

District: Bhola.

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

Present:

Mr. Justice Syed Md. Ziaul Karim

And

Mr. Justice K.M. Emrul Kayesh

Criminal Appeal No. 2782 of 2012

Md. Roni

..... Convict-appellant.

Versus

The State

..... Respondent.

Mr. Sirajuddin Ahmed, Advocate with

Ms. Sarker Samima Sultana, Advocate.

..... For the Convict-appellant.

Mr. Mohammad Monirul Islam, Deputy-Attorney-General with

Mr. Robiul Islam, Assistant-Attorney-General,

Ms. Ayesha Flora, Assistant-Attorney-General and

Mr. Md. Jahir Ahmed, Assistant-Attorney-General

Ms. Belgish Nafisa Hoque, Assistant-Attorney-General

..... For the State-respondent.

Heard on: 15.05.2024

and

Judgment on: 23.05.2024.

K. M. EMRUL KAYESH, J:

(1) The appeal is directed against the Judgment and order of conviction and sentence dated 16.01.2012 passed by the learned Nari-O-Shishu Nirjatan Daman Tribunal,

Bhola in Nari-O-Shishu Case No.129 of 2003 convicting the appellant under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) and sentencing him thereunder to suffer imprisonment for life and to pay a fine of Tk.10,000/- (ten thousand) in default to suffer rigorous imprisonment for two years more and further directing to bear all expenses of the Child till attaining the age of majority and also declared the accused as father of the disputed son.

(2) The prosecution case as projected in the First Information Report (herein referred to as FIR) and unfurled during trial in short, is that on 27.03.2003 at about 5.00 P.M the victim Josna went to fetch drinking water from a tube-well set up in the house of accused Roni, While the accused Roni called and brought her into his dwelling hut and expressed his desire to have sexual intercourse with her, but the victim did not agree to do sex with the accused. Then the accused by deceitful means obtained her consent and quenched his thirst of sex.

Thereafter the accused used to visit the house of the victim and started sexual intercourse with her in the absence of her mother finding her alone. As a result of their physical relationship, the victim had become pregnant, while the victim requested the accused to bring her to his house after being formal marriage. But the accused disowned his sexual relationship with her and was advised to cause back alley abortion her pregnancy. Thus finding no other alternative, the victim Josna lodged an FIR with Lal Mahan Police Station alleging the occurrence of rape and also her pregnancy.

Whereupon, Lal Mahan Police Station Case No.08 dated 27.02.2003 under section 9(1) of the Nari-O-Shishu Nirzatan Doman Ain 2000 (as amended in 2003) was started.

(3) After lodging of the FIR, the officer-in-charge of Lal Mahan Police Station under Bhola District entrusted to one S.I Altab Hossain for holding investigation of this case. On receiving the responsibility of investigation of

the case he visited the place of occurrence and prepared a sketch map with index thereof. He recorded the statements of the witnesses under section 161 of the Code and sent the victim to the Medical board for physical examination and then obtained a report over the same. The investigating office after thorough investigation into the case has submitted charge sheet being No.70 dated 26.09.2003 under section 9(1) of the Ain against the accused.

(4) Ultimately, the case was transmitted to the court of Nari-O-Shishu Nirjatan Daman Tribunal, Bhola for trial and disposal, wherein it was registered as Nari-O-Shishu Case No.129 of 2003. Then the tribunal framed charge against the convict-appellant under section 9 (1) of the AIN 2000 (as amended in 2003). The tribunal thereafter read over and explained the charge framed against him to which he pleaded not guilty and claimed to be tried.

(5) In course of trial, the prosecution in all examined as many as 13(thirteen) witnesses out of 17 (seventeen) charge sheet named witnesses.

(6) After closure of the evidences of the prosecution witnesses, the trial court could not examine the accused under section 342 of the Code because he was absconded during trial of the case before the learned tribunal.

(7) Though the convict appellant was absent during trial of the case before the tribunal for which the accused was defended by the state defence lawyer. All the witnesses adduced by the prosecution had been cross-examined by the state defence lawyer appointed for the accused by the State.

