



Star LAW report



READER'S queries



Evidence of hostile witness may be considered as evidence on record

**Appellate Division
Supreme Court of Bangladesh
Criminal Petition for Leave to Appeal No. 69 of 2002
Mobarak Hossain alias Mobarak
Vs
The State
Before Mr. Justice Md. Ruhul Amin, Mr. Justice K.M.
Hasan and Mr. Justice Fazlul Haque
Date of Judgement: 24.3.2003**

Background

Md. Ruhul Amin, J. The convict has preferred this petition for leave to appeal against the judgement and order dated May 7, 2002 in Criminal Appeal No. 2109 of 1998 dismissing the same. The appeal was filed by the petitioner along with 4 other convicts against the judgement and order of August 24, 1998 passed in Nari-O-Shishu Nirjatan Case No: 145 of 1997 of the Court of Nari-O-Shishu Nirjatan Daman Special Court, Rajshahi convicting the petitioner and 4 others under section 6(3) of Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 and sentencing each of them to imprisonment for life.

The case of the prosecution was that Altafunnesa (PW1), victim of the incident, in the night of February 25, 1997 was sleeping in her bedroom. Her husband also slept in the east verandah of her bed room upon bolting the door from outside. In the early hours of the night of February 26, 1997 she sensed that some one touched her body and thereupon while woke up she was threatened to keep quiet. At one stage while she called her husband one of the accused persons pressed her month by cloth and 2 other kept her pressed down and 3 others raped her and thereupon she lost her sense. She recognised the accused persons by the moon light and also by the voice since accused were talking among themselves at the time of incident. On the following morning she narrated 'the incident to her husband and at that time her husband stated to her that accused persons wrapped his mouth and tied him with the post and threatened him not to raise hue and cry. Her husband was united by his brother's son Rafiqul Islam, who came in the house upon hearing groaning.

On the basis of the information lodged on February 26, 1997 by PW1, Baghmara PS Case No. 10 dated February 26, 1997 under the provisions of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, (the Ain) was started. After investigation prosecution report was filed against 5 accused persons including the petitioner under Sections 6(3) and 14 of the Ain. The Nari-O-Shishu Nirjatan Daman Special Court, hereinafter referred to as Special Court, upon receipt of the record registered Nari-O-Shishu Nirjatan Case 145 of 1997. The petitioner and 4 others were placed on trial to answer the charge under Section 6 (3) of the Ain to which they pleaded innocent and claimed to be tried.

PW 1 deposed that accused persons raped her and she recognised them, but when she was asked to identify the accused persons in the dock, she stated that she could not recognise accused persons. Some of the witnesses have stated that after the incident the informant upon receiving Tk. 12,000/- compromised the case with the accused persons. It may be mentioned that fact of compromising the case upon affirming an affidavit has been stated by Altafunnesa (PW1) the victim of the incident. PW3, husband of PW1 has admitted fact of compromising the case by affirming an affidavit by PW1 and stated since the case was compromised he did not disclose the truth. PWs 11 and 12, doctors, who examined Altafunnesa on February 27, 1997 noted in their report that Altafunnesa was raped forcibly. The report prepared upon examining Altafunnesa was proved by the said 2 witnesses and has been marked as Ext. 4. In reply to the suggestion given by the defence these witnesses have categorically stated that upon examining and hearing Altafunnesa they have prepared the report.

The Special Court upon discussions and consideration of the evidence on record arrived at the finding that accused persons raped Altafunnesa

and thereupon found them guilty under section 6 (3) of the Ain and sentenced them. All the 5 convicts preferred appeal before the High Court Division. The High Court Division on independent discussions and consideration of the evidence on record arrived at the finding that "prosecution witnesses have not only corroborated the occurrence but also disclosed the names of the appellants, who were involved in the commission of rape. It also appears from the evidence of PWs 1, 2, 3, 5, 7 and 8 that they have corroborated the prosecution story and have said that since the accused persons effected compromise with the informant party on receipt of Tk. 12,000/- (twelve thousand) they are not willing to disclose the truth but on scrutiny and scanning the evidence of these PWs we are led to hold the view that none but the appellants have committed the offence under section 6(3) of the said Ain and the Court of trial below in our opinion has rightly believed the prosecution case Having regard to the facts and circumstances of the case and the evidence adduced by the prosecution we have good reasons to believe that the PWs. 11 and 12 doctors who examined the victim (PW1) have stated the correct nature of the injuries and have opined that a case of forceful sexual intercourse and we are to accept his (sic) opinion. Nothing has transpired from the evidence of the PWs that the occurrence took place in a different manner and not in a manner as alleged by the prosecution".

