In the Supreme Court of Bangladesh
High Court Division
(Criminal Miscellaneous Jurisdiction)

Present:
Mr. Justice Md. Khairul Alam
And
Mr. Justice K.M. Emrul Kayesh

Criminal Misc. Case No. 39480 of 2017

Md. Liton Mia
.....Accused Petitioner.
-Versus-
The State
.....Opposite Party.
Mrs. Tasmia Prodhan, Advocate with
Mr. Anayet Karim, Advocate
....For the petitioner.
Mrs. Shiuli Khanom, D.A.G. along with
Mr. Mohammad Osman Chowdhury, D.A.G.
Mr. S.M. Emamul Musfiqur A.A.G.
Mr. Md. Nazrul Islam Choton, A.A.G.
Mr. Md. Muzammal Haq A.A.G.
Mr. Md. Humayun Kabir A.A.G.
...for the State.

Heard and Judgment no 13.03.2025

K. M. Emrul Kayesh, J:

The Rule, under section 561 of the Code of Criminal Procedure at the instance of the convict petitioner was issued calling upon the opposite parties to show cause as to why the judgment and order of conviction and sentence dated 15.05.2017 passed by the learned Nari-O-Shishu

Nirjatan Daman Tribunal, Brahmanbaria in Nari-O-Shishu Case No.324 of 2009 arising out of Brahmanbaria Police Station case No.44 dated 16.08.2009 corresponding to G.R Case No.683 of 2009 convicting the convict petitioner under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) (hereinafter referred to as 'Ain') and sentencing him to suffer rigorous imprisonment for life and also to pay a fine of Tk.50,000/- (fifty thousand) should not be quashed and or pass such other or further order or orders as to this court may seem fit and proper.

The convict petitioner filed a Miscellaneous case before the High Court Division invoking the jurisdiction under section 561A of the Code of Criminal Procedure, because the convict petitioner could not prefer appeal against the Judgment and order of conviction and sentence dated 15.05.2017 passed by the tribunal within the time as

stipulated under the provision of section 28 of the Nari-O-Shishu Nirjatan Daman Ain 2000(as amended in 2003).

The prosecution case out of which the Criminal Miscellaneous case has arisen as follows;

The informant opposite party was the mother of the victim girl Sonia Akter, lodged a first information report with Barahmanbaria Sadar Police Station on 16.08.2009 at 17.30 hours alleging inter alia that she lives with her daughter (victim) at the house of her husband as her husband had been working in Dubai for a period of 7/8 years prior to the incident. Her (informant) brother-in-law Nijamuddin looks after her family. The convict petitioner is a characterless and loafer in nature. On 15.08.2009 she (informant) along with her daughter (student of six grader of a local Madrasha) went to attend a 'Gayee Halud' ceremony (Pre-Marriage ceremony) of her distant relative Chand Badsha, from there she along with her daughter safely returned their house. The convict petitioner also

attended the ‘Gayee Halud’ Program. Thereafter the victim having returned to her house and was going to the latrine to answer the call of nature. On her way to latrine from her (victim) house the convict petitioner forcibly took her to the southern side of informant’s house along with another two accused gagging a piece of cloth inside her mouth and the convict petitioner raped her inhumanly while other two accused persons stood there as guard. On causing delay in returning home of the victim, the informant along with a witness one Nijamuddin started searching nearby her house. At one stage of their searching the witness Nijamuddin had seen the convict petitioner Liton Mia, fleeing away from the place of occurrence through flashing of his torch, while the victim was screaming and was about to senseless. Thereafter they returned back home along with the victim and informed the incident to the next door neighbours and member of local Union Parishad, who tried to settle the matter out of court failing of which, the delay

was caused in lodging the First Information Report. Thereafter FIR was lodged with Brahmanbaria Police Station whereby Brahmanbaria Police Station Case No.44 dated 16.08.2009 under section 9(1) of the Ain was started against the accused petitioner.

In turn, the police after holding investigation submitted a charge sheet against the accused petitioner under section 9(1) of the Ain. On transfer, the case was registered as Nari-O-Shishu Case No.324 of 2009 and charge was framed under section 9(1) of the Ain which was then read over and explained to him when he pleaded not guilty and claimed to be tried. After closure of evidence, the accused petitioner was not examined under section 342 of the Code of Criminal Procedure, because the accused petitioner did not face the trial before the tribunal. On conclusion of trial of the case the tribunal convicted and sentenced the petitioner as mentioned above.

