## Star LAW report

# Corroborative evidence is not imperative in every case of rape

**High Court Division (Criminal Appellate Jurisdiction)**
**The Supreme Court of Bangladesh**
**Criminal Appeal No. 2487 of 1997**
**Abdus Sobhan Biswas**
**V**
**The State**
**Before Justice Md Hassan Ameen and Justice Tariq ul Hakim**
**Date of judgment: August 11, 2002**

### Background

**Tariq ul Hakim, J:** This criminal appeal, at the instance of accused-appellant Abdus Sobhan Biswas son of late Harun or Rashid Biswas, is directed against the judgment and order, dated 18.11.1997, passed by the learned Nari-O-Shishu Nirjatan Daman Bishes Judge, Nari-O-Shishu Nirjatan Damon Bishesh Adalat No-2, Rajbari, in Nari-O-Shishu Nirjatan Damon Case No 20 of 1997 arising out of GR No 588 of 1996 convicting the (accused-appellant) under section 6(1) of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 (herein after shall be referred to as the Ain) and sentencing him to imprisonment for life.

The prosecution case is that the informant on 18.11.1996 in good faith at the suggestion of the accused-appellant allowed his wife Rashida to accompany the accused to the office of the Deputy Commissioner, Rajbari to collect charitable relief of Tk. 1800.00 since his homestead was burnt in a fire. On 19.11.1996 after reaching Rajbari the appellant told the victim in the evening that the money will be paid the following day by the Deputy Commissioner's office and that they have to stay at Rajbari over night. The accused-appellant then took the victim to a residential hotel (Al Quddus) where he introduced himself as the husband of the victim and rented Room No.110. At about 12.00 mid-night he raped the victim against her will; the victim raised hue and cry and the hotel manager and hotel boy Abdur Razzak and Md Ali Bhutto rushed to the room and heard and saw the matter. On the following morning the victim returned home and reported the occurrence to her husband who filed a complaint case before a Magistrate having the competent jurisdiction at Rajbari who sent the petition to Rajbari Police Station for treating it as a First Information Report (FIR) and accordingly the aforesaid PS Rajbari case was started.

The police took up investigation visited the scene of the said occurrence, prepared sketch map with separate index, seized alamats by preparing seizur list, produced the victim before Medical Officer for holding medical examination, recorded statements of the prosecution witnesses under section 161 of the Code of Criminal Procedure (CrPC) and finally submitted charge-sheet against the accused as prima-facie case under section 6(1) of the said Ain was made out.

The learned Trial Court in consideration of evidence on record as well as facts and circumstances of the case, found the appellant guilty for the offence charged and convicted him thereunder and sentenced him for the aforesaid term as well as to pay fine with a default clause as mentioned above. Being aggrieved and dissatisfied thereby the accused-appellant has come up with the present appeal which is opposed by the Respondent-State.

### Deliberation

The occurrence of rape has been challenged by the defence. Even the appellant's presence at the place of occurrence has not been admitted. It however appears that the victim was allowed to go with the accused by her husband in good faith to Rajbari for collecting relief money from the office of the Deputy Commissioner, Rajbari. It also appears that the victim and the accused spent the night of occurrence in a residential hotel in the same room. It further appears that the accused being a Union Parishad Member commanded respect from a poor man like the informant and allowed the victim to go with the accused to Rajbari. The accused seems to have taken advantage of the situation and instead of taking her to the Deputy Commissioner's office took her to a residential hotel and kept her there with him in the same room. The defence argument of total denial is not credible in the face of corroborating statements by PWs 7 and 8 that she was kept in the residential hotel at night in the same room, prior to which the accused introduced himself to the hotel staff as the husband of the victim.

The defence argument that the informant filed the instant case out of enmity resulting from an agreement for the purchase of 22 decimals of land belonging to the victim for which a part payment was paid by the accused to the victim is not substantiated by any evidence. It is therefore difficult to believe such a story in the absence of at least a receipt for the said part payment and/or evidence of those persons who witnessed the transaction.

