IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Hasan Foez Siddique,C. J.
Mr. Justice M. Enayetur Rahim
Mr. Justice Jahangir Hossain

CRIMINAL APPEAL NO. 19 OF 2017

(From the judgement and order dated the 9th day of March, 2016 passed by the High Court Division in Criminal Appeal No. 6297 of 2013)

Mohammad Khorshed Alam alias Md. Khorshed Alam ... Petitioner

= Versus =

The State and another ... Respondents

For the Petitioner	:Mr. Munsurul Hoque Chowdhury, Senior Advocate, with Mr. Subrata Chowdhury, Senior Advocate instructed by Ms. Sufia Khatun, Advocate-on-Record
For Respondent No. 1	:Mr. Mohammad Saiful Alam, Assistant Attorney General instructed by Mrs. Shirin Afroz, Advocate-on-Record
Respondent No. 2	:Mr. Md. Abdul Mannan Bhuyean, Advocate instructed by Mr. Moh. Abdul Hai, Advocate-on-Record
Date of hearing & judgment	**:The 25th of January, 2023**

JUDGMENT

M. Enayetur Rahim,J:- This criminal appeal, by leave, is directed against the judgment and order dated 09.03.2016 passed by a Division Bench of the High Court Division in Criminal Appeal No. 6297 of 2013 dismissing the appeal.

The relevant facts for disposal of the present appeal are that Sajeda Hossain Rekha, present respondent No. 2 as complainant on 29.3.2005 filed a petition of complaint before the Nari-O-Shishu Nirjatan Daman Tribunal No.3, Chattogram, against the convict appellant for allegedly

committing offence under Section 11(Ka) and 11(Ga) of the Nari-O-Shishu Nirjatan Daman Ain, 2000(herein after referred to as Ain, 2000).

In the complaint it was alleged that the complainant got marriage with the present convict appellant on 13.11.1998 fixing dower money of Tk. 3(three) lakh. During their wedlock they were blessed with two sons. However, the convict appellant used to torture her for dowry and put pressure upon her father for the dowry. In the month of January, 2004 the appellant created pressure upon the complainant to bring dowry of Tk. 4 (four) lakh so he can start hatchery in his own village. However, the victim refused to pay the money. The appellant on 01.05.2004 assaulted the complainant and at one stage pressed her neck in order to kill her. However, the maid servant rescued her. The complainant along with her minor sons was driven away from the house and since then the complainant has been living at the house of her father. Eventually, on 06.02.2005 at noon the appellant went to her father's house and discussed for taking her to his house and the accused again demanded Tk. 4 lakh as dowry. The complainant refused to pay the money as a result the appellant again assaulted her and at one stage pressed her neck in order to kill her. However, the inmates of the house rescued her. The complainant received serious injury by such assault and on the following day she got treatment.

The learned Judge of the Tribunal after examining the complainant directed the Officer-in-Charge of Pahartoli Police Station, Chattogram to make an inquiry on the allegation and submit a report.

On the basis of the inquiry report, submitted by the police before the Tribunal, the learned Judge of the Tribunal accepted the same and took cognizance of the offence against the present appellant and ultimately framed charge against the appellant under Section 11(Ga) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 which was read over to the appellant on dock to which he pleaded not guilty and claimed to be tried.

To substantiate the charge against the appellant the prosecution examined 05 (five) witnesses while the defence examined 03(three).

The defence case as it transpires from the trend of cross-examination that the accused is innocent and has been falsely implicated in the instant case out of grudge due to divorce to the complainant.

The Tribunal by its judgment and order dated 08.09.2013 convicted the appellant under Section 11(Ga)of the Nari-O-Shishu Nirjatan Daman Ain, 2000 and sentenced him to suffer rigorous imprisonment for 1(one) year and also to pay a fine of Tk. 50,000/-(fifty thousand).