Being aggrieved by and dissatisfied with the impugned judgment the petitioner has approached before the court invoking the jurisdiction under section 561A of the Code of Criminal Procedure.

Mrs. Tasmia Prodhan, the learned Advocate appearing for the petitioner submitted that the convict petitioner have been falsely implicated in the case out of local rivalry, because the convict petitioner was the neighbour of the victim. He further submits that the Medical officer, who examined the victim medically, was not examined in court during trial for which it can be said that the rape was not proved against the petitioner beyond shadow of doubt. He next submits, drawing our attention to the impugned judgment that the conviction is based on no evidence and, hence the judgment is liable to be quashed to secure the ends of justice. It is submitted that in order to secure conviction of an accused on a charge on which deterrent punishment has been provided under the

provision of section 9(1) of the Nari-O-Shishu Nirjatan Ain, 2000(As amended in 2003) as in the present case, the evidence must be conclusive and guilt must be proved beyond all reasonable doubt according to the criminal jurisprudence. He next submitted that the trial court arrived at a decision depending on conjecture and surmise rather than considering on actual evidence on record in total ignorance of fundamental principle of criminal justice and in view of the matter the judgment is liable to be set aside and quashed to secure ends of justice. He adds that the vital witness, Nijamuddin who identified the accused petitioner through flashing of torchlight which was not produced in court for inspection of the witnesses during trial without offering any plausible explanation from the prosecution side. Even, the torchlight was not seized during investigation of the case by the investigating officer. It is further submitted that these omissions, laches and lacunas as being of vital nature has cast a serious doubt on the

prosecution case and the trial court has completely failed to take into notice of the fatal defects appearing in the evidence of the prosecution as such the judgment of conviction is not countenance in law. At the fag-end of his submission has invited our attention to the provision of section 561A of the Code of Criminal Procedure that the provision has been enacted by the legislature in 1923(XVIII of 1923) and by way of addition of this section the High Court Division has been vested with the power for achieving the following objectives:

(a) for giving effect to any order under the Code of Criminal Procedure

(b) to prevent abuse of process of the court and or

(c) other wise to secure the ends of justice. As per submission of the learned Advocate for the convict petitioners the High Court Division is not only a court of law but also a court of justice. Let us now reproduce below the section

561A of the Code of Criminal Procedure, Which provides as follows; “Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or other wise to secure ends of justice.”

Mst. Shiuli Khanam, the learned Deputy Attorney General appearing for the state, submitted taking us through the judgment of the trial court, FIR charge sheet and other materials that the trial court rightly arrived at a decision of conviction and sentence considering all evidences and materials on record. The doctor who medically examined the victim was not examined in court but Medical certificate was exhibited by the deposition of victim in court. Moreover, the informant and the victim have been examined in court wherein they have given an

account of the incident of rape vividly committed on the victim heinously. He further submitted that the victim was taken away on her way to go to latrine at night forcibly gagging a piece of cloth inside of her mouth and raped her laying nearby the house of Nurun Rahman on a high place. The prosecution successfully proved the case against the convict petitioner beyond reasonable doubt by giving cogent and trust worthy evidence against the petitioner. She further submitted that the provision of section 561A of the Code of Criminal Procedure would not apply in a case culminated by awarding a conviction and sentence. She lastly submitted that as the prosecution had successfully proved the case against this petitioner and, thereafter, she strongly prayed for discharge the Rule.

We have heard the submissions of the learned Advocate for both the parties at length and perused all materials on record.

The principal arguments advanced by the learned Advocate for the convict petitioner culling out the grounds as under.

The first contention raised that section 561A of the Code of Criminal Procedure would apply in a proceeding which has reached in its finality after the conclusion of a trial when it is found necessary to prevent an injustice.

Second contention raised that the conviction awarded by the trial court relying upon the evidences adduced by the prosecution the whole evidence is not reasonably capable of supporting a finding of the guilt of the accused.

Third contention raised that mere absconsion cannot always be a circumstances to lead to an inference of guilt of the accused.

