

1 SCOB [2015] AD 28

APPELLATE DIVISION

PRESENT

Madam Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Mohammad Anwarul Haque
Mr. Justice Hasan Foez Siddique

For the Appellant :Mr. Momtazuddin
Fakir, Additional
Attorney General,
instructed by Mr.
B.Hossain, Advocate-
on-Record

CRIMINAL APPEAL NO. 07 OF 2004
(From the judgment and order dated 31st July, 2000
passed by the High Court Division in Criminal
Appeal No. 1349 of 1996)

For Respondents :Not represented

The State ... Appellant

Date of hearing :The 17th September,
2013

= Versus =

Date of judgment :The 18th September,
2013

Mostafizur ... Respondents
Rahman and
another

In the facts of the instant case, a 13 year old house maid has undoubtedly been raped and there is no reason why the victim, who suffered the trauma and the stigma that goes with it, should not be believed. She has put herself in an invidious situation where she will be shunned and marginalised for the rest of her life and yet she has been disbelieved. This is clearly a travesty of justice. ... (Para 28) (Minority View)

In facts, the story of rape itself gives rise to a grave suspicion implicating the accused, respondent; as such it will be fully within the domain of the appellate court to acquit the accused. Moreover, the reason of delay in lodging FIR even after the release of the victim from the clutch of the accused has not been properly described; so it is very difficult to consider the evidence of prosecutrix, P.W.2 as beyond any reasonable doubt which is the fundament requirement of conviction of an accused person.... (Para 45) (Majority View)

Judgment

Madam Justice Nazmun Ara Sultana, J:

1. I have gone through the judgments proposed to be delivered by my brothers, Muhammad Imman Ali, J. and Mohammad Anwarul Haque, J. I agree with the reasoning and findings given by Mohammad Anwarul Haque, J.

MUHAMMAD IMMAN ALI, J:-

2. This criminal appeal, by leave, is directed against the judgement and order dated 31.07.2000 passed by a Division Bench of the High Court Division in Criminal Appeal No. 1349 of 1996 allowing the appeal.

3. After conclusion of the appeal hearing the view of the majority members of this Division was to dismiss the appeal.

4. I have had the privilege of going through the draft judgement of my learned brother Mr. Justice Mohammad Anwarul Haque. Since I could not agree with the reasoning and findings as disclosed in the majority judgement, I propose to express my own views.

5. The facts of the case have been narrated in the judgement of my learned brother Mr. Mohammad Anwarul Haque, J. and I do not propose to repeat those. However, I shall reproduce facts of the case relevant for the purpose of my opinion.

6. Accused Mostafizur Rahman and Aleya Begum were charged and tried by the Nari-O-Shishu Nirjaton Daman Bishesh Adalat, Rajbari in Nari-O-Shishu Nirjaton Daman Case No. 13 of 1996 for offences under sections 6 (1)/14 of the Nari-O-Shishu Nirjaton Daman (Bishesh Bidhan) Ain, 1995. Upon finding the two accused persons guilty as charged, the learned judge of the Nari-O-Shishu Nirjaton Daman Bishesh Adalat sentenced them to suffer imprisonment for life and also to pay a fine of Taka 5000/- each, in default to suffer rigorous imprisonment for 1 (one) year more.

