"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW INTERVIEW

Singing the same tune: Ending violence against women now

Nina Goswami is the Director-Programme, Ain o Salish Kendra (ASK). She is an Advocate of the Supreme Court of Bangladesh and the external expert member of sexual harassment prevention committee of many organisations such as the Department of Women Affairs under the Ministry of Women and Children Affairs, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh University of Engineering and Technology (BUET), etc. She has been playing an active role in the NGO sector as a practicing lawyer for over 25 years. In solidarity with the campaign "16 Days of Activism" to challenge violence against women and girls, Law Desk *talks to her on the following issues.*

LAW DESK (LD): How do you assess the governmental initiatives against Violence against Women (VAW) in Bangladesh?

NINA GOSWAMI (NG): In the past years, the government has appeared proactive as a response to many incidents of violence and mass reactions to the same. However, the overwhelming number of incidents of VAW and the condition of women in general bear testimony to the fact that the governmental initiatives have not been enough. There are some strategic deficiencies which remain largely unaddressed. For instance, Bangladesh had put reservations on two very important articles of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and for a while, the government appeared positive about withdrawing the reservations. However, the government has recently clarified that it has no plan to withdraw the reservations. For instance, given the reservations, the government will not address the issue of inequal property rights of women by virtue of different personal laws. Property is immensely important and when women are deemed unequal in terms of inheriting or owning property, they automatically get relegated to a subordinate position. When there are reservations put on two of the most significant provisions of the CEDAW, whatever efforts are made, would automatically fall short. Because with the reservations being put, our women will continue to be weak, to have an unequal status, and therefore, to be prone to violence.

LD: We have many laws in our country. The Prevention of Oppression against Women and Children Act 2000 has been made more stringent than before lately. There is also law for tackling domestic violence. Please tell us about the challenges that inhere in the laws.

NG: There are laws; however, there are many challenges too that largely go missing. For example, though the Domestic Violence (Prevention and Protection) Act 2010 has been enacted, no steps have been taken by the government to make people aware thereof. Many women do not know about it, and more sadly, the judicial officers and lawyers have not been trained up to apply this quasi-civil legislation. The protection officers also do not know how to attend different cases under the law. The Civil Society Organisations (CSOs) had proposed that the government take initiatives to build mass awareness. Countries such as Sri Lanka, India, separately allocated budget to make people aware through regular training. In absence of such allocation in our country, the law is not used enough to enable us to criticise its substantive weaknesses.

As far as the Prevention of Oppression against Women and Children Act is concerned, lately, the Rape Law Reform coalition of different CSOs, tabled ten proposals. There was no proposal to increase the penalty. Increasing the penalty was something done by the government to appease the public outrage at that time. It is important that the existing laws get implemented. It is important that the laid down penalty gets awarded. Rather than increasing the penalty, it was necessary to change the definition of rape, to enact a law for the protection of victims and witnesses, to amend section 155(4) of the Evidence Act 1872, and to put in place a monitoring mechanism, among others.

LD: How do you evaluate the role played by the CSOs and their partnership with the government?

NG: The CSOs have been successful in putting forward their concerted demands and voicing their proposals together. I see positive role of the CSOs in this regard. Their partnership with government in many cases is positive. Nonetheless, in my opinion, the Ministry of Women and Children Affairs (MOWCA) should have been more active in building effective coalition with the CSOs and facilitating their activities and initiatives.

While enacting the Domestic Violence (Prevention and Protection) Act, a multisectoral department was set up under the MOWCA to involve CSOs. But this is not seen at present. If there were effective partnership between the MOWCA and the CSOs, things would have been much more constructive and sustainable.

LD: What is your view on the mass movement from recent times? Do you think the people have had a positive impact?

NG: I do not think there have been any organised mass movements as such. When there are incidents of rape, at many places people take part in protests, but without any specific agenda or goal. As we have seen, people demanded death penalty lately and the government accepted it too. However, it was not supposed to be this way. Demands for the implementation of the existing laws and questions on the low conviction rate came in a very disorganised way. Had there been concerted efforts, the mass uproar could have been channelised in the right direction and a positive impact could have been made on the policy landscape in general.

LD: How far has our judiciary performed in this regard?