(8) The defence case as it transpires from the trend of cross-examination of the prosecution witnesses are that he never raped the victim nor did he makes pregnant to her. Rather one Nagor had an illicit relation with the victim and he made her pregnant before the occurrence of

this case. The accused has been implicated with the case out of family feud.

(9) After plenary trial the learned Judge convicted the convict appellant as aforesaid holding:

(a) The prosecution successfully proved the charged against the appellant by corroborative evidence.

(b) The victim as her relationship with the appellant became pregnant and then gave birth a boy baby to whom it was established that the appellant was the biological father of the boy baby through DNA test examination.

(10) Felling aggrieved by and dissatisfied with the impugned judgment and order of convict and sentence herein the appellant preferred the instant appeal.

(11) Mr. Mohammad Monirul Islam, the learned Deputy-Attorney-General, along with Mr. Robiul Islam, Ms. Ayesha Flora, Mr. Md. Jahir Ahmed, and Ms. Belgish Nafisa Hoque, the learned Assistant-Attorney-Generals appearing on behalf of the state submitted inviting our attention through the FIR, impugned

Judgment, charge sheet, Medical report, DNA test report and the evidences and materials on record to uphold the judgment and order of conviction and sentence passed by the learned tribunal. They further submit that the victim became pregnant out of her physical relationship with the appellant and then she gave birth a child. Thereafter on a DNA test it was established that the accused was the biological father of the child. The prosecution has established the prosecution case beyond all reasonable doubt against the appellant and therefore the learned tribunal on a conclusion convicted the appellant under section 9(1) of the AIN and therefore the same does not call for interference in appeal.

(12) Mr. Sirajuddin Ahmed with Ms. Sarker Shamima Sultana, the learned Advocates appearing on behalf of the appellant has sought for impeachment of the impugned Judgment and order of conviction and sentence by culling out the following arguments:

Firstly: The victim was minor at the time of establishing physical relationship as such the offence of rape was not committed upon the victim.

Secondly: The victim made physical relationship with the appellant at her own volition so the allegations does not come within the purview of section 9(1) of the Nari-O-Shishu Nirjatan Daman AIN 2000 (as amended in 2003) as such the impugned Judgment is liable to be set-aside.

Thirdly: The victim had become pregnant by establishing physical relationship with one Nagor, and the appellant was no way involved with the allegation of rape of the victim and thereby the impugned judgment is liable to be set-aside.

Fourthly: There is no eye witness of this case, the trial court arrived at a decision upon conjecture and surmise and, therefore, the impugned judgment is not countenance in law.



Fifthly: The Medical report of the victim did not support the prosecution case rather there is no eye witness in this case as such the impugned judgment is liable to be set-aside.

(13) Let us now consider the evidences and materials on record to arrive at a proper decision of this case.

(14) The victim Josna Akter has been examined as P.W-1, she deposed that on 15<sup>th</sup> Falgun at 5.00 p.m. in 1409, B.S she went to fetch drinking water from a tube-well, to the house of the accused Roni. At the time of returning her home the accused Roni called in his dwelling hut and expressed his desire to have made physical relationship with her, which was turned down by the victim, whereupon he pressed her mouth and promised to marry her placing his hand on her head. By which the accused inspired confidence in the mind of the victim and then this accused made physical relationship with the victim in order to satisfy his carnal desire placing

her on the ground inside the dwelling hut of the accused. Since then the appellant often used to visit the home and made sexual intercourse with her. Consequently, she had become pregnant by the appellant and then gave birth to a baby named Rakib.

In cross-examination she denied a suggestion that she had made illicit relationship with one Nagore. She denied a suggestion that she had foisted a false case in order to harass the appellant. She denied a suggestion that she was deposing falsely against this appellant. She further denied a suggestion that the appellant was not the biological father of her child.

(15) P.W-2 of Jahanara Begum, stated in her examination in chief that she saw the appellant called the victim in his dwelling hut, when the victim was returning home fetching drinking water from a tube-well to the house of the accused Roni. Thereafter the victim had told her (P.W-2) that the convict-appellant Roni raped her as a result of their physical relationship she became pregnant.

