

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice Md. Nuruzzaman

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

CRIMINAL PETITION NO.957 OF 2021

WITH

CRIMINAL PETITION NO.1111 OF 2022

(Arising out of Criminal Miscellaneous Case No.58314 of 2019)

(From the judgment and order dated 10th day of February, 2021 passed by the High Court Division in Criminal Miscellaneous Case No.58314 of 2019)

Hasina Akhter : . . . Petitioner
(In CrI.P.No.957 of 2021)

The State : . . . Petitioner
(In CrI.P.No.1111 of 2022)

-Versus-

Amena Begum and others : . . . Respondents
(both the cases)

For the Petitioner : Mr. Md. Hamidur Rahman, Advocate
(In CrI.P.No.957 of 2021) instructed by Mr. Md. Momin Uddin,
Advocate-on-Record

For the Petitioner : Mr. Sk. Mohammad Morshed,
(In CrI.P.No.1111 of 2022) Additional Attorney General instructed
by Mr. Haridas Paul, Advocate-on-Record

For the Respondent Nos.1 & 2 : Mr. Mirza Salah Uddin Ahmed,
(In CrI.P.No.957 of 2021) Advocate instructed by Mr. Mohammad
Abdul Hai, Advocate-on-Record

For the Respondent No.3 : Not represented
(In CrI.P.No.957 of 2021)

For the Respondents : Not represented
(In CrI.P.No.1111 of 2022)

Date of Hearing & Judgment : **The 17th day of October, 2022**

JUDGMENT

M. Enayetur Rahim, J: Both the criminal petition for leave to appeals have been filed against the judgment and order dated 10.02.2021 passed by the High Court Division in Criminal Miscellaneous Case No.58314 of 2019 making the Rule absolute and thereby quashed the proceeding of Nari-O-Shishu Nirjatan Daman Case No.658 of 2010 arising out of Kotwali Model Police Station Case No.55 dated 31.07.2010 corresponding to G.R. Case No.563 of 2010 pending in the Court of Nari-O-Shishu Nirjatan Daman Tribunal, Barishal.

The relevant facts leading to the filing of these leave petitions are as follows:

The informant petitioner (C.P No.957 of 2021) Hasina Akhter on 31.07.2010 lodged a First Information Report (FIR) with the Kotwali Model Police Station, Barishal against the 5(five) persons including the present-respondents and same was registered as Kotwali Model Police Station Case No.55 dated 31.07.2010. It was alleged therein that the accused-Kalam Mollah cohabited with the informant with deceitful promise to marry her since July,2007 and at one stage she became pregnant. When she became pregnant, she requested accused-Kalam Mollah to marry her and to take her in his house but accused-Kamal Mollah took time on various pleas; on 30.07.2010 accused-Kalam Mollah told the informant to go to Natullahbad Bus Stand and thereafter at 11.00 a.m. she went to the said Bus Stand and from there she with the accused-Kalam Mollah went to Hotel 'Royal' by a motorcycle. Then they have finished their lunch there and at 12.30 p.m they went to Shahnaj complex at Borura and after 10 minutes the other accused entered into the room and all the accused detained her into a room. The accused Salina Begum pushed her an injection and the other accused persons pushed her two more injections and on

her hue and cry the people informed the police and police recovered her at 14.35 hours and caught red handed accused-Salina Begum with instruments of M.R. The other accused including Kalam Mollah fled away. Accused Tutul snatched away a chain made of gold weighting 8 annas valued at Taka 17,000/- . Thereafter on consultation with parents and the relatives she lodged the first information report (FIR).

On the basis of the aforesaid allegations, Kotwali Police Station Case No.55 dated 31.07.2010 has been lodged against all the accused persons under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain,2000 read with sections 342/ 323/ 313/ 379/ 114 of the Penal Code.

After completing investigation, the police submitted charge-sheet against the accused persons under section 9(1) of Nari-O-Shishu Nirjatan Daman Ain,2000 read with sections 342/ 323/ 313/ 379 and 114 of the Penal Code including the present accused respondents.

The case being ready for trial the case record was transmitted to the Nari-O-Shishu Nirjatan Daman Tribunal, Barishal which was registered as Nari-O-Shishu Nirjatan Daman Case No.658 of 2010. The Tribunal after hearing the respective parties framed charge under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain,2000 read with section 313 of the Penal Code against accused-Kalam Mollah and under section 313 of the Penal Code against the other accused persons.

Eventually, the informant Hasina Akhter was examined before the Tribunal by the prosecution and she was duly cross-examined by the defence.

