



Star LAW report

Section 439 of the Code of Criminal Procedure
Informant can apply against discharge order

High Court Division (Criminal)
The Supreme Court of Bangladesh
Criminal Revision No 579 of 2000
Md Abdur Rahman Kha

The State and another
Before Justice Amirul Kabir Chowdhury and Justice Md Nizamul Huq
Judgment: January 19, 2002
Result: Rule absolute

Background

Amirul Kabir Chowdhury J: At the instance of informant Md Abdur Rahman Kha on an application under section 439 of the Code of Criminal Procedure this Rule was issued calling upon the Deputy Commissioner, Jhalakathi and opposite party no. 2 Samir to show cause as to why order dated 20-04-2000 so far as it relates to discharge of accused opposite party no. 2 and framing of charge against the remaining three accused in Sessions Case No. 10 of 2000 should not be set aside and the charge framed on 20-04-2000 should not be amended/modified in accordance with law.

The petitioner as informant lodged a First Information Report (FIR) with Rajapur Police Station on 10-07-1998 against 4 accused including accused opposite party no. 2 alleging, *inter alia*, that out of previous enmity on 10.07.1998 in the morning while the informant and his father Abdul Aziz Khan were cultivating in the land of Chand Miah, the 4 accused mentioned in the FIR including accused opposite party no. 2 Samir, being armed with ram dao approached them and the informant party out of fear wanted to run away and while they reached in front of grocery shop of Dilu Mistry all the accused with common intention of killing them attacked them and one of the aforesaid four accused Sabur assaulted his father with ram dao as a result of which his father fell down sustaining bleeding injuries on his head and succumbed and the case was then started on 10-07-1998 against all the four accused under sections 302/34 of the Penal Code. Police during investigation examined witnesses and finding a prima facie case submitted charge sheet on 06-10-1998 against accused named in the FIR including accused opposite party no. 2 Samir under section 320/34 of the Penal Code. The case thus being sent for trial the learned additional Sessions Judge heard the parties and by impugned order dated 20-04-2000 discharged accused opposite party no. 2 and framed charge against other accused under section 302/34 of the Penal Code. Hence is this Rule.

Deliberation

The informant in the First Information Report after narrating the previous incidents of 08.07.1998 and 09.07.1998 mentioned the incident of the day of occurrence i.e. 10.07.1998 wherein he stated categorically that accused Sabur and accused Shahid having ram daos in their hands, came towards the place of occurrence from the western direction and accused Samir (opposite party no. 2 in the Rule) having a ram dao along with accused Alaluddin having hockey stick came there from the southern side in a pre-planned way and then attacked them and one of them and the Informant and his father to escape themselves started running away and came in front of the grocery shop of Dilu Mistry, all the accused gheraoed them and aimed at common intention of committing murder, one of them namely accused Sabur assaulted his father with a Ram dao as result of which his father died. The learned Judge after considering the case record and the documents sent therewith has been pleased on frame charge by the impugned order against the aforesaid other accused Sabur, Shahid and Alaluddin. Having similar allegation against accused Shahid and Alaluddin charges have been framed against them leaving aside accused opposite party no. 2 Samir and it is said that the said two accused have not moved this court against order of framing charge against them. The Trial Court has got the discretion to discharge the accused after being satisfied as to existence of no sufficient

ground to proceed against any accused if upon consideration of the record of the case and the documents submitted therewith he is so satisfied. In the impugned order the learned Judge does not state that from any other materials, if any, including statements of witnesses etc. he has been led to consider that there is no sufficient ground for proceeding against accused opposite party no. 2 Samir. The Trial Court has referred to the FIR as the basis of his decision. But we have already found that materials are not lacking in the FIR as to the involvement of the accused opposite party no. 2 in the alleged offence charged under section 302/34 of the Penal Code. On perusal of the FIR and the Charge Sheet it appears that the aforesaid reasoning given by the Trial Court for discharging accused Samir is not correct. We, therefore, find substance in the submissions made by the learned Advocate for the petitioner that the impugned order of the learned Additional Sessions Judge discharging the accused opposite party no. 2 is not based on correct appreciation of the facts disclosed in the FIR and Charge Sheet and therefore it suffers from illegality.