7. The victim Shefali Khatun was 10 or 11 years old when her mother, step father and half sister Aleya (accused in the case) sent her to work as a house maid. The evidence and records disclose that at various times she worked as maid servant in the house of Proshanto, Chand Ali, Montu and lastly accused Mostafizur Rahman. At that time she was aged about 13 years. The prosecution case is that she worked in the house of accused Mostafizur Rahman for about 3 months and at that time she was kept in confinement under lock and key and was raped by accused Mostafizur on numerous occasions. She was unable to escape until 31.08.1995. On the day of her escape she met one Ruhul Parvez (P.W.5) on the way, who took her to the house of Komruddin Biswas @ Chand Ali (P.W.3). She narrated her story to P.W. 5, P.W. 3 and Maksuda Begum P.W.4, the wife of Chand Ali. The matter was disclosed to Abu Reza Ashraful Masud (Babu Mollik), the Publisher and Editor of a local Newspaper, namely Dainik Sahaj Katha. The report of the victim's torture was published in that newspaper on 07.09.1995. After seeing the newspaper report the informant Shamsunnahar Chowdhury (P.W.1), who is the Convener of the Mohila Parishad, Rajbari discussed the matter in their regular meeting on 30.09.1995 and according to the decision of the meeting the informant went to meet the victim on 08.10.1995 at the house of Chand Ali. After that the Mohila Parishad took out a procession on 11.10.1995 and, thereafter, went to the Police Station but the Officer of the Police Station declined to record the First Information Report (F.I.R.). A memorandum was handed over to the Deputy Commissioner and the Superintendent of Police. Ultimately on 24.10.1995 the police accepted the F.I.R. After investigation the police report was submitted on 17.02.1996 stating that the case against the accused persons was not proved, and recommending their discharge. However, the learned Judge took cognizance and after framing charge against accused Mostafizur Rahman under Section 6 (1) of the Nari-O-Shishu Nirjaton Daman (Bishesh Bidhan) Ain, 1995 and against accused Aleya Begum under Section 6 (1)/14 of the said Ain, read the same over to the accused, who pleaded not guilty and sought trial.

8. The prosecution produced 12 witnesses of whom 3 were tendered. The two accused persons were examined under Section 342 of the Code of Criminal Procedure when they again pleaded their innocence. After hearing argument on behalf the defence and the prosecution and upon consideration of the evidence and materials of record the learned trial Judge convicted the accused persons and sentenced them as stated above.

9. Being aggrieved by and dissatisfied with the judgement and order of conviction and sentence the accused preferred Criminal Appeal No. 1349 of 1996 before the High Court Division, which was successful and the appellants were acquitted. Hence, the State as petitioner filed the Criminal Petition for Leave to Appeal No. 37 of 2001. Upon hearing the parties this Division granted leave to consider whether the High Court Division ought to have considered the fact that in the facts and circumstances of the case no eye witness is supposed to remain present at the time of commission of rape and the sole evidence of the victim and circumstantial evidence ought to have been considered, and also to consider whether the High Court Division illegally acquitted the accused without reversing the finding of the trial Court that all the prosecution witnesses supported the F.I.R. case and the evidence of the prosecution witnesses were believed and accepted upon giving cogent reasons.

10. The submissions of learned Additional Attorney General on behalf of the appellant have been reproduced in the majority judgement and I need not repeat them.

11. The High Court Division allowed the appeal on the grounds, firstly, that there was no corroborative evidence regarding rape committed by the accused Mostafizur Rahman. The learned Judges observed that expert examination of the person of the prosecutrix and garments she had worn at the time and place where the rape took place is *sine qua non*. Since the wearing apparels were neither produced to nor seized by the Investigating

Officer they have not been brought on record as material exhibits and “in such circumstances coupled with the evidence of P.W. 12 the Doctor who examined the victim led us to believe that the story of rape as alleged by the prosecution is not true inasmuch as the same is false.” The learned Judges of the High Court Division disbelieved the evidence of the victim since she did not disclose her story to neighbours who sometimes visited the house where she was staying.

12. Secondly, the High Court Division disbelieved the story of the victim because her parents did not lodge the F.I.R. nor came to depose in court, and they asked the victim to stay in the house of the accused, who allegedly raped their daughter which is against human conduct.

13. Thirdly, the High Court Division observed that there was no reasonable explanation as to why the F.I.R. was lodged after inordinate delay “which makes a reasonable man suspicious about genuineness of the prosecution case.”

