



Star LAW report

Attempt to commit an offence is more than preparation

High Court Division (Criminal Jurisdiction)
Criminal Appeal No. 1459 of 1999
Md Abdur Razzaque
Vs
The State
Justice Gour Gopal Saha and
Justice Zubayer Rahman Chowdhury
Date of Judgement: 9.11.2003

Background

Gour Gopal Saha, J: This appeal is directed against the judgment and order dated 1.6.1993 passed by the Additional Sessions Judge and Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Tribunal, Netrokona in Nari-O-Shishu Nirjatan Daman Case No. 18 of 1998 convicting accused-appellant Md Abdur razzaque under section 6(1) of Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 and sentencing him thereunder to suffer imprisonment for life. Broad facts relevant for the purpose of the case are that on the night following on 3.10.97 victim Mazeda Khatun aged about 16 years was sleeping along with her minor sister in their dwelling hut at village Mohadebpur, Police Station Netrokona. At about 11.00 PM accused Abdur Razzaque stealthily entered into the dwelling hut by breaking open the Jhap Door and committed rape on Mazeda Khatun against her will. It has been stated that on the hue and cry raised by victim Mazeda, inmates of the house rushed to the

scene when accused Razzaque ran away. Victim Mazeda Khatun narrated the occurrence to all those who came to the scene after the departure of the accused. She also specifically stated that accused Abdur Razzaque had committed rape on her against her will, causing injuries on the private parts on her body.

The police after usual investigation submitted charge sheet against accused-appellant Abdur Razzaque under section 6(1) of the Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain 1995 to stand trial before the Court. Upon the aforesaid allegations the accused-appellant Abdur Razzaque was put on trial before the Additional Sessions Judge and Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Tribunal and he pleaded not guilty and claimed to be tried. At the trial, the prosecution examined as many as 9 witnesses in support of its case while the defence examined none.

The learned Special Tribunal by his impugned judgment dated 1.6.99 convicted accused-appellant Abdur Razzaque under section 6(1) of the Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995 and sentenced him thereunder to suffer imprisonment for life. Being aggrieved by the aforesaid impugned judgment dated 1.6.1999 accused-appellant Abdur Razzaque preferred the present appeal before this Court.

Deliberation

Learned advocate appearing for the accused-appellant submits that in view of the fact that the medical evidence does not support the case of rape, the Learned Special Tribunal was manifestly wrong in convicting and sentencing the accused appellant on a charge of rape. Therefore, the impugned order of conviction and sentence is not sustainable in law. He further submits that

having regard to the fact that the prosecution has failed to examine even a single independent, natural and probable witness to prove the case, the impugned order of conviction and sentence is not sustainable in law. The learned advocate further submits that the Learned Special Tribunal was manifestly wrong in failing to weigh and sift the evidence on the record as required by law and evidently feel in error in coming to his ultimate decision, occasioning in failure of justice.

The learned Assistant Attorney General appearing for the state, on the other hand, submits that in the fact and circumstances of the case and the evidence in record, the learned Special Tribunal was fully justified in convicting and sentencing the accused-appellant. On the basis of cogent and reliable evidence and, consequently, there is no scope to interfere with the impugned judgement with this court.

It is found that the prosecution witnesses have consistently and uniformly stated in their evidence that on the fateful night following 18th Aswin, 1404 B.S at about 11.30 PM accused Abdur Razzaque stealthily entered into the dwelling hut of victim Mazeda Khatun and committed rape on her. Victim Mazeda Khatun herself fully corroborated the

case made out in the FIR. In the lengthy and shrewd cross-examination the defence failed to discredit her in any material respect. The witnesses, who came to the scene on hearing the hue and cry raised by the victim, uniformly stated that on their query she told them that the accused had committed rape on her. There is no reason to disbelieve the natural evidence of these competent witnesses.

Now the question that calls for consideration is whether in face of the evidence of the Medical Board, which examined the victim ten days after the occurrence, the evidence of prosecution can safely be accepted on the question of rape. Mazeda clearly stated in her evidence that she put up strong resistance to the accused and struggled all the while. We find no evidence on record that the accused completely overpowered her by physical assaults or instant threat of life to neutralize her power of resistance against rape. She also stated in her evidence that her screaming instantly drew the attention of other inmates of the house, on which approach the accused ran away. It is actually difficult, well nigh impossible, to accomplish the act of rape by a single accused against a stiff resistance put up by the victim unless otherwise over-awed, and over-powered and physical subdued.