The medical examination of the victim made on 11.12.1996, several days after the occurrence is of no value. Although PW I the medical doctor found no evidence of rape this may be due to the fact that the medical examination was done long 21 days after the occurrence and the victim an adult married woman is unlikely to bear any trace of rape after such a long period.

The Act of rape as claimed by the victim has not been corroborated by the testimony of any other witness. The general rule is that the court can act on the testimony of a single witness provided his/her credibility is not shaken by adverse circumstances. Accordingly the testimony of the victim who knew the accused from before, and who used to address him as kaka (uncle) is sufficient in the absence of other evidence against her character to treat her statement as being true. This view finds support in the decision reported in 19 BLD 307 where a number of Criminal Appeals were disposed of by a single judgment. In the said case their lordships observed: "Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of a victim of sex crime is not a requirement of law but merely a guidance of prudence under given circumstances. The rule is not that corroboration is essential before there can be a conviction. The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessities looking for corroboration of her statement, the court should find no difficulty in acting on the testimony of a victim of sex crime alone to convict an accused where her testimony inspires confidence and is found to be reliable."

Thus in the absence of evidence to the contrary the only inference that can be drawn is that the victim, a helpless, village woman is telling the truth about her shameful ordeal in the hands of the accused behind locked doors of the hotel A1 Quddus on the night of the occurrence. She has nothing to gain by making false statements about subjecting herself to the ignominy and embarrassment of being raped by the accused.

Although it is stated in the FIR that the accused created hue and cry and commotion at the hotel on the night of the occurrence but the PWs 7 and 8 hotel manager and hotel boy respectively clearly denied the same, showing a discrepancy between the eijahar (FIR) and the evidence, this is a minor matter and does not make any material change in the nature and character of the circumstances of the offence. The FIR is merely a statement to get the investigation machinery into motion. It is never conclusive evidence. The witness statements and other alamats from the evidence for the trial and conviction and in the instant case that portion of the FIR which does not support the evidence will have to be disregarded. Accordingly the fact that the PWs 7 and 8 heard no shouting or commotion and the same being corroborated by the testimony of the victim that she did not scream and shout on the night of the occurrence, in fear of the accused, leads one to believe that in fact she did not shout and cerate any commotion on the night of the occurrence. In the face of total denial by the accused of ever having stayed at the said hotel on the night of the occurrence this discrepancy between the FIR statement and the evidence of PWs 7 and 8 does not reduce the weight of the other evidence adduced against the accused for the offence charged.

Thus in view of the matters aforesaid in our opinion the trial court has rightly found the accused appellant guilty of rape as charged in contravention of section 6 (1) of the Nari-O-Shishu Nirjatan (Bishes Bidhan) Ain 1995 and sentenced him to imprisonment for life.

### Decision

As for the learned Advocate for the appellant's submission that in the facts and circumstances of the case the sentence passed by the trial court is too harsh and the same may be reduced as per provisions of section 423 of the Criminal Procedure Code, we are of the opinion that though as per the language of Section 423 of the said Code the Appellate Court has a discretion to alter a sentence passed by the trial court such discretion is limited to cases where the statute does not stipulate a minimum term. Since section 6 (1) of the said Ain clearly stipulates that a person found guilty thereof will be punishable with death or imprisonment for life therefore there is no room for reducing the sentence of imprisonment for life passed by the Trial Court.

As a result this Appeal is dismissed.

Mr ABM Nurul Islam, Advocate for the accused-appellant. Mr Md Robiul Karim, AAG for the respondent-State.

