Star LAW *report*

Police cannot be present in a judicial inquiry against the police

High Court Division
The Supreme Court of Bangladesh
Criminal Revision No. 683 of 1999 with
Criminal Revision No. 680 of 2001.
Moni Begum alias Moni
…Petitioner in Criminal Revision
No. 683 of 1999.
Alena Akther Khan alias Alena Khan, Advocate.
...Petitioner in Criminal Revision
No. 680 of 2001.
Versus
Mr Mohammad Shamsur Rahman, Metropolitan Magistrate, Dhaka and Others.
...Opposite Parties in Criminal Revision
No. 683 of 1999.
The State, represented by the Deputy Commissioner, Dhaka.
…Opposite Party in Criminal Revision
No.680 of 2001.
Before Mr. Justice A K Badrul Huq and Mr Justice Md. Mamtazuddin Ahmed
December 11, 2001

A K Badrul Huq, J: In all democratic countries government is the representative of people, and police being the law enforcement agents are accountable to the people and to law. Police are expected to safeguard the interest of the individuals with regard to their basic rights. People want impartiality, proper behaviour and conduct from the police and wants to see them as their friends. **It is unfortunate that political interference fades out impartiality of the Law Enforcing Agencies and growing political interference has sometimes turned the police into the agents of the party in power. Police conduct towards the citizens must be courteous. Policemen on many occasions under the shade of politicians act ultra-vires the law and shake the public confidence on police. The impartiality of the police and the independence of judiciary from arbitrary interference are the main bulwarks of democratic way of life.** The police should, therefore, develop a professional view that their allegiance is only to law and not merely to the letter of law but to the spirit of law displaying an air of confidence in the minds of the citizens of the land.

The two complaints in hand are examples of alleged violence, atrocity and act of misconduct brought home against police personnels by seekers of Justice, two in number, one Moni Begum alias Moni, a political activist of a political party, Bangladesh Nationalist Party (BNP) and Alena Akther Khan alias Alena Khan, an Advocate, Supreme Court of Bangladesh and Director, Investigation, Bangladesh Society for The Enforcement of Human Right (BSEHR). The Metropolitan Magistrate, Dhaka to ascertain the foundation of the allegations made the petitions of complaints against some police persons charged for indictable offence ordered for a Judicial Inquiry in the presence of High Police Officer and police representative and the vires of the orders recorded by Metropolitan Magistrate, Dhaka for holding Judicial Inquiry in presence of High Police Officer and police representative have become the subject matter of challenge in two Criminal Revision Petitions being numbered Criminal Revision No. 683 of 1999 and Criminal Revision No. 680 of 2001 under section 439 of The Code of Criminal Procedure.

Fact

Moni Begum alias Moni, petitioner of Criminal Revision No. 683 of 1999 presented a petition of complaint being Complaint Case No. 1807 of 1999 in the Court of Chief Metropolitan Magistrate, Dhaka under section 324, 354, 506 and 109 of Penal Code making Siddiqur Rahman, Deputy Commissioner of Dhaka Metropolitan Police, Riot Division, Dhaka Metropolitan Police, Shafiqul Islam, Additional Deputy Commissioner, Police Headquarter, Dhaka, Mohammad Hanif, Officer-in-Charge, Motijheel Police Station, Motijheel, Dhaka, Constable Shahinoor Begum, Naik Helal, Constable Fazlul Huq and Constable Mizanur Rahman, all of Riot Police, accused persons.

The essence of the accusation made against the accused persons in Complaint Case No. 1807 of 1999 is that on 11.5.1999 Bangladesh Nationalist Party (BNP) along with other political parties belonging to opposition called a daylong hartal. The complainant-petitioner Moni Begum on the said day along with other political activists participated in a peaceful procession.The procession was stopped by a contingent of police. The procession turned back and on return towards Party Central Office it was suddenly attacked by policemen who was carrying sticks. The Complainant-petitioner was hit by one such stick and she fell to the ground. The attack was initiated, commanded and participated by accused Constable Shahinoor Begum, Naik Helal, Constable Fazlul Huq and Constable Mizanur Rahman who pulled down her saree and her clothes. The accused police personnels attempted to take away saree and yelled at her saying if they would take off saree, she would never participate in any such procession. The incident of violence, torture and atrocity by police and incident of putting shame and humiliation had been photographed and published in all the daily newspapers.

