

# IN THE SUPREME COURT OF BANGLADESH

## APPELLATE DIVISION

### **Present:**

Mr. Justice Hasan Foez Siddique, *Chief Justice*

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

### **CRIMINAL MISCELLANEOUS PETITIONS NO.1432-1434 & 1441 of 2022**

(From the order dated 11.10.2022 & 12.10.2022 passed by the High Court Division in Criminal Miscellaneous Case Nos.51229 of 2022, 51214 of 2022, 52074 of 2022 and 51520 of 2022)

The State

.....**Petitioner**  
(In all the cases)

**-Versus-**

Md. Kabir Biswas

.....**Respondent**  
(In CrI. M.P. No.1432 of 2022)

Most. Bithi Begum alias Hasi

.....**Respondent**  
(In CrI. M.P. No. 1433 of 2022)

Md. Akram Mollik

.....**Respondent**  
(In CrI. M.P. No.1434 of 2022)

Md. Aowlad Hossain

.....**Respondent**  
(In CrI. M.P. No.1441 of 2022)

**For the petitioner** : Mr. A.M. Amin Uddin, Attorney General  
(In all the cases) with Mr. Saiful Alam, Assistant Attorney General, instructed by Ms. Sufia Khatun, Advocate-on-Record.

**For the respondents** : Not represented.  
(In all the cases)

**Date of hearing** : The 27<sup>th</sup> day of October, 2022  
**and judgment**

## **JUDGMENT**

**Obaidul Hassan, J.** These Criminal Miscellaneous Petitions No.1432, 1433, 1434 and 1441 of 2022 are being disposed of by this common judgment as all the cases involve common questions of law.

These Criminal Miscellaneous Petitions are directed at the instance of the opposite parties-appellants against the order dated 11.10.2022 and 12.10.2022 granting the accused-petitioners-respondents anticipatory bail passed by the High Court Division in

Criminal Miscellaneous Case Nos.51229 of 2022, 51214 of 2022, 52074 of 2022 and 51520 of 2022.

At the outset we consider it imperative to mention the brief facts of each case.

**Criminal Miscellaneous Petition No.1432 of 2022:**

On 24.08.2022 the First Information Report (FIR) has been lodged against the accused Md. Kabir Biswas with the concerned police station and the same was registered as Baliakandhi Police Station Case No.17 dated 24.08.2022 corresponding to G.R. No.125 of 2022 under Table 10(Ka) of Section 36(1) of Madok Drobbo Niyontron Ain, 2018.

The FIR states that on 24.08.2022 at about 16.00 hours being tipped of secret information the Deputy Inspector of Madok Drobbo Niyontron Odhidoptor being accompanied by the members of raiding party conducted a raid as a part of anti-narcotic drive at the homestead of the accused in presence of the local witnesses and recovered 200 pieces Yaba tablets containing Amphetamine weighing 20 grams from the bed room of the accused. The said Yaba tablets were then seized by preparing a seizure list, but the accused could not be apprehended as he managed to flee the scene.

**Criminal Miscellaneous Petition No.1433 of 2022:**

On 14.09.2022 an FIR has been lodged against the accused Mst. Bithi Begum alias Hasi with the concerned police station and the same was registered as Sadar Model Police Station Case No.24 dated

14.09.2022 corresponding to G.R. No.453 of 2022 under Table 8(Ka) and 8(Ga) of Section 36(1) and 41 of Madok Drobbo Niyontron Ain, 2018.

The accusation arraigned in the FIR in brief is that on 14.09.2022 at about 16.00 hours being tipped of secret information while the Deputy Inspector of Madok Drobbo Niyontron Odhidoptor along with the members forming the raiding party was on move towards the Station Road at Zia Nagar, they found accused Md. Moyen Ali in front of the shop of one Md. Qurban Ali and on making search of his body 20 *puria* heroin weighing 02 grams were recovered and he was apprehended. On being quizzed said Md. Moyen Ali told that he collected the said heroin from the accused Bithi Begum alias Hashi. Later on, at about 17.00 hours the raiding party headed toward the homestead of accused Bithi Begum alias Hashi and on search they recovered heroin weighing 100 grams from her bed room. During the raid the accused Bithi Begum alias Hashi was not found present in her house.

**Criminal Miscellaneous Petition No.1434 of 2022:**

On 13.09.2022 an FIR has been lodged against the accused Md. Akram Mollik with the concerned police station and the same was registered as Kotwali Police Station Case No.48 dated 13.09.2022 corresponding to G.R. No.784 of 2022 under Section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003).