Now, we address all the points raised by the learned advocate for both the parties one by one by discussing evidences coupling with submissions led by the learned Advocate for both the parties.

First contention raised that the provisions of section 561A would apply in a proceeding which has arrived at its finality after the conclusion trial of a case. We lend support in the case of Sohail Ahmed Chowdhury -Vs- The State reported in 15 BLD(1995) at page 452 wherein it was held as under:

> "Although inherent power of the High Court Division under section 561A Cr.P.C is generally exercised for preventing an abuse of the process of the court in respect of a pending proceeding, but nevertheless the said power can also be exercised in respect of a proceeding which has reached its finality after the conclusion of the trial when it is found necessary to prevent an injustice. But this power should be exercised sparingly and in exceptional case where the offences alleged do not constitute any criminal offence or a conviction has been based on no legal evidence or shockingly inadequate evidence."

In another case of Mofazzal Mollah and others -Vs- The State reported in 45 DLR(AD) at page 175 wherein our Appellate Division observed as under:

> "In disposing of the application under section 561A

> Cr.P.C. the learned Judges of the High Court Division fell into some error as the learned Sessions Judge did not take into consideration whether the conviction was based on any legal evidence."

In the said case our apex court further observed:

> "The learned judge proceeded on the assumption that section 561A of the Code of Criminal Procedure is meant only for quashing a criminal proceeding before trial has started and when the trial, as in the present case, has been concluded followed by an appeal and a revision both being unsuccessful how the convicted accused could come for quashing the proceeding under section 561A of the Code of Criminal Procedure has only reiterated the courts inherent power to give effect to any order to prevent the abuse of process of any court or other wise to secure the ends of justice."

In the case at hand, the convict petitioner could not prefer appeal within the time as prescribed under section 28 of the Nari-O-Shishu Nirjatan Ain, 2000 (As amended in 2003), because the petitioner did not face the trial of the case before the trial court, thereafter the convict petitioner

came to know the result of the case, filed an application invoking the jurisdiction under section 561A of the Code of Criminal Procedure assailing the judgment that the judgment was not based on legal evidence. So the fact of the cited case were akin to the fact of the present case. Since the petitioner could no prefer appeal within the stipulated time as the result of the case did not come to his knowledge, so we find substance from the submissions of the learned Advocate for the petitioner.

Second contention raised that the conviction awarded by the trial court is not reasonably capable of supporting a finding of the guilt of the accused.

To address the contention raised, we have gone through the impugned judgment, wherein the prosecution examined as many as four witnesses out of twelve charge sheet named witnesses. PW-1 is the mother and also the informant of this case PW-2, the victim of the case, PW-3, the next door neighbour and PW-4, the investigating

officer of this case. On a careful perusal of the record that the P.W-1 and P.W-2 have categorically stated in their deposition that the case was reconcilled with the accused. P.W-1 and P.W-4 formally deposed in court that the accused raped the victim. On perusal of the record we find that one Nijamuddin as charge sheet cited witness identified the convict petitioner in a deep night by a torchlight but the prosecution could not produce that Nijamuddin as witness without offering any plausible explanation as to why the prosecution did not produce him to give evidence in court.

On the other hand, the victim was recovered from an isolated place by one Nijamuddin and one Alauddin, but that Alauddin was not examined in court to substantiate the prosecution case, also which cast a serious doubt over the prosecution story. Moreover, the torchlight, through which the accused was identified, was not recovered by the investigating officer during investigation of the case. In the

back drop, we find support in the case of Abu Bakker and others –Vs- State reported in 49DLR page 480. Wherein your Lordships observed as under:

> "Recognition by torch and hurricane at dead of night is doubtful."

In a rape case it is admitted that the doctor who conducted Medical examination on the body of the victim was very import witness to prove the rape charge against the convict petitioner. The learned Deputy Attorney General further submits that the trial court can award conviction relying upon the evidence of solitary witness. In this regard she relied upon the case of Siraj Mal others -Vs- State reported in 45 DLR at page 688. Wherein your Lordship observed as under:

> "In a case of sexual offence. When the victim girl is a minor her evidence, if otherwise found to be reliable, may be sufficient for conviction of the accused even without independent corroboration". In the case in hand the victim girl was examined as PW.2 and her mother examined as PW.-1 both the witnesses deposed in court that the case was

> reconciled with the accused and other parts of the evidence of PW-1 and PW-2 does not constitute an offence of rape. So the fact, of the decision cited above are not holding good with the facts of the present one."