The next point contended very emphatically on behalf of the opposite party that under section 439 of the Code of Criminal Procedure the informant has no *locus standi* to maintain the present application before this Court may now be considered.

Section 439 of the Code of Criminal Procedure is quoted below:

"439 (1) In the case of any proceeding the record of which has been



called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court Division may, in its discretion, exercise any of the powers conferred on a Court of Appeal by section 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and, when the judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence...."

It appears that section 439 of the Code has got relevancy with section 435 of the Code. Under section 435 of the Code High Court Division may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order and under section 439 of the Code in any such case proceeding of which has been called for by itself or which otherwise comes to the knowledge of the Court, High Court Division in its discretion may exercise any of the powers vested in it under the said provision of law.

On perusal of the aforesaid provision of law it appears that this Court in order to satisfy itself as to legality or propriety of any order may call for the record from the subordinate criminal court and examine the same and even in the absence of any application by anybody if it otherwise comes to the knowledge of the Court this Court in its discretion may exercise any of the powers vested in it under the said provision. In this view of the matter we are

of the view that an application under section 439 of the Code of Criminal Procedure by an informant in a session case against order of discharging an accused is maintainable in spite of the position that the state has not filed such application. More so the power of exercising such discretion is clearly vested in the Court even if this Court otherwise comes to know of any illegality in any order of any inferior Court within its jurisdiction. In view of such position of law there can not be any legal reason to lend a deaf ear to the prayer made by an informant to put the ball into motion by an application under section 439 of the Code in redressing his grievance against an order passed by any subordinate court affecting him. Be that as it may, in the instant case the informant is son of the deceased and he lodged the FIR as an eye witness to the occurrence and as such we do not find that the Rule should be knocked down because of being obtained at the instance of the aforesaid informant, son of the deceased. We have considered the decisions pointed out by the opposite party no. 2. In the case of Kanhaiya vs. Kashi Nath Tewari and others, reported in 1979 Criminal Law Journal 409, a decision by a Single Judge of Allahabad High Court has been placed before us. The said case arose out of an order of discharge passed by the Trial Court. At the time of hearing of the Rule while considering the matter on merits also the said learned Single Judge found that the Trial Court on merit passed the impugned order of discharge and, therefore, discharged the Rule issued at the instance of the informant of the case.

With respect we, on the reasons mentioned above are unable to accept the aforesaid observation and we rather reiterate that an application by the informant under section 439 of the Code is maintainable against order of discharge passed in a sessions case. In this connection a decision reported in 1975 Pakistan Criminal Law Journal 400 in the case of Nisar Ahmed Vs. The State and another may be considered. It has been held there by a Division Bench of Lahore High Court that any person could bring to the notice of Court an illegality or material irregularity in the conduct of judicial proceedings by invoking revisional powers of the High Court under section 439 of the Code of Criminal Procedure. In another decision published in PLD 1966 Supreme Court page 126 in the case of Mushtaq Ahmed Versus The state their Lordships, while defining the powers of this Court under Section 439 of the Code, held that the High Court has power to examine the record of the lower Court suo moto under section 439(1) of the Code of Criminal Procedure.

We are of the view that the order of the learned Additional Sessions Judge discharging the accused opposite party no. 2 suffers from illegality and thus calls for our interference.

The second branch of argument laid by the petitioner is that the charge framed against three other accused suffers from error and as such should be modified/amended. In this connection we have perused the First Information Report and the Police Report submitted under section 173 of the Code of Criminal Procedure. It appears therefrom that the date of occurrence of the present incident leading to the alleged murder of father of the informant petitioner is 10.07.1998 and in this First Information Report a previous occurrence of 08.07.1998 was passingly mentioned to disclose sense of animosity between the parties. The aforesaid date i.e. 08.07.1998, therefore, cannot be mentioned as date of occurrence in the case leading to the murder of the father of the petitioner which took place on 10.07.1998. In this view of the matter we find substance in the grievance of the petitioner as to framing of charge against 3 other accused and we are of the view that the Trial Court ought to have considered the facts properly before framing the charge and ought to have recorded correctly the date therein.

Decision

In view of the discussion made above this Rule, according to us, merits consideration.