On such a situation she had been requested to cause back alley abortion, which was refused by the victim. Lastly she gave birth to a child and the victim came to the court along with her child.

The accused was still on the run.

(16) P.W-3 Moyfuza Begum stated in her deposition that the informant is her daughter who was unmarried at the time of commission of rape. She further stated that the appellant raped her inspiring confidence by placing his hand on the head of the victim to have promised her to marry her. Thereby she often used to make physical relationship with the convict appellant. As their physical relationship the victim became pregnant when she told him about the incident of rape. The victim after having conceived the appellant refused to their relationship. But she had been requested to cause back alley abortion of her pregnancy.

(17) P.W-4. Md. Hanif, deposed in court that the informant is his niece. The appellant was on the run after

hearing the news of her pregnancy. The informant and his mother told him that the accused Roni raped the victim. The accused refused his relation with the victim after hearing the news of pregnancy of the victim.

(18) P.W-5 Josim, stated in his deposition that on 22.08.2002, the investigating officer came to the house of the informant and seized a petticoat and a Maxi by preparing a seizure list on which he appended his signature. He proved the seizure list which has been marked as ext.-1 and his signature thereon marked as ext.1/1. He proved the petticoat in court marked as material ext.-I one scarf (orna) marked as material ext.-II and a Maxi marked as material ext.-III. He further stated that the informant had told him that the appellant raped her.

(19) P.W-6 Dr. Shah Alam, deposed in court that he was working as Resident Medical Officer, Sadar Hospital, Bholla on 24.08.2023. The victim Josna Begum was examined by a Medical Board consisting of three

members committee. The other two members of the Medical board were Doctor Labonno Prova and Doctor Rothendra Nath Mojumder with the help of Senior Nurse Mrs. Hasina Parvin and opined the following:

“Opinion: According to out of examination findings as sonological report. The victim Josna Begum is pregnant and carrying a living foetus of 26 weeks at this moment.”

(20) He proved the examination report as the member of the Medical board and his signature thereon marked as ext.-2, 2/1 respectively and signature of Dr. Labonno Prova marked as ext.-2/2 and signature of Rothidra Nath Mojumder marked as ext.-2/3.

The convict appellant did not make cross-examination of the witness.

(21) P.W-7 Abdul Munaf the father of the victim girl stated in his deposition that the victim is his daughter. The convict appellant Roni made physical relationship with the victim giving assurance to marry her. The convict appellant Roni used to visit his house. As their

physical relationship the victim became pregnant, while the accused Roni had fled away from his house. Thereafter, the victim gave birth to a child.

The convict appellant was present at the initial stage of trial of the case. Then he fled away from the trial of the case. As the accused was absconded. So he could not cross-examination of the witness.

(22) P.W-8 Kutti Miah stated in his deposition that the victim Josna Akter is his neighbour. The accused Roni often visited the house of the informant. On their prohibition, the accused would not pay heed to their request. He further stated that the accused used to make physical relationship with the victim promising to marry her. The victim having had pregnant, the accused fled away from his house. The accused was known to him.

No cross-examination was made as the convict appellant was still on the run.

(23) P.W-9 Yanur Begum stated in his deposition that the victim was unmarried. She used to Jokes with the

accused. The accused made physical relationship with the victim promising to marry her. As their physical relationship she became pregnant and then she gave birth to a child. The victim narrated them about her rape committed by the accused.

As the accused is on absconsion so he could not make cross-examination of the witness.

(24) P.W-10 Monowara Begum was tendered by the prosecution. As the accused was on the run. So he could not cross examine this witness.

(25) P.W-11 S.I Tareq Md. Abdul Hannan stated in his deposition that he was working as S.I of Lal Mohan Police Station, while he was performing duty as officer in charge of the said police station. On 21.08.2003 upon a written ejahar the case was registered after filling up the FIR form. He proved the FIR form and his signature thereon marked as ext.-3, 3/1 respectively. He further proved the FIR and his signature thereon marked as ext.-4

and 4/1 respectively. He assigned to one S.I Altaf Hossain to hold investigation of the case.

