

Present:

Mr. Justice Md. Shohrwardi

Criminal Revision No. 16 of 2021

Md. Shahidullah Miah

...Convict-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Md. Kamal Hossain Molla, Advocate

...For the convict-petitioner

Ms. Sharmin Hamid, A.A.G with

Mr. Sultan Mahmood Banna, A.A.G

...For the State

Heard on 16.01.2025 and 28.01.2025

Judgment delivered on 02.02.2025

On an application filed under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 16.10.2017 passed by the Additional Sessions Judge, Court No. 02, Narayangonj in Criminal Appeal No. 13 of 2015 affirming the judgment and order of conviction and sentence dated 06.07.2014 passed by the Senior Judicial Magistrate, Narayangonj in C.R. Case No. 370 of 2012 (T.R. No. 149 of 2013) convicting the petitioner under Section 4 of the Dowry Prohibition Act, 1980 and sentencing him to suffer rigorous imprisonment for 3 years should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The prosecution case, in short, is that the complainant Most. Rahima Akter Suma is the wife of the accused Md. Shahidullah Miah and their marriage was solemnised on 29.04.2011. After a few days of their marriage, the accused demanded dowry from the complainant to go abroad. On 01.06.2012, the accused Nos. 1 to 4 in connivance with each other demanded Tk. 5,00,000 as dowry to the complainant, and having beaten her, drove her out of his house. After that, she took

shelter in the house of her father. Lastly, on 18.09.2012 at 4.00 pm, the accused Nos. 1 to 4 came to the house of the father of the complainant and again demanded Tk. 5,00,000 failing which he refused to live with his wife. When she refused to pay the said amount, the accused Nos. 1 to 4 had beaten her. Hearing the hue and cry of the complainant, the neighbours assembled at the place of occurrence. At that time, the accused persons threatened that unless she paid Tk. 5,00,000 as dowry, he would marry elsewhere.

After filing the complaint petition, cognizance was taken against the accused persons under Section 4 of the Dowry Prohibition Act, 1980. During the trial, charge was framed against the accused Md. Shahidullah Miah under Section 4 of the Dowry Prohibition Act, 1980 and other accused persons were discharged. At the time of the framing charge the accused Md. Shahidullah Miah. The prosecution examined 4(four) witnesses to prove the charge against the accused. Since the accused was absconding, he was not examined under Section 342 of the Code of Criminal Procedure, 1898.

After concluding the trial, the learned Magistrate, First Class, Court No. 2, Narayangonj by judgment and order dated 06.07.2014 convicted the accused Md. Shahidullah Miah under Section 4 of the Dowry Prohibition Act, 1980 and sentenced him thereunder to suffer rigorous imprisonment for 3 years. Against the said judgment the accused Md. Shahidullah Miah filed Criminal Appeal No. 13 of 2015 before the Sessions Judge, Narayangonj. The appeal was heard by the Additional Sessions Judge, Court No. 02, Narayangonj. The appellate Court by impugned judgment and order dated 16.10.2017 dismissed the appeal on the ground of non-appearance of the appellant against which the convict-petitioner obtained the instant Rule.

Learned Advocate Mr. Md. Kamal Hossain Molla appearing on behalf of the convict-petitioner submits that the alleged occurrence took place on 01.6.2012 and 18.09.2012 and the accused Md. Shahidullah Miah is an immigrant to Saudi Arabia and at the time of the alleged

occurrence, he was residing in Saudi Arabia and the trial Court without complying with the provision made in Sections 87, 88 and 339B of the Code of Criminal Procedure, 1898 illegally conducted the trial and passed the impugned judgment in the absence of the convict-petitioner. He further submits that the criminal appeal cannot be dismissed in the absence of the appellant without considering the merit of the case. Therefore, the impugned judgment and order passed by the appellate Court below dismissing the appeal on the ground of non-appearance of the appellant is illegal. He prayed for sending the case on remand to the trial Court.

No one appears on behalf of the complainant opposite party No.

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Learned Assistant Attorney General Mr. Sultan Mahmood Banna appearing on behalf of the State submits that at the time of hearing the appeal the convict-petitioner was absconding and the evidence of P.Ws 1 to 4 remained uncontroverted by the defence and the Courts below considering the evidence of the prosecution witnesses legally passed the impugned judgment and orders. He prayed for discharging the Rule.

I have considered the submission of the learned Advocate Mr. Md. Kamal Hossain Molla who appeared on behalf of the convict-petitioner and the learned Assistant Attorney General Mr. Sultan Mahmood Banna who appeared on behalf of the State, perused the evidence, impugned judgment and order passed by the Courts below and the records.

The issue involves the Rule whether the procedure under Sections 87, 88 and Section 339B of the Code of Criminal Procedure, 1898 was complied with by the trial Court and whether the appellate Court is legally empowered to dismiss the appeal filed against the judgment and order of conviction on the ground of non-appearance of the accused.

On perusal of the order sheets of the Court of Magistrate, it appears that on 19.09.2012, cognizance was taken against the convict-

petitioner under Section 4 of the Dowry Prohibition Act, 1980 and warrant of arrest was issued against him and summons were issued against the accused Nos. 2 to 4. On 05.11.2012, the accused Nos. 3 to 4 surrendered before the learned Magistrate and obtained bail. In the order dated 09.11.2012, it has been mentioned that the learned Advocate informed the Court that the accused No. 1 Md. Shahidullah Miah resides outside Bangladesh. The learned Magistrate by order dated 28.11.2012 issued P & A against the convict-petitioner holding that the warrant of arrest was not executed for a long time. The learned Magistrate passed an order on 05.03.2013 for publication of the notice in the newspaper holding that P & A issued against the accused is not returned after service.