14. The trial Court, on the other hand, had the benefit of observing all the witnesses who deposed in court and gave an elaborate judgement convicting the accused persons upon finding that the prosecution case was fully corroborated. The learned Tribunal Judge observed that the victim was taken back from her previous employer in Mirpur under false pretext and sent to the house of accused Mostafizur Rahman as a maid servant which was a preconceived plan of the victim’s half sister, Aleya. He pointed out that the fact of death of her maternal grandmother was proved to be false. So she was taken from her place of work at Mirpur on false pretences so that she could work in the house of accused Mostafiz. He found P. Ws. 3-5 to be independent and disinterested witnesses and their evidence was corroborative. He also found that P.W. 1, the informant was neither related to the victim nor had any reason to bring a false case against accused Mostafizur Rahman and Aleya. He observed that the witnesses had no enmity with the accused.

15. In a case of this nature it is imperative to keep in mind certain social and moral aspects as well as the background of the victim for proper adjudication. Shefali was an illiterate village girl who at the time of occurrence was below the age of 13 years. She came from a poor family, who forced her to work as a maid servant from the age of about 10/11 according to the evidence of P.Ws. 4 and 5. In all, she worked in 4 households including that of accused Mostafizur Rahman, where she remained confined for about 3 months. Previously she had worked for about 18/20 months in the house of one Montu, at Mirpur. She also worked for Proshanto and Chand Ali. It is also noted that her mother had re-married and co-accused Aleya was her half-sister and that either the victim’s father was dead or was not living with her. It was the half-sister Aleya and her step father and mother, who insisted that she came back from Mirpur where she had been working happily for a long period of time so that she could work for accused Mostafiz. The finding of the trial Court is that this was preplanned and that Shefali had been brought away from Mirpur under a false pretext. The evidence of the victim suggests that it was the family’s plan that Shefali should marry Mostafiz and that in spite of the fact that Mostafiz raped her, the family forced her to stay with him as he paid them money. She stated in her evidence that because she refused to marry Mustafiz, he and Aleya used to beat her. Hence, one should not lose sight of the fact that Shefali was in a most vulnerable condition.

16. The High Court Division did not believe the story of rape by the accused as, according to their Lordships, there was no corroborative evidence. Clearly the learned Judges were in patent error since the facts of the instant case would show that it is a case of “statutory rape”. Section 375 of the Penal Code provides as follows:

“A man is said to commit “rape” who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following description.-

***First.-**Against her will.*

***Secondly.-** Without her consent.*

***Thirdly.-** With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.*

***Fourthly.-** With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

***Fifthly.-** With or without her consent, when she is under fourteen years of age.*

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation.- Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

17. Description “Fifthly” under section 375 clearly indicates that sexual intercourse with a child below the age of 14 is rape whether it is with consent or without consent. The medical report clearly shows that the victim was habituated to sexual intercourse and, therefore, whoever had sexual intercourse with the victim would be guilty of rape, even if sexual intercourse took place with her consent.

18. The learned Judges of the High Court Division were clearly of the view that any allegation of rape by the prosecutrix has to be corroborated. They went so far as to say “the evidence of a prosecution (sic. prosecutrix)” in a rape case is customarily received by the court with some suspicion. This is clearly perverse since the victim of rape should be dealt with and considered in the same way as a witness who was injured in the course of the occurrence. Referring to Modi’s Medical Jurisprudence, the learned Judges implicitly required evidence of marks of violence on the body of the victim, which having been absent, they found the allegation of rape to be not substantiated. Again I must say that the existence of marks of violence is not a *sine qua non* of rape. The learned Judges further observed as follows:

“Expert’s examination of the person of the prosecution (sic. prosecutrix) and garments she had weared (sic.) at the time and the place where the rape took place is *sine qua non* in such case.”

19. This statement/requirement as pronounced by the learned Judges of the High Court Division is absolutely misconceived. It can never be said that a case of rape is not proved simply because the wearing apparel of the raped victim was not produced to the investigating officer and no expert examination took place. Clearly the views of the learned Judges are misconceived and perverse. Sexual intercourse with a girl below the age of 14 years is *ipso facto* rape.