Deliberation

The learned Advocate-on-record for the petitioner submits that conviction of the accused is based on the evidence of the witnesses, who were declared hostile by the prosecution and that there was no corroboration of

the prosecution case.

The law is now settled that evidence of the witness, who has been declared hostile would ipso facto not be of any worth for the prosecution, rather if on consideration of the evidence of such kind of witness it is found that the fact stated prior to declaring the witness hostile and in the course of cross-examination by the prosecution as well as by the defence supports the prosecution in one respect or other or that corroborated prosecution case then the evidence of such witness can very much be looked into along with other evidence on record by the court. And that if it appears to the court that evidence on record either has established the case of the prosecution or that prosecution case does not stand scrutiny then whatever order in any respect is made by the court the same is very much sustainable in law.

In the instant case although substantial number of the witnesses were declared hostile by the prosecution and thereupon cross examined by the prosecution as well as by the defence the court on scrutiny of the evidence of these witnesses along with the evidence of other witnesses i.e. witness Nos. 6, 11, 12 and 13 arrived at the finding that prosecution has been able to establish its case and thereupon found the present petitioner and 4 others guilty for committing offence under section 6 (3) of the Ain and sentenced each of them in the manner as stated above.

The High Court Division on independent discussions and consideration of the evidence arrived at the finding that prosecution case has been well established by the evidence including the evidence of the witnesses, who were declared hostile by the prosecution.

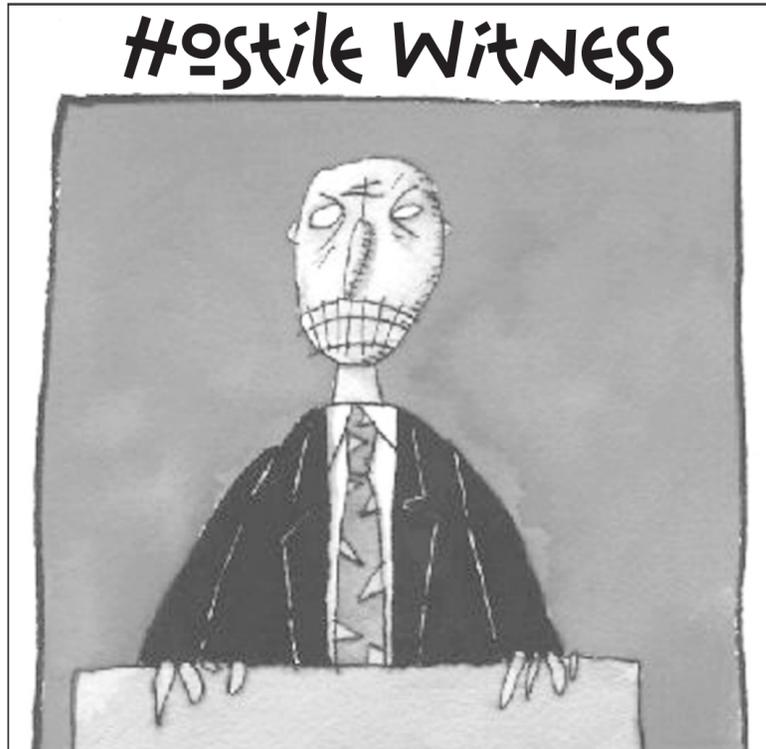
The learned Advocate-on-Record could not point out any infirmity in the aforesaid finding of the High Court Division in any respect, nor could he point out any such kind of flaw in the judgement of the said Division making the same unsustainable in law. He could not also point out non-consideration of the evidence favourable to the convicts and that if the court would have considered the same the order of conviction would have not been made in respect of the present petitioner.

Decision

Since on consideration of the evidence on record the High Court Division as well as the trial Court arrived at the finding that prosecution has been able to establish its case against the present petitioner and 4 others under Section 6 (3) of the Ain and that learned Advocate-on-Record having failed to point out any particular material on record making the observations and findings of the High Court Division as well as of the trial court as regard the guilt of the present petitioner and other convicts unsustainable in law we find no reason to interfere with the judgement and order sought to be appealed.

Accordingly the petition is dismissed.