## LAW week

### Murder case against army men

A murder case was filed against an army major and his troops in the First Class Magistrate Court, Dhaka. Mehnaj Hossain Anjana, wife of Abul Hossain Litu lodged the case against Major Kabir and his troops for killing her husband during interrogation on 28 October of the year. She alleged that on that day the army personnel of Saver camp went to her husband's poultry farm and cordoned the area. Without explaining anything they entered the farm and tied up the hands, legs and eyes of her husband and beat him up mercilessly after tying him with a tree. At one stage they termed her husband a member of the Seven Star Group and asked him to hand over the firearms. They got furious as her husband denied the allegation. Her husband succumbed to army torture later. It is noted that there are 40 persons died in army custody during the on going joint operation since October 17. But this is the first case filed against the army personnel for death in army custody. The court has directed the officer in charge of the Savar police station to take lawful action upon investigation in to the murder case. The High Court Division also directed the Saver army camp in-charge not to arrest or harass the family members of the deceased. A Division Bench comprising Justice Tafazzul Hossain and Justice M Anwarul Huq issued the rule restraining the authorities from arresting them without due legal process or harass the widow of Litu who filed a murder case against the army men for killing her husband. The order came following a writ petition filed by Mehnaj Hossain Anjana and the family members in apprehension of threat of arrest from the accused. *-Daily Star, 16, 18 and 19 December.*

### Eight-point charter for prisoners dignity

The second "South Asian Regional Conference on Access to justice and Penal Reform" ended with adoption of eight-point charter to uphold the dignity of the prisoners. The charter stipulates prisoner's rights to dignity, segregation, accommodation, decent food, health and medical care, legal consultation, prompt and fair trial etc. The charter provides that confinement of prisoners including poor and racially discriminated persons should be treated in a human manner and with respect for human dignity. There should be no discrimination on the ground of race, colour, sex, language, political affiliation, national and social origin etc. A prisoner has right to consult with legal counselor and to take help of an interpreter to exercise the right effectively. He also has the right to communicate with his family members, the charter reiterated. The three-day conference held at Pan Pacific Sonargaon Hotel on December 12-14 come out with certain recommendations for the undertrial prisoners, women and juveniles. The conference hoped that adopting fundamental rights of the prisoners by the international community would uphold the dignity of the prisoners. *-The Independent, 15 December.*

### Speedy Trial Tribunal Act challenged

A High Court Division bench comprising Justice Amirul Kabir Chowdhury and Justice Nizamul Haq issued a rule nisi upon the government to show cause as to why the Speedy Trial Tribunal Act, 2002 should not be declared ultra vires the Constitution. The rule came upon a writ petition filed by Nasibun Ahmed challenging the legality of the Act. The petitioner said in her petition that the Act is contrary to article 27 of the Constitution that says all citizens are equal before law and are entitled to equal protection of law. The government has promulgated the Act by an ordinance of the president on 24 October for speedy trial of some major offences. Initially six tribunals were set up in the six divisions and 30 cases are reportedly sent to the tribunal for disposal. The writ petition challenged the Act including government's arbitrary power under section 6 to send the case to the tribunal. *-Bhorer Kagoj, 16 December.*

### High Court's rule upon government

Three different benches of the High Court Division of the Supreme Court has issued a rule nisi upon the government to show cause as to why the detention of some opposition leaders and columnist should not be declared illegal. The detainees are former minister Tofael Ahmed, Mukul Bosh, Shafi Ahmed, Mamtazuddin Ahmed Mehdi former general secretary of Dhaka Bar Association, and writer columnist Shariar kabir and Muntasir Mamun. One bench comprising Justice Md. Hamidul Haq and Justice Salma Masud Chowdhury has also asked the government as to why the columnists Shahriar Kabir and Muntasir Mamun should not be compensated. The CMM court has granted three days remand of Shariar Kabir, Muntasir Mamun and Shafi Ahmed earlier. During this time the High Court Division ordered to send them to jail. The CMM court send them to jail after awarding them one month detention by the government under Special Powers Act, 1974. However, they were granted ad-interim bail by the High Court Division on 18 December. *-Law Desk.*

### Police first, lower courts second!

Police department hits the top position as the corrupt public departments in the country while the lower courts are second in the position, according to the report of the Transparency International Bangladesh. The report was followed by a survey conducted among 3,030 Bangladeshis during November 2001 and May 2002. The report found that the respondents had to bribe the police Tk 2,066 crore and Tk 1,135 crore to the officials of the lower courts during the survey period. *-Daily Star, 18 December.*

