

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 9135 of 2019.

IN THE MATTER OF:

An appeal under section 28 of Nari-O-Shishu Nirjatan Daman Ain, 2000.

-AND-

IN THE MATTER OF :

Sabbir Sheikh

...Accused-appellant.

-Versus-

The State and another.

.....Respondents.

Mr. Sharif Ahmad, Advocate

... For the appellant.

Mr. Md. Saiefuddin Khaled, D.A.G with
Mst. Sultana Nasrin, A.A.G

...For the State.

Judgment On: 24.06.2021.

Present:

Mr. Justice Md. Rezaul Haque

And

Mr. Justice Md. Badruzzaman

Md. Badruzzaman, J:

This appeal has been preferred against order No. 07 dated 06.08.2019 passed by Nari-O-Shishu Nirjatan Daman Tribunal, Gopalganj framing charge against the accused-appellant under section 9(1) of Nari-O-Shishu Nirjatan Daman Ain, 2000 in Nari-O-Shishu Case No. 385 of 2018 corresponding G.R. No. 90 of 2018 arising out of Gopalganj Sadar Police Station Case No. 40 dated 22.02.2018, now pending before the said Tribunal.

The prosecution case, in brief, is that on 22.08.2018 respondent No. 2 as informant, Parimani alias Chandra Sultana

lodged an ejhar with Gopalganj Sadar Police Station against the accused-appellant which was recorded as Gopalganj Sadar Police Station Case No. 40 dated 22.02.2018 under section 9(1) of Nari-O-Shishu Nirjatan Daman Ain, 2000. The contention of the informant, in short, is that the informant and the accused-appellant were involved with love affairs and the same was continued for two years and in that event, when the informant was talking with the accused over mobile phone her mother noticed the same and took away the mobile set from her and switched off the mobile; at 10.00 a.m on 7.7.2016 the accused came to the house of the informant and offered her mother to marry the informant and when her mother denied his offer, he fell at her feet and by holding her hands stated that he would be established after completing his engineering course and vehemently requested her mother to arrange their marriage as per Islamic Shariah and falsely assured that after convincing his parents he would register the marriage within one month; the informant's mother in good faith agreed with that offer and then a fake marriage between the informant and accused-appellant was solemnized as per Islami Shariah Law in presence of witnesses at 10.00 p.m on 7.7.2016; thereafter, the accused came to the house of the informant secretly and raped her on several times from 07.07.2016 and 27.05.2017 in the name of that fake marriage; when the informant requested the accused to register the kabinnama and acknowledge/recognize the marriage he took dilatory tactics and lastly, on 25.06.2016 at 10.00 a.m the accused informed the mother of the informant over cell phone that he would not register the marriage and would not recognize the informant as his wife and also told to give marriage of the informant elsewhere and thereafter, switched of his mobile. Being failed to settle the matter amicably, the informant lodged the ejhar.

The police, after holding investigation, being found *prima facie* case submitted police report against the accused-appellant under section 9(1) of Nari-O-Shishu Nirjatan Daman Ain, 2000 being charge sheet No. 230 dated 16.05.2018. Thereafter, the case was transferred to Nari-O-Shishu Nirjatan Daman Tribunal, Gopalganj for trial and numbered as Nari-O-Shishu Case No. 385 of 2018. The appellant got bail from the High Court Division and he is still enjoying the privilege of bail. The learned Judge of the Tribunal then accepted the charge sheet, took cognizance of the offence under the said section of law against the accused-appellant and then fixed the next date for charge hearing. At that stage, the appellant filed an application under section 265C of the Code of Criminal Procedure for his discharge and the learned Judge, after hearing, vide impugned order dated 06.08.2019 rejected the application and framed charge against him under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 which was read over to him, who pleaded not guilty and claimed to be tried and the learned Judge fixed the next date for evidence. Being aggrieved by the said order, the accused-appellant has preferred the instant appeal which was duly admitted.

Mr. Sharif Ahmad, learned Advocate appearing for the accused-appellant by taking us to the FIR, charge sheet, Medical Examination Report and Report of Skeletal Age of the victim girl, the statements of the witnesses recorded under section 161 of the Cr.P.C mainly submits that admittedly, the marriage was solemnized between the informant and accused-appellant and alleged sexual intercourse was made during the existence of marriage with the consent of informant and therefore, no offence was committed under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000; that even if the allegation is taken to be as true

the same may come under the purview of section 5(4) of the Muslim Marriages and Divorces (Registration) Act, 1974 and not under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000; that all conditions for a valid Muslim marriage i.e proposal by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other in presence of adult Mohamedans i.e two male or one male and two female witnesses, have been fulfilled and as such, no offence was committed under section 9(1) of Nari-O-Shishu Nirjatan Daman Ain, 2000 and as such, the Tribunal committed illegality in framing charge against the accused-appellant.