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence, the appellant preferred Criminal Appeal No. 6297 of 2013 before the High Court Division, which upon hearing was dismissed. Then the convict filed Criminal Petition for Leave to Appeal No. 459 of 2016 before this Division. Leave was granted to consider the following grounds:

I. That the High Court Division failed to appreciate that the complaint was not filed in compliance with the mandatory provision of Section 27 (Kha) of the

Nari-O-Shishu Nirjatan Daman Ain, 2000(Amended in 2003) as no affidavit was sworn by the complainant at the time of filing the instant complaint before the Tribunal stating that the police refused to lodge the case and, therefore, the subsequent proceeding being vitiated by law the judgment and order of conviction and sentence is liable to be set aside;

II. That the High Court Division failed to take into notice that the complainant received the divorce notice from the petitioner on 20.03.2005 and filed the complaint subsequently on 28.03.2005 out of grudge just to take revenge and harass the petitioner.

Mr. Munsurul Hoque Chowdhury and Mr. Subrata Chowdhury, learned Senior Advocates appearing on behalf of the appellant made submissions in line with the grounds upon which leave was granted. It was also submitted that according to the provision of Section 27 (Kha) of the Nari-O-Shishu Nirjatan Daman Ain, 2000(amended in 2003) the Tribunal ought to have sent the case for holding inquiry either by a Magistrate or by any person rather than any police officer. The present case was allegedly inquired by a police officer, who submitted perfunctory report, and based on that report cognizance was taken by the Tribunal. It was further submitted that the alleged 1st occurrence took place on 01.05.2004 at 9:00 a.m. and 2nd occurrence took place on 06.02.2005 at noon, but the complaint was filed on 28.03.2005; i.e. after 10 (ten)

months 28(twenty eight) days from the 1st occurrence and 1 (one) month 23(twenty three) days from the 2nd occurrence. Moreover, the complainant miserably failed to give any proper reason for committing such delay. The complaint after having notice of divorce on 20.03.2005 brought this case against the accused-appellant just to take revenge on him. It was further submitted that P.W.1 Sajeda Hossain Rekha is the alleged victim and complainant of this case; P.W.2 Md. Hossain is the father of the victim; P.W.3 Md. Belayet Hossain Majumder is the brother-in-law (*dulabhai*) of the victim; P.W.4 Nazma Hossain is the sister of the victim; all the witnesses are close relatives to the complainant, and all are very interested witnesses, so no credence can be given to their evidence and, as such, the impugned judgment and order is liable to be set aside. It was submitted that P.W.5 is an anesthetist and private practitioner, who treated the alleged victim and according to Section 32 of the Ain, 2000 his evidence cannot be considered as sustainable. Moreover, the description of the victim's injuries before the Tribunal totally contradict with the description of injuries mentioned in the Doctor's certificate. The complainant stated before the Tribunal that she felt pain in right teeth and left arms. However, doctor found abrasions on the right face and right elbow etc. and no injury was found in her any left organ. It was further submitted that according to the deposition of P.W.1 she was

tortured by the appellant on 06.02.2005 at 7:00 p.m. but she received medical treatment on the following day at7:00 p.m. one day after the alleged occurrence. Whereas in case of alleged magnitude of torture, she was supposed to go to doctor immediately but she did not do so, rather on the following day i.e. 07.02.2005 at first she went to her work place i.e. at college took classes and she stayed all day in the college *ipso facto* suggest that she was not tortured at all. It was submitted that the complainant stated in her complaint that on the 1st date of occurrence i.e. 01.05.2004 while the appellant took an attempt to kill her by suffocation, a maid servant namely Nurun Nahar tried to rescue her from the grip of the appellant; allegedly she was also tortured by the appellant, but surprisingly, the prosecution has failed to examine her as a witness. Lastly it was submitted that Gazi Sharif Hossain (cited witness No.4 in the complainant), younger brother of the victim, who accompanied the alleged victim to the doctor for treatment, was not produced as a witness before the Tribunal even after non-bailable warrant was issued against him again and again, so non production of him as witness before the Tribunal goes against the victim. The High Court Division failed to consider the aforesaid vital aspects in dismissing the appeal and as such the impugned judgment and order is liable to be set aside.

