



## Star LAW report

# The father is entitled to his minor daughter's custody

**Appellate Division (Criminal Jurisdiction)  
The Supreme Court of Bangladesh  
Criminal Appeal No. 42 of 2001  
Md Abdul Majid Sarker  
v  
The State and others  
Before Justice Mahmudul Amin Choudhury, Chief Justice, Justice Mainur Reza Chowdhury, Justice Md Ruhul Amin and Justice Syed J R Mudassir Hussain.  
Date of judgment: June 9, 2002  
Result: Appeal allowed**

## Background

**Mahmudul Amin Choudhury, C J:** This appeal by leave at the instance of the informant who is the father of victim Masuda Khanam (Hasi) is against judgement and order dated 16.4.2001 passed by a Division Bench of the High Court Division in Criminal Miscellaneous Case No 5638 of 2000 discharging the Rule which arose out of an application filed under section 491 of the Code of Criminal Procedure for custody of aforesaid victim Masuda Khanam (Hasi) in respect of Nari-O-Shishu Case No 90 of 2000 corresponding to Naogaon G R Case No 149 of 2000 refusing to give custody of aforesaid Masuda Khanam (Hasi) with the appellant who is her father.

The short fact leading to this appeal is that the present appellant lodged First Information Report (FIR) with Naogaon police station alleging that respondent no 4 on 10.6.2000 abducted said Masuda Khanam (Hasi) while she was going to school in order to compel her to marry him. Case of the appellants is that his daughter Masuda Khanam (Hasi) is aged 15 years on the date of occurrence. In that case the police after investigation submitted charge sheet and the case is now pending before trial court. The police recovered Masuda Khanam (Hasi) and arrested respondent No 4 Md Enamul Hoque on 9.7.2000 and her statement was recorded wherein she expressed her intention not to go with her father. Thereafter the victim was sent to judicial custody. The appellant then made a prayer for custody of her minor daughter which was rejected by the learned Magistrate and then again the Tribunal was moved unsuccessfully. The appellant then moved the High Court Division under section 491 of the Code of Criminal Procedure wherein the Rule was discharged by a Division Bench on 16.4.2001.

## Point for determination

Here in the present case the main question is whether Masuda Khanam (Hasi) is a minor or not. If she is found to be a minor she should be given to the custody of her father the appellant. In such a situation opinion of the minor is immaterial.

## Deliberation

The application before the High Court Division was filed under section 491 of the Code of Criminal Procedure and the High Court Division observed that a question arose whether that court is competent to pass an order under section 491 of the Code of Criminal Procedure in relation to the detenu who is detained in custody by an order of a competent court and the High Court Division relying on a decision reported in 53 DLR 135 held that when a detenu is detained by an order of a court unless and until the order is reversed by another competent court the detention cannot be construed as illegal and improper and the High Court Division after observing that the order of detention was passed by a competent court they cannot interfere under section 491 of the Code of Criminal Procedure.

It is true that the petition has been filed under section 491 of the Code of Criminal Procedure before the High Court Division. This has not been filed against the order passed by the learned Sessions Judge refusing to release aforesaid Masuda Khanam (Hasi) to the custody of her father the present appellant before us. In that application the appellant prayer for custody of the

petitioner on the ground that she is a minor and not an accused in the case filed by the appellant against respondent no 4. Her status is that of a witness and not an accused and as she is a minor she cannot be detained in the custody. Admittedly the petitioner has been sent to the judicial custody when she refused to go with her father and thereafter the appellant moved the High Court Division under section 491 of the Code of Criminal Procedure. The High Court Division, it appears, observed that when Masuda Khanam (Hasi) has been sent to judicial custody by a competent court the appellant has no remedy under section 491 of the Code of Criminal Procedure. But this Division in the case of Arun Karmakar Vs. the State reported in 7 MLR (AD) 82 has held that an application under section 491 of the Code of Criminal Procedure in such type of cases is maintainable. When this Division has found after a detail consideration of the reported decisions that a petitioner under section 491 of the Code of Criminal Procedure in such type of case is maintainable the High Court Division committed illegality in refusing to enter into the merit



of the case holding that the order of detention has been passed by a competent court.

In such matters the main criteria is the age of the victim girl. According to the prosecution on the date of occurrence i.e. on 10-6-2000 Masuda Khanam (Hasi) was a minor and according to the learned Advocate she is now below the age of 18 years and when she is still a minor and not an accused in the case she cannot be confined in the custody. It appears that the High Court Division has not considered this aspect of the matter. That Division was bound to come to a finding as to the age when she is not an accused which will determine the fate of the proceeding before that Division. But simply holding that petition under section 491 of the Code of Criminal Procedure is not maintainable the High Court Division refused to enter into the matter.