The Complainant-petitioner out of shame and humiliation went into hide. The Complainant-petitioner on the following day of the incident from Newspapers learnt the names of the persons involved in the incident. Since the accused persons belong to the Police Department, Complainant-petitioner was afraid of lodging any Criminal proceeding in the form of First Information Report (FIR) with Police Station and filed a Petition of Complaint before Chief Metropolitan Magistrate, Dhaka on 19.5.1999. In the Petition of Complaint photographs of the incident taken by press photographers were enclosed.

It is stated here that on the order of the Home Minister accused nos 4, 5, 6 and 7 were suspended. The Police authority, in response to the publication of the news of the incident admitted the incident by an official statement to the press. The Complainant-petitioner felt insecure and by way of Writ Petition under Article 102 of the Constitution of the People's Republic of Bangladesh sought personal security and protection from harassment and obtained a Rule.

The Metropolitan Magistrate, Dhaka by order dated 19.5.1999 sent the case record to the Chief Metropolitan Magistrate, Dhaka for recording Order for Judicial Inquiry adopting the view that Judicial Inquiry was required to be held for ascertainment of the truth of the incident.

The Chief Metropolitan Magistrate, Dhaka by order dated 20-5-1999 directed Metropolitan Magistrate Md Shamsur Rahman to hold Judicial Inquiry. The Metropolitan Magistrate by order dated 20.5.1999 asked High Police Officer to be present on 23.6.1999, the date fixed for examination of the witnesses' Judicial Inquiry. However the Inquiry could not be held on 23.6.1999 due to absence of complainant-petitioner. 21.7.1999 was again settled for the purpose of Judicial Inquiry and on that date the complainant-petitioner by way of a petition seriously objected to the presence of High police official as representative of the accused Police persons during Judicial Inquiry. Metropolitan Magistrate on 8.8.1999 rejected the petition on the ground that the Police is the law enforcing agents and they are guided by Bangladesh Police Regulation. The Regulation is parallel to the Code of Criminal Procedure and in Police Regulations there are provisions permitting the presence of Police Officers at the time of inquiry.

Being aggrieved by the above adjudication by Metropolitan Magistrate, Dhaka Complainant Moni Begum as Petitioner invoked this Court's Revisional Jurisdiction under Section 439 of the Code of Criminal Procedure and obtained Rule.

Alena Akther Khan alias Alena Khan, petitioner of Criminal Revisional No. 680 of 2001 as Complainant presented a Petition of Complaint in the Court of Chief Metropolitan Magistrate, Dhaka against Iqbal Bahar Chowdhury, Additional Deputy Commissioner, Dhaka Metropolitan Police, South Division under Section 355, 500, 505(A) and 506 of Penal Code and the said Petition of Complaint was registered as Complaint Case No 2261 of 2000.