(26) P.W-12 S.I Altaf Hossain stated in his deposition that on being responsibility of investigation on 28.08.2003 he visited the place of occurrence and prepared a sketch map with index in regard to place of occurrence. He proved the sketch map and his signature therein marked as ext.-5 and 5/1 respectively and index and his signature thereon marked as ext.-6 and 6/1 respectively. Thereafter the victim was sent to hospital for her medical examination. On 22.08.2003 he seized some alamot in connection of this case and prepared a seizure list thereof. He proved his seizure list and his signature thereon marked as 1 and 1/2 respectively. He identified the alamots in court one petticoat marked as material ext.-I and old Maxi, marked as material ext.-II and another old scarf (Orna) marked as material ext.-III. He submitted charge sheet having found prima facie case in favour of the prosecution against the accused Roni.



In cross-examination he stated that he recorded the statements of four witnesses under section 161 of the Code. He also recorded the statement of the father of victim. The father of the victim told him that his daughter had been working as a garments worker.

He denied a suggestion that the convict appellant Roni was absent from her house in the year 2001 after national election. He denied a suggestion that the accused was not involved with the allegation as set out in the First Information Report. He further denied a suggestion that he submitted charge sheet without holding proper investigation of this case.

(27) P.W-13 Minara Begum she stated in her deposition that both parties are known to her. She had seen the accused to have visited the house of the victim. The victim gave birth to a child. But he did not know who was the real father of the child. The victim was unmarried at the time of conceiving by the accused.

In cross examination he denied a suggestion that the victim told him the name of the putative father of her child.

(28) She was declared hostile by the prosecution and was then cross-examined her by the prosecution.

In cross examination by the prosecution she denied a suggestion that the victim told the name to her who was her perpetrator.

(29) This is in all of the evidences produced by the prosecution to substantiate the prosecution case.

(30) We have categorized the witnesses for the sake of clarity and convenience of understanding the case. P.W-1 Josna Begum, the informant of the case, P.W-2 Jahanara Begum, the neighbour of both the parties. P.W-3, Moyfuza Begum, the mother of the victim, P.W-4 Md. Hanif, the uncle of the victim, P.W-5 Josim. The seizure list witness, P.W-6 Dr. Shah Alam, the doctor, who examined the victim as produced by the police. P.W-7 Abdul Munaf, the father of the victim. P.W-8, Kutti Miah

the neighbour of the victim. P.W-9 Yanur Rahman is also the neighbour of both the parties, P.W-10 Monowara Begum, the neighbour of both the parties, P.W-11 Tareq Md. Abdul Hannan the officer-in-charge of Lal Mohan Police station under Bhola district. P.W-12 S.I Altaf Hossain, the investigation officer of the case. P.W-13 Minara Begum, the neighbour of both the parties.

(31) Before we entering into the merit of this case we advert to the impugned judgment dated 16.01.2012, passed in Nari-O-Shishu Case No.129 of 2012 by the Nari-O-Shishu Nirzation Doman Tribunal, Bhola. Wherein the learned Judge of the tribunal observed that the case was disposed of by the Nari-O-Shishu Nirzaton Doman Tribunal, Bhola on 20.08.2003, Who convicted the accused under section 9(1) of the Nari-O-Shishu Nirzatan Doman Ain and sentenced thereunder for imprisonment for life with pay a fine of Taka 10,000/-(ten thousand) in default to suffer rigorous imprisonment for one year more. Thereafter against the impugned Judgment