20. The learned Judges of the High Court Division disbelieved the victim because she had not reported the occurrence of rape upon her to the people who were either living in the vicinity or visited the house where she was confined. From the evidence on record it appears that the learned Judges overlooked many important factors narrated by the victim in her deposition before the court, including the fact that she was kept under lock and key everyday; that the children of Jinal, a neighbour used to visit when Mostafiz was at home; that the children used to eat guava from Mostafiz’s tree when he was at home; that the neighbours used to take water from Mostafiz’s house when he was at home; that when Hashem was at home the victim was locked up; she used to play with children when Mostafiz was present. Mostafiz always kept the key with him and finally she stated also that she could not tell anyone through fear as Mostafiz had threatened her. Overlooking such important factors the Hon’ble Judges of the High Court Division disbelieved the testimony of the victim because she did not tell anyone about her plight, ignoring the social context and practical impediments in the way of a vulnerable child.

21. The learned Judges of the High Court Division disbelieved the story of the victim because her parents allowed her to continue to live in the house of Mostafiz in spite of the fact that he raped her, which, according to them, is against human conduct. However, they have overlooked the fact that the victim was not the real child of the father and not a full-sister of accused Aleya and that it was preplanned that the victim should stay in the house of accused Mostafiz so that he would marry her. The victim also stated in her statement before the Magistrate that her parents received money from Mostafiz and that Aleya would also beat her if she did not stay in the house of Mostafiz.

22. Clearly, the whole of that family was scheming against the victim, ensuring that she continues to live in the house of accused Mostafiz. It is, therefore, neither unusual nor surprising that any member of the victim’s family did not come forward to lodge the F.I.R. or to depose in court.

23. With regard to the delay in lodging the F.I.R., the learned Judges of the High Court Division appear to have ignored the fact that the victim did not have the support of her family nor anyone else to whom she could turn for assistance. The informant runs an organization which admittedly assists victims such as Shefali, but at the same time was constrained by factors relating to the organization’s business procedure. It is not unnatural

that the organization would be required to go through certain formalities before lodging any F.I.R. and those formalities require meeting of the other members which in turn requires fixing of dates for those meetings. In such circumstances delay in commencing the procedural process is inevitable. Moreover, it appears that the police were initially reluctant to accept any information and did so later upon intervention by higher authority. Hence, it cannot be said that the delay in lodging the F.I.R. is unexplained. Furthermore, one should not lose sight of the fact that in a case of this nature where the chastity of a maiden young girl is in question publicity and legal process is purposely avoided keeping in mind her future. There is no gainsaying that once it becomes known that a girl had been raped, she effectively becomes an outcast having no prospect of marriage. It takes a lot of bravery to publicise the fact of rape of an unmarried girl in a conservative society such as ours. This factor alone speaks of truthfulness of the victim.

24. With regard to the evidence of the witnesses, we note that the informant has deposed as P.W.1 in an official capacity as the Convener of the Rajbari Mohila Parishad, stating facts as they were reported to her. There is no question of any motive being present for her to file any false case against the accused. Moreover, it is noted that no question was put to her with regard to the delay in lodging the F.I.R. The evidence of P.W. 2, the victim gives a vivid description of her vulnerable condition and the tragic and horrendous events which she had to suffer. It is noted that there was no suggestion that she had had any sexual intercourse with anyone other than the accused Mostafiz. Her evidence shows that she was very happy in the house of Montu at Mirpur. There was no suggestion that she had had any sexual relationship with anyone in that household. P.Ws 3, 4 and 5 are independent witnesses who narrated their knowledge of the story and no suggestion was made as to any existence of enmity between the witnesses and the accused. I note from the evidence of P.W. 5 Ruhul Parvez that when he met her at 5:30 in the morning she was in fear and was crying. This appears to be quite natural in the attendant situation as described.

25. In the facts and circumstances discussed above, I am of the view that the discussion of the evidence and materials by the High Court Division indicates perversity, misconception and lack of appreciation of the surrounding circumstances leading to the occurrence. I may profitably refer to the decision of the Indian Supreme Court in the case of *Md. Iqbal and anr. Vs. State of Jharkhand* reported in *AIR 2013 SC 3077*. In that case the father of the prosecutrix as well as other witnesses, who had been examined as prosecution witnesses were declared hostile and did not support the case of the prosecution. No spermatozoa were found in the vaginal swab examination and there was no injury in the private parts. Their lordships held that:

“There is no prohibition in law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses.”

