COURT *corridor*

The story of an exemplary judgment

SHARIN SHAJAHAN NAOMI

ONE of the findings of my study 'Legal challenges on the way to get remedy in rape case' is that our judges are demanding and strict about the circumstantial evidence and corroboration in rape cases. The study also shows how the witnesses get intimidated and provoked by the accused and give contradictory statements in the court which ultimately go against the victim and her desired remedy. Thus, the defence lawyer is able to influence the judge's mind quite successfully.

It is to be considered that rape is a crime of very sensitive nature. Usually, a rape keeps no witness. Even after the commission, a raped woman remains very reluctant to disclose the incident. In this circumstance, it becomes very difficult for the prosecution to prove a rape through corroboration.

The international legal standard set by Amnesty International contains the provision that testimony of raped women should not be put at the mercy of the corroboration of other witnesses. Indian courts, in a number of judgments, expressed a pragmatic view on rape incidents. In Bharwada Bhong Hirjibhai Vs State of Gujrat, AIR 1983, SC 753; 1983 CRLJ 1096, it was held that the statement of the raped victim can be regarded as true because in our conservative society a girl hardly comes forward to bring allegation of rape voluntarily and face the embarrassing court procedure of examination and other complicated matters.

Bangladesh High Court has also taken the same view in a number of cases - 51 DLR 1999, 154; 54 DLR , 2002, 114. In England also change has been brought in 1994 discouraging the need for corroboration in rape cases. Though, none of the above changes in legal attitude is suggesting a judge to give up his contention of beyond reasonable doubt.

Despite having legal contentions for not clinging to corroboration in rape cases, in my case studies I found the strong demand of corroboration in our tribunals (Nari o Sishu) and the contradictory statements of the witness being allured by the offer of the accused play a major role in acquitting the accused in rape case. As a result, rape becomes a crime having least conviction rate.

Amidst such disappointing trend, the judgment of the special tribunal of Mymensingh on Rokeya Vs Holud Mia and Shahjahan Ali illuminates as an example of justice and conscience and ray of hope of changing attitude in our legal domain. Before going into the judgment, the background story needs to be unfolded for better perception of the entire scenario.

In 2004, in the month of June, 7 years old girl Rokeya got brutally raped by Holud Mia and Shahjahan Ali in Mrigali village of Isshorganj, Mymensingh. After the occurrence, Rokeya returned home crying and fainted. When she got back to consciousness, she narrated the story to her mother and other neighbours. She was taken to Mymensingh hospital at night. When BRAC staff came to know about the incident, they immediately went to the hospital and found Rokeya in a very critical condition.

Local newspaper narrated the story as -- 'She was fighting with death. Her whole body was injured with the bite of the rapists. Stitches had been given in her private organ. Still bleeding could not be stopped. Even blood was coming out from mouth.' (from BRAC HRLS file on Rokeya case). Prothom Alo reported the crime on 14-6-2004: 'A raped child from Issorganj has been sent to Dhaka in critical condition'. Rokeya's uterus was cut off and it took her a long time to recover from mental trauma. She was kept in the custody of ASK for her security.

When the case was going on, the accused left no stone unturned to manipulate the normal flow of the case. First, they influenced Rokeya's father to withdraw the case offering land, money and the assurance of marriage with the accused. Rokeya's father succumbed to the offer and tried to convince Rokeya to do the same.

But the staff of BRAC and ASK took a stern position to prevent such unexpected happening. Rokeya's father filed a case against programme officer Nilu of BRAC's legal aid and another staff of ASK for getting back the custody of Rokeya. That also didn't work as ASK successfully managed an injunction to prevent such order. But the accused side continued to threat BRAC's programme officer Nilu, and Nilu had to keep off her office for some time because of that.

In all my case studies, the investigating police officer and public prosecutor were found non cooperative in assisting the victim. But in Rokeya case, public prosecutor Torikul Islam and investigation officer Shawkat Ali were exceptional. When BRAC's staff lawyer was running from here to there to find out the doctors who examined Rokeya (by the time summon was issued to bring the doctors before the court for giving evidence, both the doctors were transferred from Mymensingh), the investigation officer came forward. His wife was a doctor and she helped to find out the present address of both the doctors. But the problem arose when the doctor (who gave seal on the medical legal report) went for training in the USA. The public prosecutor approached the judge narrating the matter and requested to issue another summon for the doctor who was present at the time of examination. The judge considering the practical limitations, issued another summon for that doctor who could appear before the court.