the convict appellant preferred a Criminal Miscellaneous Case being No.12266 of 2009 before the Hon'ble High Court Division, wherein Hon'ble High Court Division after hearing both the parties made the rule absolute setting aside the judgment and order of conviction and sentence dated 20.07.2005 by the trial court, where the Hon'ble High Court Division further directed the tribunal to dispose of the case having held DNA test between the accused and the disputed child given birth by the victim girl. Thereafter a DNA test was held as per-direction of the Hon'ble High Court Division. Whereupon the tribunal further disposed of the case complying with the direction given by the High Court Division. The learned tribunal delivered the Judgment further on 16.01.2012. Where the court convicted the accused further under section 9(1) of the AIN and sentenced thereunder to suffer rigorous imprisonment for life and to pay a fine of TK.10,000/- (ten thousand) in default to suffer rigorous imprisonment for two years more. The trial court further declared to the

effect that the accused Roni is the father of the disputed son and accused Rakib to be incurred all expenses of the disputed son till attaining the age of majority of the disputed son. Thereafter the convict appellant preferred appeal before this court.

(32) The principal arguments canvassed by the defence counsel that the allegation of rape committed on the victim was not established by the prosecution evidences. Because the victim was the willing partner of making physical relationship. Over and above, the victim girl did not make any complain to anybody else even the member of the law enforcing agency. So the allegation as depicted in the First Information Report which does not fall within the purview of section 9(1) of the AIN. Moreover it was not supported by the evidence of eye witnesses of this case. The victim herself persuaded him to make physical relationship with her. The convict appellant was innocent. He never went to the house of the

victim. The father of the victim filed this case at the instance of the rival party of the accused.

(33) We have to address the principal arguments advanced by the learned Advocate for the convict appellant by discussing evidences and material on record in tandem with the submissions of the learned Advocate for both the parties.

(34) At the outset of our discussion in evidence on record that there was no eye witness of the incident of rape only the victim herself stated that the accused made physical relationship to satisfy his carnal desire, promising to marry her by placing his hand on her head of the victim and thereby he inspired confidence in the mind to be married her in future. Whereupon she yielded herself to the accused, as a result, she became pregnant and then she gave birth to a child.

(35) PW-1 Josna Begum as a victim of the case stated in her deposition that on 15<sup>th</sup> Falgun at 5.00 p.m. in the year 1409, B.S. She was called by the convict

appellant in his dwelling hut while she was fetching drinking water from a tub-well in the dwelling house of the accused and expressed his desire to have satisfied his carnal desire by establishing physical relationship with her promising to marry her by placing his hand on her head and thereby she was persuaded to have made physical relationship with the accused. Since then he used to visit her father's house often and would make physical relationship. Therefore she became pregnant. After hearing the news of her pregnancy the accused fled away from the place of occurrence house. She proved the FIR and her left hand impression on it. But the defence could not elicit any material contradictions with her deposition. P.W-2 the neighbour of the victim stated that she saw the accused called the victim in his dwelling hut. P.W-3, the mother of the victim stated that the informant told her (mother) that the accused raped her while she went to fetch drinking water from the tub-well of the house of accused. P.W-4 stated that he had been reported by the

victim for having raped her by the accused. P.W-5 the seizure list witness, P.W-6 Medical officer who performed the Medical examination on the body of the victim P.W-7 the father of the victim stated that the accused raped the victim promising to marry her. P.W-8 the witness who saw the accused came to the house of the informant's father. The prosecution has claimed that the victim girl was minor at the time of making physical relationship. The victim gave birth to a child which is admitted by both the parties but we have to ascertain through the discussions of the evidences and material on record who was the author of the offence of rape of the victim. After giving birth to a child by the victim a DNA test was held between the sample of the accused and the alleged child given birth by the informant victim. The DNA test was held at the observation made by the Hon'able High Court Division in Criminal Miscellaneous Case No.12266 of 2009. As the victim gave birth to a boy baby but the accused did not recognize him as his son. So



