded under section 22 of Ain of 2000, though, wrongly recorded under section 164 of the Code had not been the only structure for awarding conviction and imposing penalty upon accused-appellants but there are other evidences, both ocular and circumstantial, which form the basis of conviction and sentence upon accused-appellants.



Section 164 of the Code makes provision for recording statement or confession. A statement recorded under section 164 of the Code is not necessarily a statement made by an accused person. It may be that of a witness in the case under investigation. "Confession" clearly refers to that of an accused person. The word "statement" used in the section is limited to the witness only. A statement which is not a confession is to be recorded in a manner prescribed for recording evidence while a confession is to be recorded in the manner provided in section 364 of the Code.

The statement that is recorded under section 164 has the endorsement of a Magistrate that the statement has been made by the witness. During trial if the witness sticks to the statement given by him/her to the Magistrate under section 164, no problem arises. But if the witness deviates from the statement given by him/her under section 164, problem arises and the witness can be cross-examined. Then it is for the court to consider taking into account all the circumstances. Previously section 157 of the Evidence Act could be pressed in aid which postulates that the statement recorded under section 164 can be relied on for corroborating the statement made by witness in committal court but committal proce-

dures stood omitted by Law Reforms Ordinance of 1978.

A careful examination of above provision demonstrates that statement of a witness noted down under section 22 of Ain of 2000 cannot form the sole basis in imposing penalty upon a person stands indicted and for awarding conviction there should be some evidences, ocular and circumstantial, which will lend support to authenticity of statement of witnesses recorded under section 22 of Ain of 2000.

Section 22 of Ain of 2000 is almost akin to section 164 of the Code. Distinction which is gathered is that in section 164 provision of recording confession along with the statement had been also provided and in section 22 of Ain of 2000 provision of recording a confession had not been provided.

The kernel question which survives for determination in this appeal is whether conviction and consequential sentence passed upon accused-appellants can be sustained on evidences, materials on record, fact and circumstances of the case and, also, in safe dispensation of criminal justice.

The Ain of 2000 is a stringent legislation, the paramount object is to punish the offenders in respect of women and children in the face of spurt of crime like rape, acid burn, dowry death etc.

Accused-appellants stood tried and convicted for offence of section 9(1) of Ain of 2000. Section 9(1) provides for punishment of commission of rape and punishment is imprisonment for life and also fine. In the Ain offence of commission of rape has been contained in section 2 (Uma) and definition of rape embodied in section 375 of The Penal Code has been made applicable to Ain of 2000.

The word "rape" literally means forcible seizure and that element is characteristic feature of offence. Therefore, it can be said that rape is forcible ravishment of a woman/girl without her consent. To put simplest definition of rape is having sexual intercourse with a woman/girl without her consent.

Now it is to be seen whether the charge of section 9(1) of Ain of 2000 could be brought home by prosecution in respect of two accused-appellants Md. Wasim Mia and Md. Wafiz Mia.

Fabric upon which the prosecution case rested are: Ocular evidence of informant PW 1. Tenor and spirit of evidence of PW 1 demonstrates that she proved prosecution case that accused-appellant Md. Wasim Mia was the contributor of commission of rape of her daughter Champa Khatoon (PW 10). The evidence of PW 1 is sufficient to find accused appellant Md. Wasim Mia guilty of the offence of section 9(1) of the Ain of 2000 as section 134 of The Evidence Act, 1872 gives statutory recognition that conviction can be based on the testimony of a solitary witness.

Evidence of PWs 2 and 3 that Champa Khatoon had gone for bath and, thereafter, was untraceable and at (12-00) mid-night Champa Khatoon was recovered from a road. PWs . 2 and 3, also, give evidence in respect of holding of shalish over the incident. Evidence of PW 5 and PW 6 over holding of shalish in respect of the incident.

Seizure of wearing apparels that is Kamiz and torn Salowar of victim Champa Khatoon, Material Exhibit-2/1 and seizure of Material Exhibits had been proved by PW 8.

Medical Evidence: It came from the evidence of PW 14 the Doctor that hymen of victim Champa Khatoon had been ruptured.

Act of abstinence is a relevant piece of evidence to be considered along with other evidence and it can be held as a determining link which admit of no other reasonable hypothesis than that of guilt of the accused-appellant Md Wasim Mia. Abstinence furnished circumstances which is considered sufficient corroboration of accused-appellant No 1 Md Wasim Mia's participation in commission of crime.

