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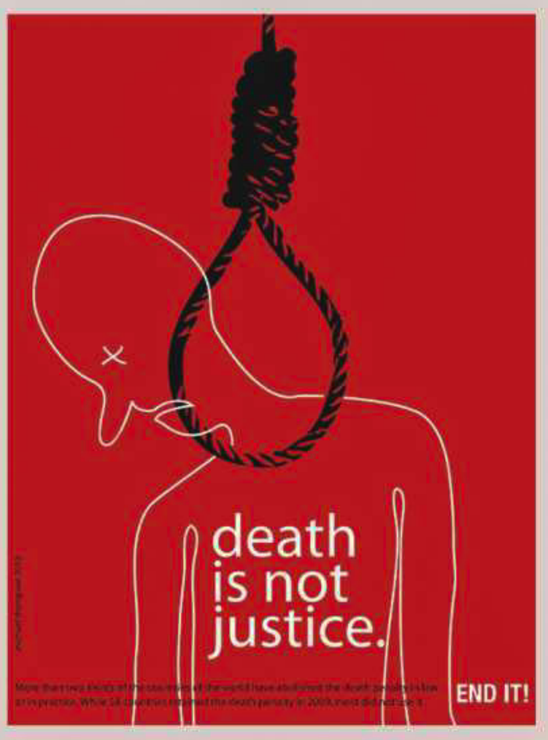
REVIEWING THE VIEWS

Unconstitutionality of mandatory death penalty

MOHAMMAD GOLAM SARWAR

AMIDST of debate over the abolition of death penalty around the world, the higher judiciary in Bangladesh has come with a milestone judgement declaring mandatory death penalty unconstitutional. This judgement was pronounced in an appeal arising out of a Writ petition jointly filed by the Bangladesh Legal Aid and Services Trust (BLAST) and Shukkur Ali, a convict who was sentenced to death under the Nari o Shishu Nirjaton (Bisesh Bidhan) Ain 1995.

The Appellate Division of the Supreme Court declared section 6(2) (3) (4) of the Nari O Shishu Nirjaton (Bisesh Bidhan) Ain 1995 and section 34(2) of the Nari o Shishu Nirjaton (Bisesh Bidhan) Ain 2000 unconstitutional because they prescribe a mandatory death penalty for the offence of causing death after rape. The aforesaid sections were challenged as they violate Articles 7(Supremacy of the Constitution), 26 (Laws inconsistent with fundamental rights to be void), 27(equality before law), 31(right to equal protection of law), 32 (right to life) and 35 (Prohibition on cruel and degrading treatment or punishment) of the Constitution. The provisions were also questioned as it did not keep any scope of exercising the power of judicial discretions in awarding sentence. The judgement was delivered by the Hon'ble Chief Justice of Bangladesh Mr, Justice Surendra Kumar Sinha presiding over a bench comprising Justice Nazmun Ara Sultana, Justice Syed Mahmud Hossain and Justice Hasan Foez Siddique.



The judgment has some dynamic features. Firstly, it widens the scope of judicial discretions. For curtailment of such power may result into injustice. The constitution has guaranteed right to life and that can only be taken away through the due process of law. Due process of law not only includes law making process but also involves procedural protections with a view to ensuring fair trial and justice. By virtue of the device of due process of law, the judges can exercise their judicial minds in order to check unfairness and arbitrariness in judicial proceedings. Considering this, the Hon'ble judges in the aforesaid judgement ruled out the absence of judicial power of discretions in awarding sentence.

Secondly, the judgment carries few elements of rule of law which need to be emphasised in terms of law making process. For example, if we look at Article 31 of the Constitution, then we see that the Article not only guarantees equal protection of law but also imposes limitation on the power of parliament in the enactment of laws. Similarly, Article 7 and 26 works as safeguards against arbitrary law making process.

The Articles oblige the parliament to make reasonable laws. The judgment will make the lawmakers more cautious in maintaining reasonableness and rationality of law.

Thirdly, It reminds again that imposition of harsher punishment is not the sole way of ensuring justice and mitigating crime rate rather in some cases it disregards the standard of procedural fairness. The imposition of rigid penalty can impact negatively on the efficiency of courts and make sentencing less transparent.

Whereas the criminal cases in Bangladesh rarely see conviction, the imposition of harsher punishment can impact negatively on the offenders. While the offenders got the sense that the punishment is certain and the discretion of judges is limited then they might engage in committing crime out of vengeance and show disrespect towards the law.

Finally, this judgment secures the right to freedom from torture or cruel, inhuman or degrading treatment or punishment which clearly reflects the urge of the judiciary to close the gap between international and national standards of ensuring fair trial.