we have to peruse the evidence of P.W-6 Doctor Shah Alam, stated in his deposition that the sonological report and their examination of the victim physically found the victim pregnant and carrying a living foetus about 26 weeks. He proved the report marked as ext.-2 and 2/1. After giving birth to a child a DNA test was held between the sample of the accused and the disputed child. Thereafter the DNA test was conducted by National Forensic DNA Profiling Laboratory NFDPL, Dhaka and the report was submitted before the tribunal on 18.10.2011 vide Memo No. NFDPL/DNA/11/51 which has been exhibited by the court marked as ext.-7 without any objection on the part of the accused, wherein clearly opined by the DNA test expert that the present convict appellant was the biological father of the disputed son Rakib. The prosecution clearly mentioned that the victim was minor girl at the time of physical relationship with the accused. Where we have gone through the Medical examination report ext.-2, wherein the Medical board

opined her age was 17 years on the date of examination of the victim. The informant mentioned in the FIR that the occurrence of rape took place on 27.02.2003. The Nari-O-Shishu Nirzatan Doman AIN 2000 was amended on 19.07.2003. So the occurrence of rape took place before the amendment of the AIN-2003 when we have perused the definition of child as provided under section 2 sub-section (ট) wherein the law clearly Speaks “শিশু”- অর্থ অনধিক ষোল বতসর বয়সের কোন ব্যক্তি।

(36) As per definition of “child” (শিশু) the victim was 17 years at the time of commission of incident of rape. So the victim was not minor as per Medical report (ext.-2). We have to peruse the definition of “rape” as provided by the Nari-O-Shishu Nirzatan Doman AIN 2000. Section 9(1) of the AIN provided the definition of “rape” which are as follows:

ধর্ষন, ধর্ষন জনিত কারনে মৃত্যু ইত্যাদি  
 “শাস্তি : ৯(১) যদি কোন পরুষ বিবাহ  
 বন্ধন ব্যতীত (ষোল বতসরের) অধিক কোন  
 নারী বা শিশুকে ধর্ষন করে তাথাইস্হলে তিনি

যাবজ্জীবন সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অর্থদণ্ডে ও দণ্ডনীয় হইবেন।

ব্যাখ্যা : যদি কোন পুরুষ বিবাহ বন্ধন ব্যতীত (ষোল বতসরের) অধিক বয়সের কোন নারীর সহিত তাহার সম্মতি ব্যতিরেকে বা ভীতি প্রদর্শন বা প্রতারণা মূলক ভাবে তাহার সম্মতি আদায় করিয়া অথবা (ষোল বতসরের) কম বয়সের কোন নারীর সহিত তাহার সম্মতি সহ বা সম্মতি ব্যতিরেকে যৌন সঙ্গম করেন, তাহা হইলে তিনি উক্ত নারীকে ধর্ষণ করিয়াছেন বলিয়া গণ্য হইবেন।

(২).....

.....

(37) On a careful analysis and reading of the above provision of law if a person obtained consent of a woman/girl by adopting deceitful means and, therefore, made physical relation with a woman/girl his act would be treated as rape.

(38) In the case in hand the victim informant deposed in court as P.W-1 that “১৪০৯ সনের ফালগুন মাসের ১৫ তারিখ বিকাল ৫.০০ ঘটিকার সময়ের ঘটনা। আমি পানি আনার জন্য কলসি নিয়া রনির বাড়ীর টিউবওয়েলে পানি আনতে গিয়েছিলাম। আমি পানি নিয়া আসার সময় আসামী আমাকে কথা শুন্যর জন্য ডাক দিয়া তার ঘরে নিয়া যায়। আমি আসামীর ঘরে গিয়ে অন্য কোন লোক দেখি নাই। তখন আমার পরণে মেঝি ও পেটিকোট ছিল। আসামী আমাকে জড়িয়ে ধরে ও খারাপ কাজ করার

চেপ্ট করেন। আমি চিৎকার দেওয়ার চেষ্টা করিলে আসামী আমার মুখ চাপিয়া ধরে। আসামী আমার মাথায় হাত দিয়ে কিরা করিয়া বলে বিবাহ করিবে। আসামী আমাকে জোর পূর্বক মাটিতে শোয়াইয়া আমার ইচ্ছার বিরুদ্ধে জোর পূর্বক ধর্ষন করে।”