On perusal of the order sheets of the Court of Magistrate, it reveals that no report was sent by the officer in charge of the concerned police station regarding the execution of the warrant issued on 19.09.2012 against the convict-petitioner. It is also evident that no report from the concerned police station was sent regarding the execution of the P & A and the learned Magistrate without any report regarding the execution of W/A and P & A passed the order on 05.03.2013 directing for publication of the notice in the newspapers against the accused for his appearance. At the time of filing the case against the accused on 19.09.2012 the convict-petitioner was residing abroad and the procedure under Sections 87 and 88 of the Code of Criminal Procedure, 1898 was not complied with before publication of notice under Section 339B of the Code of Criminal Procedure, 1898.

A bare reading of Section 339B of the Code of Criminal Procedure, 1898 reveals that after compliance with the requirements of section 87 and section 88 of the Code of Criminal Procedure, 1898 if the trial Court has reason to believe that an accused-person has absconded or concealing himself so that he cannot be arrested or produced for trial and there is no immediate prospect of arresting him, the Court taking cognizance of the offence complained of shall, by

order 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.

On perusal of the records, it appears that a notice under Section 339B of the Code of Criminal Procedure, 1898 was published on 06.04.2013 in the daily “আজকের নীরবাংলা” published from Narayanganj and in the daily “দৈনিক ভোরের সময়” published from Shanti Nagar, Dhaka on 05.04.2013. Under Section 339B of the said Act, notice is required to be published in at least two national daily Bengali Newspapers having wide circulation. The “আজকের নীরবাংলা” is published from Narayanganj and the same is a local newspaper. The “দৈনিক ভোরের সময়” is published from Shanti Nagar, Dhaka and it is a national daily but the “দৈনিক ভোরের সময়” has no wide circulation all over the country. Therefore, I am of the view that the provision made in Sections 87, 88 and 339B of the Code of Criminal Procedure, 1898 was not complied with before holding the trial of the case and the trial was held beyond the knowledge of the convict-petitioner due to non-compliance with the said provisions.

The provision made in Sections 87, 88 and 339B of the Code of Criminal Procedure, 1898 although procedural but those procedures are substantive concerning the right of the accused to be notified regarding the charge to be framed against him. Therefore, the provision made in Sections 87, 88 and 339B of the Code of Criminal Procedure, 1898 is sign qua non.

The above view of this Court lends support from the decision made in the case of Lal Mia Vs. the State reported in 42 DLR 15 para 10 judgment dated 06.02.1989, in which the High Court Division (Anwarul Hoque Choudhury, J.) held that;

“Though a trial in absentia is a new concept under the present amended law the provision for bringing an absconder to trial is an old one exhaustively provided for

under sections 87 and 88 of the Code of Criminal Procedure. Thus, even when an accused having absconded and is to be tried and convicted in his absence the court could apply its coercive power for compelling him to attend even by selling his moveable and immovable properties after proper publication made for his presence and surrender as provided under sections 87 and 88 of the Criminal Procedure Code. Section 339 B(1) of the Code of Criminal Procedure thereafter, now, has been added to the Code, finally providing for the trial of such an offender in his absence. It is provided in that section that such a trial could only be held if the court has reasons to believe that even after complying with all the requirements of section 87 and section 88 of the Code an accused had absconded and is concealing himself and cannot be arrested and produced in trial and that there is no such immediate prospect of his arrest, the court then would again order him to appear within a certain time, having it notified in the official Gazette and at least in one Bengali daily newspaper and then only try him in absentia, if he yet failed to appear.”

In the case of Balayet Howlader Vs. The state reported in 49 DLR 520 para 14 judgment dated 07.07.1997, a Division Bench of this Court has held that

In this case process was issued by the trial Court through SP for arrest, proclamation and attachment of the accused and admittedly, no return of compliance was received by him in spite of repeated reminders. It appears that the learned trial Court without taking further steps or ascertaining about the compliance of sections 87 and 88 of the Code of Criminal Procedure

referred above directed for publication of notice in Faridpur “দৈনিক ঠিকানা”. On such facts on record we find that it cannot be said that the learned trial Court had reasonable materials to hold that the accused was avoiding arrest and concealing himself from appearing in court and his attendance or arrest was not possible and, as such, the publication of notice in newspaper and commencing the trial was in clear violation of the mandatory provision of law as provided under section 20(5) (kha) of the Act and thereby vitiated the whole trial.”

On perusal of the judgment and order passed by the appellate Court, it reveals that the appeal filed by the convict-petitioner was dismissed due to the non-appearance of the accused. The appeal against the judgment and order of conviction and sentence is a statutory right, and a criminal appeal cannot be dismissed by the appellate Court without considering the evidence. Therefore, the impugned judgment and order passed by the appellate Court below dismissing the appeal on the ground of non-appearance of the accused is illegal.

Admittedly, at the time of the occurrence the accused was residing abroad. The mandatory provision made in Sections 87, 88 and 339B of the Code of Criminal Procedure, 1898 was not complied with by the Court before framing the charge against the accused. It is also found that the appellate Court dismissed the appeal without considering the evidence. Therefore, I am of the view that the case should be sent back on remand to the trial Court to allow the convict-petitioner to cross-examine the prosecution witnesses already examined.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgments and orders of conviction and sentence passed by the Courts below against the convict-petitioner Md. Shahidullah Miah is hereby set aside.

The case is sent back on remand to the trial Court to allow the convict-petitioner Md. Shahidullah Miah to cross-examine the prosecution witnesses already examined.

The trial Court shall dispose of the case within 6(six) months from the date of receipt of the judgment and order.

Send down the lower Court's records at once.