

Present:  
 Mr. Justice Borhanuddin  
 and  
 Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.3504 of 2003

Md. Rafique Ullah  
 ... Appellant

-Versus-

The State  
 ... Respondent

Mr. S.M. Shahjahan with  
 Mr. Md. Mohinur Rahman, Advocate  
 ...for the appellant

Mr. Md. Monwar Hossain, A.A.G.  
 ...for the respondent

Judgment on 9.8.2011

*Md. Ruhul Quddus, J:*

This appeal under section 28 of the Nari-o-Shishu Nirjatan Damon Ain, 2000 is directed against judgment and order dated 21.8.2003 passed by the Nari-o-Shishu Nirjatan Damon Tribunal, Lakshmipur in Nari-o-Shishu Nirjatan Damon Case No.23 of 2000 convicting the appellant under section 10(1) of the Nari-o-Shishu Nirjatan Damon Ain and sentencing him thereunder to suffer rigorous imprisonment for seven years with a fine of Taka 20,000/- in default to suffer rigorous imprisonment for another six months.

Facts leading to this appeal, in brief, are that the informant Md. Salim (P.W.1) lodged an *ejahar* with Lakshmipur Police Station on 9.5.2000 alleging *inter alia* that his daughter Fatema Begum (P.W.2) was a student of Class-V in Dalal Bazar Government Primary School. On the date of occurrence i.e. 5.3.2000 she went to her School as

usual. After the class was started, the appellant Md. Rafique Ullah, a teacher of the School had called her to library and asked to bring a glass of water. Accordingly she brought a glass of water and handed it over to him. He held the glass by one hand and held her by another, and thereafter kept the glass on table, embraced her and kissed her on the cheeks taking her on his lap. He also bite her cheek. Somehow she was released and went back to class-room, where she informed her class-mate Shewly Akhter Mishu about the occurrence and also informed her mother after return to home. Her mother communicated the informant, who took up the matter to the Headmaster of the School. The Headmaster assured him to settle the matter amicably. The Headmaster did not take any step and asked him to take up the matter to the authority superior to him. The informant filed an application to the superior authority and getting no response, lodged the *ejahar*, which gave raise to Lakshmipur Police Station Case No.10 dated 9.5.2000. The police, after investigation submitted charge sheet on 6.7.2000 under section 10(1) of the Nari-o-Shishu Nirjatan Damon Ain (herein after referred to 'the Ain') against the sole appellant.

The case after being ready for trial, was sent to the Nari-o-Shishu Nirjatan Damon Tribunal, Lakshmipur and was registered as Nari-o-Shishu Nirjatan Damon Case No.23 of 2000. The learned Judge of the Tribunal by his order dated 13.9.2000 framed charge against the appellant under the said section of law, to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case examined as many as fifteen witnesses. After closing the prosecution, the learned Judge examined the appellant under section 342 of the Code of Criminal Procedure, to which he reiterated his innocence, but did not adduce any evidence in defense. The defense case as it appears from the trend of cross-examination that the appellant was quite innocent and was falsely implicated in the case to dismiss him from service so that the informant's sister-in-law could be transferred to the School against his vacant post. After conclusion of the trial, the learned Judge found the appellant guilty of charge leveled against him and accordingly pronounced his judgment and order of conviction and sentence on 21.8.2003 as stated above. Against the said judgment and order of conviction and sentence, the appellant moved in this Court with the instant criminal appeal and subsequently obtained bail from this Court.

Mr. S. M. Shahjahan, learned Advocate appearing for the appellant submits that the occurrence was allegedly committed on 5.3.2000 but the *ejahar* was lodged long after sixty four days on 9.5.2000 without offering any satisfactory explanation, which casts a deep shadow of doubt over the prosecution case. The occurrence allegedly took place in an open school, when the students were attending the classes and the teachers were performing their duties. In that situation, it was highly improbable to commit the occurrence behind their back. It appears from the documentary evidence namely, the class-routine and attendance register as well as the oral evidence of Headmaster (P.W.8), that at 12.15 p.m. the Headmaster himself

was teaching in Class-V and before that the National anthem was sung at 12 o'clock, whereas the occurrence allegedly took place at that time, when the victim was not supposed to stay in class-room. Her demeanour and continuous presence in the school on the following days do not indicate that she had faced sexual harassment, which caused her mental depression. Mr. Shahjahan points out that in the meantime the appellant, an old unfortunate teacher has already suffered nearly two years and is under suspension for eleven years.