Mr. Md. Nawab Ali, Advocate-on-record, for the petitioner. Respondent: Not represented



Your Advocate



This week your advocate is M. Moazzam Husain of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

Q: Would you please let me know the legal procedure in Bangladesh if a non-Muslim man would like to get married a Muslim woman. Thanks & regards. **Abbi.**

Your advocate: Your question is of general type. Since this is a problem-oriented column a general discussion on a major topic is not called for as the same leads us nowhere. You may have gone through the "Your Advocate" columns of 21st and 28th December last which cover much of your area of interest. You will notice from the reply given there that this a topic replete with controversies claiming extensive discussion which is not possible in this short span. I will simply try to address your interest area on a broader outline. Under the Muslim law more or less agreed upon position is that a Muslim female cannot contract a valid marriage except with a Muslim. There is a serious controversy upon the question whether her marriage with a Christian, Jew, idolator or fire-worshipper would be irregular or void. The majority view is that it is void. A Muslim male of course, can contract a valid marriage with a Muslim, Jew or Christian woman and not with an idolatress, i.e., Hindu or fire-worshipper. His marriage with an idolatress or fire-worshipper is not void but irregular. The main effects of irregular marriage are, a) the issues of the marriage are legitimate b) the wife is entitled to dower and c) it does not create mutual rights of inheritance between husband and wife. In our country, a marriage between a Muslim male and Christian female must be solemnised in accordance with the provisions of the Christian Marriage Act, 1872. But since a Muslim woman cannot contract a valid marriage with a Christian, such marriage therefore, cannot be solemnised under that Act. In Shia law a marriage between a Muslim male and a non-Muslim female is unlawful and void; and so also is a marriage between a Muslim female and a non-Muslim male.

With the passage of time the issue of inter-religious marriage is gradually coming to the fore. In view of the peculiarities of the personal laws in more cases than not it is impossible to arrange a valid marriage between the intending parties maintaining their respective faith. The Special Marriage Act, 1872, provides a form of marriage which may be celebrated under this Act between persons neither of whom professes the Christian, the Jewish, the Hindu, the Muslim, the Parsi, the Buddhist, the Sikh or the Jaina religion or between persons each of whom professes one or other of the following religion, that is, Hindu, Buddhist, Sikh or Jaina religion. The law also legalises the marriages of doubtful validity. For a Christian, Muslim, Jew or Parsi, in order to marry a person belonging to Hindu, Buddhist, Sikh or Jaina religion, or conversely for one belonging to either of the latter four religions but intending to marry a Muslim, Christian, Jewish or Parsi, there is no other accepted way but to renounce their respective faith and declare that none of the parties to the marriage professes any religion so as to bring the marriage within the sweep of this law.

You will have to find your way out from the maze of the complicated body of personal and secular laws governing the area.

LAW news



US court grants Guantanamo rights

Detainees being held by the US military at Guantanamo Bay in Cuba should have access to lawyers and the US court system, a federal appeals court has ruled.

The court said their detention was contrary to US ideals. It did not accept that the US Government had "unchecked authority".

The ruling relates to the case of a Libyan national captured in Afghanistan and currently being held at Guantanamo.

About 660 people are currently being held as "enemy combatants" at the base.

"Even in times of national emergency... it is the obligation of the judicial branch to ensure the preservation of our constitutional values and to prevent the executive branch from running roughshod over the rights of citizens and aliens alike," said the ruling by the Ninth Circuit Court of Appeals.

It added it could not accept the position that anyone under the jurisdiction and control of the US could be held without "recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement".

The decision comes shortly after another US federal appeals court ruled that US authorities did not have the power to detain an American citizen seized on US soil as an "enemy combatant".

That ruling, by the US Second Circuit Court of Appeals, related to the case of so-called "irty bomb" suspect Jose Padilla.

Guardian's consent not required in marriage

The Supreme Court of Pakistan upheld the verdict of Federal Shariat Court allowing adult Muslims girls to marry without consent of their 'wali' (guardian). In a detailed judgement, the apex court observed that female adult is not required the consent of her guardian or father to enter into valid marriage.

The appeal was filed by Hafiz Abdul Waheed against the verdict of Federal Shariat Court. In the mid 90s Waheed's daughter Saima had married without the consent of her father against which a bench of Lahore High Court gave a controversial judgement disallowing adult girls to marry without their free will, a verdict that caused lot of complications for young couples at the hands of the police.

There was lot of controversy at the time of verdict as Waheed, known for his "religious links" accused human rights activist Asama Jehangir of criminal charges. Asma then had raised concerns of her security in wake of threats by Waheed.

The Supreme Court while setting aside the decision of Lahore High Court observed that the marriage in question is not illegal "due to lack of consent of guardian".

The Federal Shariat Court while allowing Muslim girl attaining puberty had declined to give her in the custody of her guardian. Shariat Court had also ruled that admission by a couple of being married would be construed as proof of marriage. Attorney General for Pakistan in his arguments had also supported Shariat Court judgement.