The case projected in the Petition of Complaint is that the Detective Branch of Police on 29.5.2000 illegally arrested Aminur Rahman Taj, Senior Reporter of 'Ajker Kagoj' and brought him to Ramna Police Station. The Reporters of various National Dailies approached Police authority to release the Senior Reporter. The Complainant petitioner came to Ramna Police Station and wanted to know the reason of arrest of the Reporter from Officer-in-Charge. While the complainant-petitioner was engaged in a conversation with the Officer-in-Charge of Police Station, the accused Iqbal Bahar Chowdhury came into the room. When the Complainant-petitioner wanted to know the reason of arrest of the Reporter, the accused Iqbal Bahar Chowdhury was very excited and told that 'Police could arrest anybody at any time.' The Complainant-petitioner identified herself to be an Advocate of Supreme Court of Bangladesh and said to the accused that Police could not arrest any body at any time without any reason. The accused asked the complainant-petitioner to remain silent and in angry voice asked her to go to Court and asked her to leave Police Station. The complainant-petitioner felt insulted and uttered that the accused could not oust anybody from Police Station and as a citizen of the country she got the right to know the reason of the arrest of Reporter Aminur Rahman Taj. The accused called out the Sentry and ordered him to oust the complainant-petitioner from Police Station. The incident of misbehaviour by accused to complainant-petitioner was published in all Daily Newspaper on 30.5.2000. The accused humiliated and harassed the complainant-petitioner publicly thus laid Petition of Complaint before Chief Metropolitan Magistrate, Dhaka.

The Chief Metropolitan Magistrate on 1.6.2000 examined the complainant-petitioner under Section 200 of the Code of Criminal Procedure and recorded that the matter might be investigated by Metropolitan Police Commissioner, Dhaka and a Report be submitted.

The complainant-petitioner, thereafter filed a Petition to cancel the above order holding investigation by Metropolitan Police Commissioner, Dhaka and prayed for a Judicial Inquiry.

The Chief Metropolitan Magistrate by order dated 1.3.2001 cancelled the order dated 1.6.2000 and entrusted Mr Md Abdul Huq, Metropolitan Magistrate, Dhaka for performing Judicial Inquiry. The Chief Metropolitan Magistrate held that since allegations are against a Police Officer, opportunity be given to a Senior Police Officer for his presence during Judicial Inquiry and a letter be issued to Commissioner, Dhaka Metropolitan Police to send a Police representative on the day of examination of witnesses. The Metropolitan Magistrate by order dated 4.3.2001 ordered for sending notice upon Police Commissioner, Dhaka Metropolitan Police for sending a Police Officer for his presence during recording of evidence of witnesses. The Complainant-petitioner, thereafter, filed a petition objecting to the presence of a Police Officer during Judicial Inquiry. The Metropolitan Magistrate by order dated 9.8.2001 rejected the said petition and maintained the order dated 1.3.2001 for holding Judicial Inquiry in presence of a Senior Police Officer as representative. The complainant-petitioner dissatisfied with the above orders approached this Court in Revisional Jurisdiction under Section 439 of the Code of Criminal Procedure and obtained Rule. The controversy and point of law involved in two Criminal Revision petitions having been similar both are heard analogously and are being disposed of by this common judgement.

The deliberation

The spirited legal debate in two Criminal Revision Petitions is whether the presence of High Police Officer and Police representative during a Judicial Inquiry to be performed by Magistrate can be permitted in the interest of fair Judicial inquiry when police personnel stand indicted for commission of offence. In approaching the legal debate, the relevant laws in the Code of Criminal Procedure and Police Regulation may be considered.

The object of an inquiry under Section 202 of the Code of Criminal Procedure is, ascertainment of the fact whether the complainant has any valid foundation calling for the issuance of process to the person complained against or whether it is baseless one on which no action need to be taken. The section does not require any adjudication to be made out about the guilt or otherwise of the person against whom the complaint is preferred.

Police Regulations Bengal, 1943 are Regulations for Police in Bengal now Bangladesh. Police Regulations are applied only for police personnel and for police service. Provisions of Statutory Regulations governing police discipline are embodied in Police Regulations.

Procedure with respect to allegations against police officer in a complaint or First Information Report is embodied in Regulation 24(a).

Regulation 24(a) indicates that in the event of an allegation of misconduct made against police officer in a complaint before a Magistrate or in an Information lodged with police officer, the Magistrate concerned should decide whether there will be an inquiry under the appropriate section (159 or 202) of the Code of Criminal Procedure.

Magisterial Inquiry into allegations against police officer is contained in Police Regulation 29. The language clearly manifests that in a Magisterial Inquiry in an allegation against police officer if the presence of any police officer or officers is essential as a witness or witnesses, the Superintendent of Police shall depute a police officer to attend and arrange for production before Magistrate of any police witness and or such other evidences as may be available.

