

Present:

Mr. Justice A.K.M. Asaduzzaman

And

Mr. Justice Syed Enayet Hossain

Criminal Appeal No.9340 of 2023

Md. Sathel Mahamud Sweet

..... Appellant.

-Versus-

The State

..... Respondent.

Mr. Prabir Ranjon Halder, Advocate

.....For the appellant.

Mr. Md. Jasim Sarker, D.A.G. with

Mr. Rasel Ahmmad, D.A.G. with

Mr. Md. Geas Uddin Gazi, A.A.G. with

Mrs. Shamima Akhter Banu, A.A.G. and

Mrs. Laboni Akter, A.A.G. and

Mr. Kazi Mohammad Moniruzzaman, A.A.G.

.... For the respondent.

Heard and judgment on 7<sup>th</sup> November, 2024.

A.K.M.Asaduzzaman,J.

This appeal was preferred against the judgment and order dated 23.08.2023 passed by the Nari-O-Shishu Nirjatan Daman Tribunal No.7, Dhaka in Nari-O-Shishu Nirjatan Daman Case

No.371 of 2018 arising out of Cantonment P.S. Case No. 12 dated 18.10.2012 corresponding to G.R. No. 122 of 2012 convicting and sentenced the appellant under section 7/9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 in each of the two section to suffer imprisonment for life and to pay a fine of Tk.20,000/- in default to suffer rigorous imprisonment for a further period of 3 (three) months and the sentences would run concurrently.

Prosecution case in short, inter alia, is that on 18.10.2012 one Md. Rezaul Karim as informant lodged FIR in the Cantonment Police Station being Case No. 12 dated 18.10.2012 implicating the appellant along with his parents as accused under section 7/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000 alleging, inter alia, that the prosecutrix Israt Jahan Jhuma, a 13 years old girl on 17.10.2012 at 7.30 A.M. went to her school namely B.A.F. Shaheen School at Kurmitola by school van. During school hours she felt headache and on taking leave from her class teacher came out from class for home, and as soon as she reached to the school gate, accused applicant abducted her firstly to Gazipur and therefrom to Chittagong and took shelter in the house of his brother. On 18.10.2012 the convict applicant

committed rape upon her and having learnt that the police might arrest the parents of the applicant, the appellant came back to Dhaka with the victim, the parents of the victim received the victim in Airport Railway station in the morning and they took her by a private car in Manikdi Area. Police recovered the victim therefrom and hence the allegation. The FIR was lodged by the father of the victim.

The matter was sent for investigation to the Cantonment Police Station and on 18.10.2012 victim was recovered and she made statement under section 22 of the said Act on 20.10.2012 and on that date she was also been examined by the Doctor.

After investigation police submitted charge sheet against the accused persons on 08.12.2012.

Thereafter the case was transferred to the Nari-O-Shishu Nirjatan Daman Tribunal No.4, Dhaka and registered as Nari-O-Shishu Nirjatan Daman Tribunal Case No. 142 of 2013.

During trial, the prosecution examined 6 witnesses and the defence examined none.

The defence case is that case was false and victim was neither been kidnapped nor been raped and the appellant was falsely been implicated in this case and he is also entitled to get benefit of doubt.

Considering the evidences and hearing the parties, the trial court convicted and sentenced the accused appellant as stated above and acquitted the other accused persons.

Being aggrieved there against, the appellant preferred the instant appeal.

Mr. Prabir Ranjon Halder, the learned advocate appearing for the appellant submits that the case is of no evidence. The appellant was convicted on mere surmises and conjectures. The impugned judgment is not sustainable in law.

Mr. Md. Jasim Sarker, the learned Deputy Attorney General appearing on the other hand opposes the appeal and submits that the trial court after correct assessment of the evidences convicted the appellant.

Heard the learned advocate and perused the Lower Court Records and the impugned judgment.

In this case for kidnapping a victim named Israt Jahan Jhuma, daughter of the informant Md. Rezaul Karim from the gate of his school named B.A.F. Shaheen School situated at Dhaka Cantonment on 17.10.2012, the accused was alleged to have committed the offence of kidnapping and thereafter before recovery on 18.10.2012, she was said to have rapped by the accused and accordingly he was convicted and sentenced. Accordingly there are two parts in the case. One is victim Jhuma was been kidnapped from in front of her school on 17.10.2012 and then she was taken to other place and been rapped allegedly by the accused.