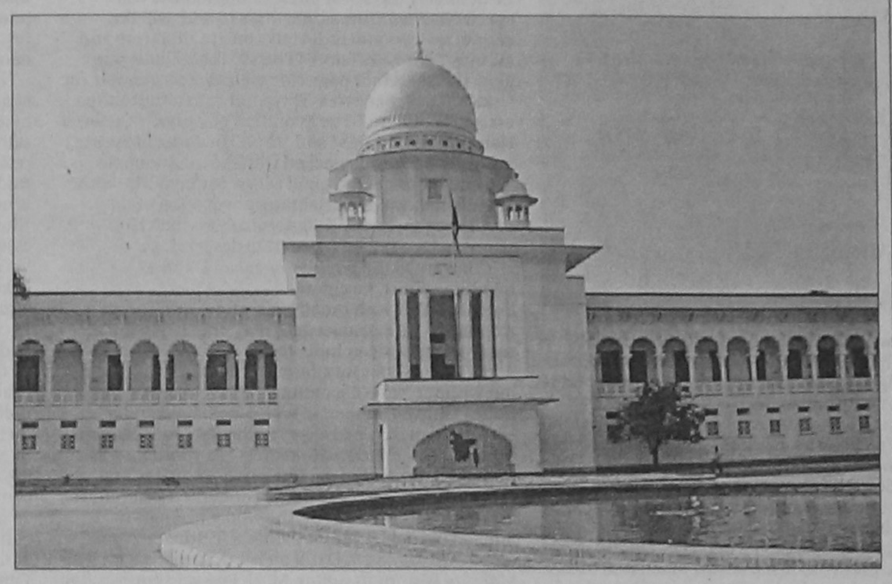
The witnesses of the prosecution side were intimidated and persuaded by the side of the accused and they started to give contradictory statements during the time of examination. The defence lawyer's strategy was very clearl about the two accused: Holud Mia (who was shown under 16 years, hence was treated as juvenile) was planned to be sent to juvenile development centre instead of having any punishment and Shahjahan Mia was to be acquitted taking the benefit of doubt of the contradictory statements of the witnesses.

Prosecution lawyer brought 9 witnesses to prove the case. Among them 2 were the doctors and the investigation officer who could only tell about the incident of rape but not about the rapists. Of the rest six witnesses, five created serious doubt about Shahjahan Mia's involvement in the commission of rape. Another witness, Rokeya's mother, was not so firm about Shahjahan Mia's involvement. Only Rokeya was firm about the involvement of both the accused.

In this regard, there was a strong apprehension that all the efforts and struggle for justice could be in vain if the defence lawyer's strategy would be implemented.

At this moment, public prosecutor and panel lawyer (private lawyer of BRAC) in coordination with Human Rights and Legal Aid Programme of BRAC (head office) opted to rely on legal literature for justice.

The book written by Dr. Shahdeen Malik on juvenile delinquency was submitted before the court insisting on Section 51 of the Children Act 1974 that a juvenile can be given life time imprisonment considering the nature of the crime. Prosecution lawyers very



strongly focused on the point that Rokeya's uterus had been cut off, she could not be a mother in life and she had also lost the normal balance.

Public prosecutor brought into attention the judgments of Bangladeshi court and Indian court regarding the issue of the statement of the victims (54 DLR, 2002, 114, 22 BLD HCD, 2002, 621; 8 MLR (HC), 2003, 252; 8 MLR, HC, 2003, 275 ; AIR, 1951 Mad 760; AIR 1983, SC 753; 1983 CRLJ 1096; AIR 1990, SC 658 ; 51 DLR 1999, 154; 54 DLR, 2002) where it has been told again and again that rape is such a crime where the best witness is the rape victim herself. If a rape victim can give statement of her rape and the commission of the rape by the accused is proved beyond reasonable doubt, judge can give verdict in favour of the victim.

The prosecution lawyers further added how Rokeya was resolutely consistent on her statements in FIR, statement under 161 of CRPC, statement under 164 of CRPC and at the time of examination in the court. She was doubtless on the issue of time and occurrence of the incident and the fact that both the accused raped her.

On 24 June, a ground-breaking judgment came from the Nari o Sishu Nirjaton Daman Tribunal of Mymensingh. In the judgment, the honourable judge mentioned - 'Rape is such a crime where no eye witness remains. In rape case, victim is the best witness'.