The above Regulations do not indicate that the presence of a Police officer or a representative of police for holding a Judicial Inquiry under Section 202 of the Code of Criminal Procedure is necessary. It is posited that Police Regulations are applied only for police personnels and for the administration of police service and not for regulating any action under Section 200 of the Code of Criminal Procedure. Police Regulations cannot control the Code of Criminal Procedure rather Judicial Inquiry as envisaged in Section 202 is absolutely controlled and guided by the Code of Criminal Procedure and Police Regulations got no manner of application.

The decision

The Metropolitan Magistrate, Dhaka ordered for Judicial Inquiry. The Magistrate was mainly concerned with the allegations made in the petitions of complaint or the evidence laid in support of the same and he was only to be prima facie satisfied whether there were sufficient grounds of proceeding against the accused police personnels at the time of inquiry. Permitting high police officer or police representative for and on behalf of the accused police personnels during Judicial Inquiry would frustrate its very object and that is why the Legislature made no specific provision permitting an accused person or his representative to be present in a Judicial Inquiry. Metropolitan Magistrate misinterpreted and misconstrued Rule 29 in holding that presence of a high police official, as representative of the accused police officers was lawful. The Metropolitan Magistrate was absolutely wrong in holding that Police Regulation is supplementary to the Code of Criminal Procedure in as much as Police Regulation is not supplementary to the Code of Criminal Procedure rather police Regulations are subservient to the Code of Criminal Procedure with respect to all procedures.

In presence of police representative the petitioners and their witnesses, will feel intimidated and insecure. Hence there can never be a fair hearing and Inquiry. Justice should not only be done but it should manifestly appear to have been done and the court concerned must, nevertheless, guard against any suspicion in the mind of the victims.

The Code of Criminal Procedure is a procedural law and procedural fairness is an indispensable element. The doctrine of Natural Justice is but Fairness. Justice demands that there must not only be a fair hearing but the decision itself must be fair and reasonable. The presence of the high police officer and police representative will prejudice the complainant-petitioners and in the presence of high police representative for and on behalf of accused police personnels there cannot be any fair and impartial Inquiry. The inevitable conclusion is that when the police personnel is accused for a crime, presence of high police officer and police representative during Judicial Inquiry to be performed by a Magistrate under Section 202 of the Code of Criminal Procedure is absolutely impermissible in the interest of fair Inquiry and hearing and also contrary to law, procedure and justice.

The power of the High Court Division envisaged in Section 439 of the Code of Criminal Procedure is a kind supervisory power which is to be exercised in cases where there is a defect in the procedure or there is a manifest error on point of law and consequently there has been a flagrant miscarriage of justice. This power is to be exercised in aid of justice and there is no form of injustice where the long arm of the Court cannot reach.

The corollary thereof is that both the Rules got merit and made absolute. The orders under challenge in Criminal Revision No. 683 of 1999 dated 19.5.1999, 20.5.1999 and 8.8.1999 and orders dated 1.3.2001, 4.3.2001 and 9.8.2001 in Criminal Revision No. 680 of 2001 requiring presence of high police officer and police representative during Judicial Inquiry to be performed by Metropolitan Magistrate having suffered from manifest illegality, legal infirmity and flagrant error of law causing a gross miscarriage of justice to complainant-petitioners and stand set aside/quashed. The Judicial Inquiry will be performed by Metropolitan Magistrate, Dhaka in Complaint Case No. 1807 of 1999 and Complaint Case No. 2261 of 2000 in the absence of the High Police Officer and Police Representative.

Ms. Sigma Huda, For petitioners in both the Criminal Revision No. 683 of 1999 and Criminal Revision No. 680 of 2001. Mr Golam Kibria, Deputy Attorney General, with Ms. Fahima Nasreen, Assistant Attorney General for State-Opposite Party in both the Criminal Revision Cases.