NG: Whenever a constitutional crisis faced Bangladesh and whenever it seemed as though all doors were closed, we turned to the higher judiciary, and the higher judiciary played a commendable role as well. However, when it comes to the subordinate judiciary, it always seemed as though there were many missing pieces in the puzzle. The subordinate judiciary needs to be made more sensitised with regard to the women question so that the women get a humane response from the judiciary. Subordinate judiciary is the first tier to access justice, and thence, it really needs to have a humane approach to the victim women in general.

In terms of exercising the judicial mind, the judiciary needs to be made more aware. Adequate trainings are to be imparted in this regard. Further, it has to be made sure that the judiciary works independently, being free from any external pressure.

The overwhelming number of incidents of VAW and the condition of women in general bear testimony to the fact that the governmental initiatives have not been enough.

LD: The 16 days campaign against VAW is going on. What are your thoughts on this year's campaign?

NG: Each year we spend a lot of money and celebrate it. This year we are celebrating it again. However, even for the UN, there are different voices. Different agencies of the UN have different mandates and different agenda and we do not see a concerted collaboration among different UN agencies. I think if different UN agencies, CSOs and government could work together, sing the same tune, and make a concerted effort, only then we could hope for an impactful consequence of such campaign. We need to underscore the things to do and navigate our determinations together in the right direction.

LD: Thank you for your time.

NG: You are welcome.

RIGHTS ADVOCACY

The nuances of confessional statement made by a child

Rajib Kumar Deb

In a landmark judgment in *Anis Miah* v *State,* Criminal Appeal No. 6799 of 2011, a full bench of the High Court Division (HCD) deliberated on the "legal implication of confession made under section 164 of the Code of Criminal Procedure [CrPC] by a child in conflict with law".

The judgment was published at a time when the Children Act 2013 was in force repealing the Children Act 1974. The case was about the offence of murder and kidnapping in which the appellant (Anis Miah), a child under 16 at that time (according to the 1974 Act), made a confessional statement under section 164 of the CrPC. Accordingly, the Police submitted a charge sheet against nine persons including the appellant. The Speedy Trial Tribunal as the Juvenile Court found him guilty and awarded him with punishment of detention and imprisonment of 10 (ten) years.

On appeal, the HCD stated that the recording of confessional statement under section 164 of the CrPC is part of adversarial processes. The application of confessional statement by a child against a juvenile offender, however, runs counter to the fundamental tenets of the juvenile justice system as it intersects with human rights principles. The HCD observed that because neither the 2013's Act nor the 1974's Act makes any provision for recording confession of a child and using the same against him/her, it is in fact legally impossible to do so. Hence, the HCD rejected the contention of the Prosecution that by virtue of section 18 of the 1974 Act or section 42 of the 2013 Act, the confession of a child can be recorded under section 164 of the CrPC and used against him.

The Court noted that the legislature purposefully did not reenact the provisions of the 1974 Act into the 2013 Act, and this omission implies

that a child is not supposed to make a confession in the first place. Eventually, the HCD rejected the contention that the evidentiary value of confession made by a child has already been approved by the Appellate Division in *Md Shukur Ali* v *State* (Jail Petition No. 8 of 2004) inasmuch as the question of recording confession of a child or its evidentiary value was not at issue in the said decision.

The Court eventually held that confession of a child under section 164 of CrPC has no evidentiary value, and therefore, such confession cannot form the basis of finding a child guilty in any criminal case. Consequently, the Court allowed the appeal and set aside the judgment and order of the trial court.

Here, a crucial question arises as to whether the arguments, observations, and opinions made by the HCD form a binding law prohibiting the magistrate from recording any confessional statement by a child as defined in the 2013 Act or not.

Significantly, the judgment in *Ridoy* v *State* (Criminal Appeal No. 7533 of 2019), made by another bench of the HCD, becomes relevant in this regard.

The HCD in *Ridoy* case, raised questions of law as regards who will take cognizance of an offence when the accused person is a child under any special law like the Prevention of Oppression against Women and Children Act 2000 or the Special Powers Act 1974 and so on. It also dealt with who is authorised to decide interlocutory matters like petitions for bail or remand to police custody, and determination of age of a child. The Court was of the opinion that the magistrate is empowered to do the routine works and pass any order for the sake of investigation. It made some seven observations-cum-directives. In one of the directives, it said that the magistrate may record the confessional statement of a child who comes in conflict with law.