Mr. Shahjahan further submits that the victim Fatema Begum (P.W.2) in spite of being a minor may be competent to depose, but under the facts and circumstances of the present case, it is very likely that she was heavily tutored by her parents. The glass which was used as an instrument to bring the victim near to the appellant was not seized and proved. Moreover, the star-witness Shewly Ahkter Mishu (P.W.3), the Headmaster (P.W.8) and two other women teachers namely, Aroti Rani Paul and Laxmi Rani Das (P.Ws.9 and 10 respectively) and another local witness namely, Fazal Karim (P.W.4) did not support the prosecution case. In such a position, the case cannot be said to have been proved beyond reasonable doubt, and the judgment and order of conviction and sentence cannot sustain, he concludes.

On the other hand, Mr. Md. Monwar Hossain, learned Assistant Attorney General appearing for the State submits that although there is some small inconsequential discrepancies in the evidence of the prosecution witnesses would not affect the case as there is no contradiction in material particulars. He further submits that in our

social context, no parents can level any stigma on the character of their minor daughter only for dismissing a person from service and get their relation transferred to his post. The learned Judge of the Tribunal rightly considered this aspect of the case in passing the judgment and order of conviction and there is nothing to interfere with.

In order to appreciate the submissions of the learned Advocates, let us examine the evidence and other materials on records. P.W.1 Md. Salim, the informant stated that her daughter Fatema Begum was in School on 5.3.2000 (Sunday) at about 12.00 noon. At the time of recess, she came out from the class-room, when the appellant called her to library and asked to bring a glass of water. Accordingly she brought a glass of water and handed it over to him. He kept the glass on table, embraced her and kissed on her cheeks taking her on his lap. He had also bite her right cheek and attempted to bite the left. Somehow she got herself released and went back to class-room, where she informed her class-mate Shewly Akhter Mishu about the occurrence. On the following day, she informed the occurrence to the inmates of her house. Thereafter the informant took up the matter to the Headmaster, who asked him to keep silent and assured him to settle the matter amicably. Ultimately the Headmaster expressed his inability, which compelled him (informant) to lodge the *ejahar*. In cross-examination he stated that the left hand of the appellant was paralyzed. He further stated that the occurrence took place during class-hour and also stated that his sister-in-law was a

teacher of Kamankhola Government Primary School at Dalal Bazar situated at distance of  $1\frac{1}{4}$  kilometer from his house.

P.W.2 Fatema Begum, the victim stated that on 5.3.2000 (Sunday) at about 12 noon she was in her class-room. The appellant called her out from the class-room and asked to go to library with a glass of water. She went to library with a glass of water and offered him the glass. He held the glass with one hand and held her with another and thereafter kept the glass on table, embraced her and kissed on her right cheek taking her on his lap. He had also bite her right cheek and attempted to bite the left. Somehow she got herself released and went to the class-room, where she informed her class-mate Shewly about the occurrence. She (Shewly) told that the appellant was her house-tutor and had harassed her in the same manner. After return to home, she (Fatema Begum) told her mother about the occurrence. He mother communicated it to her father, who took up the mater to the Headmaster of the School. In cross-examination she stated that her house was situated by 12/13 cubits from the School. She further stated that at 12.00 noon, third period was on. The Headmaster was teaching in her class at third period. In his (Headmaster's) presence, the appellant had called her, when 30/40 students were also present.

P.W.3 Shewly Akhter Mishu stated that the victim Fatema Begum was her class-mate at that relevant time, and that she knew nothing about the occurrence. P.W.4 Fajal Karim, a local witness stated he was in dark about the occurrence. The defense declined to cross-examine both of the said witnesses.

P.W.5 Peary Begum, mother of Shewly Akhter Mishu (P. W. 3) stated that she knew nothing about the occurrence. At this stage, she was declared hostile and was cross-examined by the prosecution. She denied the prosecution suggestion that her daughter Shewly Akhter Mishu ever told her that the appellant had bite the right cheek of victim Fatema Begum. She (P.W.5) also denied the suggestion that while the appellant was a house-tutor of her daughter, committed sexual harassment on her daughter.

P.W.6 Md. Mostafa Kamal an *ejahar* named witness stated that he knew the victim Fatema Begum. On the date of occurrence, the informant told him that the appellant had pressed her hands and taken her on his lap. P.W.7 Mohammad Ali, another *ejahar* named witness stated that he was a businessmen at Dalal Bazar. About two years back, the informant told him that the appellant had kissed Fatema Begum. In cross-examination he stated that he was not examined by the Investigation Officer.

P.W.8 Anil Chandra Debnath, Headmaster of Dalal Bazar Government Primary School stated that the appellant was a teacher in his School. The police arrested him from the school on 13.5.2000. In cross-examination he stated that the classes in his school were held in two shifts. Class I to II were held in morning shift from 9.30 a.m to 12 noon and Class III to V were held up to 4.15 p.m. Before starting the second shift, National anthem was sung from 12.00 noon to 12.15 p.m. He taught Bangla in Class-V on 5.3.2000 from 12.15 to 12.55 p.m. On that day, the appellant taught Bangla in Class-III and also in Class-V. He was the Class-Teacher in Class-III. The victim

Fatema Begum was present in the School on 5.3.2000, 6.3.2000 and 7.3.2000. He proved the class routine, his signature thereon and the attendance register.