Now let us see, how the alleged allegation of kidnapping was proved in order to convict the accused under section 7/30 of the Nari-O-Shishu Nirjatan Daman Ain, 2000.

Victim Jhuma was examined under section 22 of the Nari – O-Shishu Nirjatan Daman Ain on 20.10.2012 after recovery on 18.10.2012, wherein she has stated that:

"আমি বি,এ,এফ শাহীন স্কুল, কুর্মিটোলা শাখায় ৭ম প্রেনীতে পড়াশুনা করি। আমি বাসা হইতে স্কুলে যাওয়া আসার পথে মোঃ সাখেল পিতা

আব্দুস সালাম সাং-আদর্শ বিদ্যা নিকেতন ষ্টাফ কোয়ার্টার, মানিকদী, ক্যান্টনমেন্ট, ঢাকা আমাকে ডিসটার্ব করত এবং আমার দিকে সে তাকাইয়া থাকত এবং বিভিন্ন ধরনের কথা বলত। বিগত ১৭/১০/১২ ইং তারিখে আমি স্কুলে থাকাবস্থায় আমার প্রচন্ড মাথা ব্যথা শুরু হইলে আমি ছুটি নিয়া বাসায় ফিরতে ছিলাম। ঐ দিন আমি স্কুল হইতে হেটে স্কুলের গেটের সামনে আসিলে সকাল ১০.০০ ঘটিকার দিকে সাখেল নামে ছেলেটি একটি সি,এন,জি গাড়ী নিয়া আমার সামনে উপস্থিত হইয়া আমাকে ধরিয়া জোর করিয়া সি,এন,জি গাড়ীতে উঠায়। আমি ঐ সময়ে চিৎকার করিলেও আশে পার্শ্বের কেহ দেখতে পায় নাই। আসামী আমাকে উঠাইয়া নিয়া সি,এন,জি যোগে গাজীপুর যায় এবং আমাকে একটি অফিসে নিয়া জোর পূর্বর ভাবে একটি কাগজে স্বাক্ষর নিয়া আমাকে বিবাহ করে। সাখেলের সহিত গাজীপুর হইতে আরেকটি ছেলে উঠে তাকে আমি চিনি না। তাহারা আমাকে একটি বাসে করিয়া নিয়া চট্টগ্রাম যায়। সাখেল আমাকে চট্টগ্রামে তাহার একটি আত্মীয়ের বাসায় নিয়া সকাল হইতে সন্ধ্যা পর্যন্ত রাখে। আমাকে বাসে চট্টগ্রাম নিয়া যাইতে সারা রাত্র চলিয়া যায়। আমি পরের দিন সকালে চট্টগ্রাম পৌছি। পরের দিন সন্ধ্যা পর্যন্ত আমাকে তারা চট্টগ্রাম রাখে। ঐ দিন চট্টগ্রামে থাকিয়া সাখেল যখন জানিতে পারে তাহার বাবা মাকে পুলিশ ধরবে তখন সন্ধ্যার দিকে আমাকে নিয়া ঢাকার দিকে রওয়ানা হয়। আমি পরের দিন সকালে ট্রেনে ঢাকায় পৌছি। আমি চট্টগ্রামে যার বাসায় ছিলাম আমাদের সাথে ঐ বাসার ২জন লোক (১জন

পুরুষ এবং ১জন মহিলা ) আছে। ঢাকায় আসার পর সাথেলের বাবা মা আমাকে পুলিশের কাছে দিয়া দেয়। আমাকে চট্টগ্রামের বাসার রাখিয়া সাথেল জোর পূর্বক ভাবে আমাকে ধর্ষণ করে। আমি বাঁধা দিলেও নিজেকে কোন ভাবেই রক্ষা করতে পারি নাই। সাথেল যখন আমার সাথে এই সব করে তখন বাসায় কেহ ছিল না। এই আমার জবানবন্দী।

স্বাঃ ইসরাত জাহান (ঝুমা)।"

During examination in court, victim as P.W.3 Israt Jahan has said that after going to school she attacked with bad headache and during leisure period, on taking leave, she left from class, and appeared at the school gate where she found accused Sathel standing there, who forcibly pull her in a CNG and took her to Gazipur. In this story of taking her forcefully, how been proved is the main thrust to connect the accused with the alleged crime.

Now let us see how this contention has been proved.