This direction is relevant to the present issue as it involves the question of binding status of the HCD's observation that a child's confessional statement must not be recorded.

One argument is that a magistrate may deny recording a confessional statement only upon two grounds: if the statement appears not to be "true and voluntary", and when the child refuses to make it. The magistrate's such denial takes support from sections 24-28 of the Evidence Act 1872 concerning relevance of confessional statement, the procedure in section 164 and the manner provided in section 364 of the CrPC about recording confessional statement, and the guidelines detailed in Rules 78 and 79 of Criminal Rules and Orders 2009 (Vol. 1) with regard to the compliance about due care and deliberation.

To conclude, both the judgments of the HCD dealt with some legal points that are not covered in the 2013 Act including the issue of legality of confessional statement made by a child. While in *Anis Mea* case the Court observed that a confessional statement by a child must not be recorded, the Court in *Ridoy* case held that a magistrate could do so in the interim period. Now, it is logical to conclude that a magistrate may record confessional statement made by a child who is in conflict with law under the 2013 Act.

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LAW LETTER

Legal recourse for a misstated prospectus

A prospectus is a document that gives details of a company's activities and aims to persuade the public to invest in their company. Since the public invests in a company relying on prospectus's content, it is the company's obligation to ensure that it is authentic and transparent. However, in reality, there have been several instances where corporations have made false statements in the hope of attracting shareholders.

Before diving into the legal recourse in this regard, it is essential to understand what constitutes misstatement in a prospectus. Section 143 of the Company Act 1994 provides a comprehensive vision in this respect. By interpreting this section, three notions can be discovered which come within the scope of misrepresentation. Those notions are false statements, statements that provide the incorrect impression, and concealment of essential information.

Let us now revert to the basic concern of whether the aggrieved party has recourse to the law if they are deceived by a misrepresented prospectus or not. The answer is yes, for aggrieved subscriber or defrauded shareholder, legal redress is possible. Basically, two remedies are available for aggrieved shareholder. The rescinding of the contract is the first remedy accessible to the aggrieved party. If he discovers any untrue statements regarding material facts in the prospectus, he has the right to cancel the transaction. To rescind the contract, nevertheless, the aggrieved party needs to prove that the company provided a fraudulent prospectus. The second remedy that is available to the aggrieved party is claiming the damages. Section 145 of the Company Act clarifies this by saying that if the misstatement is discovered, the aggrieved party may seek compensation or damages from the directors, promoters, or any other person who has permitted their name to be mentioned during the prospectus's issuance.

However, some defences have been granted to the directors under this provision, which safeguards them from burden of paying compensation. Section 145 in clause 2 stipulates that a director is not obligated to pay compensation if he can demonstrate that the prospectus was produced without his knowledge or that he had reason to think the assertion was genuine. This clause specifies four more instances which operate as defence to the director. Those instances are as follows: first, withdrawing his/her consent to become a director before the prospectus was issued; second, becoming familiar with the idea of a misstatement and stepping away his/her assent after the prospectus was issued but before the allotment; third, the statement was a replica of an official paper made by an official person; and finally, the statement was a fair presentation produced by the expert and he/she withdrew his/her approval. The aggrieved party will not be able to obtain damages from the directors if the directors are successful in proving these circumstances.

Apart from that, making misstated statements are punishable under sections 146 and 147 of the Act. According to section 146, anybody who is authorised to produce a prospectus faces a two-year jail sentence or 5,000 taka fine or both, if they make any type of misstatement in the prospectus. Fraudulently encouraging individuals to invest money is punishable under section 147. For this, the penalty is either 5 years in prison or a fine of 15 thousand taka or both.

In view of the foregoing, it emerges that aggrieved investors will get legal recourse if they are defrauded by a deceptive prospectus. Despite the fact that legal redress is accessible, investors will need to exercise greater caution. They must examine the prospectus diligently before investing in the company since they usually act believing in the substance of the prospectus to invest money.

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