(39) It appears from the deposition of the victim as P.W-1 that the accused obtained her consent to have made physical relationship by way of adopting deceitful means placing his hand on her head swearing upon the name of God (কিরা) which indicates that if the accused would not have promised to marry the victim by placing his hand on the head of the victim she would not have allowed him to have made physical relationship with her. On a meticulous reading of the deposition of victim that the accused obtained her consent (victim) by adopting deceitful means promising to marry her by placing his hand on her head. So the submissions led by the learned Advocate for the defence that the physical relationship was made at the consent of the victim which has got no

substance in view of the evidence of P.W-1 (victim). As the consequence of their physical relationship the victim girl became pregnant (Ext.2) and then she gave birth to a child. Thereafter (Roni) as per DNA test (Ext.7) that it was established that the accused is the biological father of the disputed boy Rakib (Ext.7). The DNA test report has been marked as ext.-7 but on perusal of the evidence of prosecution witnesses that the DNA test report has been exhibited by the court without objection.

(40) The learned Advocate for the defence strongly submits that the DNA test report could not be exhibited without calling the DNA test performing authority. But it appears from the impugned Judgment the learned tribunal observed that the DNA test report was exhibited without objection of the defence lawyer. He further submits that the DNA (Deoxyribo Nucleic Acid). Law was promulgated in the year 2014. So the DNA test report should not be accepted as report because it was prepared before coming into force of law. It appears from the DNA

test report (Ext-7). The DNA test report was prepared by the “National Forensic DNA profile Laboratory DFDPL Nuclear Medicine Building (10<sup>th</sup> floor), Dhaka Medical College Campus under Multi Sectoral Programme on violence against women (2<sup>nd</sup> phase). Though the said law was promulgated in the year 2014 but the DNA test was conducted under the said project which was done according to law. Moreover the DNA test report could be taken into consideration by the court during trial of a case. In the instant case the DNA test report has been exhibited by the court as ext.-7. So the DNA test report was rightly exhibited by the court and marked as ext.-7 wherein mentioned the accused was the biological father of the disputed boy. The Medical report reveals that (Ext-2) the victim was carrying living foetus about 26 weeks and then she gave birth a child. So the rape was committed upon the victim has been established by the evidence of P.W-1 and P.W-2, who stated that she saw the accused called the victim into his dwelling hut. P.W-3 Moyfuza Begum has

deposed in court confirming that her daughter was unmarried before committing rape upon her. P.W-9 Yanur Begum stated in her deposition that the accused used to Jokes with the victim before the event of rape. P.W-13 Minara Begum stated in her deposition that she had seen the accused to visit the house of the victim. So except the evidence of P.W-1 there is no eye witness of incident of rape of the victim but P.W-1, 2, 3, 9 and 13 have deposed in court that the accused used to visit the home without any hindrance on the part of the victim. Moreover the Medical report and the DNA test report was also supports the prosecution case. As the prosecution has been able to prove the charge of rape by adducing cogent and trustworthy evidence against the accused.

(41) We have carefully perused the impugned Judgment and order of conviction and sentence, on the other hand the learned court below observed that the prosecution has been able to prove the charge of the rape against the accused by Medical report (ext.-2) and DNA

test report (Ext.-7) which was observed by the court in discussing the evidence at length and convicted the accused under section 9(1) of the AIN and sentenced thereunder to suffer rigorous imprisonment for life with a fine of Tk.10,000/-(ten thousand only) in default to suffer rigorous imprisonment for two years more. Which was rightly observed as such the judgment in question does not call for any interference by this court on appeal.