By declaring mandatory death penalty unconstitutional the judiciary has enriched the jurisprudence of punishment theory which is something new in the Bangladeshi context. It reminds us again that right to life necessarily includes right to respect for life.

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FOR YOUR INFORMATION

Relief against failure to file case

RAISUL ISLAM SOURAV

OFTEN people alleged that police is reluctant to take Ezahar or First Information Report (FIR) in police station for various reasons. If the concerned officer of a police station had denied receiving the case then the informant can file complaint case to the judicial magistrate straightly instead of filing the case to police station to get redress.

However, one can lodge a complaint case to the judicial magistrate court directly in case of a non-cognizable offence. Non-cognizable offences are those type of offences for which police cannot arrest an accused without warrant and for which police need to take prior permission from magistrate to investigate the matter as well and cognizable offence is the vice versa. If anybody brings information regarding the commission of a non-cognizable offence to the police station then the duty officer will take the matter as a General Diary (GD) and send the person to any of the following concerns, Chief Metropolitan Magistrate, Metropolitan Magistrate, Chief Judicial Magistrate, 1st class Magistrate or Specially empowered Magistrate depending upon the place of occurrence along with the GD.

Processes to lodge a complaint to the magistrate: The complainant should be in details including i) name and address of the accused, if known; ii) approximate time, date and place of occurrence; iii) enough description about suspect offenders; iv) sequential narration of every activity of the perpetrators v) present condition of the victim, vi) subsequent circumstances; vii) name of the witnesses, if any; viii) any previous linkage, history or threat to commit the offence; ix) types of injury, list of lost properties or other damage; x) reason of delay to file the complaint, if happened, xi) corroborate fact by witness, if possible etc.

Then the magistrate will administer an oath of the complainant and the witnesses, if any. Subsequently, the magistrate will testify them to about the real prospect of occurrence of the incident. At the end, the magistrate will record the matter and take their signatures on it. If it is proved latter that the complaint was fake, frivolous or vexatious then the complainant will be prosecuted by that magistrate.

Nonetheless, if any applicants file an application by mentioning the above matters in writing on white paper then the application will be granted instantly and there is no other formality to examine him on the fact. After taking cognizance of such complaint the court will record it in register and put a complaint registered case number on it. Hence it is also called as Complaint Registered (CR) case.

Oppositely, if the magistrate is not satisfied with the evidences produced before him or if the informant is failed to establish prima facie of his allegation then the court can dismiss such an application. However, the applicant can file a revision application to the Sessions Judge Court or in the High Court Division (HCD) within sixty days to get remedy against that decision.

Consequences of taking cognizance: After taking cognizance the concerned magistrate can serve summons to the accused to appear before it to defend the allegations. Alternatively, it may issue warrant to arrest. If the matter is involved with commission of a cognizable offence then the magistrate can direct the police to take the matter as a FIR. After getting such an order the police will record the matter as an Ezahar and initiate other necessary actions immediately.

On the other hand, if it is a non-cognizable matter then the magistrate may order the police to investigate the truth of the allegation. In that case the police will have same power as cognizable offence while investigating the matter. After completion of the investigation, police can submit final report due to lack of actuality of the fact.

The informant can file naraji petition against such final report or can apply for further investigation if they are not satisfied. However, the magistrate himself can inquire to testify the matter or may direct to conduct such judicial inquiry by his subordinate officer for further information.

It should be kept in mind that State will not involve in complaint registered case at initial stage. State may be involved after getting direction from the court to take the matter as an Ezahar.

Hence, one should not get worried when police refuses to take cases. Law opens alternative door to seek justice in magistrate court. This provision confines police's sole power and provides relief against their arbitrary act.

In reality, most of the poor, powerless and illiterate litigants are not always be able to supersede the police and take shelter of magistrate court due to many obstacles. So, the State should take proper steps to create more accessible justice system and also create awareness about one's legal rights.

THE WRITER IS AN ADVOCATE AT SUPREME COURT OF BANGLADESH .

LAW WATCH

Insufficiency on witness protection

ATWAR RAHMAN & MOHAMMAD MAHDY HASSAN

THE protection of witnesses plays a key role in the successful functioning of the Court. But unfortunately in our country, the trend is such that the witnesses do not wish to come to the courts to give their statements and evidences as they feel unsafe. In this situation, the Court has a duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of witnesses.

Generally in the occurrence of rape, it is difficult to get eye witness as it mostly takes place in closed rooms or in secret places. In this situation, the testimony of a victim is the best and the only evidence that can be obtained by the prosecution against the accused. But witnesses are reluctant to appear before the court fearing their life and property. As a result, cases of such crimes of heinous nature are resulting in acquittals of criminals in most of the cases.