On a close examination of evidences and materials on record there were penumbra of suspicion in accused-appellant No.2 Md Wafiz Mia's involved in commission of crime and prosecution could not bring home his culpability in crime. Charge of section 9(1) of The Ain of 2000 fell through. Tribunal was not at all justified in finding accused-appellant No.2 Md Wafiz Mia guilty of offence of section 9(1) of Ain of 2000 and in passing a judgement of conviction and sentence upon him and conviction in respect of accused-appellant No.2 Md Wafiz Mia is liable to be knocked down and a verdict of acquittal was required to be awarded upon him.

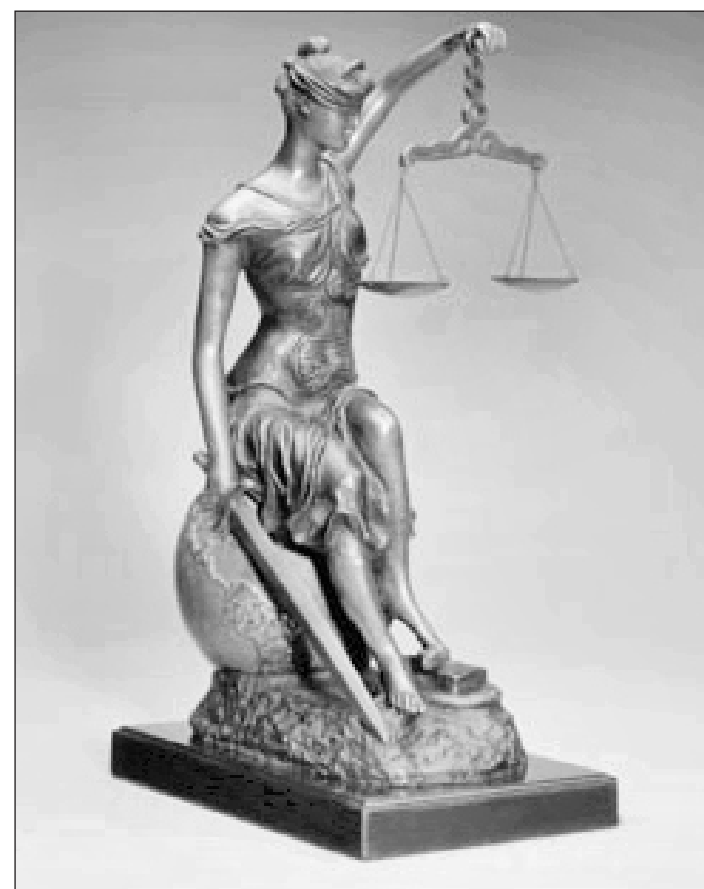
Decision

On a proper and correct analysis of evidences both, ocular and circumstantial, it transpires that Tribunal was quite justified in rendering decision that appellant No.1 Md Wasim Mia was the culprit who raped the victim Champa Khatoon. There is no option but to maintain the well founded judgement put down by Tribunal in awarding conviction and imposing penalty upon him.

Advocate Mr. Syed Ziaul Karim for the appellants and Mr. Md. Hejal Uddin Molla, Deputy Attorney General with Mr. Mohammed Abdul Baset, Assistant Attorney General for the state.

READER'S queries

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: My religion is Hindu but I love a Muslim girl. We would like to get married without converting our own religions. So my question is what is the legal procedure in our country if a Hindu person would like to get marry a Muslim woman. Means should we register at the court (if yes pls. me know from which court & how) or through Notary Public?

Shamol,
Uttara, Dhaka.

Your Advocate: In view of the prevailing laws governing the area I find it extremely difficult to devise for you a way out. All is fair in love and war. As a young man you may fall in love with a young girl. Quite natural. But the family, society and the laws sometimes stand on the way. In the Muslim law there is a clear restriction on a female to contract a valid marriage with anyone other than a Mohammedan. According to some scholars marriage of a Muslim female however, with Christian, Jew, an idolator, i.e., Hindu or a fire worshipper, is merely irregular, not void. But the overwhelming majority of the view is that such marriage is void. So is the case with Hindu law. As a Hindu you cannot contract a valid marriage with a Muslim.

The personal and secular laws now prevailing in our country do not really cover the issue you have raised. That is, you cannot legally marry a Muslim girl maintaining her as well as your faith. In the peculiar circumstances, if you both still stick to your views you ultimately lead yourselves to a live-together. Nothing more. As adults and sui juris you can do that. Laws will not bother you. But you will suffer in terms of your status as husband and wife and in terms of legitimacy of your children. If you prefer to avoid socio-legal complications and want to give your marriage a legal shape, in my opinion, you have two options: a) both of you can renounce your respective faith and declare that neither of you profess any religion and thereby facilitate the marriage to be solemnized in accordance with the provisions of the Special Marriage Act, 1872, b) and the second is you can embrace Islam and get your marriage solemnized according to Muslim shariah law. In any case it would be advisable for you to consult a lawyer.