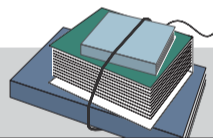
The Rule is, therefore, made absolute, Impugned order dated 20.04.2000 passed by the learned Additional Sessions Judge, Jhalakati in Sessions Case No. 10 of 2000 is set aside. Let the matter be heard afresh by the learned Judge and orders be passed in accordance with law.

Mr Md Serajul Huq, Advocate for the petitioner. Mr Mainul Hossain with Mr Md Muzammel Huq, Advocates for the State.

READER'S queries



LAW lexicon



Bankruptcy & Bankrupt

Bankruptcy means the formal condition of an insolvent person being declared bankrupt under law. The legal effect of bankruptcy is to divert most of the debtor's assets and debts to the administration of a third person, sometimes called a "trustee in bankruptcy", from which outstanding debts are paid pro rata. Bankruptcy forces the debtor into a statutory period during which his or her commercial and financial affairs are administered under the strict supervision of the trustee. Bankruptcy usually involves the removal of several special legal rights such as the right to sit on a board of directors or to contest in national elections etc. Commercial organizations usually add other non-legal burdens upon bankrupts such as the refusal of credit.

A person who has done, or suffered some act to be done, which is by law declared an act of bankruptcy; in such case he may be declared a bankrupt. It is proper to notice that there is much difference between a bankrupt and an insolvent. A man may be a bankrupt, and yet be perfectly solvent; that is, eventually able to pay all his debts or, he may be insolvent, and, in consequence of not having done, or suffered, an act of bankruptcy.

Bill of exchange & Bill of lading

Bill of exchange is a written order from one person (the payer) to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at some fixed future date, a certain sum of money, to either the person identified as payee or to any person presenting the bill of exchange. A check is a form of bill of exchange where the order is given to a bank. Bill of lading is a document which a transport company possesses acknowledging that it has received goods, and serves as title for the purpose of transportation. In case of shipment bill of lading means the document issued on behalf of the carrier describing the kind and quantity of goods being shipped, the shipper, the consignee, the ports of loading and discharge and the carrying vessel.

Breach of contract & Breach of trust

Breach of contract is the failure to do what one promised to do under a contract. Proving a breach of contract is a prerequisite of any suit for damages based on the contract.

Breach of trust is any act or omission on the part of the trustee which is inconsistent with the terms of the trust agreement or the law of trusts. A prime example of breach of trust is the redirecting of trust property from the trust to the trustee, personally.

Source: The Lexic Law Library's Legal Lexicon & Duhaime's Law Dictionary.

LAWSCAPE



Did you hear about the clever multi-millionaire who figured out a way to be sure his family actually ended up with most of his fortune?
How did he do it?

Left one-third of his millions to one of the smartest probate lawyers in the country on the condition that the other two-thirds ended up going to his family.

What's the difference between a good lawyer and a great lawyer?

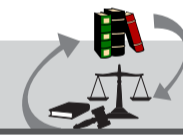
A good lawyer knows the law.

A great lawyer knows the judge.

Client: Excuse me, do you have a moment? If I pay you Tk. 3000, will you answer three questions for me?

Lawyer: Yes. Yes. Now then, what is your third question?

LAW reform



Points to ponder

MIRZA ASADUZZAMAN AL-FARRUQ

Article 135(1) of the Bangladesh Constitution lays down that no person who holds any civil post in the service of the Republic shall be dismissed or removed or reduced in rank by an authority subordinate to that by which he was appointed and Article 135(2) provides that no such person shall be dismissed or removed or reduced in rank until he has been given reasonable opportunity of showing cause why that action should not be taken.

Rule 34 of Bangladesh Service Rules (BSR) (Part-1) which corresponds to Fundamental Rules (FR) 18 provides that "unless Government in view of the special circumstances of the case, shall otherwise determine, after five years' continuous absence from duty, elsewhere than on foreign service in Bangladesh, whether with or without leave, a Government servant ceases to be in Government employ." This rule of Bangladesh Service Rules appears to be in conflict with the constitutional safe guard that no person who holds any civil post in the service of the Republic shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause why that action should not be taken. Without adherence to the constitutional provisions contained in Article 135(2) very often the appointing authority takes recourse to Rule 34 of BSR (Part 1) and without any departmental proceeding either under Government Servants (Discipline and Appeal) Rules, 1985 or any other existing Service Rules passes an order terminating the services of the Government servant who absents himself from duty continuously for a period of over five years. Constitutional law being the supreme law of the land must have preference to Bangladesh Service Rules (BSR) or Fundamental Rules (FR) which are subordinate legislations.