In the instant case the prosecution did not produce the Medical officer who examined the victim physically without offering any explanation. But the Medical certificate and the signature of the victim thereon which has been exhibited by the victim herself as ext.3, 3/1 respectively wherein the doctor found no sign of recent sexual intercourse on her body. So the rape committed on the body of the victim was not established by the evidence of the prosecution witnesses and the evidence of the doctor who held Medical examination on the body of the victim. In addition, the victim herself deposed in court parting with her allegation of rape against the petitioner committed on her body. In such a situation the trial court awarded conviction punishable under section 9(1) of the said Ain was based on no evidence rather the trial court came to a

conclusion mere conjecture and surmise without entering into actual evidence of the case. We further find support in a case of Sohail Ahmed Chowdhury -Vs- The State reported in 15 BLD at page 452, wherein your lordship observed as under:

> "The term 'no evidence' is not only confined to dearth of evidence but also it extends to a case where the evidence taken as a whole is not reasonably capable of supporting a finding of guilt of the accused."

On a careful perusal of the impugned judgment the learned trial court came to a conclusion that the prosecution proved the charge of rape against the convict petitioner beyond shadow of reasonable doubt. But the trial court ought to have considered the evidence on record in its true perspective of law. In the instant case the rape was not proved medically on the body of the victim. Over and above, the vital witness Nijamuddin was not examined in court to substantiate the case that the victim was recovered from an isolated place by one Nizamuddin and Alauddin

and the evidence of PW-1. P.W-2 does not attract the ingredient of rape. Because the evidence led by the prosecution did not constitute an offence of rape against the convict petitioner. Moreover a division Bench have given a guideline, when the evidence to be treated as no evidence.

In the case of Abul Hashem -Vs- State, reported in 16 BLC at page 699. Wherein your lordships observed as under:

> "In many cases it has been decided that if the evidence on record against the accused do not inspire confidence of Court to impose conviction that will be treated as the case of no evidence. No evidence does not necessarily mean without evidence".

In the case in hand, the evidence as produced by the prosecution is not reasonably capable of supporting a charge of rape. On consideration of all documents and materials on record, we are of the opinion that the case is no evidence one.

Third contention raised that the convict petitioner was all along absconding from the prosecution, which does not mean the accused was involved with the offence as alleged in the case. On evaluation of the evidence of PW-1 and PW-2 that the case was reconcilled with the convict petitioner, whereupon the convict petitioner did not face trial of the case. Mere absconsion does not entangle the accused with the offence.

In a case of State -Vs- Badshah Mollah reported in 41 DLR (1989) at page 11. Wherein your lordship observed as under:

> "Mere absconding cannot always be a circumstance to lead to an inference of guilt of the accused".

So the instant case the convict petitioner was absent during trial in court as the case was reconciled out of court, as such his absence in court during trial does not mean his guilty mind.

In the case before us we find that the prosecution has miserably failed to prove the charge of rape against the

accused petitioner and the learned court below committed grave error of law in passing the order of conviction and sentence which is based on no evidence.

In the above view of the matter relying on the decisions of the Appellate Division that inherent power under section 561A of the Code of Criminal Procedure can be invoked at any stage of the proceeding and even after the conclusion of trial, if it is necessary to prevent the abuse of the process of the court or otherwise to secure that the ends of justice. In such a situation, we are of the view that the impugned judgment and order of conviction and sentence cannot be sustained and hence is liable to be quashed and set-aside.

In the result, the Rule is made absolute.

The order of conviction and sentence passed against the convict petitioner in Nari-O-Shishu Case No.324 of 2009 corresponding to G.R No.683 of 2009 arising out of Brahmanbaria Police Station case No.44 dated 16.08.2009

under section 9(1) of the Ain is hereby quashed and set-aside. The petitioner is acquitted of the charge levelled against him.

The surety is discharged from his bail bond.

The office is directed to send down the lower court records along with a copy of the Judgment communicate at once.

Md. Khairul Alam, J:

I agree