P.W.9 Aroti Rani Pal, a teacher of Dalal Bazar Government Primary School stated that the appellant was her colleague. She could not say anything about the occurrence. In cross-examination she stated that she could see other class-rooms and library sitting in her class-room. The guardian who used to come with the minor students, were to stay at office room of the School. P.W.10 Laxmi Rani Das, another teacher of the School stated that the appellant was her colleague and she was in dark about the occurrence.

P.W.11 Saleha Begum, mother of the victim stated that after return of her daughter from the School on 5.3.2000, she (victim Fatema Begum) told her that the appellant had kissed on her cheeks. On the following day, she (P.W.11) and her husband went to the School and took up the matter to the Headmaster, who assured them to do justice, but ultimately failed. P.W.12 Sanaullah Master was tendered by the prosecution and the defense declined to cross-examine him.

P.W.13, Md. Serajul Islam, paternal uncle of the victim stated that the informant and his wife told him that the appellant had kissed Fatema taking her on his lap. She went to the School several times to seek justice from the Headmaster, who did nothing but killed time. Thereafter they had initiated the present case. In cross-examination he stated that his house was adjacent to that of the informant. He



further stated that his wife was a teacher of Kamankhola Government Primary School situated one mile away from his house.

P.W.14 Md. Mashiur Rahman, one of the Investigating Officers who submitted charge sheet, stated that after the case was endorsed to him, he visited the place of occurrence and prepared the sketch map with index. He examined the witnesses and recorded their statements under section 161 of the Code of Criminal Procedure and produced the victim Fatema Begum before the Magistrate for recording her statement. In cross-examination he stated that no glass was supplied to him as an *alamat*. He further stated that while giving statement under section 161 of the Code, Saleha Begum (P.W.11) did not state whether Fatema Begum told her that the accused had kissed on her cheeks.

P.W.15 Manjarul Mannan stated that at the relevant time he was posted to Lakshmipur as a Magistrate of first class. He recorded the statement of victim Fatema Begum under section 22 of the Ain on 12.5.2002. He proved the said statement and his signature thereon. In cross-examination he stated that the victim Fatema Begum while making her statement, did not tell that the appellant had held her and kissed on her cheeks.

It appears that the learned Judge in passing the impugned judgment and order of conviction, did not discuss the delay in lodging the *ejahar*. P.W.1 the informant himself admitted that the appellant was handicapped with one hand paralyzed. So, it was not possible for him to hold a glass by one hand and hold the victim by another. This absurdity destroys the prosecution case. It is also unbelievable that

the occurrence took place in an open School without any protest and resistance from the students and teachers present or it took place behind their back. P.W.3 Shewly Akhter Mishu, the star-witness in this case, whose name has been cited in the *ehahar* as well as in depositions of the victim and that of the informant, and some other vital witnesses like the Headmaster and two other women teachers did not support the prosecution case. P. Ws.1, 2, 11 and 13 who supported the prosecution case are members of same family and are not eye-witnesses to the occurrence. There are discrepancies and contradictions in their evidence, which cast reasonable doubt over the case. P.Ws.6 and 7 were named in the *ejahar*, who are hearsay witnesses and one of them was not examined by the Investigating Officer. One of them stated that the appellant had pressed the victim's hands, while another stated that he had kissed her. There are contradictions in their evidence as well. The source of their knowledge is the informant, who himself is not an eye-witness. In such a position, their evidence cannot be taken into consideration to prove the fact. The statement of victim Fatema Begum made under section 22 of the Ain and her evidence in Court are also contradictory. Although she (victim) was competent to depose, but it is not unlikely that she was tutored by her parents. Moreover, her evidence was not corroborated by P.W. 3 Shewly Akhter Mishu or any other witness, teacher or student present in the school at the time of occurrence. The circumstances before and after the occurrence was not described and proved by any other witness. In such a case it is not safe to impose punishment upon a person only considering the social reality that parents are not supposed to level any stigma on the

character of their minor daughter. In view of the evidence on records and attending facts and circumstances, the prosecution case cannot be held to have been proved beyond reasonable doubt.

For all the reasons stated above, we find substance in the submissions of the learned Advocate for the appellant. The prosecution case having not been proved beyond reasonable doubt, the impugned judgment and order of conviction should not sustain.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 21.8.2003 passed by the Nari-o-Shishu Nirjatan Damon Tribunal, Lakshmipur in Nari-o-Shishu Nirjatan Damon Case No.23 of 2000 is hereby set aside. The appellant is released from his bail bond.

Send down the lower Court records.

Borhanuddin, J:

I agree.