



Star LAW report



# Court has no discretion to award sentence less than the limit ordained

**High Court Division (Criminal Appellate Jurisdiction)**  
**Criminal Appeal No. 1247 of 1993**  
**Dulal Madhu**  
**V**  
**The State**  
**Before Mr. Justice Mr. AK Badrul Huq and**  
**Mr. Justice Syed Mahmud Hossain**  
**Date of Judgement: April 16, 2003**  
**Result: Appeal dismissed**

**Background**  
**A.K. Badrul Huq, J:** Accused-appellant faced trial on a proper charge under section 326A of the Penal Code and was convicted. Awarding of a sentence is consequential and incidental to conviction. Section 326A prescribes two penalties; one is death and the other is imprisonment for life. Court has no discretion to award sentence less than the limit ordained. In brief the fact is Nilima Rani Roy (PW2) a school going girl is the victim of crime. The crime had been attributed to Dulal Madhu. The case in hand presents a dehumanising episode of throwing acid on Nilima Rani Roy by Dulal Madhu. The unfortunate incident took place on the fateful night of 24.7.1992 in her own house when she was on bed with her mother. Following commission of offence law was set on roll on laying a First Information Report with Kotallipara Police Station by Ruhi Das Roy as Informant. Accused Dulal Madhu faced trial before learned Sessions Judge, Gopalganj in Sessions Case No. 46 of 1992 having been charged of offence under section 326A of the Penal Code. Prosecution to bring home charge against accused Dulal Madhu examined eight (8) witnesses.

Learned Sessions Judge on a meticulous evaluation and exploration of evidences, materials on record, fact and circumstances of the case found that prosecution could successfully prove that accused Dulal Madhu on the night of incident disfigured the face of Nilima Rani Roy on doling out acid on her face and it could bring home the culpability of the accused Dulal Madhu beyond all reasonable doubt. Learned Sessions Judge positively found that the accused Dulal Madhu committed the offence of section 326A of The Penal Code. He also found that turning down the marriage proposal of accused Dulal Madhu by victim Nilima Rani Roy was the cause for perpetration of the offence. In awarding sentence learned Sessions Judge took a soft hearted view and imposed sentence of life imprisonment instead of death penalty. Thus, it convicted accused Dulal Madhu imprisonment for life and, also, a fine of Taka 5,000/-, in default of payment of fine he was to undergo Rigorous Imprisonment for a further period of three (3) months more. Rightness of the judgement of conviction and sentence has been ventured to be

bombarded by convict Dulal Madhu on presentation of this Criminal Appeal before this Court. He submitted two grounds to substantiate his appeal, a) Prosecution failed to bring home charge of section 326A of the Penal Code against accused-appellant, b) and offence of section 335 of the Penal Code and not section 326A of the Code could be attracted to accused-appellant and conviction under section 326A is liable to be altered to one under section 335 of The Penal Code.

## Deliberation

Rejoinder to the contentions pressed from the side of accused-appellant has been offered from the side of State respondent in bringing home contention that the prosecution could prove charge under section 326A of The Penal Code beyond all reasonable doubt. And judgement recorded by learned Sessions Judge in awarding conviction and imposing penalty upon accused-appellant is well founded on law and fact. He also submitted that sentence cannot be said to be severe one and minimum sentence prescribed by law

fine for voluntarily causing Grievous Hurt in respect of both eyes, head either by gouging out the same or by means of any corrosive substance or head or of face by means corrosive substance and punishment.

We ourselves in the exercise of our appellate power, also, re-examined and reassessed evidences of PW 2 and PW 3 and we, also, find that evidences are worthy of credit. From the above it became manifestly clear that injuries caused on cheek, lips, throat, chest, legs, wrist and waist had been flamed by corrosive substance which was acid.

Section 335 enjoins that whoever voluntarily caused grievous hurt on grave and sudden provocation, he would be punished with imprisonment of eight description for a term which may extend to four years, or with fine which may extend to two thousand taka or with both.

Section 335 is not at all attracted in respect of the offence carried out by accused-appellant. The question of voluntarily causing grievous hurt on grave and sudden provocation by accused-appellant did not and does

not arise at all.

tion advanced from the side of accused-appellant is absolutely misconceived and untenable. First branch of contention having been bereft of any substance stands rejected.

Second breach of contention is now being addressed. Awarding of sentence is consequential and incidental to conviction. Section 326A of The Penal Code prescribes two penalties, one is death and other is imprisonment for life and fine also.

Legislature totally disfavours the sentence to plummet below the limit prescribed and Court has no discretion to award sentence less than the limit ordained. Court cannot go against the Legislative mandate.

