

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Syed Mahmud Hossain, *Chief Justice*
Mr. Justice Hasan Foez Siddique
Mr. Justice Obaidul Hassan

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.527 OF 2017

(From the judgment and order dated 13.06.2016 passed by the High Court Division in Criminal Appeal No.4692 of 2015)

Md. Mujibur Rahman alias :Petitioner
Mujibur Rahman

Versus

The State and another. :Respondents

For the petitioner : Mr. Ali Imam Khaled Rahim,
Advocate, instructed by Mr. Syed
Mahbubur Rahman, Advocate-on-
Record.

For the respondent : Mr. Biswajit Debnath, Deputy
No.1 Attorney General (with the leave of
the Court).

For the respondent : Mr. Mohammad Ali Azam,
No.2 Advocate-on-Record.

Date of hearing and judgment : The 18th day of February, 2021.

JUDGMENT

Obaidul Hassan, J. Delay in filing of the petition is hereby
condoned.

This Criminal Petition for Leave to Appeal has arisen out of the judgment and order dated 13.06.2016 passed in Criminal Appeal No.4692 of 2015 by the High Court Division dismissing the appeal modifying the conviction of the petitioner under Section 9(4)(kha) of the Nari O Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) (shortly, the Ain) instead of Section 10 of the Ain enhancing the sentence to suffer rigorous imprisonment for 5 (five)

years and to pay a fine of Tk.15,000.00 failing which to suffer rigorous imprisonment for 04 (four) months from rigorous imprisonment for 3 (three) years and to pay a fine of Tk.5,000.00 failing which to suffer rigorous imprisonment for 03 (three) months as was passed by the Nari O Shishu Nirjatan Daman Tribunal, Moulvibazar (hereinafter referred to as the Tribunal) in its judgment and order dated 17.06.2015 in Nari O Shishu Nirjatan Daman Tribunal Case No.16 of 2011 arising out of Moulvibazar Police Station Case No.15 dated 20.10.2010 corresponding to G.R. No.167 of 2010.

The prosecution case, in short, is that the convict-petitioner is the victim Shapla Akhter Joba's husband's elder brother (brother-in-law/vashur). Her husband works in Dhaka in a mobile company namely, Banglalink Mobile Company and lives in Dhaka. She has been living with her daughter Sahenawaz aged about 3 years 8 months. The convict-petitioner is the person of bad character, who always expressed his bad desire as she has been living alone and he used to give proposal of illicit physical relationship and on her refusal, he (the petitioner) became aggrieved upon her. In such a situation, she went to her father's house to stay there because of unbearable disturbance caused by the petitioner. On an invitation of Milad Mahfil, the convict-petitioner went to the father's house of the victim. On the date of occurrence, at 7:30 pm on 17.10.2010 the convict-petitioner entered

into her bed room and then locked the door from inside and with an intention to rape her, the petitioner caught her and started to take off her saree and blouse. When the victim-respondent No.2 tried to save her from the petitioner, the petitioner inflicted fist blow and kicked her. In such a situation, she and her daughter started screaming. On their screaming, some witnesses from the kitchen and neighbouring area came to rescue her. At that time, the accused ran away from the place of occurrence. The victim at that time was pregnant for 4 (four) months. Because of the fist blow given by the petitioner, on the body of the victim Shapla, she became seriously injured. The other witnesses took her to Moulivibazar Sadar Hospital for treatment. Her husband came to the hospital and after consultation with her husband and other relatives, there occurred a delay in lodging the First Information Report (shortly, the FIR).

On receiving the FIR, the Duty Officer recorded the case under Section 9(4)(kha) of the Nari O Shishu Nirjatan Daman Ain, 2000 and sent the matter for investigation. After investigation, the Investigation Officer submitted charge sheet being No.126 dated 05.12.2012 against Mujibur Rahman the convict-petitioner under Section 9(4)(kha) of the Ain, 2000.

Charge was framed against the convict-petitioner under Section 9(4)(kha) of the Ain, 2000 and it was read over to the petitioner to which he pleaded not guilty and claimed to be tried.

The prosecution examined as many as 10 witnesses in favour of its case and the defence examined 02 witnesses to defend against the charges brought against the convict-petitioner. Thereafter, the accused persons were examined under Section 342 of the Code of Criminal Procedure, 1898 to which he claimed innocence and led evidence in defence.