It has been alleged that on 13.09.2022 at about 8:30 A.M. while the informant's daughter aged about 10 years old was engaged in cooking in the kitchen of their homestead, finding her alone the accused Md. Akram Mollik committed rape upon her forcefully which caused grave injuries to her private organ. Due to the sound of rainfall none could hear the scream of the victim. The accused left the crime scene by extending threat to the victim that she would be slaughtered with machete if she would disclose the incident to anyone. At the relevant time the informant along with his other family inmates remained outside the house. He along with his family inmates excepting the victim went to his in-laws house on 11.9.2022. Thereafter, the victim disclosed the event to her aunt and on 13.9.2022 at about 9:00 A.M. her uncle Md. Akkas Bepari informed the incident to the informant, the father of the victim. As the victim fell ill she was admitted to Bangabandhu Medical College Hospital, Faridpur and her treatment was going on there.

**Criminal Miscellaneous Petition No.1441 of 2022:**

On 19.06.2022 an FIR was lodged against the accused Md. Akram Mollik with the concerned police station and the same was registered as Ulipur Police Station Case No.13 dated 19.06.2022 corresponding to G.R. No.153 of 2022 under Section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003) read with Section 323 of the Penal Code.

The victim being the informant lodged *ejahar* against the accused to set the law on motion alleging inter alia that she along with her husband had been living at the rented house owned by one Md. Abu Taher for one and a half year. Her husband used to run a betel leaf shop at Tabakpur Rail Gate. The accused person attempted to give love proposal to her and incited her to make sexual relationship with him at several occasions. But the victim did not agree with the unholy relationship. On 13.06.2022 at about 9:00 P.M. the informant fell asleep at her bedroom with her minor daughter, later on, at about 9:30 P.M. the accused person came to her house and knocked the door. Believing that her husband came, as soon as the informant opened the door the accused entered inside the room and forcefully raped her. At one stage of violence, while the informant started screaming loudly her husband rushed to the spot hearing the scream. No sooner her husband entered inside the bedroom the accused person smacked her husband in his head, neck and back of the body with bricks and also caused wounds at various parts of his the body by beating with steel pipe. Thereafter, the informant and her husband got admitted to Ulipur Health Complex to undergo necessary medical treatment.

Mr. A.M. Amin Uddin, the learned Attorney General along with Mr. Saiful Alam, the learned Assistant Attorney General appearing for the petitioner assailed that the High Court Division passed the impugned orders illegally and without applying judicial

mind to the gravity and nature of arraignments. The learned Attorney General contended next that the High Court Division granted anticipatory bail to the respondents flouting the decision of this Division rendered in the case reported in 66 DLR(AD) 92 and 71 DLR(AD)364. The learned Counsel lastly contended that the High Court Division did not take into consideration of the fact that there are specific allegations against the every respondent in the respective cases.

We have considered the submissions of the learned Counsel for the petitioner, perused orders passed by the High Court Division as well as the materials on record

It has been divulged from the record that in all the Criminal Miscellaneous Petitions the respondents surrendered before the High Court Division and they were granted anticipatory bail by the said Division. Now, it is disputed in these Criminal Miscellaneous Petitions that whether the High Court Division was authorized to exercise the power of granting anticipatory bail in cases involving the offences of rape, narcotics recovery etc.

The above crucial question was fairly answered by this Division in the year 2019. A full-bench of seven member Judges of this Division headed by the Hon'ble Chief Justice formulated some principles to be followed by the Court while dealing with the anticipatory bail. Referring a number of case laws from the domestic and foreign jurisdiction this Division in the case of *State vs. Professor*

*Dr. Morshed Hasan Khan and 16 others* reported in *71 DLR(AD) 364 paragraphs-51 & 52* held in the following manner:

“No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. No attempt should be made to provide right and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. Few principles for grant of anticipatory bail can be summarised as follows:

- (i) The F.I.R. lodged against the accused needs to be thoroughly and carefully examined;
- (ii) The gravity of the allegation and the exact role of the accused must be properly comprehended;
- (iii) The danger of the accused absconding if anticipatory bail is granted;
- (iv) The character, behaviour, means, position and standing of the accused;
- (v) Whether accusation has been made only with the object of injuring or humiliating the applicant by arresting him. Because it is to be remembered that a worst agony, humiliation and disgrace is attached to arrest. Arrest leads to many consequences not only for the accused but for his entire family and at the same time for the entire community;
- (vi) A balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and thorough investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;
- (vii) The anticipatory bail being an extraordinary privilege should be granted only in exceptional cases. Such extraordinary judicial discretion conferred upon the Higher Court has to be properly exercised after proper application of mind to decide

whether it is a fit case for granting anticipatory bail not according to whim, caprice or fancy;

(viii) A condition must be imposed that the applicant shall not make any inducement or threat to the witnesses for tampering the evidence of the occurrence;

(ix) The apprehension that the accused is in a position to influence, induce or coerce witnesses to desist from furnishing relevant information to the investigating agency cannot be considered to be imaginary and the court ought to have considered that aspect seriously before granting anticipatory bail;