The court mentioned the following cases -

'It is settled in principle that in a case of sexual offence, there is no legal bar in believing the sole testimony of the prosecutrix 'if it is found to be reliable and worthy of credence.' (Delower Hossian and Ali Hossian Bhuiyan Vs The State, 54 DLR, 2002, HCD; 621, 8 MLR. HC, 2003, 252). 'Corroborative evidence is not an imperative component in every case of rape' (Shibu Pada Acharjee Vs the state, 8 MLR, HC, 2003, 275). In a case Soosalal Bania Vs Emperor (AIR 1925, Nag 74) it has been held that 'in the case of rape on an innocent girl of tender age, her evidence is of great value', especially the case 'Re. Boya Chinnappa AIR, 1951 Mad 760' again emphasized the fact telling that 'where a girl of immature years has been raped and has made disclosure of the rape at the earliest possible opportunity to her mother and another, the court will not insist upon independent testimony connecting the accused with the crime when she makes a statement immediately after the occasion'. The court mentioned how Rokeya disclosed the fact after the occurrence of the crime and her consistency in all the statements.

The honourable court took into consideration the heinous nature of the crime committed by juvenile delinquent Holud Mia and hence decided to resort to the provision 51 of the Children Act 1974 regarding life time imprisonment of the juvenile delinquent.

The court ended the judgment stating 'The case has been proved beyond reasonable doubt under 9 (3) of Nari O Sishu Nirjaton Daman Ain. Both the accused have done inhuman, barbaric offence and such crime is beyond forgiveness. Considering the age of the accused people, instead of giving death penalty to the accused, life time imprisonment has been given.' The court also charged extra compensation against the accused and half of that to be given to the victim.

The judgment itself proves the existence of rule of law in our country and strikes the manipulative efforts of the accused down. This case opens a new door in our legal jurisprudence regarding the issue of corroboration. Especially, it is an exemplary judgment before the other courts who put too much reliance on corroboration of the statements of rape victims.

The motive of narrating a long background story behind the judgment is to congratulate the public prosecutor and the investigation officer and of course the honourable court for proving their dedication to truth and justice going beyond usual lingering practice of the court. The story also gives the message that a good coordination between the legal aid NGOs and state components can ensure justice.

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FOR YOUR *information*

Stop executions of juvenile offenders

ENDING executions for crimes committed by children in just five countries would result in universal implementation of the prohibition on the juvenile death penalty, Human Rights Watch said in a report released today. Governments should use next week's United Nations General Assembly session opening to commit to urgently needed reforms to protect the rights of children in conflict with the law.

In the 20-page report, "The Last Holdouts: Ending the Juvenile Death Penalty in Iran, Saudi Arabia, Sudan, Pakistan, and Yemen," Human Rights Watch documents failures in law and practice that since January 2005 have resulted in 32 executions of juvenile offenders in five countries: Iran (26), Saudi Arabia (2), Sudan (2), Pakistan (1), and Yemen (1). The report also highlights cases of individuals recently executed or facing execution in the five countries, where well over 100 juvenile offenders are currently on death row, awaiting the outcome of a judicial appeal, or in some murder cases, the outcome of negotiations for pardons in exchange for financial compensation.

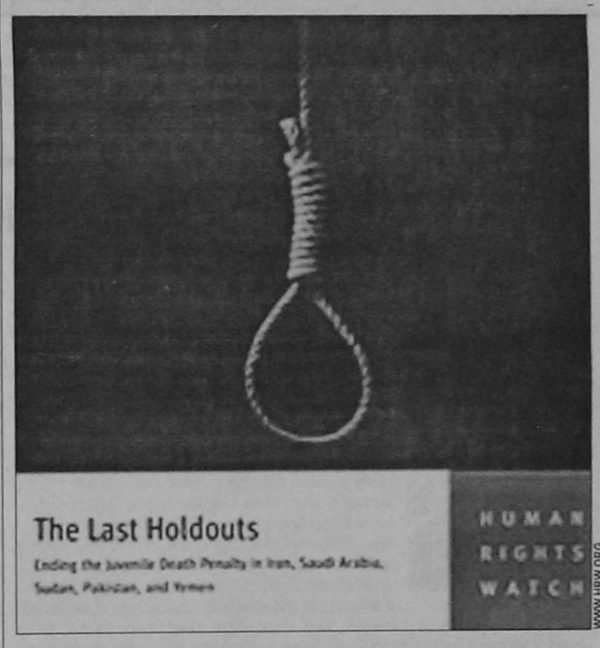
"We are only five states away from a complete ban on the juvenile death penalty," said Clarisa Bencomo, Middle East children's rights researcher for Human Rights Watch. "These few holdouts should abandon this barbaric practice so that no one ever again is executed for a crime committed as a child."