(42) But the learned court below declared that the accused was the father of the disputed boy which does not support the said AIN. Because the Criminal Court could not declare the right of a party. In this case the learned court below declared the accused as the father of the disputed boy which was not declared in accordance with law for which the relevant law provided under section 13 of the Ain which is extracted as below

"১৩. ধর্ষণের ফলশ্রুতিতে জন্মলাভকারী শিশু সংক্রান্ত বিধান - অন্য কোন আইনে ভিন্নতর যাহা কিছুই থাকুক না কেন, ধর্ষণের কারণে কোন সন্তান জন্মলাভ করিলে-



- (ক) উক্ত সন্তানের ভরণপোষণের দায়িত্ব ধর্ষণকারী পালন করিবেন,
- (খ) উক্ত সন্তান জন্মলাভের পর সন্তানটি কাহার তত্ত্বাবধানে থাকিবে এবং তাহার ভরণ-পোষণ বাবদ ধর্ষণকারী কি পরিমাণ খরচ তত্ত্বাবধানকারীকে প্রদান করিবে তাহা ট্রাইব্যুনাল নির্ধারণ করিয়া দিতে পারিবে,
- (গ) উক্ত সন্তান পঙ্গু না হইলে, এই খরচ পুত্র সন্তানের ক্ষেত্রে ২১ বৎসর পর্যন্ত এবং কন্যা সন্তানের ক্ষেত্রে তাহার বিবাহ না হওয়া পর্যন্ত এবং পঙ্গু সন্তানের ক্ষেত্রে তিনি স্বীয় ভরণপোষণের যোগ্যতা অর্জন না করা পর্যন্ত প্রদেয় হইবে।"

(43) Moreover it appears from the judgment that the accused would bear the cost of the disputed boy which is not permitted under section 13 of the Nari-O-Shishu Nirzatan Doman AIN 2000. Because there is a provision for providing maintenance of the disputed child by the state till attaining the age of 21 years. The learned court below passed the judgment without following the provision of section 13 of the AIN and therefore to the extent of the portion of the judgment should not be sustained in law. The relevant portion of the Judgment are mentioned below "The accused Md. Roni is hereby

declared to be the father of Md. Rakib and he will bear all possible expenses of his son Md. Rakib to be incurred till attaining the age of 21 years.”

(44) But the defence case as it appears from the trend of cross examination of the prosecution witnesses are that the victim was not raped by the accused rather she had been raped by one Nagor by giving suggestions to the prosecution witnesses and the accused falsely implicated with this case. The informant in her cross examination denied that as her physical relation with one Nagor for which an amount of Tk.5000/- was penalized by holding a Salish. But the accused did not produce any arbitrator before the trial court to substantiate his defence.

Over and above the accused next raised that he has been falsely implicated with this case. Admittedly the victim girl comes of a very poor family and she had no sufficient money to influence the investigating officer, after thorough investigation the investigating officer submitted charge sheet against the accused and the

accused had not bad relation with the investigation officer. So the possibility of false implication of the accused is devoid of substance. The defence plea has fallen through in view of the evidence of investigating officer and other evidence and material on record.

(45) Considering the fact circumstances, and materials on record the prosecution has been able to prove the charge of rape against the accused beyond reasonable doubt and therefore we are of the view that the learned court below came to a conclusion relying upon evidence on record as such no reason to call for interference of the impugned Judgment by this court in appeal. Therefore the judgment and order of conviction and sentence in Nari-O-Shishu case 129 of 2003 passed by the Nari-O-Shishu Nirjatan tribunal is maintained so far as it relates to the sentence imposed upon the convict appellants and the remaining portion of the judgment is deleted as of no legal basis.

(46) In the fact and circumstance of the case we are of the view the judgment passed by the learned court below is maintained in respect of conviction and sentence with modification deleting the portion of the Judgment not based on Law.

(47) But the defence case that the victim was not raped by the accused rather she had been raped by one Nagor by giving suggestions of the prosecution witnesses. But DNA test report and Medical report has falsified the defence plea as raised by the accused.

Thus, the appeal having no merit.

(48) In the result:

The appeal is partly allowed. The sentence in respect of the convict appellant is maintained but the portion to the extent of the judgment “The accused Md. Roni is hereby declared to be the father of Md. Rakib and he will bear all possible expenses of his son Md. Rakib to be incurred till attainment of his majority of 21 years” is deleted.

(49) The convict appellant will get the benefit of section 35A of the Code undergone in calculating the sentence already been served in connection of this case.

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

(Justice K. M. Emrul Kayesh)

Syed Md. Ziaul Karim, J:

I agree.