In the circumstance of the case and the material evidence on record, we are of the view that although accused Abdur Razzaque definitely made a determined attempt to commit rape on Mazeda, yet he could not accomplish it. In such view of the matter we think the case comes down to one for an attempt to commit rape. We have given our anxious considerations to the facts of the case and the nature of the evidence. We are, therefore, inclined to hold that although accused Razzaque made a definite attempt to commit rape on victim Mazeda by undoing the string of her pajama but he was actually unsuccessful in fulfilling his object.

In a case like this, the culprit first intends to commit the offence and then makes preparation for committing it and thereafter attempts to commit the offence itself. If the attempt succeeds, he commits the offence but if he fails due to the reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when preparations are complete and the culprit commences to do an act with the necessary intention, he commences his attempt which is a step toward commission of the offence.

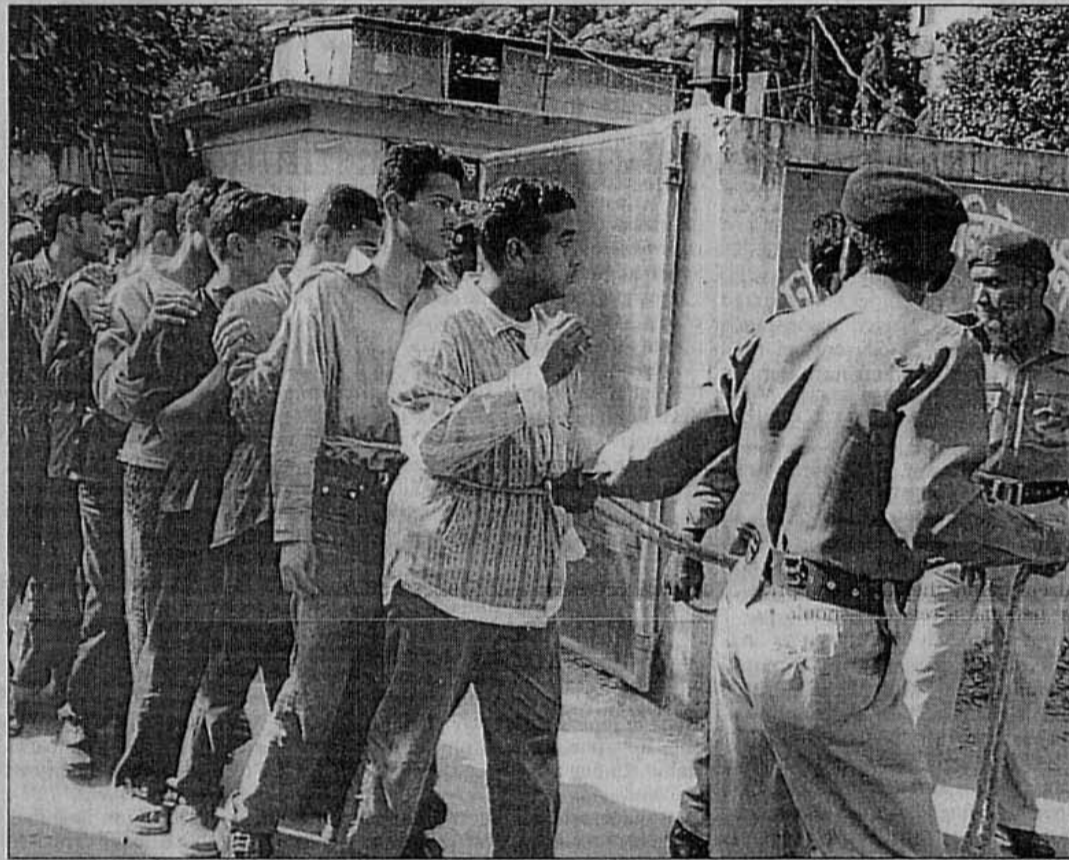
An attempt is an act done in part execution of a criminal design, amounting to more than a mere preparation but falling short of actual consummation. An attempt may thus be defined as an act which if not prevented would have resulted in the full consummation of the act attempted. In the present case, we have found that the accused made victim Mazeda Khatun nude by removing her 'pajama' and made a determined attempt to ravish victim Mazeda. The attempt of the accused could not be successful only because of the strong resistance put up by the victim and the timely approach of the inmates of the house to the scene of the occurrence, which compelled the accused to run away, leaving his mission incomplete.