### Backlog of cases in Jessore

About 8,500 cases are waiting for disposal in 20 judge courts for a long time in Jessore district. The reason behind this backlog is lack of officials in the court and vacant posts of the court. There are 20 judge courts including the District and Sessions Judge Court, Women and Children Repression Tribunal and Special Judge Court. But the posts of seven judge courts have been vacant for two years. Delay in disposal of cases is causing serious harassment to both the parties. *-The Bangladesh Observer, 18 December.*

### AI for independent investigation

Amnesty International demanded independent investigation of the deaths in army custody. A press note released by Amnesty International said that the government must made independent investigation of the deaths in army custody and give a believable explanation of the deaths. 39 persons have died in the army custody during the on going joint operation commenced from 17 October this year. But the government confessed that only 12 persons died in army custody and the rest died of heart attack. But the family members of the deceased persons alleged that they were died of torture in military custody, the report said. *-Prothom Alo, 19 December.*

### Certificate case against farmers

Four banks and Bangladesh Rural Development Board (BRDB) have lodged certificate cases against four thousand farmers of Rangpur district. The cases were filed for non-payment of bank loan. The four banks are Rajshahi Krishi Bank, Agrani Bank, Janata Bank and Rupali Bank. The authorities alleged that they issued notice after notice to pay the bank loan but the farmers did not respond to the notice. Concerned court of Rangpur has ordered the respective thanas to arrest the defaulter farmers. Therefore the farmers have left their houses to escape arrest leaving their family in anxiety. *-News Today, 19 December.*

### Show cause notice for contempt of court

High Court Division of the Supreme Court has issued show cause notice against the ad-hoc managing committee of Gono Bidday Niketan High School in Narayangonj for contempt of court. It was reported that an ad-hoc managing committee was formed for six months to run the school abolishing the elected managing committee before expiry of its term on 20 January of the year. Three members of the elected committee filed a writ petition against the formation of the ad-hoc managing committee. A High Court Division bench comprising Justice Md. Awlad Ali and Justice Sayed Dastogir Hossain declared the ad-hoc committee illegal and reaffirmed the elected managing committee on 24 July 2002. But the ad-hoc managing committee continued to run the activities defying the order of the court. The above-mentioned petitioners again filed a writ petition against the ad-hoc managing committee for contempt of court. A High Court Division bench comprising Justice Hamidul Haque and Justice Salma Masud Chowdhury issued a rule nisi asking the defendants as to why their activities should not be declared as contempt of court. The rule was issued against Md. Junaid, chairman of Dhaka Educational Board, Harunur Rashid Sikdar, Inspector of schools of Dhaka Board, Abul Kalam Azad, ADC of Narayangonj, Abdus Samad Mollah, Secretary of the ad-hoc committee and Alhaj Obaidullah, member of the same. *-Law Desk.*

## LAW column

# In memoriam of Chief Justice Amin Ahmed

BARRISTER HARUN UR RASHID

The word "remarkable" keeps recurring when people talk about Chief Justice Amin Ahmed who as the head of the East Pakistan High Court was determined to keep judiciary fiercely independent from the executive arm of the state. When martial law was declared for the first time in Pakistan in 1958, it was a difficult period for the High Court to digest such unconstitutional political system in the country. During the martial law period he never compromised the integrity and judicial independence, come what may.

One of the instances to demonstrate his firm stand of judicial independence was the fact that when Governor A.K. Fazlul Huq was dismissed by the martial law authority at 2 A.M. in the morning, Chief Justice Amin Ahmed was advised by the authority to administer oath to Mr. Hamid Ali, the Chief Secretary of the Government of East Pakistan. He refused to administer the oath until he received and was satisfied with written proper documents. The delay annoyed the authority but he did not budge from his firm stand.

Justice Amin Ahmed passed away on 6th Dcember 1991. He was a practising Barrister and a Judge for nearly 40 years. He was elevated to the Bench of the Calcutta High Court and was one of the very few Muslim Judges at the time. After partition in 1947 he was one of the four Judges of Calcutta High Court who opted for the East Pakistan High Court. He became Chief Justice in 1955 and retired in 1959.