Rule 76 of the Service Code of the State of Bihar (India) runs as follows: "Unless the State Government, in view of the special circumstances of the case shall otherwise determine, a government servant after five years of continuous absence from duty, elsewhere than on foreign service in India, whether with or without leave, ceases to be in Government employ."

Rule 34 of BSR (Part 1) and F.R. 18 are couched in the same language except in place of the word "India" there is the word "Bangladesh" in the BSR. In the case of *Jai Shankar vs the State of Rajasthan* (AIR 1966 S.C. 492) the Supreme Court of India had to consider Regulation No.13 of the Jodhpur Service Regulations, which is as follows: "13. An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority." It was contended on behalf of the State of Rajasthan that the above regulation operated automatically and there was no question of removal from service because the officer ceased to be in service after the period mentioned in the Regulation quoted above. The Supreme Court of India, however, rejected the contention and held that an opportunity must be given to a person against whom such an order was proposed to be passed, no matter how the regulation described it. It further held to give no opportunity is to go against Article 311 of the Constitution of India.

Article 135(2) of Bangladesh Constitution corresponds to Article 311(2) of the Indian Constitution. In the case of *Deokinandan Prasad vs the State of Bihar* and others (AIR 1971 S.C. 1409) the Supreme Court of India considered Rule 76 of the Service Code of the State of Bihar and relying upon the earlier decision of the same court given in the case of *Jai Shankar vs the State of Rajasthan* (AIR 1966 S.C. 492), referred to earlier, held "Even if it is a question of automatic termination of service for being continuously absent for over a period of five years, Art. 311 applies to such cases." Since Rule 76 of the Service Code of the Indian State of Bihar corresponds to Rule 34 of BSR (Part 1) and as Article 311(2) of the Indian Constitution corresponds to Article 135(2) of our Constitution, we can rely upon the decisions of the Indian Supreme Court referred to above while disposing of a case under Rule 34 of BSR (Part 1) particularly because of absence of any authoritative decision of the Supreme Court of Bangladesh on this score.

The provisions of Rule 34 of BSR (Part 1) and F.R. 18 should be struck off the Service Rules in as much as those are in conflict with the constitutional safe guard provided in Art. 135 (2).

Mirza Asaduzzaman Al-Farruq is former Law Secretary

LAW week



Rapists of Mahima sentenced to death

The special court in Rajshahi for "Prevention of Repression on Women and Children" sentenced all the four accused of Mahima kidnap and rape case to death on 9 October. The court ordered that the rapists be hanged by the neck till death. Among the accused three are the activists of the Jatiotabadi Chatradal (JCD) while one belongs to the Chatra Shibir, student wing of the Jamaat-e-Islami of Bangladesh. Mahima committed suicide after being kidnapped and raped by the convicted accused. The accused forcefully took her on gunpoint to a sugarcane field near her house on 15 February this year. They then raped her by turn and took her photographs. Mahima committed suicide on 19 February by drinking poison. Only one accused was present in the courtyard when the judgment was pronounced. The other three accused are still absconding. The convicted can appeal to the higher court within seven days against the verdict. But in the case of the absconding accused the verdict will be executed as soon as they are arrested or surrendered before the court. -Daily Star, 10 October.

Child labour increasing in Northern districts

Child labour is increasing alarmingly in the 16 Northern districts. According to unofficial sources more than one lakh children are engaged in child labour in this area. Most of the children earn their living by pulling rickshaws, carrying merchandise and working as house servants and hotel boys. A large number of the children are working in bidi factories, exposing themselves to various health hazards. They have entered labour market since their parents are not able to maintain them. -News Today, 14 October.