None has appeared for informant-respondent No.2 to oppose the appeal.

Mr. Md. Saiefuddin Khaled, learned Deputy Attorney General appearing with Mst. Sultana Nasrin, learned Assistant Attorney General for the State by refuting the submission made by the learned Advocate for the appellant submits that admittedly, the marriage between the parties was not registered in accordance with the purview of section 5(4) of the Muslim Marriages and Divorces (Registration) Act, 1974 and as such, there was no marriage in the eye of law and accordingly, it is to be considered that the accused-appellant made sexual intercourse with the informant in a deceitful means and thereby, a *prima facie* case has been made out in the FIR followed by charge sheet against the accused-appellant in committing rape within the meaning of section 9(1) of Nari-o-Shishu Nirjatan Daman Ain, 2000 and resultantly, the learned Judge of the Tribunal committed no illegality in framing charge against the accused-appellant to go for trial.

We have heard the learned Advocate for the accused-appellant and the learned DAG and also perused the FIR, charge sheet, impugned order and other documents available on records.

Nari-O-Shishu Nirjatan Daman Ain, 2000 (Act No. 8 of 2000) has been enacted to provide stringent provision for prevention of offences of oppression to women and children and to provide adequate measure for effective punishment for the offences related therewith. This Act, as per section 3, has overriding effect over all other laws for the time being in force. As per section 2(e) 'rape' means rape as defined under section 375 of the Penal Code, 1860. Section 9(1) of the Ain prescribes punishment for committing rape. For easy reference section 9(1) is quoted bellow:

“৯। (১) যদি কোন পুরুষ কোন নারী বা শিশুকে ধর্ষণ করেন, তাহা হইলে তিনি মৃত্যুদণ্ডে বা যাবজ্জীবন সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অর্থদণ্ডেও দণ্ডনীয় হইবেন।

ব্যাখ্যা- যদি কোন পুরুষ বিবাহ বন্ধন ব্যতীত ষোল বৎসরের অধিক বয়সের কোন নারীর সহিত তাহার সম্মতি ব্যতিরেকে বা ভীতি প্রদর্শন বা প্রতারণামূলক ভাবে তাহার সম্মতি আদায় করিয়া, অথবা ষোল বৎসরের কম বয়সের কোন নারীর সহিত তাহার সম্মতিসহ বা সম্মতি ব্যতিরেকে যৌন সঙ্গম করেন, তাহা হইলে তিনি উক্ত নারীকে ধর্ষণ করিয়াছেন বলিয়া গণ্য হইবেন।”

The 'Explanation' employed in sub-section (1) of section 9 of Nari-O-Shishu Nirjatan Daman Ain, 2000 clearly stated that 'if a male person **without marital relationship** has sexual intercourse with a woman above sixteen years of age without her consent or with consent obtained by putting her in fear or **deceitful means** or with a woman of age below sixteen years with or without her consent he shall be presumed to have raped such woman'. (underlined to give emphasis). According to the 'Explanation' of section 9(1) of the Ain, 2000 in a case of rape to a married woman

above sixteen years of age the prosecution must prove that the accused had sexual intercourse with that woman without her consent or with consent obtained by putting her in fear or deceitful means (প্রতারণামূলক ভাবে তাহার সম্মতি আদায় করিয়া). In other words, if a person has sexual intercourse with an unmarried woman above sixteen years of age with consent in deceitful means he shall be presumed to have raped such woman.

The phrase '**deceitful means**' is a big term which depends on many factors. The Nari-O-Shishu Nirjatan Daman Ain, 2000 does not define deceitful means (প্রতারণামূলক ভাবে). In Oxford Languages Dictionary the word '**deceitful**' defines as 'guilty of' or 'involving deceit'; '**deceiving** or **misleading others**'. The definition of deceitful is someone or something intentionally untruthful or intended to mislead. An example of something that would be described as deceitful is a statement that is blatantly untrue and that is intended to convince someone of a falsehood.

In the instant case, it is the case of the prosecution that there was a love affair between the informant-victim and the accused-appellant, at the relevant time, was an engineering student and behind the knowledge of his parents and the father of the victim girl he convinced her mother by making a false promise that he would registrar the marriage within one month if she gives marriage the victim with him and by arranging a fake marriage ceremony he made sexual relationship with the informant by obtaining consent from the informant in such a deceitful means and thereby, committed rape within the meaning of section 9(1) of Nari-O-Shishu Nirjatan Daman Ain. The police, during investigation, having found the allegation as *prima facie* true submitted charge sheet against the accused-appellant to go for trial.

The case of the accused-appellant is that since, admittedly, the accused-petitioner validly married the informant and involved with physical relationship with her at her free will, mere non-registration of the marriage in accordance with Muslim Marriages and Divorces (Registration) Act, 1974 would not make the marriage invalid and question of deceitful means does not arise at all and thereby, the accused-appellant committed no offence under section 9(1) of the Ain, 2000.