Mr. Md. Abdul Mannan Bhuyan, learned Advocate appearing on behalf of respondent No. 2, makes submissions

in support of the impugned judgment. He submitted that the complaint was filed with an affidavit on 28.03.2005, before execution of divorce where the notice of divorce was given on 17.03.2005 which was received by the victim on 20.05.2005 and the alleged occurrence took place on 01.05.2004 and 06.02.2005 before giving the notice of divorce. In the facts and circumstances of the present case the High Court Division as well as the Tribunal rightly passed the judgment and order of conviction and sentence by considering relevant section of law as mentioned in Section 7(3) of Muslim Family Laws Ordinance, 1961 and established judicial principles reported in 13 MLR (AD)2008, page 278. Mr. Bhuyan further submitted that it is a cardinal and settled principle of law as enunciation in 46 DLR (AD) 1994, page 169 that the legislature has taken care to see that not only the taking or giving of dowry or abetment thereof before or at the time of marriage is made an offence but also the demand thereof after the marriage and by considering the aforesaid judicial principle the High Court Division as well as the Tribunal passed the judgment and order of conviction and sentence and, hence, there is no reason to interfere with the impugned judgment.

Mr. Mohammad Saiful Alam, learned Assistant Attorney General appearing for respondent No.1, adopted the submissions of the learned Advocate appearing for respondent No.2.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment of the High Court Division as well the judgment

passed by the Tribunal, evidence and other materials on record.

Let us first decide the issue, whether the Nari-O-Shishu Nirjatan Daman Tribunal took cognizance into the offence against the convict appellant in compliance of the provision of section 27 of the Ain, *2000.*

To address the above issue it is needed to examine section 27 in particular sub-section 1 and (1 ka)(ka) (kha) of the Nari-O-Shishu Nirjatan Daman Ain, 2000, which runs as follows:

"২৭। (১) সাব-ইন্সপেক্টর পদমর্যাদার নিম্নে নহেন এমন কোন পুলিশ কর্মকর্তা বা এতদুদ্দেশ্যে সরকারের নিকট হইতে সাধারণ বা বিশেষ আদেশ দ্বারা ক্ষমতাপ্রাপ্ত কোন ব্যক্তির লিখিত রিপোর্ট ব্যতিরেকে কোন ট্রাইব্যুনাল কোন অপরাধ বিচারার্থ গ্রহণ করিবেন না।

(১ক) কোন অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন মর্মে হলফনামা সহকারে ট্রাইব্যুনালের নিকট অভিযোগ দাখিল করিলে ট্রাইব্যুনাল অভিযোগকারীকে পরীক্ষা করিয়া,-

(ক) সন্তুষ্ট হইলে অভিযোগটি অনুসন্ধানের (inquiry) জন্য কোন ম্যাজিষ্ট্রেট কিংবা অন্য কোন ব্যক্তিকে নির্দেশ প্রদান করিবেন এবং অনুসন্ধানের জন্য নির্দেশপ্রাপ্ত ব্যক্তি অভিযোগটি অনুসন্ধান করিয়া সাত কার্য দিবসের মধ্যে ট্রাইব্যুনালের নিকট রিপোর্ট প্রদান করিবেন;

(খ) সন্তুষ্ট না হইলে অভিযোগটি সরাসরি নাকচ করিবেন।

(১খ) উপ-ধারা (১ক) এর অধীন রিপোর্ট প্রাপ্তির পর কোন ট্রাইব্যুনাল যদি এই মর্মে সন্তুষ্ট হয় যে,-

(ক) অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন এবং অভিযোগের সমর্থনে প্রাথমিক সাক্ষ্য প্রমাণ আছে সেই ক্ষেত্রে ট্রাইব্যুনাল উক্ত রিপোর্ট ও অভিযোগের ভিত্তিতে অপরাধটি বিচারার্থ গ্রহণ করিবেন;