Every state in the world has ratified or acceded to treaties obligating them to ensure that juvenile offenders persons under 18 at the time of the crime are never sentenced to death. The overwhelming majority of states complies with this obligation, with several states including the United States and China in recent years moving to ban the juvenile death penalty and strengthen juvenile justice protections.

The vast majority of executions of juvenile offenders take place in Iran, where judges can impose the death penalty in capital cases if the defendant has attained "majority," defined in Iranian law as 9 years for girls and 15 years for boys. Iran is known to have executed six juvenile offenders so far in 2008, including two in August: Behnam Zare on August 26, 2008, and Seyyed Reza Hejazi on August 19, 2008. Over 130 other juvenile offenders are currently sentenced to death.

In Saudi Arabia judges have discretion to impose the death sentence on children from puberty or 15 years whichever comes first. Saudi Arabia executed at least two juvenile offenders in 2007: Dhahiyan bin Rakan bin Sa'd al-Thawri al-Sibai'i on July 21, 2007, and Mu'id bin Husayn bin Abu al-Qasim bin 'Ali Hakami on July 10, 2007. Hakami was only 13 years old at the time of the alleged crime, and 15 at the time of his execution. According to his father, Saudi authorities did not inform the family of the execution until days later, and did not return boy's body.

In Sudan, the 2005 Interim National Constitution allows for the



juvenile death penalty for certain crimes, including murder and armed robbery resulting in murder or rape. Vague language in Sudan's 2004 Child Law leaves open the possibility that children can still be sentenced to death under the 1991 Penal Code, which defines an adult as "a person whose puberty has been established by definite natural features and who has completed 15 years of age ... [or] attained 18 years of age ... even if the features of puberty do not appear." With more than 35 percent of Sudanese births not registered, even very young juvenile offenders can face execution because they have no birth certificates to prove their age at the time of the offense. Sudan executed two juvenile offenders, Mohammed Jamal Gesmallah and Imad Ali Abdullah, on August 31, 2005, and has sentenced at least four other juvenile offenders to death since January 2005.

In Pakistan, the Juvenile Justice System Ordinance of 2000 bans the death penalty for crimes committed by persons under 18 at the time of the offense, but authorities have yet to implement it in all territories. With only 29.5 percent of births registered, juvenile offenders can find it impossible to convince a judge they were children at the time of the crime. Pakistan executed one such juvenile offender, Mutabar Khan, on June 13, 2006.

In Yemen, the Penal Code sets a maximum 10-year sentence for capital crimes committed by persons under 18, but in a country with only 22 percent of births registered and minimal capacity for forensic age determinations, children can find it impossible to prove their age at the time of the crime. Yemen last executed a juvenile offender, Adil Muhammad Saif al-Ma'amari, in February 2007, despite his allegation that he was 16 at the time of the crime and had been tortured to confess. According to nongovernmental organizations and government sources, in 2007 at least 18 other juvenile offenders were on death row.

"Even states that still execute juvenile offenders acknowledge that such executions are wrong," said Bencomo. "But changes in law and practice need to be faster."

In the coming weeks the United Nations secretary-general will report back to the UN General Assembly on follow-up to the latter's ground-breaking December 2007 resolution calling for a moratorium on the death penalty for all crimes. Human Right Watch calls on UN member states to request that the secretary-general issue a similar report on compliance with the absolute ban on the juvenile death penalty, including information on:

1. The number of juvenile offenders currently sentenced to death, and the number executed during the last five years;
2. Rates of birth registration; and
3. States' implementation of relevant domestic legislation, including mechanisms ensuring juvenile offenders have legal assistance at all stages of investigation and trial.

Source: Human Rights Watch.

LAW *opinion*

Independence of judiciary and reality

NAJMUL HASAN

TO ensure absolute independence of the judiciary England had to fight a long and sustained battle and it was not until 1701 that she was able to achieve that object. On March, 23, 1954 Sir Winston Churchill said to the Judges, "There is nothing like them at all in our England. They are appointed for life. They cannot be dismissed by the Executive Government. They have to interpret the law according to their learning and consciences."

About the salary of judges it is recognised in England that it should be such that they should be able to maintain a way of life befitting the gravity of the duties they have to discharge. They are at present the highest paid officials in England except the Prime Minister and a few others. Lord Denning said, "Such is the price which England readily pays so is to ensure that the Bench shall command the finest character and the best brains, that we can produce".

In the words of Sydney Smith, "Nations fall when the Judges are unjust because there is nothing which the multitude think worth defending but Nations do not fall which are treated as we are treated."