It is to be noted that instances are not rare in our society that innocent persons are implicated in false cases of rape with a view to satisfying grudge out of enmity to harass under the stringent provision of law relating to bail, trial and punishment. The Tribunal in such cases is required to exercise its great care and caution against false implication of innocent person and exuberance with the reasonable standard of proof, probability and improbability fairly based on the facts and circumstances of each and every individual case so that the real culprits are punished and innocent persons are not suffered.

It must be borne in mind that sexual intercourse by a man with a woman above 16 years of age with her consent as a willing partner does not constitute rape punishable under section 9(1). When a man have sexual intercourse with a woman above 16 years without her consent or with consent obtained under fear or by deceitful means shall be deemed to have committed rape punishable under section 9(1). Again, when a man have intercourse with a girl below 16 years of age even with her consent shall constitute rape as the consent of a minor is immaterial. Thus, in order to attract section 9(1) the offence of rape must strictly conform to the ingredients of rape as defined under section 375 of the Penal Code, 1860.

Muslim Marriages and Divorces (Registration) Act, 1974 (Act No. LII of 1974) has been enacted to consolidate and amend the law relating to registration of Muslim marriages and divorces. Section 3 of the Act has an overriding effect over any law, custom or usage relating to Muslim marriage which reads as follows:

“3. Registration of marriages- Notwithstanding anything contained in any law, custom or usage, every marriage solemnised under Muslim law shall be registered in accordance with the provisions of this Act.”

Section 5 of Muslim Marriages and Divorces (Registration) Act, 1974 employs procedure of registration of marriage and punishment for non-compliance of such provisions. Section 5 reads as follows:

“ 5. Solemnisation of a marriage to be reported and registered-

- (1) Where a marriage is solemnised by the Nikah Registrar himself, he shall register the marriage at once.
- (2) Where a marriage is solemnised by a person other than the Nikah Registrar, the bridegroom of the marriage shall report it to the concerned Nikah Registrar within thirty days from the date of such solemnisation.
- (3) Where solemnisation of a marriage is reported to a Nikah Registrar under sub-section (2), he shall registrar the marriage at once.
- (4) A person who contravenes any provision of this section commits an offence and he shall be liable to be punished with simple imprisonment for a term

which may extend to two years or with fine which may extend to three thousand taka, or with both.”

Sections 3 and 5 of the Muslim Marriages and Divorces (Registration) Act, 1974 read together suggests that the overriding effect of the provision under section 3 and provision of punishment for violation of the provisions under section 5 make those provisions mandatory which follows that every Muslim marriage solemnised by the Nikah Registrar or any other person shall be registered by the Nikah Registrar. As per section 5(2) of the Act, 1974 where a marriage is solemnised by a person other than the Nikah Registrar, the Bridegroom of the marriage shall report it to the concerned Nikah Registrar within thirty days from the date of such solemnization. In the instant case, admittedly, the alleged marriage was not solemnized by the Nikah Registrar and accordingly, the accused was bound to report that to the Nikah Registrar for registration under section 5(3) of the Act which have not been done by him.

The learned Advocate for the accused-appellant has tried to convince us that for non-registration of the alleged marriage cannot be considered as an offence of rape because of the fact that the marriage, as per prosecution version, was validly solemnized and the sexual relationship, if any, made by the accused-appellant with victim girl was with her consent. But the learned Advocate for the accused-appellant could not show from records that the accused-appellant ever gave recognition to the alleged marriage or he took any steps to register the marriage under section 5(2) of Muslim Marriages and divorces (Registration) Act, 1974.

The facts of non-reporting about the alleged marriage by the accused-appellant to the concerned Nikah Registrar under section 5(2) of Muslim Marriages and divorces (Registration) Act, 1974,

making sexual relationship with the informant with her consent pretending to be his valid wife and his subsequent refusal to recognize the marriage *ipso facto* suggest that the accused-appellant had an initial intention to deceive her and to fulfil his ill desire he made sexual relationship with the informant in the name of a fake marriage. The above fact also suggests that the accused appellant with a false promise to register the marriage intentionally mislead the victim and convinced her with a falsehood for obtaining her consent to make sexual intercourse with him which is obviously a “deceitful means” as per the Explanation of section 9(1) of the Ain, 2000 and thus, he *prima facie* committed offence of rape punishable under section 9(1) of Nari-O-Shishu Nirjatan Daman Ain, 2000. Accordingly, we are of the view that the Tribunal committed no illegality in framing charge against the accused-appellant under the said section of law to go for trial.

In view of the discussion made above we find no merit in the appeal.

In the result, the appeal is dismissed.

The Tribunal is directed to proceed with the case in accordance with law and conclude the trial expeditiously.

Communicate a copy of this judgment to the concern Tribunal at once.

(Md. Rezaul Haque, J)

I agree