The office is extremely brutal and revolting, which shocks judicial conscience. In such a shocking nature of crime as the one before us it was necessary to impose such maximum punishment under the law as means of social necessity which would work as deterrent to other potential offenders. Learned sessions Judge took a lenient view and instead of imposing maximum punishment applied minimum punishment prescribed by law, which is 'imprisonment for life'. No interference in respect of awarding of sentence upon accused appellant is warranted. Prosecution could substantially prove the charge beyond all reasonable doubt through legal evidences, materials on record, fact and circumstances of the case. We are in full agreement with the decisions rendered, reasons canvassed in arriving at decisions and conclusion reached by learned Sessions Judge in awarding conviction and imposing sentence upon accused-appellant Dulal Madhu. Learned Sessions Judge has awarded a fine of Taka 5,000/- upon accused-appellant and in default of payment of fine he was to undergo Rigorous Imprisonment for three (3) months more. In the even of realisation of fine of Taka 5,000/- that amount shall be paid to the victim Nilima Rani Roy (PW 2) as compensation or solace towards irreparable injury she sustained and the pain which she will endure till her death.

## Decision

Resultantly, Criminal Appeal No. 1247 of 1993 preferred by accused-appellant Dulal Madhu stands dismissed. Judgment of conviction and sentence dated 23.5.1993 passed by learned Sessions Judge, Gopalganj in Sessions Case No 46 of 1992 arising out of Kotallipara Police Station Case No. 2 dated 28.7.1992 corresponding to GR No 26 of 1992 is maintained.

Mr. Syed Ziaul Karim; for appellant: Mr. Md. Helal-Uddin Mollah; Deputy Attorney General with Mr. Mohammed Abdul Baset, Assistant Attorney General for State Respondent.



had been awarded.

Permanent disfigurement of head or face is sixth kind of "Grievous Hurt" enumerated in section 320 of The Penal Code. Section 326 prescribes penalty for voluntarily causing Grievous Hurt by dangerous weapons or means. Section 326A, which has been inserted in the Penal Code by ordinance No. LXIX of 1984 lays down punishment as death or imprisonment for life and, also,

not arise at all.

Accused-appellant faced trial on a proper charge that is under section 326A of the Penal Code and he was, also, convicted on a proper and appropriate charge. Accused-appellant committed the heinous offence of section 326A of the Penal Code. It cannot be at all suggested that accused-appellant committed offence of section 335 of the Penal Code. The conten-

## 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:** I'm trying to find out how long the police can hold a person in jail before trial and when it has been to long they get let go?

**Angel Griswold,**  
**On Email.**

**Your Advocate:** It seems you wanted to know the legal position in Bangladesh in relation to your subject of query. Bangladesh Constitution, Article 33(2) says "Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from place of arrest to the court of the Magistrate, and no such person shall be detained in custody beyond the said period without the authority of a Magistrate". This law is a bit excepted where any person is arrested or detained under any law providing for preventive detention. Article 35(3) of our Constitution reads- "Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law".

In Bangladesh police may detain a person in their custody for a period not exceeding fifteen days subject to an order of the Magistrate passed on that behalf. But the Magistrate authorising such detention in police custody shall record his reasons for so doing. Law authorises the court to grant bail in some cases, if investigation could not be completed within one hundred and twenty days. Law also authorises the courts to grant bail if the trial cannot be concluded within one hundred and eighty days in case of Magistrate and three hundred and sixty days in case of Sessions Judges.

There is nothing like too long detention to justify release of any accused. Long detention may serve as a mitigating circumstance and the judge may take a lenient view in determining the punishment proposed to be given. And a recent law has authorised the court to deduct the time of pre-trial detention from the total sentence awarded. In another recent law entitled- "Speedy Trial Tribunal Act, 2002", 90 days are fixed for disposal of cases transferred to such tribunal for trial. In case of failure Tribunal is required to report to the Supreme Court with a copy to the Government the reason of such failure for a further extension of time. There may be two such extensions of 30 days and 15 days for disposal of the case. In an unavoidable case of difficulty tribunal would be competent to send back the case to the court from which it was sent to the Tribunal for disposal. But in this Act also there is no specific provision of law making an accused entitled to release merely on account of delay in trial or investigation.

## RIGHTS corner



### International Declaration of Health Rights

We as people concerned about health improvement in the world do hereby commit ourselves to advocacy and action to promote the health rights of all human beings.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being. It is not a privilege reserved for those with power, money, or social standing.

Health is more than the absence of disease, but includes prevention of illness, development of individual potential, a positive sense of physical, mental and social well being.

Health care should be based on dialogue and collaboration between citizens, professionals, communities and policy makers. Health services should be affordable, accessible, effective, efficient and convenient.

Health begins with healthy development of the child and a positive family environment. Health must be sustained by the active role of men and women in health and development. The role of women and their welfare must be recognized and addressed.

Health care for the elderly should preserve dignity, respect and concern for quality of life and not merely extend life.

Health requires a sustainable environment with balanced human population growth and preservation of cultural diversity.