26. Their lordships went on to observe that no explanation had been furnished by either of the accused as to why the prosecutrix had deposed against them and involved them in such a heinous crime. *It was further held that:*

“Rape cannot be treated only as a sexual crime but it should be viewed as a crime involving aggression which leads to the domination of the prosecutrix.”

27. It was further held that:

“In case of rape besides the psychological trauma, there is also social stigma to the victim.....Social stigma has a devastating effect on rape victim. It is violation of her right of privacy. Such victims need physical, mental, psychological and social rehabilitation..... Rape is blatant violation of women’s bodily integrity.”

28. In the facts of the instant case, a 13 year old house maid has undoubtedly been raped and there is no reason why the victim, who suffered the trauma and the stigma that goes with it, should not be believed. She has put herself in an invidious situation where she will be shunned and marginalised for the rest of her life and yet she has been disbelieved. This is clearly a travesty of justice.

29. In view of the above discussion it is my opinion that the appeal should be allowed.

30. Accordingly, the appeal is allowed. The judgement and order of the High Court Division is set aside and the judgement and order of conviction and sentence passed by the trial court is affirmed.

Mohammad Anwarul Haque, J:

31. This criminal appeal is directed against the judgment and order of acquittal passed on 31.07.2000 by Division Bench of the High Court Division, in Criminal Appeal No. 1349 of 1996 arising out of Nari-O-Shishu Nirjaton Daman Case No. 13 of 1996, Rajbari, acquitting the accused–appellant of the charge punishable under section 6(1)/14 of the Nari-O-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 on setting aside the order of conviction and sentence of life imprisonment with fine of Tk.5000/-in default to pay to suffer one year imprisonment more passed by the judge of Nari-O-Shishu Nirjaton Daman, Bishes Adalat.

32. In short, the case of the prosecution for the purpose of disposal of the appeal is as follows:

33. Victim Shefali was appointed as domestic worker in a house, situated at Mirpur, Dhaka. While she was rendering her service there; her step sister accused Aleya, serving at Rajbari as maid servant in the house of accused Mostafizur Rahman, called her back from Dhaka to Rajbari but she did not respond but ultimately accused Aleya, step sister of victim P.W.2, brought her in the Rajbari on false plea of her maternal grand mother’s death and engaged her as maid servant in the house of accused Mostafizur Rahman on 01.06.1996 where she was also there.

34. Taking such opportunity the accused Mostafizur Rahman began to ill-treat her and frequently committed rape on her who was at that time a minor girl of 13 years only.

35. To release herself from such an atmosphere P.W.2, victim Shefali, fled away from the house of the accused Mostafizur Rahman on 31.08.1995 and took shelter in the house of local businessman P.W.3, Chand Ali, where she previously worked as domestic-worker with the help of P.W.6 & 7 and others. Then victim disclosed the entire story of rape and related physical torture committed by accused Mostafizur Rahman which was published in the daily news paper “Soja Katha”. Then local “Mohila Parishad” took up the matter and lodged the FIR on 24.10.1995 with the help of local administration, Rajbari showing the date of occurrence from 1.6.1995 to 31.8.1995.

36. During the course of investigation victim was produced before learned Magistrate who recorded the statement of the victim under section 164 of the Code of Criminal procedure and she was sent to doctor for physical examination.

37. However, on the conclusion of investigation a final report was submitted which was not accepted by the learned Judge of the Nari-O-Shishu Nirjaton Daman Bishes Adalat rather took cognizance of the offence punishable under section 6(1)/14 of Nari-O-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 and issued process to secure the presence of the accused to face trial.

