

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Revision No. 695 of 2007

Md. Khokon Mia

...Convict-petitioner

-Versus-

The State and another

...Opposite party

Mr. Biplob Goswami, Advocate

...For the convict-petitioner

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan, A.A.G

...For the State

Heard on 22.02.2024 and 14.03.2024

**Judgment delivered on 18.03.2024**

This Rule under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 was issued calling upon the opposite parties to show cause as to why the impugned judgment and order of conviction and sentence dated 19.04.2007 passed by Nari-O-Shishu Nirjatan Daman Tribunal, Faridpur in Criminal Appeal No. 123 of 2006 affirming the judgment and order of conviction and sentence dated 17.08.2006 passed by Magistrate, First Class, Faridpur in C.R. Case No. 156 of 2005 (Banga) corresponding T.R. No. 143 of 2006 convicting the petitioner under Section 4 of the Dowry Prohibition Act, 1980 and sentencing him to suffer rigorous imprisonment for 3(three) years should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The prosecution case, in short, is that the complainant opposite party No. 2 is the wife of the accused No. 1. The accused No. 2 is the father of the accused No. 1 and the accused No. 3 is the sister of the accused No. 1. The complainant and accused No. 1 married on 25.12.2004 by registered kabinnama. Before their marriage, Abu Jafor, the elder brother of accused No. 1, married the complainant and she gave birth to two children. Her first husband Abu Jafor went out of

Bangladesh and he did not take care of the complainant. In the meantime, a relationship developed between the complainant and accused No. 1. At One point in time, her husband divorced her. Thereafter, the complainant came back to the house of her father. After a few days, the accused Nos. 2 and 3 considering the welfare of the children came to the house of the father of the complainant and gave a proposal for marriage of the accused No. 1 with the complainant. Under the above circumstances, the accused No. 1 married the complainant by registered kabinnama and they enjoyed their conjugal life. Later on, the accused demanded a dowry of taka one lakh and used to beat her for the dowry. After fifteen days of the marriage, the accused No. 1 rented a house at Bogura town and he resides along with his wife and two children of his wife. After a few days, he rented a new house at Bhanga and again demanded dowry. When she refused to pay the dowry, the accused No. 1 beat her on 05.02.2005 and the complainant took shelter at the house of her brother. Lastly, a salish was held on 04.07.2005 in the house of the brother of the complainant and in that salish he also demanded taka one lakh failing which he refused to live with her. After that, she filed the case.

The Magistrate, First Class, Cognizance Court, Faridpur took cognizance of the offence under Section 4 of the Dowry Prohibition Act, 1980 against the convict-petitioner and by order dated 29.05.2006 framed charge against the accused in absentia under Section 4 of the Dowry Prohibition Act, 1980. The prosecution examined 6(six) witnesses to prove the charge against the accused. Since the accused was absconding, the defence did not cross-examine the prosecution witnesses. The trial Court by judgment and order dated 17.08.2006 convicted the petitioner under Section 4 of the Dowry Prohibition Act, 1980 and sentenced him thereunder to suffer rigorous imprisonment for 3(three) years against which the convict-petitioner filed Criminal Appeal No. 123 of 2006 before the Sessions Judge, Faridpur and the appellate Court after hearing the parties by impugned judgment and

order dated 19.04.2007 affirmed the judgment and order passed by the trial Court against which the convict-petitioner obtained the instant Rule.