(খ) অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন মর্মে প্রমাণ পাওয়া যায় নাই কিংবা অভিযোগের সমর্থনে কোন প্রথমিক সাক্ষ্য প্রমাণ পাওয়া যায় নাই সেই ক্ষেত্রে ট্রাইব্যুনাল অভিযোগটি নাকচ করিবেন।

(১গ) উপ-ধারা (১) এবং (১ক) এর অধীন প্রাপ্ত রিপোর্টে কোন ব্যক্তির বিরুদ্ধে অপরাধ সংঘটনের অভিযোগ বা ততসম্পর্কে কার্যক্রম গ্রহণের সুপারিশ না থাকা সত্ত্বেও ট্রাইব্যুনাল, যথাযথ এবং ন্যায়বিচারের স্বার্থে প্রয়োজনীয় মনে করিলে, কারণ উল্লেখপূর্বক উক্ত ব্যক্তির ব্যাপারে সংশ্লিষ্ট অপরাধ বিচারার্থ গ্রহণ করিতে পারিবেন।

(২)----------।

(৩)----------।" (under line supplied).

In the instant case the learned Judge of the Tribunal after receiving the petition of complaint supported by an affidavit and examining the complainant having *prima facie* satisfied directed the Officer-in-Charge of the concerned police station to make an inquiry with regard to the complaint and to submit a report within a period of 7(seven) days. Pursuant to the said order Sub-Inspector Mohammad Khorshed Alam, Pahartoli Police Station, on 23.4.2005 submitted an inquiry report and on the basis of such report the learned Judge of the Tribunal took cognizance of the offence under section 11(Ka) and 11(Ga) of the Ain, 2000 against the appellant.

On a careful examination of section 27(1 ka) coupled with sub-section (ka) it becomes crystal clear that on receipt of a complaint supported by an affidavit if the Tribunal is satisfied upon examining the complainant that after being refused by the concerned police officer or the authorized person he/she directly came to the Tribunal in that event an order for holding inquiry on the complaint can be made.

In the case in hand, the complainant filed the petition of complaint before the Tribunal supported by an affidavit stating that statements made in the complaint is true. And in the complaint it was asserted that she went to the police

station but the police refused to accept her complaint and the concerned Tribunal being satisfied about the same, upon examining the complainant, directed to hold an inquiry into the allegation.

Since the complainant by swear in an affidavit before the Tribunal asserted that the concerned police officer refused to accept her complaint and the Tribunal has also been satisfied about the said assertion, in our view, there is no legal necessity to make an inquiry into the said issue afresh, i.e. whether the complainant went to the police station and he/she was refused by the police before submitting the complaint before the Tribunal.

Thus, the submissions of the learned Advocate for the appellant to the effect that the complainant in support of the complaint did not swear in any affidavit and did not make any statement that she went to the police station and the concerned police officer refused to accept her complaint and thus the learned Judge of the Tribunal has committed serious error of law in entertaining the complaint and sent it for inquiry have no leg to stand.

The word "অভিযোগ অনুসন্ধানের জন্য" as contemplated in section 27 (1 ka) is very significant. It means that an inquiry should be done on the allegations brought against an accused. It does not mean that inquiry should be done to ascertain whether the complainant went to the police station and he/she was refused by the police.

In the Nari-O-Shishu Nirjatan Ain, 2000 the word 'অভিযোগ' (complaint) has not been defined. However, in section 4(h) of the Code of Criminal Procedure, 1890 the word **'complaint'** has defined which is as follows:

> *4(h) "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police-officer."(Underline supplied).*

In view of the above definition, 'complaint' means allegation made orally or in writing to the Magistrate or Tribunal as the case may be with a view to his/it's taking action under the Code or relevant law against the person(s) who committed an offence.

The intention of Section 27 (1 ka) is that before filing of the complaint before the Tribunal, the complaint should approach to the concerned police station and if he/she is refused in that event he/she can file the complaint before the Tribunal with an affidavit in regard to his/her refusal by the police. In our opinion it is a procedural matter and also not an offence and thus it cannot be treated as an allegation, i.e. complaint against which action could be taken.