It is the definite case of the appellant that Masuda Khanam (Hasi) was born on 30.10.1984 and the same has been recorded in the Municipal Birth Register as reported on 19.12.1984 and after a calculation from this date it would appear that she has not as yet attained the age of 18 years. The appellant produced a copy of the Birth Register maintained by Naogaon Municipality and it supports the contention that date of birth of Masuda Khanam (Hasi)

was recorded as on 30.10.1984 and this was reported on 19.12.1984 which is little over after two months of her birth. The learned Advocate for respondent no. 4 on the other hand placed reliance on her Secondary School Certificate Examination where her date of birth has been mentioned as on 29.10.1983 and if that date is found to be correct date of birth then she has now attained the age of majority. We have called for the admission register of the school and from that register it appears that her date of birth has been mentioned as on 29.10.1983. Now the question is when date of birth is correct. It is well known that in this sub-continent people always try to give a different date of birth and in most cases later date of birth has always been shown. But it is not the tendency to raise the age of a person. In the present case date of birth has been shown in the admission register as on 29.10.1983 but in the Municipal register it was shown as on 30.10.1984 which was reported to the Municipality on 19.12.1984.

The facts and circumstances indicate that the date of birth of the victim has been correctly reflected in the Municipal Birth register. There was no reason or occasion for the appellant to give a date of birth in the Municipal Birth Register then the actual date of birth and that was reported after two months from the date of actual birth and thereafter after about nine years a new date of birth has been given while the victim was being admitted in the school and the reason behind it was to allow her to sit in the SSC examination subsequently. Finding as to the age in such matter at this stage is always prima facie and when prima facie it is found that the date of birth of the victim is 30.10.1984 it is prima facie found that she is a minor.

The learned Advocate for respondent no. 4 drawing our attention to the report of the medical examination submitted that the victim was found to be aged in between 17 to 19 years and that examination was done on 16.7.2000 and by this time she has become a major and as such she cannot be forced to go with the appellant. But the Privy Council in the case of Md. Sayedul Arefin Vs. YO Gafur reported in AIR 1916 (PC) 242 has held that Doctor's certificate is only in assertion of opinion. Final confirmation will be on the basis of the evidence adduced at the time of trial. Doctors have not given any clear opinion. Their opinion varied from 17 years to 19 years. In such a situation it cannot be prima facie found at this stage that on the date of occurrence or at least on 16.7.2000 the girl was a major.

Having given our anxious consideration to the available materials and on hearing the learned Advocate of both the sides we prima facie hold that the date of birth of victim Masuda Khanam (Hasi) is 30.10.1984 and not 29.10.1983. Being prima facie a minor on the date of occurrence and even today we are of the view that the girl not being an accused has been illegally and improperly detained in judicial custody and when prima facie she is a minor it is right and proper that the girl should stay with her parents and as she is not an accused she cannot be kept in judicial custody. In such a situation the opinion of the girl who is a minor is irrelevant. The minor's refusal to go with her father the appellant is not at all a material consideration. The father being the best well-wisher of the minor is entitled to her custody and for her own interest she should be given to her fathers custody.

## Decision

In view of our above discussion we have no hesitation to hold that an application under section 491 of the Code of Criminal Procedure is maintainable for custody of a minor to see that the minor is not held illegally and in an improper manner and in the instant case when the age of the victim is prima facie below the age of majority we are inclined to allow the victim to the custody of the appellant.

For the foregoing reasons we are inclined to allow the appeal and the appeal is accordingly allowed. Judgment and order passed by the High Court Division is hereby set aside and the rule is made absolute. Superintendent of Naogaon Jail is directed to release the detenu Masuda Khanam (Hasi), daughter of the appellant forthwith and hand over her to the custody of her father the appellant.

Mr Md Fazul Karim, Senior Advocate, (Mr Shahidul Islam, Advocate with him) instructed by Mr Md Nawab Ali, Advocate-on-Record, for the appellant. Mr Fida M Kamal, Advocate instructed by Mvi Md Wahidullah, Advocate-on-Record, for respondent no 4.