The witness feels uncomfortable in giving answers in the presence of the offender. Sometimes, it is found that the complainant as witness in court, contradicts his/her own statement made in the First Information Report (FIR) or during investigation because of the fear of consequence at the time of his/her returning to home from the court after giving deposition. In such a situation he/she may not be able to give details of the incident which may result in a miscarriage of justice.

At present, there is no specific law on the protection of witnesses in Bangladesh where there is a directive from the High Court in 2010 in a writ petition namely *BNWLA* v *Government of Bangladesh* (Writ Petition No. 8769 of 2010) where it was said that "Government shall take immediate steps to enact law for introduction of witness and victim protection system for effective protection of victims and witnesses of sexual harassment as well as the people who come forward to resist sexual harassment."

Article 35 of the Constitution says that the accused of a criminal offence

shall be entitled to get a speedy and public trial by an independent and impartial court or tribunal. It is an established principle that any accused shall be presumed to be innocent until and unless their guilt is proved by the prosecution "beyond all reasonable doubts". Thus it appears that the existing laws and the principles of criminal justice system favour the right and protection of the accused. But no specific law is there providing for the rights and protection of the witnesses although they are the principal actors for the prosecution to prove the case "beyond all reasonable doubt".

On the other hand, sections 151 and 152 of the Evidence Act, 1872 forbid indecent, scandalous and insulting questions to the witness. But these two sections protect the witnesses only in the court-room. Section 506 of the Penal Code, 1860 provides for punishment for committing criminal intimidation. Criminal intimidation has been defined under section 503 of the Penal Code, which is fairly wide no doubt, but it still falls short of giving sufficient protection to the witness.

The International Crimes (Tribunals) Act, 1973 does not contain any provision regarding witness protection. But the Rules of procedure have been amended in June 2011 where under the new Chapter VIA, a new Rule 58 A (1) has been inserted on witness and victim protection. Sub Rule 02 inserted arrangements of accommodation of witnesses or victims and other necessary measures regarding camera trial and keeping confidentiality as necessary where violation of such undertaking shall be prosecuted under section 11(4) of the Act. The success of these protective measures is yet to be proved especially with regard to the sexual violence witnesses.

The Law Commission has submitted two reports to the Law Ministry on the protection of witness and victim issue. The First one was submitted in 2006 namely 'Final Report on a proposed law relating to protection of victims and witnesses of crimes involving grave offences' (Report No 74). And second one was submitted in 2011 (Report No 108). In the first report, the Commission has proposed a draft law on the protection of witness and victim. The proposed law addresses many significant needs of members of this vulnerable group, and acknowledges the importance of support mechanisms that address physical, psychological, and economic wellbeing of victims and witnesses who will testify before the Court.

It is high time to consider to legislate a specific law on the witness protection providing for the rights, privileges and protection of the victims and witnesses and where necessary their family members. We hope the government will enact the draft law proposed by the Law Commission on the protection of witness and victim within a very short time.

THE WRITERS ARE ADDITIONAL DISTRICT JUDGE, RAJBARI AND STUDENT OF LAW, UNIVERSITY OF DHAKA RESPECTIVELY.

LAW EVENT

Child protection can ensure better future

THINK Legal Bangladesh, an online legal resource platform based at www.thinklegalbangladesh.com, held the second Lecture in its Think Legal Lecture Series last Saturday, 9th May, 2015 at Dhanmondi's EMK Centre. The Hon'ble Mr. Justice Muhammad Imman Ali, a Judge of the Appellate Division of the Supreme Court of Bangladesh, delivered the lecture on the topic "Rights of Children in Bangladesh & the Children Act, 2013". Barrister Mustafizur Rahman Khan, an Advocate of the Supreme Court of Bangladesh, moderated the lecture. Eminent legal practitioners from top law firms of the country, academics, High Court judges and students attended the event.

The Think Legal Lecture Series is an initiative to add to the knowledge pool by generating new legal content from renowned experts in our jurisdiction. Justice Ali's lecture began with an introduction to the concept of special needs of children in the justice system. He took the audience through the newly enacted Children Act, 2013, and its various aspects, some of its encouraging improvements and some gaping holes especially when it comes to implementation of the Act for the benefit of children.

Justice Ali advocates a paradigm shift from the role of courts being purely punitive to being a holistic effort geared to ensure the proper well-being and guidance of a child who enters the justice system. Justice Ali cited attitude of the society towards children, especially those from poorer backgrounds, as an impediment to the proper enforcement of their rights and called for a better understanding and appreciation of children.

Barrister Mustafizur Rahman Khan summed up and requested all to invest in the future of children to ensure a better future for everyone. Overwhelmed with the immense interest shown from the guests and a significant turn-out at Saturday's event, team Think Legal, aims to continue the lecture series with distinguished speakers speaking on pressing issues of law.

THINK LEGAL TEAM.