Health depends on the availability to all people of basic essentials: Food, safe water, housing, education, productive employment, protection from pollution and prevention of social alienation.

Health depends on protection from exploitation without distinction of race, religion, political belief, economic or social condition.

Health requires peaceful and equitable development and collaboration of all peoples.

Source: Johns Hopkins School of Public Health, Baltimore, MD, USA.

## LAWSCAPE



An elderly patient needed a heart transplant and discussed his options with his doctor. The doctor said, "We have three possible donors, tell me which one you want to use. One is a young, healthy athlete who died in an automobile accident. The second one is a middle-aged businessman who never drank or smoked who died in his private plane. The third one is an attorney who just died after practising law for thirty years."

"I will take the lawyer's heart," said the patient.

After a successful transplant, the doctor asked the patient why he had chosen the donor.

"It was easy," the patient replied, "I wanted a heart that hadn't been used."

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Two lawyers walking through the woods spotted a vicious-looking bear. The first lawyer immediately opened his briefcase, pulled out a pair of sneakers and started putting them on.

The second lawyer looked at him and said, "You're crazy! You'll never be able to outrun that bear!"

"I don't have to," the first lawyer replied, "I only have to outrun you."

### Corresponding with the 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 <dsldeskw@yahoo.co.uk>

## LAW week



### Judge Shahidur axed

Additional Judge of the High Court Division Syed Shahidur Rahman was removed from office on 18th April in the first ever verdict of the Supreme Judicial Council on a judge's gross misconduct. President Iajuddin Ahmed signed the removal of Shahidur, charged with taking Tk 50,000 in bribe to fix bail for an accused in a women repression case. Prime Minister Khaleda Zia on April 18 approved the presidential note. Former chief justice KM Hasan, who headed the three-member council, handed over the verdict report to the president on his last day in office for action against the judge. The first-ever council opened an investigation into the misconduct of Shahidur after Supreme Court Bar Association President Rokonuddin Mahmud on October 15 last year came up with the allegation. Meanwhile protesting his removal, Syed Shahidur Rahman will file a writ petition in two weeks to challenge the order as he told the newspaper on 21st April Wednesday, a day after receiving his dismissal order for misconduct. Mr. Shahidur rejected the council report and the removal decision terming them as 'flawed, unfair and illegal'. -The Daily Star 22nd April.

### Builders caught in lawsuits

Rajdhani Unnayan Kartripakshsha (Rajuk), the city planning authority of Dhaka, is in a dilemma with thousands of lawsuits that render its initiatives to contain building code violations ineffective. Rajuk Chairman Iqbal Uddin Chowdhury said building code violations are so wide and varied that it has become well nigh impossible for Rajuk inspectors to find a single building in the metropolis free of the fault. In most cases, building code violators get away with their acts by seeking and getting stay orders from courts on Rajuk interventions. For example, recently, Rajuk cancelled the plan of a building in Lalmaatia for a number of building code violations and took measures to demolish the structure. The developer went to a court and obtained an order to maintain the status quo invalidating the Rajuk initiative and continued with construction of the six-storey house. As many as 5,000 such cases are pending with different law courts, said a Rajuk official. -The Daily Star, 22nd April.

### Magistrate violates law

A magistrate yesterday violated a Dhaka Metropolitan Police (DMP) ordinance by sentencing 62 women, arrested ahead of the Awami League's Hawa Bhaban siege programme, to three-day imprisonment before the police took them to court. As per the

ordinance, every arrestee has to be produced before a court to defend oneself and the judge is to ask whether he or she pleads guilty or not. The magistrate yesterday failed to follow that provision. The 62 women were punished with imprisonment along with a fine of Tk 50 each, in default of which they would be confined for an additional two days. The breach of the ordinance by the magistrate prompted anger among the lawyers, relatives of the accused and others present in the court, who shouted protests and questioned the validity of the ruling. -The Daily Star, 22nd April.

### Ershad Sikdar to be hanged

The authorities have decided to hang notorious criminal Ershad Shikdar on May 10 after his mercy petition was turned down by President Iajuddin Ahmed. Khulna Jail Superintendent Farhad Mia fixed the date in accordance with section 6 of the jail code after being officially informed about the president's decision. Ershad Shikdar was given the death penalty by a Khulna court on April 30, 2000, for murdering Jubo League leader Khalid Hossain. The High Court Division upheld the judgement of the Khulna special court and the Appellate Division also dismissed a subsequent review petition on March 21. On April 9, Ershad petitioned the president to commute the death sentence to life imprisonment, but the president also rejected the petition. -Prothom Alo, 21st April.