(x) In the cases involve grave offence like murder, dacoity, robbery, rape etc. where it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims the accused should never be enlarged on anticipatory bail. Such discretion should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise;

(xi) It is to be borne in mind about the legislative intention for the purpose of granting anticipatory bail because legislature has omitted the provision of Section 497A from the Code;

(xii) It would be improper exercise of such extraordinary judicial discretion if an accused is enlarged on anticipatory for an indefinite period which may cause interruption on the way of holding thorough and smooth investigation of the offence committed;

(xiii) The Court must be extremely cautious since such bail to some extent intrudes in the sphere of investigation of crime;

(xiv) While enlarging an accused on anticipatory bail, the Court must direct the applicant to co-operate with the investigating

officer in every steps of holding proper investigation if the same is needed;

(xv) The anticipatory bail granted by the Court should ordinarily be continued not more than 8(eight) weeks and shall not continue after submission of charge sheet, and the same must be in connection with non-bailable offence;

(xvi) The Court granting anticipatory bail will be at liberty to cancel the bail if a case for cancellation of bail is otherwise made out by the State or complainant.

The indicatives of this Division given in the case of State V. Abdul Wahab Shah Chowdhury that “such extraordinary remedy and exception to the general law of bail should be granted only in extraordinary and exceptional circumstances upon a proper and intelligent exercise of discretion” should be followed strictly.” (underlines supplied)

The aforesaid guidelines enunciated by this Division in the abovementioned case indisputably have a binding effect. Here we do not dilate our discussion on granting anticipatory bail *vis-a-vis* the scope and the legal provisions regarding the same to avoid the prolixity of discussion since the matter has well been settled in the aforesaid case of **State vs. Professor Dr. Morshed Hasan Khan and others** (supra).

Suffice it to reiterate that pursuant to the provisions enunciated in Article 111 of the Constitution of Bangladesh the law declared by the Appellate Division does have binding effect on the High Court Division and all other courts. Article 111 of the Constitution provides as follows:

“The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.”

In the case of *Secretary, Posts and Telecommunications Division, Ministry of Posts and another vs. Shudangshu Shekhar Bhadra and others* reported in 25 ALR(AD)[2022] 19 paragraph-22 this Division very eloquently stated that:

“.....the provision of Article 111 of the Constitution enjoining upon all courts below to obey the law laid down by this Court, judicial discipline requires that the High Court Division should follow the decision of the Appellate Division and that it is necessary for the lower tiers of courts to accept the decision of the higher tiers as a binding precedent. This view was poignantly highlighted in *Cassell & Co. Ltd vs. Broome and another*, (1972) AC 1027 where Lord Hailsham of St. Marylebone, the Lord Chancellor, in his judgment said:

“The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.”  
(underlines supplied)

In view of above it is quite evident that the ratio decided by this Division is binding on the High Court Division as well as other subordinate courts. But the impugned orders passed by the High Court Division stand in glaring violation of the precedents of this

Hon'ble Court, which is not at all desirable and expected from the High Court Division.

On scrutiny of the impugned orders passed by the High Court Division, we are constrained to observe that the same are totally unwarranted and have been made flouting the specific allegations surfaced in FIR. In such cases involving the offences of grave sexual ravishment and narcotics recovery the High Court Division ought not to have exercised its jurisdiction in providing protection of the accused persons by granting anticipatory bail to them.

The High Court Division must keep in mind that to ensure judicial discipline it is obliged to follow the decision of the Appellate Division. Glaring non application of judicial mind of the High Court Division, as it appears, in allowing an anticipatory bail seems to be an instance of defiance of the settled legal proposition. It is highly deprecated.

It should be kept in mind that the Investigating Officer(IO) deserves free-hand space to go on with the task of investigation to arrive at its logical conclusion. The impugned orders cannot be said to be the outcome of judicial discretion. It is to be noted that judicial discretion refers to power to make a decision chiefly guided by the principles of law. Judicial discretion has always to be exercised not according to whim and without considering the gravity of offences.

The High Court Division should have paid due attention to gravity of offences and specific allegations which are the parameters

while granting anticipatory bail to an accused. But it has been divulged that the orders of High Court Division granting anticipatory bails without taking the nature and gravity of the arraignments into account indubitably has created clog to the investigation and also extends frustration to the victims of hideous sexual aggression. Such orders of High Court Division rather obstructs natural course of criminal justice system.

Discretion vested in the High Court Division in dealing with the prayer seeking anticipatory bail must be exercised with due care and prudence depending upon the nature of accusations and averments. But it appears that the High Court Division pitiably failed to go on in light of the guidelines and principles propounded by the highest court i.e. the Appellate Division.