The learned Advocate for the appellant referred to us the case of Gopi Shankar and others Vs. the State (Rajasthan), reported in 1967 CrL J. 922, the case of Lahore High Court Vs. The Emperor, reported in AIR 1933, Lahore 1002 and the case of Kishen Singh Vs. the Emperor, reported in AIR 1927, Lahore 580 in support of his contention. The principle of law laid down in the cited decisions readily supports our view.

Decision

In the result, the appeal is allowed in part and the order of conviction passed by the learned Special Tribunal, Netrokona against accused-appellant Abdur Razzaque under section 6(1) of the Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain 1995 is altered to a conviction under section 6(1) of Nari-O-Shishu Nirjatan Daman (Bishesh Bidhan) Ain 1995 read with section 511 of the Penal Code and accordingly accused appellant Abdur Razzaque is sentenced thereunder to suffer Rigorous Imprisonment for ten (10) years.

Mr Munsurul Haque Chowdhury, Advocate, for the Appellant and Mr S M Aminul 'Islam, Assistant Attorney General, for the State.



READER'S queries

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: My father died three years ago. Before his death, he didn't distribute his property. We are 4 brothers and my mother is also alive. It may be mentioned that my father married my mother divorcing his first wife. But she claims that the divorce was not valid. Now, after my father's death, she has filed a case against us and claiming share of my father's property as his legal wife. My question is, is her demand lawful? Please, give me a solution about that as soon as possible.
SultanWohid,
On E-mail.

Your Advocate: Reply to your question lies in the question of validity or invalidity of divorce of your father's first wife. It appears from your words that your father divorced her in a way not permitted by law. Law says - "(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talak in any form whatsoever, give the chairman notice in writing of his having done so, and shall supply a copy thereof to the wife. (2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to ten thousand taka or with both." The provisions of law is mandatory and violation of the same renders the talak ineffective in the eye of law. You have possibly got the reply of all your queries. Law is said to be blind. If law favours her we have hardly anything to do about it. I give my opinion merely on the basis of your words. I do not know the case on records. Engage a good civil lawyer in your case. The engaged lawyer would be in a position to find out good points, if any, for your defence.

Q: My daughter is now around 20 months of age. My husband passed away on the 89th day of my marriage. Is it possible for my in-laws to legally lay claim for upbringing her grand daughter? I have no intention to get married again. So, what is my status according to guardianship of my daughter?
Rokeya Kasim Putool,
Firozshah, Chittagong.

Your Advocate: Your status with regard to the custody of your child is very well footed in law. Under the Muslim law the mother is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty. As for 'puberty' it is said to be attained within the age-range of 14-15 years. Therefore, until that age of your baby you can safely continue as her custodian. Generally mother loses her right to custody under three circumstances, namely, a) if she marries a person not related to the child within the prohibited degree, i.e., a stranger b) if she goes and resides during the subsistence of her marriage, at a distance from the father's place of residence or d) if she neglects to take proper care of her child.

In the circumstances peculiar to you I do not find any potential claimant of custody of your daughter at any point of time unless her welfare slides into stake in your custody.

Star LAW book review

Constitutional law simplified

MUHAMMAD ZAMIR

The Constitution of the People's Republic of Bangladesh with Comments and Case Justice Latifur Rahman Mullick Brothers, Dhaka, February 2004, 256 pages, Price: Tk. 225

A regular presence in the tennis courts and the golf course, the author, a former Chief Justice of Bangladesh and also the Head of the last Non-Party Caretaker Government (2001) has drawn on his judicial experience of many years to present in broad strokes the constitutional developments that have taken place in Bangladesh over the last three decades. The book includes a compilation of the provisions of the Bangladesh Constitution along with Article by Article, commentary and relevant case laws based mostly on decisions by the Supreme Court of the country.