The defence case as it transpires from the trend of cross-examination is that of innocence and false implication. It was divulged in defence that there was land dispute between the petitioner and the husband of victim-respondent No.2 and hence, the petitioner has been implicated with this case falsely out of previous enmity.

The convict-petitioner was placed on trial before the Tribunal and the Tribunal after examination of evidence, convicted the petitioner under Section 10 of the Nari O Shishu Nirjatan Daman Ain, 2000 and sentenced him to suffer rigorous imprisonment for 3 (three) years and to pay a fine of Tk.5,000.00 failing which to suffer rigorous imprisonment for 3 (three) months more by its judgment and order dated 17.06.2015.

Being aggrieved by the impugned judgment and order of the Tribunal, the convict-petitioner preferred Criminal Appeal being No.4692 of 2015 before the High Court Division.

After hearing both the parties, the High Court Division dismissed the appeal by the impugned judgment and order dated 13.06.2016 modifying the conviction of the petitioner from Section 10 of the Nari O Shishu Nirjatan Daman Ain, 2000 to Section 9(4)(kha) of the Nari O Shishu Nirjatan Daman Ain, 2000 (Amended 2003) (shortly, the Ain) enhancing the sentence to suffer rigorous imprisonment for 5 (five) years and to pay a fine of Tk.15,000.00 failing which to suffer rigorous imprisonment for 04 (four) months from rigorous imprisonment for 3 (three) years and to pay a fine of Tk.5,000.00 failing which to suffer rigorous imprisonment for 03 (three) months as was passed by the Nari O Shishu Nirjatan Daman Tribunal, Moulvibazar in its judgment and order dated 17.06.2015 in Nari O Shishu Nirjatan Daman Tribunal Case No.16 of 2011 arising out of Moulvibazar Police Station Case No.15 dated 20.10.2010 corresponding to G.R. No.167 of 2010.

Being aggrieved by and dissatisfied with the judgment and order of the High Court Division, the leave petitioner preferred this criminal petition for leave to appeal under Article 103 of the Constitution of the People's Republic of Bangladesh before this Division.

Mr. Ali Imam Khaled Rahim, the learned advocate, appearing for the petitioner, took us through the judgment and order of the High Court Division, the relevant provisions of law,

the connected materials on record and submits that the prosecution did not prefer any appeal for enhancement of the sentence against the judgment and order of conviction and sentence passed by the Tribunal. the convict-petitioner preferred the appeal before the High Court Division for setting aside the judgment and order of conviction passed by the Tribunal and the said appeal must be disposed of as per provision of Section 423 of the Code of Criminal Procedure, 1898 and there is no scope to enhance the sentence altering the conviction on the basis of the appeal filed by the convict-petitioner for setting aside the conviction and sentence. He further submits that the informant is the wife of the younger brother of the petitioner and long about 8 years she resided in the petitioner's ancestral house with the petitioner along with other relatives and no allegation of outraging of modesty of the victim was raised ever against the petitioner during the said period. There is a land dispute between the petitioner with his younger brother Mahtabuzzaman and the younger brother lodged several cases against the petitioner by his wife, the informant and the local Union Parishad Chairman, DW 1 and DW 2 have brought the parties to compromise by way of amicable settlement and the said dispute cast serious doubt upon the prosecution case, but the Tribunal as well as the High Court Division convicted the petitioner wrongly holding that the said land dispute is the cause of the alleged modesty. He also submits that admittedly the

petitioner was invited in a Milad Mahfil in memory of the late father of the informant in the ancestral house of the informant which is admittedly 20km away from the petitioner's house, none of the participants of the said Mahfil or Maulana, who conducted the Milad Mahfil or any independent witness was examined to prove the case of the prosecution. He adds that the evidences of PW 2 and PW 3 sister and sister-in-law of the informant are not corroborative about assault and injury, the Medical Officer, PW 10 did not mention in his medical certificate about the number of bruises and how long the informant stayed in the hospital for treatment, thus the injuries of the information were not proved. Thus the judgment and order of conviction and sentence passed by the trial Court as well as the High Court Division are not sustainable in law.

In reply, Mr. Biswajit Debnath, the learned Deputy Attorney General and Mr. Mohammad Ali Azam, the leaned Advocate-on-Record, appearing on behalf of the respondents No. 1 and 2 respectively, made their submissions supporting the judgment and order passed by the High Court Division and prayed for dismissal of the petition.