LAW letter

Is it restoration of law and order?

It is a matter of appreciation that our law enforcing agency has launched combing operation in search of bandits in Noakhali Chars to elevate the law and order situation, though it is too late. The forest robbers have made landless villagers as hostage for a long time. The people of that area have been tormented in every day life and were taking part overwhelmingly in this drive. In my point of view, it is laudable participation otherwise this operation won't be fruitful like Spider web. Meanwhile, it is a matter of regret that in the course of such assistance, they turned into lynching mob. These frenzied villagers lynched, gouged eye out, set fire on the houses of robbers and looted splendid amount of stocked rice paddy. They didn't hesitate to take the law into their hands. All these untoward incidents took place in presence of law enforcing agency. Surprisingly, they were mute for unforeseeable reasons. If our law enforcing agency would have minimum commitment, couldn't we be able to avert these unfortunate incidents? As a result, death toll rose to 38. Is this situation not proof of the deterioration of law and order situation? Were they not under the protection of law only because they had seedy past? Moreover, is there any certainty that all of the persons killed were guilty? In fact, these incidents continued up to six days but our law enforcing agency could not stop happening of it.

In addition, these jungle robbers didn't make their intrusion in a day rather they have extorted, demanded ransom following kidnap, and committed numerous rapes for a long time. Why didn't our administration take any action earlier? Thus, we can easily deduce that they could thrive because of prolong laxity of administration.

Finally, habit of lynching will definitely have ominous impact over society. People of other parts in country will be encouraged to take part in similar practice and won't hesitate to take law in their own hands. No civilised society can harbour the feeling of retaliation in any way. So the concerned authority should take necessary steps immediately to discourage people from this practice.

Bivuti Tarafdar,
3rd year, Department of Law, DU.

Black money

The Daily Star (20th December 2003) first page's one news title was "Black money undermines work of law enforcers- Chief Justice KM Hasan says". Thanks Chief Justice Mr. K.M. Hasan for his voice against black money. Bangladesh won award for third time as the most corrupted country in the world. It undermines our national economy and administrations. Our national image is affected in abroad which creates difficulty for the expatriate of Bangladeshis who sends foreign currency remittance. Corruption is the final upshot of black money in all sectors in our country. Day by day its branches & sub branches are thinning out. We have made provision to legalise black money giving a certain percent tax. As a result, it encourages the corrupt persons to receive kickback. It undermines the spirit of democracy. It is a matter of regret that our two main political parties don't take the issue of black money seriously as an election manifesto. We need to get rid of the influence of black money to foster democracy.

Md. Zillur Rahaman,
Gandaria, Dhaka-1204.

LAW week

Magistrate oversteps to grant bail

A magistrate in Dhaka has granted bail to four accused in a case under the Women and Children Repression Prevention Act beyond jurisdiction. Section 19 of the act says only tribunals, set up to deal with such cases, have the authority to grant bail to the accused. Jahangir Alam, magistrate of the Chief Metropolitan Magistrate's (CMM) Court, ignoring the provision, allowed bails to four accused who were arrested on 3 December for their suspected roles in the rape and killing of a maid. Lawyers for the accused filed a writ petition for bail with the High Court (HC) on December 15 that said in its order the petitioners 'may ... move the appropriate criminal court for bail' and directed the magistrate to dispose of the petition in line with the law. After the HC order, the lawyers for the accused submitted a bail petition on 20 December to the CMM's court, which was opposed by the prosecution, and the magistrate -- hearing both sides -- granted the accused an ad-interim bail on a bond of Tk 10,000 with two guarantors each. -Daily Star, 25 December.

Murder case against policemen

A murder case was filed with the Court of Chief Metropolitan Magistrate (CMM), Dhaka accusing three police personnel of Sabujbagh Police Station, Dhaka of torturing a boy to death in custody on 12 December. The accused are sub-inspectors (SIs) Mohammad Emdad, Mohammad Shaheed and Mohammad Riaz. Metropolitan Magistrate Mohammad Emdadul Haq took the case into cognisance following a hearing and asked the Dhaka Metropolitan Police (DMP) commissioner to appoint an investigation officer from the Criminal Investigation Department (CID) of police to probe the matter. Mohammad Hamiduzzaman

Ujjal, vice-president of ward No. 29 unit of BNP and brother of victim Mahbul Alam Roni, filed the case. He alleged that Emdad and Shaheed picked up Roni and three on 4 December. They took them to Sabujbagh Police Station at about 9:00pm. Emdad and Shaheed tortured Roni with electric shocks that left him seriously injured. Police implicated Roni in a criminal case the next day and produced him before the CMM's Court with a prayer for a five-day remand. But the court cancelled the prayer on ground of Roni's illness and sent him to Dhaka Central Jail. When Roni's condition deteriorated, he was shifted to Dhaka Medical College Hospital on December 12 where doctors declared him dead. Police, of course, refuted the allegations. -Prothom Alo, 25 December