## LAW letter

## Combating all kinds of terrorism



Terrorism has engulfed all sectors of our social life and it is spreading like a contagious disease. Public life has become insecure and unbearable due to terrorism. Over all law and order situation of the country aggravated to such an extent that the government had to deploy the army to curb terrorism as well as to nab the terrorists. Operation Clean Heart started on 17 October and it continues till date. People were passing their days in fear and anxiety. Now they get a sigh as the ongoing operation by the army has significantly improved the law and order situation of the country. The majority of the public has appreciated the army deployment by the government. Terrorism can be defined as the use of force for political gain or intimidating people for undue gain, such as ransom, toll or any other means. There are different kinds of terrorism like terrorism by arms, terrorism by pen and terrorism by tongue. Arms terrorism is visible and its effect to our social life is heart-rending. Terrorism by pen is classic one and its effect is very cute. It destroys nation's conscience. Black money is the root of all evils and arms terrorism has been fostering by black money. Another terrorism that is very visible in our political arena is terrorism by tongue. Balderdash utterance by the political leaders in public meetings lacks any sense of courtesy. Sometimes their irresponsible

speeches out side the country tarnishes our image greatly. Government has launched a drive to eliminate the arms terrorism only. The people of the republic expect and eagerly want to wipe out all kinds of terrorism from their beloved motherland. Would the government take necessary steps in this regard immediately?

MH Bari, Khulna

## Caught in vicious circle

The news item 'Caught in Vicious Circle' by Nicole Meier published on 16 November issue of Daily Star and subsequent comments/opinions on the issue have got my attention. I totally agree with the point that the children of sex workers at brothel are abused at the very early age. In the article, the writer mentioned only about initiatives of NGOs, which created a negative attitude of people towards the government efforts on the issue. For this reason, I would like to mention the efforts of the government. With financial assistance from the UNDP, Department of Social Services (DSS) under the Ministry of Social Welfare, GOB has been executing a project titled 'Capacity Building, Poverty Alleviation and Sustainable Livelihood of the Socially Disadvantaged Women (SDW) and their Children' called as 'Capacity Building Project'. The project is being implemented through local NGOs at 4 sites of Bangladesh. Jessore is one of the project sites where an NGO named ACLAB has been implementing the project since June 2000. The project is the 1st of its kind with the objective to rehabilitate the Sex Workers through empowerment and alternative livelihood opportunities. Under this project the children of sex workers are provided with Education, Crèche and Boarding facilities. At Jessore, the project has already achieved a remarkable success in this field. At the time of reporting, 70 children (with age range 0-18 years) of Sex Workers staying at Crèche and Boarding Houses provided under the project of which 30 are studying at different government and non-government schools at Jessore under the guardianship of the implementing organization.

Still now a large number of children are out of support from government or non-government organizations. There are some different lanes in the brothel areas in which the Sex Workers have negative attitude towards the activities of NGOs or the Government. They are reluctant to accept help. The writer probably visited any of those lanes. Interested persons or organizations are requested to contact the District Social Services office at Jessore.

Syed Taposh  
Site Coordinator-Jessore  
UNDP Assisted Capacity Building Project (BGD-97/029)  
Department of Social Services (DSS)

## LAW quotations

"No law can possibly meet the convenience of every one: we must be satisfied if it be beneficial on the whole and to the majority."  
Titus Livius (Livy) (59 BC-AD 17), Roman historian.

"The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread."  
Anatole France (1844-1924), French author.

"The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of laws, where there is no law, there is no freedom."  
John Locke (1632-1704), British philosopher

## LAWSCAPE

Running into a lawyer's private office, a butcher yelled angrily, "If a dog steals a hunk of meat from my shop, is his owner obligated to pay?"

"Sure," replied the lawyer.

"Okay then, your dog just stole half a rib roast worth Tk. 500 from my shop."  
"Give him the other half," said the lawyer, "and it will cover my consultation fee."

Changing lawyers is like moving to a different deck chair on the Titanic.

What is the definition of a lawyer?  
A mouth with a life-support system

## LAW lexicon

## Diplomat

An official representative of a state, present in another state for the purposes of general representation of the state-of-origin or for the purpose of specific international negotiations on behalf of the diplomat's state-of-origin.

## Immunity and diplomatic immunity

Immunity means an exemption that a person (individual or corporate) enjoys from the normal operation of the law such as a legal duty or liability, either criminal or civil. Under the Vienna Convention on Diplomatic Relations, 1961 diplomats enjoy certain immunities while working as diplomats. These immunities are called diplomatic immunities. These immunities are: inviolability of Persons of Envoys (Article 29 of the said Convention), immunity from criminal jurisdiction of the courts (Article 31), immunity from civil jurisdiction (Article 31), immunity regarding residence (Articles 22 and 27), immunity from being presented as witness (Articles 31 and 37), immunity from taxes dues, etc. (Articles 34 and 36), immunity from police rules, right to worship, right to exercise control and jurisdiction over their officers and families, right to travel freely in territory of the receiving State (Article 26), freedom of communication for official purpose (Article 27), immunity from local and military obligations (Article 35), immunity from inspection of Personal baggage (Article 36), immunity from Social Security Provisions (article 33) etc.