We have heard the learned advocates appearing on behalf of both the parties and examined the FIR, the charge-sheet, the medical certificate, the testimonies of the witnesses, the judgment and order of conviction and sentence passed by the Tribunal, the

judgment and order of conviction and sentence passed by the High Court Division in appeal and the connected materials on record.

The police submitted charge sheet being No.126 dated 05.12.2010 under Section 9(4)(kha) of the Nari O Shishu Nirjatan Daman Ain, 2000 (as amended in 2003). After hearing both the parties, the Tribunal convicted the convict-petitioner under Section 10 of the Ain holding that, *"The accused tried to took off the clothes, which causes toreing the blouse and he also had scuffle with the informant to gratify his greed for sex, which causes injuries over limbs and thereon, but due to complainants screaming the witnesses rushed to place of occurrence, as a result the convict-petitioner failed to complete his action, but it was an indecent of sexual assault, outraging womanly modesty, here the state of preparation amounting to an attempt to commit rape has not been occurred, rather he had committed outraging the modesty of woman."*

It is noted that neither the state nor respondent No.2 filed appeal on the ground of an inadequate sentence. The petitioner preferred appeal before the High Court Division against the conviction and sentence passed by the Tribunal. The High Court Division dismissed the appeal altering the conviction of the petitioner from Section 10 to Section 9(4)(kha) of the Ain and sentenced him to suffer rigorous imprisonment for 5 (five) years and to pay a fine of Tk.15,000.00 failing which to suffer rigorous imprisonment for 04 (four) months from rigorous imprisonment

for 3 (three) years and to pay a fine of Tk.5,000.00 failing which to suffer rigorous imprisonment for 03 (three) months, which is amounting to the enhancement of sentence. Now, obviously, the question arises whether the High Court Division enhanced the sentence after giving opportunity to the convict-petitioner of being heard. From the materials on record, it appears that the High Court Division did not issue any notice upon the petitioner to show cause why the sentence imposed upon him should not be enhanced before passing its judgment and order. The High Court Division convicted the appellant under Section 9(4)(kha) of the Ain which amounts to the enhancement of sentence and is the violation of Section 423 of the Code of Criminal Procedure, 1898 as well as the principle of natural justice i.e. let the other side be heard as well (*Audi alteram partem*). It was held in *Khandker Zillul Bari vs. The State* [28 BLD (AD) 145, Para-37] that, ".....Similarly, the High Court Division in an appeal or revision filed by the convict accused under sections 423 and 439 respectively can enhance the sentence suo moto but only after issuing show cause notice on them." In the instant case, the High Court Division allegedly passed a greater sentence without issuing any Rule upon the convict-petitioner. Principles of natural justice also demands that the sentence imposed on the accused cannot be enhanced without giving him/her the opportunity to be heard on the action to be taken. The view was taken in *Surjit Singh and others vs. State of Punjab* [AIR 1984 SC 1910, Para-3] that,

“While dismissing the appeal of the appellants a division Bench of the High Court observed 'that Surjit Singh and Harjinder Singh had been proved to have committed the murder of Bachan Singh in quite a ruthless manner as is apparent from the number of injuries found on the person of the deceased'. The High Court further observed that it is a fit case in which over and above the sentence of imprisonment for life imposed by the trial Court a fine of Rs.5,000/-, in default to suffer further rigorous imprisonment for two years must be imposed on the appellants. This additional sentence imposed by the High Court unquestionably constitutes an enhancement of sentence. The High Court did not issue notice calling upon the appellants to show cause why the sentence imposed upon them be not enhanced before doing so. Rules of natural justice as also the prescribed procedure require that the sentence imposed on the accused cannot be enhanced without giving notice to the appellants and the opportunity to be heard on the proposed action.....”

In consideration of the matters discussed above, we are also of the view that the High Court Division altered the conviction from Section 10 to Section 9(4)(kha) of the Ain and thereby enhanced the sentence imposed upon the convict-petitioner without giving show cause notice or issuing any Rule upon him and such enhancement has been done without following the due process of law as provided in the statute.

On these above findings, the petition is **disposed of**. The judgment and order of the High Court Division passed in Criminal

Appeal No.4692 of 2015 dated 13.06.2016 is set aside. However, since the allegation of Section 10 of the Ain, 2000 has been proved by adducing witnesses from the prosecution side, the judgment and order of the Tribunal is thus restored.

C.J.

J.

J.