P.W.1 Md. Rezaul Karim, the informant deposed in support of his contention in the FIR and said that like any other day his daughter went to school but did not return back home and then came to learn from classmate Muna (who was not examined) that due to illness victim Jhuma came out of the school at 10.a.m..

P.W.2 Juena Akter, the mother of the victim deposed the similar version like of P.W.1.

P.W.4 Md. Jakir Khan, a neighbour stated in his deposition that on 17.10.2012 victim went to school at 10.00 a.m. but said nothing more than that about the taking away or kidnapping of the victim by any accused persons not even by the accused appellant. He is the practically a seizure list witness. In his presence the investigating officer recovered the wearing apparels of the victim.

P.W.5 Dr. Kazi Golam Mokhlesur Rahman, is the formal witness, who examined the victim and submitted the medical report.

P.W.6 Munshi Shohidul Islam, is the investigating officer, who investigated the case and submitted charge sheet.

Going through the above statement of the deposition of the P.Ws. we find that save and accept disclosure of the parents of the victim, who actually could not say about the taking away of the victim from the place of occurrence by any accused persons is practically there is no other evidence about the participation of the accused in taking away the victim or kidnapping the victim. It is

very important to note that victim a school girl of B.A.F. Shaheen School, which is situated inside the Dhaka Cantonment, is obviously surrounded as well as protected by lot of Army personnels having on duty in the protection and control of the cantonment. It is impossible to kidnap or taking away any person from inside the cantonment area forcibly by any miscreant. Moreover there is no witness in support of the contention of the victim that victim was at all went to the school on the date i.e. on 17.10.2012 or came out from his school at the leisure time on suffering from headache getting permission from the school authority. Moreover Muna from whom P.W.1 got to know the victim went out of her school on taking permission due to headache was also been since not examined, the alleged story was not been proved at all. So the kidnapping of the victim was not been proved by any evidence.

In the next contention regarding the rape of the victim, let us see what the evidence are there. Victim appears to be examined by the doctor on 20.10.2012. Doctor, when examined her could not find any elements of physical violence on the part of the

victim as well as he did not find any spermatozoa in vaginal swab but found hymen of the victim recent teared.

As per Modi's Medical Toxicology 'hymen' of a female can be ruptured or teared for many other reasons, except, the act of coitus (mixing up sexuality), viz:

- 1) accident,
- 2) masturbation, if practiced with some large foreign body,
- 3) introduction of instruments by medical practitioners during examination or a surgical operation,
- 4) the insertion of sanitary tampons,
- 5) a foreign body such as solapith, introduced purposely, and
- 6) ulceration from diphtheria, noma, or other diseases.

(Page No. 310-311 of Modi's Medical Jurisprudence and Toxicology, 19<sup>th</sup> Edition)

Surprising to notice that although doctor who examined the victim immediately after recovery could not find any spermatozoa on the private part of the victim but on chemical analysis it was

found that some marks of spermatozoa of human being on trouser and scarf was been detected. But this spermatozoa was not been proved by way of DNA test, whether it was at all been any spermatozoa of the accused or not. Moreover tools which are alleged to be seized are not the wearing apparels of the victim while she went to the school as alleged. Victim was alleged to have recovered on 20.10.2012 and some new wearing clothes were seized and handed over by the victim, which were not been wearing apparels of the victim as she was said to be missing from the school having school uniform. Thus the spermatozoa alleged to be recovered from a supplied new clothes is a got up story having no nexus with the case. Accordingly the allegation of rape upon the victim is not been proved.

So in any view of the matter, the contention of rape as being alleged to have committed upon the victim by any person not been proved through evidence. The charge under section 9(1) of the Nari-O-Shishu Act is not been proved. The conviction thus thereunder is also illegal.

Regard being had to the above law, fact and circumstances of the case, we are of the opinion that the impugned conviction

was passed on mere surmises and conjectures, which is not sustainable in law, and is liable to be set aside. We thus found merits in this appeal.

In the result, Appeal is allowed and the judgment and order dated 23.08.2023 passed by the Judge of Nari-O-Shishu Nirjatan Daman Tribunal No.7, Dhaka in Nari-O-Shishu Nirjatan Daman Case No.371 of 2018 is hereby set aside. Since the appellant is found not guilty of the charge leveled against him, he is hereby acquitted.

Let the appellant be set at liberty at once if not been wanted in connection with any other case.

Send down the L.C. records at once along with judgment.

Syed Enayet Hossain, J:

I agree.