### Govt faces contempt charge

The government faces contempt of court proceedings for violating the Supreme Court (SC)'s directives on separation of judiciary. On 17 April, The SC set 19 April for hearing a contempt petition filed by Chowdhury Monir Uddin Mahfuz, Chairman of Khulna and Barisal division labour court. Secretaries of law, establishment and finance ministries were made respondents in the petition. After a brief hearing on the matter Chamber Judge Tafazzal Islam, passed the order for hearing the petition before the full court. The petitioner specified three major grounds for drawing contempt proceedings. They are: (1) The manner the government constituted the Judicial Service Commission (JSC) for the purpose of recruitment of judges flagrantly violates the SC directives given in the Mazder Hossain case in December 1999; (2) The government by constituting the JSC purports to place judicial service on a par with the civil executive/administrative service and to amalgamate, replace, mix up and tie together with the civil executive/administration services, which is prohibited by the directives; and (3)

The JSC was formed with majority civil executive/administrative officials ignoring the directives, which is a mala fide device to control the judges. -The Daily Star, 18 April 2004

### Rule on govt for accusing a 3-year-old kid

The High Court Division on 17 April issued suo moto rule asking the government to show cause within April 24 why the proceeding of the criminal case against the three-year old child Iman Ali, son of Anwar Ali, should not be quashed. The court directed the Chief Metropolitan Magistrate, Dhaka, to send the record of the case to the High Court Division before April 24 positively. A division bench comprising Justice Nazmun Ara Sultana and Justice A K M Asaduzzaman passed the order. As per Section 82 of the Bangladesh Penal Code implicating a child below seven years of age in a criminal case is illegal since nothing is an offence which is done by a child under seven years. The concerned police officer has acted beyond his jurisdiction and committed illegality in accepting and registering a criminal case against a child of three years, the High Court said in the order. The rule was issued upon the Secretary, Ministry of Home Affairs, District Magistrate and Deputy Commissioner, Dhaka, Chief Metropolitan Magistrate, Dhaka, Officer-in-Charge of (concerned) police station. -News Today, 18 April 2004.

### EU rules on GM food

The new European Union rules on labelling and tracing genetically modified (GM) foods came into force on Sunday, in what could pave the way towards lifting a five-year EU ban on bio-engineered crops. Consumer Rights and Environmental Groups have welcomed the rules, officially adopted last July, which requires food and animal feed to be labelled if they contain at least 0.9 percent of GM ingredients. Producers and buyers must also store all data about the origin, composition and sale of GM products for a five-year period, which Brussels describes as the toughest GM food regulations anywhere in the world. Environmentalists have welcomed the measures as a chance for consumers to express their opposition to GM foods. "Although imperfect, the laws will enable people to reject this experiment (with GM foods) once and for all. According to Geert Ritsema, of the Friends of the Earth pressure group. -AFP, Brussels, 19th April.

## CRIME & Punishment



## On being hurt



Hurting someone is a criminal offence. Sections 319 to 338 A of the Penal Code 1860 deal with hurt. Hurt usually means causing physical injury or pain. It can be divided by simple hurt and grievous hurt.

According to section 319 whoever causing bodily pain, disease or infirmity to any person is said to cause hurt. Severe bodily pain will fall within the definition, no matter whatever may be the duration of such pain. Even hurt need not to be caused by direct physical contact between the accused and the victim. Serious mental derangement by causing shock also amounts to hurt. Where, the accused with intent to frighten victim, presented himself in a sudden and horrified manner, in that case intention to cause hurt can be presumed (AIR 1944 Sind 19).

Section 320 defines "grievous hurt". Only eight kinds of injuries, which have been specifically stated in this section, will be considered as grievous hurt. These classifications are:

Firstly. Emasculation

Secondly. Permanent privation of the sight of either eye

Thirdly. Permanent privation of the hearing of either ear

Fourthly. Privation of any member or joint

Fifthly. Destruction or permanent impairing of the powers of any member or joint

Sixthly. Permanent disfigurement of the head or face

Seventhly. Fracture or dislocation of a bone or tooth

Eighthly. Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Injury to the nerves is not covered by any one of these eight conditions, which are necessary in order to designate a hurt as grievous (PLD 1960 WP Lahore). Penal Code also defined voluntarily causing hurt. Here nature of the act is important and "Intention" is a necessary ingredient

### Punishments of hurt

Different kind of punishments has been fixed by the Penal Code for the offence of hurt. It depends on the grievousness of the act done by the accused. The range of punishment can be one month to life term imprisonment and will also be liable for fine, which may be at least five hundred taka or above, or with both.

Where hurt is caused by anybody to deter public servant from his duty or in consequences of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant shall be punished with imprisonment for a term which may extend from three years to ten years and also shall be liable for fine (section 332).

A new section has been inserted in 1984 where death sentence may be applied for voluntarily causing grievous hurt in respect of both eyes, head or face by means of corrosive substances. This section has been inserted mainly because there is a menace of acid throwing throughout the country, so the legislation has been made to meet the seriousness of the offence and to curb the crime.