At this stage the present accused respondents moved before the High Court Division by filing an application under section 561A of the Code of Criminal Procedure for quashing

the proceeding. A Division Bench of the High Court Division initially issued Rule and also stayed the proceeding pending before the Tribunal. Eventually, the Rule was heard by a Division Bench of the High Court Division and the High Court Division by the impugned judgment and order dated 10.02.2021 made the Rule absolute and thereby quashed the proceeding of Nari-O-Shishu Nirjatan Case No.658 of 2010.

Being aggrieved by the said judgment and order the informant has preferred criminal petition for leave to appeal No.957 of 2021 and on behalf of the State criminal petition for leave to appeal No.1111 of 2022 has also been filed.

Mr. Hamidur Rahman, learned Advocate, appearing for the informant-petitioner (C.P.No.957 of 2021) submits that the Tribunal having found prima-facie case against the accused persons framed charge under section 9(1) of the Nari-O-Shishu Nirjatan Daman Tribunal,2000 read with section 313 of the Penal Code and in support of the prosecution case the informant has already been examined as P.W-1, but the High Court Division quashed the proceeding relying on the evidence of P.W-1 and thereby committed serious error of law.

Mr. Rahman, further submits that the High Court Division failed to appreciate that in the midst of the trial there is no scope to consider, evaluate or assess the evidence adduced by the prosecution invoking section 561A of the Code of Criminal Procedure but in the instant case the High Court Division in taking consideration of the said materials quashed the proceeding and thereby committed serious error of law.

Mr. Sheikh Mohammad Morshed, learned Additional Attorney General, has also assailed the impugned judgment and submits that the High Court Division in the garb of exercising power under section 561A of the Code of Criminal Procedure in fact

assumed the jurisdiction of the trial Court and thus, committed serious error in passing the impugned judgment and order.

Per Contra, Mr. Mirza Salah Uddin Ahmed, learned Advocate, appearing for the accused respondent having supported the impugned judgment and order submits that the High Court Division on consideration of the evidence of P.W-1, medical report and other materials available on record rightly came to a finding that if the proceeding is allowed to be continued, in that event it will be share abuse of the process of the Court and as such rightly quashed the proceeding.

We have considered the rival submissions of the learned Advocates for the respective parties, perused the impugned judgment and order and other materials as placed before us.

Upon perusal of the impugned judgment and order it transpires that the High Court Division having considered the evidence of P.W-1 and medical report has quashed the proceeding.

Now the moot question is whether in exercising power under section 561A of the Code of Criminal Procedure the High Court Division can consider, assess, evaluate the part evidence adduced by the prosecution before conclusion of the trial. It is by now well settled that quashment of a Criminal Proceeding under section 561A of the Code of Criminal Procedure is possible in cases of;

- i) facts alleged not constituting any offence;
- ii) the proceeding is barred by law;
- iii) coram non-judice;
- iv) lack of legal evidence adduced;
- v) for ends of justice.

Having considered the facts and circumstances of the present case, coupled with the above proposition of law, we have no hesitation to hold that above ingredients for quashing are absent in the present case and further, prima-facie offence has been disclosed against the accused persons in the FIR and charge sheet and the Tribunal having found prima-facie case framed charge against the accused persons. Falsity or truth of the allegation has to be decided at the trial in the light of the evidence adduced by the parties.

The High Court Division committed serious error in considering the evidence of P.W-1 and medical report in exercising the power under section 561A of the Code of Criminal Procedure at this stage when the prosecution yet not completed to adduce its evidence. The High Court Division has not been empowered to usurp the jurisdiction of the trial Court invoking section 561A of the Code of Criminal Procedure.

In the case of **Golam Sarwar Hiru vs. The State and another, reported in 13 MLR 103 (AD)** this Division has held that neither the High court Division nor the Appellate Division of the Supreme Court is in favour of entertaining application under section 561A of the Code of Criminal Procedure for quashment of proceedings at the stage when trial has already begun and prosecution witnesses are examined.

In the case of **Habibur Rahman Mollah Vs. the State reported in 62 DLR(AD), 233** this Division has also held that it is the consistent views of the superior courts of this sub-continent that the High court Division which exercising its power under section 561A of the Code of Criminal Procedure should not usurp the jurisdiction of the trial Court.

Having considered and discussed as above, we find merit in the leave petitions.

However, since the respondent accused have appeared in the leave petitions and their learned Advocate made his submission at length, we are of the view that to avoid further delay of disposal of the case justice will be best served if we dispose of the leave petitions without granting any leave.

Accordingly, both the leave petitions are disposed of.

The judgment and order dated 10.02.2021 passed by the High Court Division is hereby set aside. The Tribunal is directed to proceed with the case in accordance with law.

C.J.

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