Probe report submitted to VC

University probe committee of Dhaka University has submitted their report on the incident of Shamsunnahar hall to the Vice Chancellor. On the backdrop of the police torture in the early hours of 24 July over the female students of the hall a university probe committee was formed headed by treasurer of the university. Former VC, Provost of the hall and the Proctors of the university were found guilty for the shameful incident in the report. The committee also found that the case filed against 18 female students of the hall was false. The former JCD leaders, former students of the hall were also found guilty. -Daily Janata, 14 October.

New law to protect quality of product

The government plans to enact a new law to ensure the quality of different products amending the BSTI Act. The Minister for Industries informed it in a seminar organised by Bangladesh Standard Testing Institute (BSTI) marking the 33rd World Standard Day on 14 October. The government also plans to expand the activities of the BSTI and develop its technical section to protect the quality of products. The speakers of the seminar asked the BSTI authority to open a complaint center so that the consumers could register their allegations against the adulterated products. -The Financial Express, 15 October.

Rapid Action Force to nab terrorist

The Dhaka Metropolitan Police (DMP) are going to introduce Rapid Action Force (RAF) to nab the 18 listed terrorists, professional killers and their associates. The special police force will start the hunt from the beginning of the month of November. The city police and other law enforcing agencies will also be working for the improvement of law and order situation. As the DMP, detective branch, special branch and other law enforcing agencies failed to net the criminals, the government decided to introduce Rapid Action Force under DMP. -News Today, 15 October.

Repression on women and children

Repression on women and children is increasing day by day in the 10 districts of Khulna division. About 204 women and children were subjected to rape and 200 were subjected to various tortures in the last 9 months in this region. Inaction of the law enforcing agencies, delay in delivering justice and politicization of criminality are the reasons behind such heinous crimes. -Jugantor, 15 October.

Jam, Jelly sold without BSTI seal

More than 50% Jam and Jelly are sold in the market openly without having approval from the Bangladesh Standard Testing Institute (BSTI). These adulterated foods are sold in open market illegally. Most of the foods have no label with the date of production and expire. The statistics, showed by a survey report conducted by the Consumer Association of Bangladesh (CAB), shows the extreme violation of consumer rights. The product includes 12 foreign brands, which has no quality control certificate from the BSTI. According to the law all imported foods must be approved by the BSTI before marketing. But the products are available in the market, as the BSTI does not monitor the quality of the imported food items, the report claimed. -Daily Star, 14 October.

ILO, ADB to improve labour standard

The International Labour Organisation (ILO) and the Asian Development Bank (ADB) have joined forces to improve the labour standard in the Asia-Pacific region. They took joint programmes as means of promoting development and reducing poverty in this area. The two international organisations in a workshop revealed that the commitment of the government was needed to ensuring broad-based and sustainable development in this area. The two organisations agreed to strengthen cooperation to promote decent working conditions that would reduce poverty and raise living conditions of the workers. According to the ILO statistics some 127 million of world's 246 million child labourers are living in this area. -News today, 16 October.

Steps for quick disposal of cases

The district administration of Khulna has taken some initiatives for quick disposal of 19 sensitive cases. The decision came upon a meeting of the district officials chaired by the Deputy Commissioner of the district. The concerned officials of the district said that complainants and witnesses of the cases do not appear before the courts and investigation officers in time for giving deposition and recording statements. The accused persons in these cases are frequently intimidating the prosecution witnesses and complainants, the public prosecutor told in the meeting. The meeting also took note of the fact that investigation officers could not submit chargesheet in time due to political influence. -Daily Star, 16 October.

New law to control brick burning

The government plans to enact a new law to control brick burning. About 10 thousands brick kilns are contributing enormously to the environmental degradation all over the country. It is posing serious health hazard to the people. It is also destroying greenery of the urban as well as rural areas of the country. Similarly, the construction of multistoried buildings is going ahead posing threat to the environmental degradation. In view of this situation the government has decided to completely overhaul the brick burning procedure. As per the changed procedure the brick burners will have to use coal instead of wood and raise chimney to height of 120 feet to emit some far above human habitation. Brick burners will have to apply to the government for renew of the licenses under the new law. The existing license will stand cancelled with immediate effect of the law. As the brick burning contributes greatly to environmental degradation and pollution by destroying flora and fauna the government decided to stop brick burning by wood. -News Today, 16 October.

Corresponding Law Desk

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