LAW letter

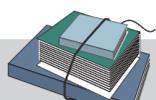


For a little knowledge of law

Part three of our constitution contains a very important topic which bear the evidence of our freedom i.e. freedom of speech, freedom of religion and freedom of movement etc. It also guarantees a cluster of rights to our citizens including the right to be treated as equal before the law and ensures the enjoyment of equal protection of law. It also makes sure of our easy access to justice. Everyone irrespective of race, religion and caste has a right to get legal assistance. These are our inalienable rights and no one is empowered to take them away from us. But what is unfortunate is that more than half of our population is ignore of their rights guaranteed by the Constitution. They are also ignore of the law of land and our legal system. While an abstract knowledge on the topics mentioned is necessary for all. In a recent workshop held on December 19, our honourable Chief Justice underscored the pitfalls including backwardness and ignorance that has kept the mass of our population away from adequate legal assistance. This is because of our so-called syllabus and fragile education system. He cautioned if the trend continues the judiciary will be in danger. Nowhere from our primary to secondary level syllabus included a chapter with a substantive knowledge on our Constitution and legal system, but the knowledge of which is imperative for every citizen. So, to make the people aware of their rights and to make the judiciary easily accessible to them, it is very important to insert a part on law into our syllabus.

Md. Kamal Hossain Meahzi,
LLB (Hons), University of Chittagong.

LAW lexicon



Person

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

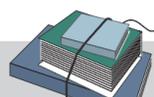
Personal representative

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

Physical custody

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

Star LAW book review



Administration of Justice in Bangladesh: A review

MAHMUDUL ISLAM

Administration of Justice in Bangladesh
Kazi Ebadul Hoque
Publisher: Asiatic Society of Bangladesh
Published on: September 2003
Price: Tk. 400/-

Whatever may be the true content of 'rule of law', and the jurists differ greatly, the minimum is that a country is to be governed in accordance with law and the people should have access to the court for enforcement of their rights. If there is no effective way of enforcement, a law is merely a paper product not even worth the value of the paper on which it is written. There may be a set of laws defining rights of the people, but if the common man cannot seek enforcement of the rights, those rights merely embellish the paper on which they have been described and have no significance in real life. In the present day a common man is suffering not for the dearth of law, but for the lack of enforcement of it. It has become imperative to assess how far the administration of justice in our country is effective in enforcing the laws of the land.

In examining the worth of the existing state of the administration of justice, it is necessary first of all to examine how it was in the past and then to evaluate how it is in the present. Kazi Ebadul Hoque J, who had been long associated with the administration of justice of this country both as a lawyer and as a Judge of the highest tribunal, has gone to the history starting from the Mughal times and has presented a total picture of the administration of justice as of today in his book. The author directed his attention to the deficiencies for which the present-day administration of justice is failing to achieve the purpose for which it exists. He is explicit in stating the effect of the shortcomings in important spheres of life. He has exposed the evil consequences which are looming large, about which we are complacent. The author emphasised the necessity of efficient and honest judges and rightly commented, "If the judges of a country are not honest, independent, dutiful and efficient, the people of that country are deprived of the benefits of even good laws of the country." (p. 252). The author has spent a considerable space in suggesting measures for improvement of the administration of justice so that it can properly function to uphold the rule of law and create an atmosphere where the ordinary people may have access to justice. He has included some important statistics in the appendices which clearly demonstrate the urgent necessity of reform of the administration of justice.

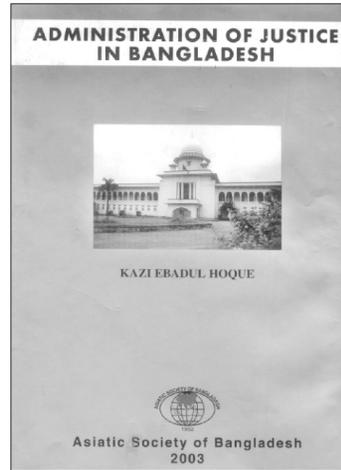
There has been a continuing debate as regards measures to be adopted

to improve the administration of justice. The Government has taken up a project of 'Judicial Capacity Building'. One may not agree with some of the proposal made by the author or may opine that the proposals are inadequate, but no one can gainsay the importance of the proposals which have been timely made and require serious consideration by all interested in the efficacy of the administration of justice.

In Chapter VI, the author has catalogued important decision handed down by the two Divisions of the Supreme Court of Bangladesh. Coming from an experienced lawyer and Judge, some critical comments about the trend of the decisions would have been very useful and welcome.

The printing of the book is neat. The cover design is attractive and the price is moderate.

Mahmudul Islam, Senior Advocate, Supreme Court, Former Attorney General for Bangladesh.



Corresponding Law Desk

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