## Asylum

Asylum means shelter and active protection extended to a political refugee from another State by a State which admits him on his request. Asylum involves following two elements- (1) a shelter which is more than a temporary refuge; and (2) a degree of active protection on the part of the authorities which have control over the territory of asylum (J.G. Starke, Introduction to International Law). The Institute of International Law has defined asylum as "the protection which a State grants on its territory or in some of her place under the control of certain ties organs to a person who comes to seek it." According to Article 14 of the universal Declaration of Human Rights: "Every one has a right to seek and enjoy in other countries asylum from prosecution."

## Extradition

The term 'extradition' denotes the process whereby under treaty or upon a basis of reciprocity one State surrenders to another State at its request a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender (J.G. Starke, Introduction to International Law). In the view of eminent jurist Grotius, it is the duty of each State either to punish the criminals or to return them to the States where they have committed crime. In practice, however, States do not accept such obligation. Under International Law, extradition is mostly a matter of bilateral treaty. However, as pointed out in Wheaton's *International Law*, there is no universally recognised practice that there can be no extradition except under a treaty, for, some countries grant extradition without a treaty.

Source: International Law by Dr. S. K. Kapoor.

## Corresponding Law Desk

Please send your mails, queries, and opinions to: post - Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email dsllawdesk@yahoo.co.uk; interactive email lawdesk20@hotmail.com

## LAW week



## HC declares SSA's project illegal

The project for installation of the private container terminal of Stevedoring Services of America (SSA) was declared illegal and against jurisdiction by the High Court Division of the Supreme Court. A two-member bench comprising Justice Shah Abu Naim Mominur Rahman and Justice Arayes Uddin declared this after hearing a writ petition. The writ petition challenged the finalisation of the order for the draft agreement to provide land for installation of the private port. The court also ordered for sending one of the copies of judgment to the Prime Minister for further inquires. The writ petition was filed on September 12, 2000 challenging order of the government awarding the project to SSA. The project envisages building a container terminal at Patenga in Chittagong and another in Panagoan in Dhaka. It is noted that the issue of the installation of the privat container terminal becomes a national and international issue since 1997 when the procedure of the agreement started. Debate continued both in favour and against the installation of the container. On the other hand some political organisations protested the initiatives of the government. The court declared it illegal as the government approved the project of SSA arbitrarily without studying its feasibility and without economic appraisal. The court said that the government was misled that the SSA was the joint corporation of Bangladesh and USA. It also said that there was no tender for such installation of private port, as the government did not consider the application of the PNO ports of Australia and Overseas Trade Services of Britain. SSA made an application to the government for installation of private container in Chittagong and Panagoan on 29 December 1997. The application was admitted by the government on 25 April 1998. Later the government deferred the process of agreement due to protests of common people on 4 July 1998. The four-party alliance after coming to power made a committee to investigate the process. The committee on 30 April advocated for concluding an agreement with the SSA for installation of the port. The Prime Minister admitted it on 8 May of this year. The SSA Bangladesh Limited has now decided to prefer an appeal to the Appellate Division of the Supreme Court against the verdict of the High Court Division. -Prothom Alo, 27 November.

## Dispute over the schedule of UP polls

A dispute arose between the Government and the Election Commission as the government planned to reschedule the election of the Union Parishad polls. The ministry of the Local Government and Rural Development asked the Election Commission to reschedule the polls of the lowest tier of local government. Election Commission had earlier announced that the voting for the lowest and oldest tier of the local body would take place between January 4 to February 27 next year. On the other hand the government wanted to continue the ongoing joint drive till February next year and wished to hold the election of the UP after the drive comes to an end. Policy makers of the government argued that political activist at the grassroots level had gone into hiding to escape arrest. Therefore, if the election takes place during the army drive there would be none to carry out the election campaign. The decision of the government created a sharp reaction in Election Commission. It is noted that Election Commission is an independent body established by the Constitution. As per the Local Government Ordinance 1983 government can change the election schedule through gazette notification. However, the Election Commission said that the government's initiatives to change the schedule of the election of the UP without consultation with them is unlawful. There is no scope for any other authority to interfere in it since the EC is the sole authority to hold the election under section 24 of the Local Government (Union Parishad) Ordinance 1983, it added. Government can reschedule the election if the EC fails to hold the election within the scheduled time frame, it further said. The Election Commission finally decided to hold the election of union parishad as per the previous schedule from January 4 to February 27, 2003. However, the government requested the Election Commission to reconsider its decision. The Election Commission has positively responded to the request of the government and rescheduled the date of UP polls. According to the new schedule election in different union parishads will begin on 25 January 2003 and end on 16 March 2003. -Law Desk.