Learned Advocate Mr. Biplob Goswami appearing on behalf of the convict-petitioner submits that the complainant filed the complaint petition on 06.07.2005 and on the same date the learned Magistrate was pleased to take cognizance of the offence under Section 4 of the Dowry Prohibition Act, 1980 against the accused and the charge was framed on 29.05.2006 without complying the procedure laid down in Sections 87 and 88 of the Code of Criminal Procedure, 1898. He further submits that before framing charge, the trial Court is legally obliged under Section 339B of the Code of Criminal Procedure, 1898 to pass an order for publication of notice at least in two national daily newspapers having wide circulation directing the accused to appear before it within a specified period but the procedures under Sections 87, 88 and 339B of the Code of Criminal Procedure, 1898 were not complied with and consequently, the trial was held in absentia in violation of the said provision. Therefore, the impugned judgments and orders passed by the Courts below are not sustainable in law. The learned Advocate also relied on the decision made in the case of Md. Jamshed Ahmed Vs. The State reported in 14 BLD (1994) 301, Moktar Ahmed Vs. Haji Farid Alam and another reported in 42 DLR 162 and the case of Md. Ali Hossain Vs. The State reported in 14 BLD 102.

Learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara appearing on behalf of the State submits that before the framing charge a report was sent from the concerned police station stating that the accused is not available in the locality and there was no early prospect of arrest of the accused. Thereafter, the notice under Section 339B of the Code of Criminal Procedure, 1898 was published in 'The Daily Azadi' but the convict-petitioner did not appear before the trial Court and all the procedures provided in Sections 87, 88 and Section 339B of the Code of Criminal Procedure, 1898 was complied with and

the trial was held in absentia following law. He prayed for discharging the Rule.

I have considered the submission of the learned Advocate Mr. Biplob Goswami who appeared on behalf of the convict-petitioner and the learned Deputy Attorney General Mr S.M. Golam Mostofa Tara who appeared on behalf of the State, perused the evidence, the impugned judgments and orders of conviction and sentence passed by the Courts below and the records.

The issue involves the instant Rule whether before framing charge, the procedure laid down in Sections 87, 88 and Section 339B of the Code of Criminal Procedure, 1898 was complied with.

On perusal of the records, it appears that the complaint petition was filed on 06.07.2005 and the learned Magistrate was pleased to send the case for judicial inquiry. On 22.08.2005 a report was submitted by the Judicial Magistrate stating that there is a prima facie truth of the allegation against the convict-petitioner and by order dated 22.08.2005, the learned Magistrate was pleased to take cognizance of the offence against the accused. On 25.09.2005 a warrant of arrest was issued against the accused and the learned Magistrate fixed the next date on 30.10.2005 for execution of the warrant of arrest. After that, the learned Magistrate by order dated 29.12.2005 was pleased to issue WP & A although no report was submitted by the concerned Officer-in-Charge of the Police Station regarding the execution of the warrant.

Under Section 87 of the Code of Criminal Procedure, 1898 if any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court is empowered to publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. In the instant case, there was no evidence or any material before the learned Magistrate to believe that the accused had absconded. Without

any report from the Officer-in-Charge of the concerned Police Station to the effect that the accused has absconded or concealed himself so that the warrant issued against the accused cannot be executed the trial Court cannot proceed with the trial.

At this stage, it is relevant here to quote section 339B (1) of the Code of Criminal Procedure, 1898;

Section [339B. “[1) Where after the compliance with the requirements of section 87 and section 88, the Court has reason to believe that an accused person has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect of arresting him, the Court taking cognizance of the offence complained of shall, by order <sup>3</sup>[published in at least two national daily Bengali Newspapers having wide circulation, direct such person to appear before it within such period as may be specified in the order, and if such person fails to comply with such direction, he shall be tried in his absence.]”

It reveals that a copy of ‘The Daily Vorer Ranar’ published from Faridpur is available with the record. In the impugned judgment passed by the appellate Court below, it has been mentioned that on 19.04.2006 a notice under Section 339B (1) of the Code of Criminal Procedure, 1898 was published in ‘The Daily Vorer Ranar’.