LAW *watch*

Human rights should know no boundaries

JULIE MERTUS

THE Kosovo Albanians I got to know while working on a book on nationalism in the early 1990s had a way of bidding farewell that I shall never forget. "Next time," they would say, "may we meet in free and independent Kosovo." Most of them, I learned, were not interested in actually changing the borders of their province; for them, self-determination meant choosing their own government and gaining some measure of independence from Serbia. They talked about being part of a free Europe, where frontiers would be fluid and permeable, and the rights of minorities would be protected.

All of this seemed like a fantasy as the fighting began in the summer of 1998. Yugoslav President Slobodan Milosevic believes in borders--and believes in going to any lengths to retain them. Specifically, he believes in the use of force--including mass expulsion and paramilitary hit squads--to keep Kosovo within Serbia, within Yugoslavia. The international community also believes in borders--and has questioned the wisdom and legality of crossing them to settle internal disputes in a sovereign state. The legal debate concerns a tension between two competing principles: respecting the territorial integrity of states and guaranteeing universal human rights and self-determination. In fact, it is a debate about nothing less than the very purpose of the United Nations. The international community's response to the crisis in Kosovo provides a test case of these competing views.
Those who cling to existing borders view the fundamental purpose of the U.N. as ensuring global security by maintaining the status quo. Others--and I fall firmly into this group--contend that to emphasize security without regard for human rights sacrifices the core purpose of the organization--namely the promotion of peaceful and just societies.

At face value, the words of the U.N. Charter, the most fundamental document of international law, appear to favour anti-interventionists, who believe that intervention is susceptible to misuse and that what a state does within its own borders is largely its own business. Article 2(4) of the charter, clearly declares that states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ." Exceptions exist where a state acts in self-defence or where the U.N. Security Council finds a "threat to the peace, a breach of peace or act of aggression" and authorizes the use of force.

In the case of Kosovo, each of these exceptions is problematic. The self-defense exception has been read narrowly. States may use force against other states only to defend themselves and their allies from actual attack (and not from mere anticipation of attack). The neighboring states of Albania and Macedonia have not been attacked, and the self-proclaimed Albanian Kosovo was never recognized as a state. Thus, the self-defense exception would have to be stretched to apply to Kosovo.

Nor does the Security Council authorization exception apply. Three U.N. Security Council resolutions on Kosovo, which Serbia has flagrantly disregarded, found the existence of a threat to the peace and enjoined Serbia to take certain actions, such as reducing troops. But it would be a strain to contend that those resolutions authorize the use of force. What's more, at the bidding of Russia and China, the Security Council recently and explicitly rejected the use of force.

Anti-interventionists further support their argument by pointing out that another article of the U.N. Charter forbids the U.N. and individual states from intervening in "matters, which are essentially within the domestic jurisdiction of any state." But this article also supports the notion of humanitarian intervention.

Read on a little further in the charter, and you will find Articles 55 and 56, which implore "all Members [to] pledge themselves to take joint and separate action" to promote "universal respect for, and observance of, human rights and fundamental freedoms for all," suggesting that the U.N. Charter not only permits intervention on humanitarian grounds, but in some cases requires it.

It's not that humanitarian intervention is a new concept. (Hugo Grotius, the father of international law, recognized the principle as long ago as the 17th century). The broad acceptance of human rights principles is a recent phenomenon, however. And as human rights have gained acceptance, the notion of state sovereignty has lost ground: Where a state is incapable of protecting human rights or is itself the perpetrator of abuses, human rights cannot be guaranteed without eroding the ancient principle of state sovereignty.

One reason for many international lawyers' caution about applauding the doctrine of humanitarian intervention is that, in the colonial and Cold War periods, it could be misused by strong states as a pretext for vigilante activity and for the occupation of weaker and politically disobedient countries (some people would include the U.S. interventions in Grenada in 1983 and in Panama in 1989 as examples). However, the post-Cold War era provides us with an opportunity to salvage the doctrine. Drawing from the U.N. Charter itself, U.N. Security Council resolutions and other international documents and decisions, we need to identify workable criteria that limit the scope of humanitarian intervention so as to respect borders. Where human rights abuses target a particular racial, ethnic or religious group, the argument for intervention is strong.