38. On conclusion of the trial the learned Judge of the Nari-O-Shishu Nirjaton Daman Bishes Adalat ensured the conviction of the accused–appellant–respondent for commission of the offence referred to above. Subsequently convicted accused preferred a criminal appeal to the High Court Division which was heard and allowed acquitting the convicted appellant of the charge punishable under section 6(1)/14 of the Nari-O-Shishu Nirjatan Daman (Bishes Bidhan) Ain, 1995.

39. Mr. Momtaz Uddin Fakir the learned Additional Attorney General submits that the High Court Division erred substantially in upsetting the sentence of imprisonment for life awarded under section 6(1)/14 of the Nari-O-Shishu Nirjaton Daman (Bishes Bidhan) Ain, 1995 since it is

based on sound and sturdy reasons. Mr. Fakir further submits that the High Court Division has chosen to advance on fragile reason to upset a well resound conclusion of the trial court based on the evidence of the prosecutrix which is relevant one. Moreover, the High Court Division has given to much importance on the inordinate delay in lodging the FIR without considering the prevailing circumstances which was absolutely beyond the control of a minor victim. As such impugned Judgment of the High Court Division acquitting the accused cannot be sustained. In fact, the behavior of the victim of rape would depend upon the circumstances where she is placed. In the instant case since victim was kept confined she had no occasions to lodge the FIR with help of any one at an earliest opportunity. So the impugned judgment of acquittal passed by the High Court Division is to be set aside and the very judgment of conviction and sentence passed by the trial Court is to be maintained.

40. On the other hand, none is found on behalf of the accused–appellant who has been acquitted by the High Court Division.

41. We have gone through the FIR meticulously which has been lodged by P.W.1 Mrs. Shamsunahar Choudhury who has not given any plausible explanation about the inordinate delay in lodging such FIR.

42. It is evident that there is no eye witness of the occurrence. Even the victim, getting sufficient opportunity to disclose this type of alleged physical torture did not project it to any other requesting to release her from the hand of the accused persons.

43. It is equally interesting to note that in spite of getting this type of information from the victim her parent did not take any step rather asked her to remain in the job in the house of the accused persons. In this connection we are to quote an observation made in case of state of Panjab Vs Jagir Sing; reported in SCC(1974) PP 285-286:

A Criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures”.

44. In fact, materials placed before the court give rise to suspicion against the commission of the offence as narrated by the prosecution. The victim, being a minor, was not handed over to her parents who are her best well-wisher P.W.1 being convener of Mohila Parishad under took the matter for prosecution beyond the knowledge of her parent. As such High Court Division disbelieved the entire story of commission of rape on the person of a minor girl which deserves no interference.

45. In facts, the story of rape itself gives rise to a grave suspicion implicating the accused, respondent; as such it will be fully within the domain of the appellate court to acquit the accused. Moreover, the reason of delay in lodging FIR even after the release of the victim from the clutch of the accused has not been properly described; so it is very difficult to consider the evidence of prosecutrix, P.W.2 as beyond any reasonable doubt which is the fundament requirement of conviction of an accused person.

46. Considering the overall situation including the non-examination of the parent of the victim to whom she previously disclosed the entire alleged occurrence and other evidence, adduced by the prosecution, we find no ring of truth beyond any reasonable doubt in the case as narrated by the prosecution. In fact, we are not ready to accept or believe this infirm evidence of the prosecutrix which has rightly been discarded by the High Court Division. In this connection we may also refer the decision of a case Md. Abdul Hamid Mollah Vs. Ali Mollah and another reported in 13 BLD page 127 where their lordships of the Apex Court have observed that the High Court Division on proper assessment of the evidence both oral and circumstantial has taken a decision for acquittal which Appellate Division should not interfere on reevaluating the same available in the record.

47. As such we are not inclined to interfere with the decision of the High Court Division and considering the majority views as shown in the judgment this appeal is dismissed.

Mr. Justice Hasan Foez Siddique, J:

48. I have gone through the judgments proposed to be delivered by my brothers, Muhammad Imman Ali, J. and Mohammad Anwarul Haque, J. I agree with the reasoning and findings given by Mohammad Anwarul Haque, J.

COURT'S ORDER

49. The appeal is dismissed by majority decisions.