Having considered and discussed above, we are of the view that the Tribunal did not commit any illegality in entertaining the complaint filed by respondent No. 2. Section 27 (1 Ka) clearly speaks that if the learned Judge of the Tribunal is satisfied as to the filing of the complaint he can direct the Magistrate or any other person to make an inquiry with regard to the allegation. The expression 'অন্য কোন ব্যক্তি' (any other person) does not include any police officer but, it includes any public officer or any

private individual or any other responsible person of the locality upon whom the Tribunal may have confidence to conduct the inquiry in respect of the complaint logged before it.

In the instant case the learned Judge of the Tribunal acted illegally in directing the Officer-in-Charge of Pahartoli Police Station to make an inquiry in respect of the complaint and, thereafter, taking cognizance on the basis of such inquiry report has vitiated the entire proceeding.

It was argued by the learned Advocate for the appellant that the complainant filed the case after getting the notice of divorce. We do not find any substance in the above submission because alleged occurrence took place prior to the alleged divorce and divorce had not been taken effect on the day of filing the complaint. Moreover, it is well settled that criminal offence never abates.

To sustain conviction under section 11 (Ga) of the Ain, 2000 the prosecution has to prove that the accused caused hurt on the victim demanding dowry. In the petition of complaint it is alleged that on 01.05.2004 and 06.02.2005 in two occasions the appellant assaulted the complainant demanding dowry and one stage of the occurrence he pressed her neck in order to kill her.

On scanning of the evidence, we do not find an iota of evidence with regard to the alleged occurrence to have been committed by the appellant on 01.05.2004, i.e. the first occurrence; even no medical certificate was produced in support of the said allegation. Nurun Nahar, maid servant, who allegedly rescued the complainant, was not examined. As

such we have no hesitation to hold that the prosecution has failed to prove the occurrence allegedly to have been taken place on 01.05.2004. P.W.1 deposed that on 2nd time she was tortured by the appellant on 06.02.2005 at 7:00 p.m.; but she received medical treatment on the following day, i.e. on 07.02.2005 at 7:00 p.m., one day after the alleged occurrence and on that day at first she went to her work place, i.e. at the college and, thereafter, she took treatment at the evening which creates doubt about the veracity of the prosecution case. P.W.1 in his cross-examination stated that Gazi Sharif Hossain, her younger brother accompanied her to the doctor for treatment, but he was not produced as a witness before the Tribunal and as such in view of section 114(g) of the Evidence Act an inference can be validly drawn that if he was examined he might have not supported the prosecution case. The complainant as P.W.1 deposed to the effect: "On hearing my refusal the accused started to kick me. He disfigured my face by his fist. He also tried to kill me by throttling." However, P.W.5, the doctor deposed that he found multiple abrasions on the right face, right elbow, nose, abdomen which were caused moderately by heavy blunt weapon (exhibit-2). This material contradiction between the evidence of P.W.1 and doctor, P.W.5 also creates doubt about the veracity of the prosecution case. P.W.2 the father of the complainant in his cross-examination stated that "on the date of occurrence (06.02.2005), these witnessed (P.W No. 3 and 4) were not present." P.W.3, in his cross-examination stated that he was called after the occurrence. P.W.4 also deposed that hearing the cry of the complainant she rushed

to the place of occurrence. The evidence of P.Ws. 2, 3 and 4 do not convince and inspire us in finding the guilt of the appellant within the mischief of section 11(Ga) of the Ain, 2000. As such it is our considered view that the prosecution has failed to prove the charge under section 11(Ga) of the Ain, 2000 against the appellant beyond reasonable doubt.

Having considered and discussed as above, we find merit in the appeal.

Accordingly, the appeal is allowed. No order as to costs. The judgment and order of the High Court Division affirming the judgment and order of conviction and sentence passed by the Nari-O-Shishu Nirjatan Daman Tribunal, Chattogram in Nari-O-Shishu Nirjatan Case No. 126 of 2005 is hereby set aside. The appellant is acquitted of the charge and he be discharged from his bail bond.

C. J.

J.

J.

B.S./B.R./*Words-3,510*