In the course of his effort, Justice Latifur Rahman has particularly recognized the contribution of Judges of the Supreme Court towards the evolution and development of our Constitution through their interpretations. In this regard, he has tried to highlight the important role which the Supreme Court plays in safeguarding liberty and ensuring justice for the common citizen.

In the course of evaluating the judicial progression of constitutional law in Bangladesh, the author has also noted that 'the rule of law and constitutionalism can only grow in a democratic polity, where the Supreme Court possesses the absolute power of judicial review'. One can only observe that such an assertion assumes greater relevance in contemporaneous times where politicisation of the judiciary is affecting the fabric of perceived neutrality and impartiality.

It is important that the author has also referred to the pernicious effects of martial law on constitutional development. Such an arrangement affected us more than once-between August 1975 to November 1979 and then again between March 1982 to November 1986. During these two periods the Supreme Court essentially lost its power of judicial review. Details of this in the book will evoke interest for the reader.

The introductory note also outlines in simple language the thirteen different amendments made of the Bangladesh Constitution since our independence. This chapter will be useful for students of political science as well as law.

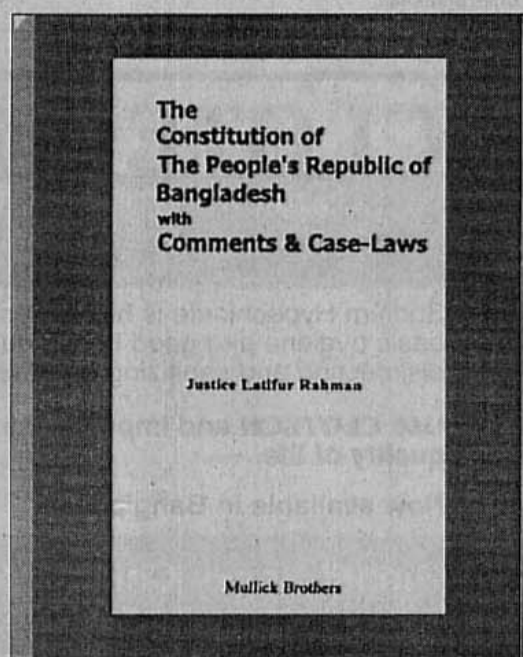
with interpretations of similar provisions by the Supreme Courts of India and Pakistan. That would have enriched the work. Similarly, it might have helped if he had provided more comments with regard to Articles 14 to 20 which deal with important duties of the State to provide for its citizens fundamental necessities with regard to education, public health, equality of opportunity and work as a right and duty. One thinks that the author should not have brushed aside such significant issues as being dependent only on "the economic resources of the State". The author might have also liked to discuss in greater detail the difficult aspects of Part IX (Emergency Provisions) as contained in the provisions of Articles 141 A, 141 B and 141 C. That would have materially helped serious students.

It would have also benefited readers if an index of cases used in the book was prepared as an Annexure. One hopes that this will be included in the next edition.

In any case, what is important is that a functional presentation has been made of a difficult subject. For this the author deserves thanks.

This work will be popular across the main-stream readership. It will also be less controversial than the author's previous book on his experiences as the Chief of the last Caretaker Government.

Muhammad Zamir is former Secretary and Ambassador.



LAW week

Extradition treaty with India soon

Bangladesh and India have agreed to sign an extradition treaty. The purpose of the treaty would be to hand over criminals who cross over from the other country to escape the law. This was informed by Home Minister Altaf Hossain after a meeting with the Indian foreign secretary. An extradition treaty gives diplomatic and legal coverage for the hand over to one country of criminals taking refuge in another country. -New Age, 11 March.

3,309 women raped in 3 years

Some 3,309 women were raped across the country in the last three years. Of them 351 were killed and 32 committed suicides. This was revealed by report compiled by Odhakar. The report said 575 women were killed and 54 women committed suicide, 206 tortured, 29 acid-burnt and six got divorcees for dowry during the same time. In 2003, 1,336 women were raped and 142 of them were killed and 17 committed suicide, while 1,350 women were raped in 2002 and of them, 114 were killed and 12 committed suicide, the report said. In 2001, 623 women were raped, while 95 of them were murdered and three committed suicide. The report went on to say that 870 women fell prey to dowry during the period. Of them, 261 were killed, 87 tortured, 15 acid-burnt and one was divorced in 2003, while 191 women were killed, 90 tortured, 14 acid-burnt and one was divorced in 2002. Another 123 women were murdered, 31 tortured, three divorced for dowry in 2001. All the divorcees committed suicide. -Law Desk.