Singapore ship sued

Bangladesh Navy has filed a damage suit against Singapore flag carrier MV Eagle Strength for damaging its ships at the outer anchorage on September 21. The case was filed with Admiralty Division of the High Court on the basis of inquiry reports that held the Singapore vessel responsible for the damage of 18 ships of Bangladesh Navy. The court ordered for seizure of MV Eagle Strength. The Court also set 4 January for hearing of the case. The Navy claimed a compensation of Tk 200 crore for the damage to its ships in an accident that also left 16 Navy personnel injured. Soon after the incident the Port and Navy authorities had formed separate inquiry committees that found MV Eagle Strength responsible for the damage to the Navy ships. -Ajker Kagaj, 22 December

Twin Tower victims get compensation

Three Bangladeshi families, who suffered from the September 11, 2001 terrorists' attack on Twin

Tower of World Trade Center have received a total compensation of Taka 12.24 lakh from American Red Cross Society. A total of six Bangladeshi citizens were killed in the Twin Tower incident. Of them three victims used to regularly send money to their Bangladeshi family members. The American Red Cross Society gave this amount as compensation to the victims' family members through Bangladesh Red Crescent Society. Society's Vice-Chairman Dr Gazi Abdul Haq handed over the cheques for Tk 12.24 lakh to the family members of the three victims. -Prothom Alo, 22 December.

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25 December

HC asks for list of undertrial prisoners

The High Court has asked the government to submit by January 4 a list of under-trial prisoners, who have spent five years or more at the Dhaka Central Jail. The vacation bench of Justice Syed Mahmud Hossain also asked the government to submit particulars, including present status, of the cases related to under-trial prisoners. The order came on a writ petition, filed by the Bangladesh Legal Aid and Services Trust (BLAST) following a news published in the Daily Star that as many as 155 under-trial prisoners have spent five years or more at the central jail. The cases against them involve charges of rape, murder, robbery, abduction, smuggling and possession of illegal firearms and explosives. -Law Desk, 25 December.

Certificate case against farmers

Five commercial banks and the Bangladesh Rural Development Board sued 6,501 agricultural loan defaulters in Bogra to realise Tk 12 crore and 14 lakh. The farmers of the district failed to repay their loans to Rupali, Sonali, Janata, Agrani, and Rajshahi Krishi Unnayan Bank and the rural development board. The loans were distributed for cultivation of paddy, wheat, vegetable, for rearing cattle and fish farming. The cases were filed with the upazila certificate court as the total amount of individual loans including interest did not exceed Tk 50,000. The cases were filed against the farmers as they failed to repay the loans in six months after the dates they were scheduled to repay the loans. -New Age, 23 December

LAW lexicon

Person

An entity with legal rights and existence including the ability to sue and be sued, to sign contracts, to receive gifts, to appear in court either by themselves or by lawyer and, generally, other powers incidental to the full expression of the entity in law. Individuals are "persons" in law unless they are minors or under some kind of other incapacity such as a court finding of mental incapacity. Many laws give certain powers to "persons" which, in almost all instances, includes business organisations that have been formally registered such as partnerships, corporations or associations.

Personal representative

In the law of wills, this is the general name given to the person who administers the estate of a deceased person. There are two kinds of personal representatives. Where a person dies without a will, the court must appoint an administrator. Where a personal representative is named in a will, the personal representative is known as an executor.

Petition

The formal, written document submitted to a court, and which asks for the court to redress what is described in the petition as being an injustice of some kind. Petitions set out the facts, identifies the law under which the court is being asked to intervene, and ends with a suggested course of action for the court to consider (eg. payment of damages to the plaintiff). Petitions are normally filed by lawyers because courts insist on complicated forms but most states will allow citizens to file petitions provided they conform to the court's form. Some states do not use the word "petition" and, instead, might refer to an "application", a "complaint" or the "writ."

Pettifogger

A petty or underhanded lawyer or an attorney who sustains a professional livelihood on disreputable or dishonourable business. The word has also taken on an common usage definition referring to anyone prone to quibbling over details.

Physical custody

A child custody decision which grants the right to organise and administer the day to day residential care of a child. This is usually combined with legal custody.

Picket

To object publicly, on or adjacent to the employer's premises, to an employer's labour practices, goods or services. The most common form of picketing is patrolling with signs.

Corresponding Law Desk

Please send your mails, queries, and opinions to: Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email dslawdesk@yahoo.co.uk