His father was a Deputy Magistrate, one of the prize posts in the British-ruled Bengal. His father ensured that he got the best of education in the country and overseas. Justice Amin Ahmed took his Masters degree in Economics in 1919 from the Calcutta University and went to England for higher studies. He was in Cambridge together with Netaji Subhas Chandra Bose. He took tripos in Economics and Law from Cambridge University in a period of three years and was called to the English Bar from the Hon'ble Society of Grays Inn, London. He returned from England in 1924 and joined the Calcutta High Court Bar.

He started his legal practice in Calcutta High Court. One of the celebrated cases he appeared together with A.K. Fazlul Huq and Torrick Amir Ali was in Meena Peshawari case. She was acquitted by the Court and it created a stir at the Bar. He also taught law in the Calcutta University for a number of years while he was in the Bar.

He was an efficient administrator and a good judge. From anecdotal evidence it is clear that he had highly developed analytical mind which he brought fully to bear during his 12 years as a judge of the High Court. He provided significant non-partisan leadership and influence in the area of administrative law. He did not break rules but sought creative solutions to ensure good outcomes, which reflected balanced judgment and good sense.

As a judge he was a patient to the lawyers who appeared before him. He allowed young lawyers to make submissions without interruptions and permitted as much time as required to complete intelligent submissions. His temperament and manner was typical of a judge of the High Court- a person of plenty of reserve without intimidation.

He could relate to people of all ages. He was witty, charming and a great communicator. He was elected three times as the President of Dhaka Club in the early 50s. He loved playing golf and continued to play until he became frail. He was the first person to be invited by the Dhaka University to deliver the prestigious Kamini Kumar Dutta Memorial Law Lecture and he chose "Judicial Review of Administrative Actions" as a subject which was published by the University as a book.

He also had time to write his memoirs titled "A Peep into the Past" in 1982 in which he narrated his personal experiences as a teacher, judge, traveller laced with unique sense of humour. He loved life and everything about it. To his family he was a wise and inspiring figure. He was a religious person and read the holy Quran everyday and imparted Islamic teachings to his children. He had a disregard for worldly goods and left his property for promotion of education and public welfare. A part of his residence in Dhanmondi at Road 10 A has been converted to a Charity Medical Clinic for the needy and poor.

Justice Amin Ahmed will live on through his services to the judiciary and to the nation.

Barrister Harun ur Rashid is former Bangladesh Ambassador to the UN, Geneva.

## LAW letter

# Traditional land rights of indigenous peoples call for recognition

On 9th August this year, as in every year, the members of ethnic communities in Bangladesh observed the International Day of World's Indigenous Peoples. This year the day was observed through a colourful procession starting from the Shaheed Minar, a discussion meeting and a cultural function at the Central Public Library. I was fortunate enough to be present at the function and witnessed with amazement the diverse songs and dances of the Chakmas, Marmas, Khasis, Santals, Oraons, Monipuris and others. 'Recognise the Traditional Land Rights of Indigenous Peoples' was the theme of this year's International Day of the World's Indigenous Peoples. In fact, the United Nations has identified 'ownership and use of land' to be the foremost problem faced by the minority nationalities of the world.

The very inception of Bangladesh was of equality, for in 1971 the goal of liberation had united all irrespective of religion, caste and ethnic identity. However unspeakable torture and oppression have been meted out on these who belong to indigenous entities before and after formation of Bangladesh. The indigenous peoples of various parts of Bangladesh are quite unaware of the concept of land as a private property. They do not have documents to prove that the land on which they reside belongs to them. But that does not mean that they are not the owners of the lands which they have been occupying and utilizing for hundreds of years.

In 1870 the British isolated a large portion of the land of Chittagong Hill Tracts as 'Reserved Forests' and denied access of these areas to all except agents of the state. Prior to this, these lands had been used by the local indigenous peoples as 'common property' for homesteads, shifting cultivation or *'jum'*, grazing, hunting etc purposes. The ethnic eviction process was continued by the Pakistani government (1947-1971). In 1960 the Kaptai Hydroelectricity Dam was constructed, which submerged 40% arable lands of the CHT and displaced approximately 100,000 inhabitants, most being Chakmas. After independence in 1971, Sheikh Mujib insisted that there could be only "one nation" in Bangladesh and shockingly asked the hill people to forsake their unique identities and "become Bengalis". During the regime of General Ziaur Rahman about 400,000 Bengalis from the plain districts were given settlements in Chittagong Hill Tracts, reducing the indigenous population there to a near minority. Since the 1980s, indigenous leaders have been demanding rehabilitation of the 'Settlers' outside CHT. But no government till today has agreed to such a demand.