If we cherish the independence, efficiency and impartiality of our Judiciary as the people do in England, we should see to it that the judges are better paid, that they are able to work so long as they are fit, that their salary and pension are increased and that they have nothing to look forward to at the hand of the government either in the course of their service or after their retirement. The service, promotion and appointment of the Judges should be made immune from the action of the government and their service, promotion, salary etc. should not be in the hand of the executive and the government so that the government or any other quarters cannot exert any influence upon the judges.

All political parties, specially while in the opposition, shout for rule of law and independence of the judiciary. In all political movements the demand for rule of law and independence of the judiciary was one of the main slogans in our country and yet the rule of law and complete independence of the judiciary could not be achieved. One of the main slogans of the political party in power was "Rule of law and for the independence of judiciary" and still the same has not been fully achieved and established even after passing of 37 years of independence.

The parties, in the opposition, in full throat shouted for rule of law and for independence of the judiciary but while they were in power they did exactly the opposite. They did not make any efforts for establishing "rule of law and independence of the judiciary" rather they tried to make judiciary subservient to the Executive and the government and to that end they did not hesitate to amend the constitution from time to time to suit their purpose.

The first major encroachment upon the inde-

pendence of the judiciary and to make it subservient to the executive was made by the 4th Amendment of the Constitution. The power of impeachment of the judges was taken away form Parliament, and the President was vested with the sole authority to remove judge of the supreme court without any charge, notice or show cause.

That was the first blow upon the "Rule of Law and the Independence of the Judiciary" immediately after independence. Thereafter, from 1982 to 1990, attempts were made to weaken the Judiciary further and to make it subservient to the Executive by eight amendment and bifurcation of the High Court Division of the Supreme Court of Bangladesh.

During the last regime and the government preceding the present one, perhaps the cruelest blow was inflicted upon the Judiciary when four senior most eminent Judges of the Supreme Court of Bangladesh were removed arbitrarily.

The aforesaid removal of the senior most judges including the chief justice shall always remain as the most naked act of encroachment upon the rule of law and the independence of the judiciary.

Even under those unfavourable conditions judges of the Supreme Court made their utmost to uphold the dignity and independence of the judiciary. Subsequently it was the Supreme Court of Bangladesh which restored back its power, authority, jurisdiction and independence to a great extent by its unparallel historic judgment declaring the 8th Amendment to the Constitution in relation to the bifurcation of the High Court Division and curtailing of its overall jurisdiction over all the territorial jurisdiction of Bangladesh as illegal, un constitutional and void.

Till date the reasons for the removal of the affronted senior eminent judges of the Supreme Court form their office are not known. These eminent judges were not only removed form service most illegally and arbitrarily in flagrant violation of all norms, ethics and principles, they were as well restrained from practicing law for their livelihood and were refused any compensation or pension whatsoever, except Chief Justice Kemaluddin Hossain who was given pension.

One of the four judges, Justice S M Hussain, could not absorb the shock of his illegal removal form service and died of cardiac failure, leaving behind his widow and minor children penniless and without any shelter. It is shocking that till today nothing worthwhile has been done to compensate and redress the family of that eminent, dedicated judge and other three judges of the supreme court of Bangladesh.

Justice S M Hussain became a victim of the past regime, along with other three eminent judges, for their uncompromising and unflinching judicial temperament and relentless endeavour and efforts to establish rule of law and safeguard independence of the judiciary. Many years have passed since my respected teacher Justice S M Hussain has died in agony and helplessness in his tormented mind but we the lawyers and officers of the court will never forget him and the names of Justice S M Hussain, Justice Abdur Rahman Chowdhury and Justice K M Sobhan will always be remembered.

It is now quite evident that the political parties always shout for "rule of law and independence of the judiciary" not for the sake of the judiciary but to achieve their political objective and to give impetus and momentum to their criticism and movement against the party in power.

Now it is high time that the slogan needs to be raised by all lawyers irrespective of cast creed and political affiliation unanimously (not by politicians) to achieve rule of law and the independence of the judiciary in the country.

As referred to in the historic 8th Amendment case judgment that independence of judiciary is not an abstract concept. The reference given therein where Judge Vagabati said "If there is one principle which runs through the entire fabric of the constitution it is the principle of the rule of law and under the constitution it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective". He said that the judges must uphold the core principle of the rule of law, which says "be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy and maintenance of the rule of law as dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the constitution.

The writer is an Advocate, Supreme Court and former General Secretary, Bangladesh Ainjibi (lawyers') Federation.