## Draft bills on separation submitted to the SC

The government has submitted the four draft bills for separation of the judiciary in compliance with the order of the Appellate Division of the Supreme Court. The Appellate Division earlier on 19 November asked the government to submit the bills for the formation of Judicial Service Commission and Judicial Pay Commission. According to the draft bill there will be one judicial service commission with the Judges and judicial Magistrates. Their service will be transferable. Before the appointment of sufficient judicial officers the existing magistrates will continue their service as the judicial magistrate. Among them the efficient ones will be appointed as the judicial magistrate. The hearing of the government's petition for seeking extension of time will take place on 10 December. -Law Desk.

## Bank laws to be amended

The government plans to amend the bank laws in order to invest Bangladesh Bank more authority and the Bank Governor more power. The proposed laws are Bangladesh Bank Order 1972, Bank Companies Act 1991 and Bangladesh Bank Nationalisation Order 1972. A bill to reshape the bank laws will be introduced in the parliament soon. The government also plans to include some strict rules through amendments to keep the banking sector in sound footing. The amendment also proposed to lift government's control on the day to day operation of the banks. -The Independent, 21 November.

## Two new bills passed

Two new bills have been passed in the parliament seeking slash to the court fees and establish Police Staff College. The bills are Court Fees (Amendment) Bill 2002 and The Police Staff College Bill 2002. Barrister Moudud Ahmed, Minister of Law Justice and Parliamentary Affairs placed the Court Fees (Amendment) Bill to the parliament. The bill was for reducing the court fees from Tk. 500 to 200 for the cases where the subject matter cannot be determined in terms of money and for preemption cases. Home Minister Altaf Hossain Chowdhury brought the Police Staff College Bill for the better training of the police officials in the rank of ASP and above. -Daily Star, 21 November.

## Protection of intellectual rights at snail's pace

Bangladesh's progress in protecting the intellectual rights is at snail's pace. There is no updated law or enforcement mechanisms in Bangladesh to protect the intellectual property. Bangladesh has passed the copyrights law amending the concerned laws of the British period. But it does not have any mechanism to deal with the copyrights. Besides, no initiative has been taken yet to amend the existing laws concerning the "Patent and Design" to check counterfeiting of brands. As a party to the WTO Bangladesh is under obligation of the provisions of Trade Related Intellectual Property Rights (TRIPR). The agreement would come into force in Bangladesh on January 1, 2006. However, Bangladesh is unlikely to meet the deadline as its problem relating to amending the laws, development of institutions and mechanisms are manifold and complicated. Failure to Bangladesh would be severely affecting its external trade. The cry for diversification of export will be fruitless without having adequate legal weapons for protection of intellectual property rights. -Financial Express, 21 November.

## Prisoners in condemn cell

At least 200 persons are passing a miserable life in the condemn cells in various jails of the country. Their death sentences were not executed due to various obstacles of the court procedures. The High Court Division confirms one death sentence per month on an average. It was noted that the death sentence awarded by the lower court needs confirmation of the High Court Division. One may prefer an appeal against the verdict of the High Court Division to the Appellate Division. The decision of the Appellate Division is final. The process of confirmation of a death sentence requires 5/6 years due to the backlog of cases in the higher courts. During this period one who has been sentenced to death by lower court is kept in the condemn cell in jail. Condemn cell is the most deserted place in the jail. No one is allowed to meet with the convicted person detained in the condemn cell. It was reported that one convicted is to be detained in one condemn cell. But this rule is not followed due to the accommodation problem in jail. Detention of person in condemn cell is violation of human rights. Dr. Shahden Malik, Advocate of the Supreme Court argued that when most of the developed countries have abolished the death sentence our country inserted it in the various laws. Death sentence is the barbaric system of punishment, which does not help create a good society, he also added. When the verdict of the lower court is challenged in the higher court the detention of the accused in condemn cell continues, which is against the concept of criminal justice. -Bhorer Kagoj, 23 November.