The United Nations observed 1993 as 'The year for Indigenous Peoples' all over the world. However, the Bangladesh Government did not take part in that global event. The concerned indigenous population has hardly ever been consulted prior to various government initiatives relating to their land. In fact when the 1500-acre Eco-Park in Moulvi Bazar was planned, the 2000 Khasis and Garos residing on that land were regarded as 'illegal settlers'. The Eco-Park apparently aims to preserve the flora and fauna of that region. But that is impossible unless the rights of the indigenous communities who have fostered the natural environment are safeguarded. Governments of different eras have accused the ethnic communities residing in the forests of polluting the environment. But such comments are manipulated to further deny the forest dwellers of their due rights to land. The indigenous peoples' interest in protecting the environment lies with the fact that they depend on the woodland for their very sustenance. The armed struggle of the hill people to attain their rights came to an end through the signing of the CHT Peace Accord on December 2, 1997. However the representatives of the CHT peoples remonstrate that even after almost five years, the provisions of the Accord are yet to be fulfilled.

In order to safeguard the customary land rights of the indigenous population throughout Bangladesh, these rights must be formally acknowledged by legislation. According to the ILO Convention No.107 and UN Draft Declaration on the Rights of Indigenous Peoples, in which Bangladesh is a signatory, even if the Indigenous Peoples do not have documents to prove their ownership of the land they cultivate and reside on, they ought to be allowed to exercise their traditional rights on that land. This convention must be incorporated in the national law and enforced through administrative steps. In the Philippines, the Indigenous Peoples' Rights Act (IPRA) recognises the control of the indigenous peoples over their ancestral domains. Similar measures could be taken in Bangladesh as well. Often common property resources of the indigenous peoples are utilized for the "needs of the state" as a whole, neglecting the interests of the local residents. But for sustainable development to take place, community consent is a must. The people should be elaborately notified of the favourable and unfavourable consequences of a planned government scheme well ahead of implementation of that scheme and they must have a say on the final outcome. We should esteem the rich cultures, customs and traditions of various minority nationalities, and their precious contribution to the diversity of the world. Their land issue should be perceived, not from a mere political angle, but accepting them as members of the human race to which we all belong.

**Munasir Kamal**
*Dhanmondi, Dhaka.*

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# An urge to the NGOs, lawyers and concsious people

Forty people reportedly died during the on going "Operation Clean Heart" commenced from 17 October last. The government called out the army to combat the crimes and arrest the criminals. Army arrested 926 listed criminals so far but none is the most wanted criminal whose name was published by the government earlier. Though common people welcomed this operation, the failure to arrest the notorious criminals has made them little bit anxious about the success of the operation. Moreover, death in army custody made the sincerity of the army personnel questionable. On the other hand there is no government initiatives to investigate the deaths in army custody. So-called civil society or renowned lawyers or the Bar Council did not file any case challenging the legal basis of the army drive. The Supreme Court, who is the protector of the fundamental rights of the people, also has not taken any action till date against the violation of fundamental rights during the army drive. Silence of the Supreme Court and the lawyers' community frustrates the common people when their right to life, the most valuable right, is at stake in the hands of the law enforcing agency. Role of the human rights organisations is also questionable. They have not taken any solid action against the deaths in army custody as they usually do against deaths in police custody. Only one case has been filed so far against the army in the First Class Magistrate Court Dhaka by a resident of Savar thana by a brave woman for killing of her husband. Silence of all those who are very much vocal about human rights in other times has frustrated many people like me. We want to see that they have come forward to help the brave woman get justice. Through this letter I urge all the concerned NGOs, lawyers and conscious people to help the woman win her legal battle against the killer of her husband.

**Khokon,** *Dhaka University.*

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