The orders passed by the High Court Division in dealing with the matter of anticipatory bail rather indicate conspicuous stamp of gross reluctance in exercising true and fair judicial mind. It appears that the High Court Division remained deliberately abstained from accepting loyally the decisions of the higher tiers. Judicial discretion has always to be exercised not according to whim and without considering the gravity of offences and material aspects. It should have been considered that the offence of sexual aggression arraigned degraded and defiled the soul of helpless minor girl and woman.

The impugned orders granting anticipatory bail to the respondents do not depict that while exercising the power of

granting bail the High Court Division took into consideration, inter alia, the prima facie case placed against the accused, the gravity of the crime along with the severity of punishment prescribed for the offences arraigned, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds.

It is to be noted that each criminal case demonstrates its own peculiar factual matrix, and therefore, certain grounds peculiar to a particular case deserve to be taken into account by the court. But to our utter dismay the High Court Division has not even gone through the FIR let alone complying with the directives given by this Division.

But it depicts explicitly that the High Court Division considered the anticipatory bail of the respondents mechanically, whimsically and capriciously, flouting settled legal propositions. It has come to our notice that some of the benches of the High Court Division are exercising the power of granting anticipatory bail indiscriminately without adherence to law. In doing so the High Court Division travelled beyond its periphery. Such act of the High Court Division is deprecated seriously. Discretion the High Court Division exercised in granting anticipatory bail cannot be termed fair and intending to

secure justice. Rather, such orders were capricious causing adverse impact upon the criminal justice system.

It is pertinent to mention here that the latitude given to the High Court Division while exercising the discretionary power of granting anticipatory bail must be guided by the principles laid down by the Appellate Division. But the High Court Division passed the impugned orders overstepping its limits. We have given our anxious consideration to such unwarranted attitude of the High Court Division. Such derogatory trend of the High Court Division shall leave an adverse impression upon the criminal to get an upper hand through the hands of law. In such backdrop, our considered view is that the High Court Division and all other courts are bound to follow the law and propositions enunciated by this Division in the case of **State vs. Professor Dr. Morshed Hasan Khan and others** (supra). We also direct the High Court Division to refrain from unscrupulous exercise of the power of granting anticipatory bail.

Thus, finally taking note to the patent violation of settled decision of this Division regarding the anticipatory bail, we disapprove the manner in which the High Court has adjudicated the anticipatory bail applications preferred by the respondents. In the light of the observations made above, we find merit in the submissions of the learned Attorney General. Therefore, the impugned redress passed by the High Court Division is liable to be set aside.

Accordingly, these Criminal Miscellaneous Petitions No.1432, 1433, 1434 and 1441 of 2022 are **disposed of**.

Let the operation of the orders dated 11.10.2022 and 12.10.2022 passed by the High Court Division in Criminal Miscellaneous Cases No.51229 of 2022, 51214 of 2022, 52074 of 2022 and 51520 of 2022 arising out of Tender Nos.59226 of 2022, 59082 of 2022, 59640 of 2022 and 59037 of 2022 so far as these relate to the interim orders of anticipatory bail granted in favour of the respondents be stayed.

The respondent namely, Md. Kabir Biswas, son of late Rahomat Biseas and late Achis Begum of Village-Baliakandi, Ward No.5, Union Parishad-Baliakandi, Police Station-Baliakandi, District-Rajbari, is directed to surrender before the learned Chief Judicial Magistrate, Rajbari at once, failing which, the said Court shall take appropriate steps to bring him in jail custody.

The respondent namely, Mst. Bithi Begum alias Hasi, daughter of Md. Esahak Ali and Mst. Ozua Begum, wife of Md. Zakir Hossein of Village-Fakir Para, Holding No.30, Permanent address-Huzrapara Zianagar, Police Station-Sadar Model, District-Chapai Nawabganj is directed to surrender before the learned Chief Judicial Magistrate, Chapai Nawabganj at once, failing which, the said Court shall take appropriate steps to bring her in jail custody.

The respondent namely, Md. Akram Mollik, son of Md. Ali Akbar of Village-Kosundi, Police Station-Magura Sadar, District-Magura, At present-Father-in-law-Samad Bepari of Village-Rajapur,

Police Station-Kotwali, District-Faridpur is directed to surrender before the learned Chief Judicial Magistrate, Faridpur at once, failing which, the said Court shall take appropriate steps to bring him in jail custody.

The respondent namely, Md. Aowlad Hossain, son of late Dulu Miah of Village-Mollapara, Union Parishad-Tabakpur, Police Station-Ulipur, District-Kurigram is directed to surrender before the learned Chief Judicial Magistrate, Kurigram at once, failing which, the said Court shall take appropriate steps to bring him in jail custody.

Let a copy of this judgment be sent to the concerned Courts below, immediately.

C.J.

J.

J.

J.

J.

The 27<sup>th</sup> day of October, 2022

Sarwar, RRO; Total words 3726