On perusal of the records, it is found that there is a newspaper namely ‘The Daily Vorer Ranar’ published on 19.04.2006 from Faridpur directing the accused to appear before the Court. On scrutiny of the said newspaper, revealed that the said newspaper was published from Faridpur which is a local newspaper. Section 339(b) was inserted in the Code of Criminal Procedure, 1898 by Ordinance No. XIV of 1982. In the said Section, the publication of the notice at least in one

Bengali Newspaper was required. Subsequently, the legislature by Act No. XXVI of 1991, the words “published in at least two national daily Bengali Newspapers having wide circulation” were substituted in place of the words and comma “notified in the official gazette, and also published in at least one Bengali Daily Newspaper.” The legislature by way of said amendment made provision for publication of the notice in at least two daily national Bengali Newspapers having wide circulation. The notice under Section 339B of the Code of Criminal Procedure, 1898 was published on 19.04.2006 in ‘The Daily Vorer Ranar’. Therefore, the amended provision of Section 339B of the Code of Criminal Procedure, 1898 is applicable in the instant case.

Under Section 339B (1) of the Code of Criminal Procedure, 1898 publication of notice in at least two daily national Bengali newspapers having wide circulation directing the accused to appear before the Court within a specified period is sine qua non. ‘The Daily Vorer Ranar’ is neither a national daily nor it had wide circulation. Therefore, I am of the view that the mandatory provision of Section 339B of the Code of Criminal Procedure, 1898 was not complied with before framing the charge for which the convict-petitioner could not appear before the trial Court for which the defence was seriously prejudiced and the trial was vitiated for non-compliance of the mandatory provision of Section 339B of the Code of Criminal Procedure, 1898 and the fundamental principle of natural justice.

In the case of Md. Ali Hossain Vs. The State reported in 14 BLD 103 judgment dated 07.07.1992 it has been held that

“It is well settled that the provision of Section 339(b) of the Code of Criminal Procedure is a mandatory provision and unless that is complied with, it vitiates the trial. Section 339(b) provides that in a case of trial in absentia, notification in Official Gazette and also publication in at least one Bengali daily newspaper, asking the

absconding accused to surrender within a date fixed by the Court, is necessary. Here, in the present case, notification was issued, but there was no compliance of paper notification as required under Section 339B of the Code of Criminal Procedure. In view of this, I find that there was no compliance of the mandatory provision of Section 339B of the Code of Criminal Procedure and this vitiated the entire trial.”

In the case of Md. Sabuj Vs. The State reported in 40 DLR 150 the High Court Division held that

“So even if the accused were considered to be absconding because of their absence still it was obligatory to publish in official gazette a direction on the accused to appear before the court before taking up the trial.”

In the case of Moktar Ahmed Vs. Haji Farid Alam & another. reported in 42 DLR 162 it has been held that;

“The expression “in at least one Bengali daily Newspaper” occurring in Section 339B Cr.P.C. seems to me that the provision of section 339B is a mandatory and not a directory one.”

In the case of Md. Jamshed Ahmed Vs. The State reported in 14 BLD (1994) 301 judgment dated 30.11.1993 it has been held that

“In the absence of any notification in respect of the absconding accused in any News Paper as was required under the law, the Special Judge acted illegally in proceeding with the trial in violation of the express provision of law”

The publication of notification in at least two daily national Bengali Newspapers having wide circulation is mandatory under the

amended provision of Section 339B of the Code of Criminal Procedure, 1898. Failure to publish the notice in at least two daily national Bengali Newspapers having wide circulation is violative of the provision of Section 339B of the Code of Criminal Procedure, 1898 and the principle of natural justice. Due to non-compliance of the said provision, the convict-petitioner failed to appear before the trial Court to answer the charge framed against him and the defence was seriously prejudiced.

The convict-petitioner was arrested on 26.10.2006 and he was granted bail by order dated 05.06.2007 and he served more than 7(seven) months in custody. Therefore, I am not inclined to send the case on remand.

In view of the above evidence, facts and circumstance of the case, observation, findings and proposition, the impugned judgments and orders passed by the Courts below are hereby set aside.

The convict-petitioner Md. Khokon Mia is acquitted from the charge framed against him.

However, there will be no order as to costs.

In the result, the Rule is made absolute.

The impugned judgments and orders of conviction and sentence passed by the Courts below are hereby set aside.

Send down the lower Court's records at once.