HC orders to remove extra bumper

The High Court has ordered to remove extra bumpers within one month from all vehicles of the city.

Another contempt rule against IGP

The High Court has issued a rule upon the Inspector General of Police (IGP) and three other senior police officers to explain why contempt proceedings should not be drawn against them for ignoring the court order. The petitioner, a suspended sub-inspector, submitted that he was acquitted of corruption charge after departmental investigation. Despite that he was summoned to appear before the security cell in police headquarters in connection with the corruption charge. He had challenged the order in the High Court and secured a stay order. But he was again summoned ignoring the stay order. The bench comprising Justice M Abdul Matin and Justice Syed Refat Ahmed also stayed the order of suspension on the petitioner. Earlier on January 27, the High Court in a contempt case found the IGP guilty of misconduct and fined him Tk 2000. The Supreme Court had stayed execution of the High Court verdict. -Prothom Alo, 10 March.

Fraud case against DG of Manpower

A fraud case has filed against director general (DG) of Manpower, Employment and Training Bureau, Dhaka and 21 others with the Chief Metropolitan Magistrate's (CMM) Court, Dhaka. After hearing, Metropolitan Magistrate Moha-mad Emdaul Haq took the petition into cognizance and directed the Officer-in-Charge of Motijheel Police Station to register it as a regular case upon the investigation. The complainant Mosammat Anwara Begum in her complaint stated her younger brother died in Saudi Arabia in road accident on 19 November 1994. Later, victim's family members were given Tk 13 lakh as compensation and the court gave an order for distribution of the money among the heirs (including the complainant) of the victim in accordance with the Muslim Law. But the accused in connivance with others misappropriated her entire share of Tk 5 lakh. -Daily Star, 10 March.

Rapist executed in Comilla

Eight years after a seven-year-old girl was killed after raping at Bagdi village in Polish upazila of Narsingdi district, her parents got justice with the execution of the assailant. The death penalty on Abdul Moteleb was executed by hanging in Comilla Central Jail on 9 March midnight. According to the prosecution, Abdul Moteleb raped the minor girl, Nilufer, 5 on August 1995. She died from excessive bleeding at a hospital. Moteleb was awarded capital punishment under the Women and Child Repression Prevention Act on 28 April 1997. Later the verdict was upheld by higher court and also in the clemency prayer to the president. -New Age, 11 March.

LAW lexicon

Prohibition
A legal restriction against the use of something or against certain conduct. For example, in the 1920s, both the USA and Canada enacted liquor prohibitions, outlawing the manufacture or use of alcoholic beverages.

Promisor
The person who has become obliged through a promise (usually expressed in a contract) towards another, the intended beneficiary of the promise being referred to as the promisee. Also sometimes referred to as 'obligor'.

Promissory note
An unconditional, written and signed promise to pay a certain amount of money, on demand or at a certain defined date in the future. Contrary to a bill of exchange, a promissory note is not drawn on any third party holding the payor's money; it is a direct promise from the payor to the payee.

Power of attorney
A document which gives a person the right to make binding decisions for another, as an agent. A power of attorney may be specific to a certain kind of decision or general, in which the agent makes all major decisions for the person who is the subject of the power of attorney. The person signing the power of attorney is usually referred to, in law, as the donor and the person that would exercise the power of attorney, the donee.

Præcipe or precept
Latin: used to refer to the actual writ that would be presented to a court clerk to be officially issued on behalf of the court but now mostly refers to the covering letter from the lawyer (or plaintiff) which accompanies and formally asks for the writ to be issued by the court officer. The precept is kept on the court file, but does not accompany the writ when the latter is served on the defendant.

Praemunire
An offence against the King or Parliament, in old English law, which led to serious penalties but not capital punishment.

Precatory words
Words that express a wish or a desire rather than a clear command. "Precatory words" are often found in trusts or wills and cause great difficulties when courts try to find the real intention of the settlor or testator. For example, the words "all my property to my wife to be disposed of as she may deem just and prudent in the interest of my family" were found to be "precatory" and did not constitute a trust for family members other than the wife.

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