Meaningful humanitarian intervention does not threaten world order. Rather, it vindicates the fundamental principles for which the United Nations was created. Bajram Kelmendi, an ethnic Albanian from Pristina and one of Europe's leading human rights lawyers, used to say to me, "We may not win, but the law is on our side." Unfortunately, he and his two sons were murdered by a Serbian hit squad. Their deaths underline a need for a human rights vision that transcends borders.

Julie Mertus, formerly a visiting professor at Emory, is a professor of law at Ohio Northern University. She was in the Balkans on a fact-finding mission and is the author of a forthcoming book on Kosovo.

Role of environmental audit

NASER ALAM

LAYING down an infrastructure for the protection of environment in a developing country is much easier than taking the next burdensome initiative to manage the environmental rules, regulations and laws. The legal and ethical efforts are bound to falter if the regulatory frameworks fail to provide an efficient, practical and community based approach to the problems as to managing the environment. Governmental efforts coupled with participation of the community are always required for devising a well-balanced management mechanism. For the past decade, our country achieved landmarks in the desire to legislate for preservation of the eco-system and the control of it. However, further efforts to see these laws implemented and practiced generally have been a far cry. It may be that the way the 'environmental protection' concept has been intensified and transmitted to the public, the concept of 'environmental management' did not find that much appeal to the public. Thus the idea had drifted from being a serious issue of public interest. What has resulted from this is that better compliance and better public image with the community has failed to develop. It is suggested that voluntary or regulated 'environmental audit' has to be introduced more rigorously and the concept should be evolved and enhanced to the public level participation.

An environmental audit is a management tool to regulate the compliance of the environmental standards and practice. It includes the analysis of:

- emission to air, land and water;
- company policy on hazards and operational nuisance;
- waste management
- clean fuel promotion
- environmental and energy conservation measures.

Auditing environment under Environment Conservation Act 1995

The audit system serves equally the purpose to verify or check that environmental management systems do in fact exist and are in use. Recently, the efforts of the government to detox the environment from the hazardous effects of emission to air, land and water from hazardous vehicles and polythene is commendable, but it remains questionable how far the government would be able to manage the steps taken so far by carrying out regular environmental audit under the Bangladesh Environment Conservation Act 1995 and its Rules.

It should be remembered that a few checks of the vehicles or so would not surely be sufficient for the purpose of environmental audit. The basic objectives of an environmental audit should be to check whether all companies or industries have its own objectives and policies towards conservation and maintenance of sound environment and to check their performance against those objectives as well as the environmental rules and regulations. Governmental organisations including the concerned ministries should also be audited to determine their efforts towards the management process. Voluntary organisations involved in the environmental awareness should be consulted regularly by the government regarding their assessment of the management process and effectiveness. This should be done with the purpose of ensuring good governance and transparency in the protection of environment. Reports of the audit should be made public that would in turn create more awareness and bring the government efforts into more scrutiny. An internal system of environmental audit should also be mandatory in industries, which directly or indirectly affect the eco-system. In summary, it is suggested that: the environmental management concept should get more preference from the vested quarters; there should be a transparent and effective environmental audit system; voluntary and community participation in the auditing factors and stages should be encouraged; industries and companies should have their own internal environmental management and auditing system; an independent authority should be empowered to verify and consider the auditing system and practice, and suggest changes as necessary; more awareness programme as to environmental management by NGOs should be encouraged and undertaken; and concerned ministries should be audited as to their benchmark regarding environmental management. Finally, the need for more focus on environmental management and proficiency in auditing techniques cannot be understated and, therefore, learning the skills and essential training in environmental auditing would be an essential part of environmental management.

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