IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL REVISIONAL JURISDICTION)

Present:
Mr. Justice Md. Bashir Ullah

Criminal Revision No. 5290 of 2023

In the matter of:
An application under section 439 read with 435 of the Code of Criminal Procedure
-And-
In the matter of:
Md. Mamun Or Rashid @ Almari
... Convict-Petitioner
-Versus-
The State
...Opposite Party

Mr. Syed Md. Zahangir Hossain, Advocate
... For the Convict- Petitioner

Mr. S.M. Aminul Islam Sanu, D.A.G with
Mr. Md. Nasimul Hasan, A.A.G with
Mr. Md. Golamun Nabi, A.A.G and
Ms. Farhana Abedin, A.A.G
… For the State

Heard on: 02.02.2026, 03.02.2026 and 15.02.2026
Judgment on: 23.02.2026

This Rule was issued calling upon the opposite party to show cause as to why the judgment and order of conviction and sentence dated 14.05.2023 passed by the learned Additional Sessions Judge, 1st Court, Naogaon in Criminal

Appeal No. 152 of 2021 dismissing the appeal with modification of sentence and thereby sentencing him to suffer rigorous imprisonment for 04 (four) years and to pay a fine of Taka 2,000/-, in default to suffer simple imprisonment for 01(one) month and modifying the judgment and order dated 19.07.2017 passed by the learned Chief Judicial Magistrate, Naogaon in Niamotpur Police Station Case No. 07 dated 19.03.2009 corresponding to G.R. No. 28 of 2009 (Niamotpur) convicting the petitioner under Section 377 of the Penal Code and sentencing him to suffer rigorous imprisonment for 10 (ten) years with a fine of Taka 5,000/-, in default to suffer simple imprisonment for 01 (one) month more should not be set aside and/or such other or further order or orders be passed as to this court may seem fit and proper.

Facts relevant for disposal of the Rule, in brief, are that, one Alhaj Al Mamun lodged an FIR with Niamotpur Police Station alleging, *inter alia,* that his minor son namely Md. Fazle Rabbi aged about 8 years used to attend private tuition at the house of the accused, Mamun-Or-Rashid alias Almari. On 18.03.2009 at about 9.00 pm, the accused had committed

sodomy upon Md. Fazle Rabbi. After that the victim was sent to his house. The victim returned home and disclosed the occurrence to his parents. Upon receipt of the information, the informant along with relatives went to the house of the accused to apprehend him but accused nos. 2 to 5 forcibly rescued him and obstructed the informant party. Subsequently, the victim was first taken to a village doctor for treatment and on the following day he was taken to Niamotpur Hospital. Accordingly, Niamotpur Police Station Case No. 07 dated 19.03.2009 under Section 377 of the Penal Code was initiated against the petitioner along with four others.

On closure of investigation, the investigating officer submitted police report no. 57 dated 07.06.2009 under Section 377 of the Penal Code against the accused petitioner.

The accused initially filed an application for discharging him from the allegations leveled against him. Upon hearing both parties the learned Chief Judicial Magistrate, Naogaon discharged the accused from the charge leveled against him on 09.02.2011 finding absence of prima facie materials.

Against the said order of discharge, the prosecution filed Criminal Revision No. 81 of 2011. Upon hearing the learned Additional Sessions Judge, 2nd Court, Naogaon allowed the revisional application and directed to frame charge against the accused on 25.03.2014. Subsequently, charge was framed against the accused under Section 377 of the Penal Code. The accused pleaded not guilty and claimed to be tried at the time of framing of charge and when the charge was read out.

During trial the prosecution examined 10 (ten) out of 11(eleven) charge sheeted witnesses. The accused was examined under section 342 of the Code of Criminal Procedure and once again he claimed innocence. However, he did not examine himself nor led any evidence in his defence.

Upon conclusion of trial and considering the evidence, the learned Chief Judicial Magistrate, Naogaon convicted the accused under Section 377 of the Penal Code and sentenced him to suffer 10(ten) years simple imprisonment with fine of Taka 5,000/- by judgment and order dated 19.07.2017.

Challenging the judgment and order of conviction and sentence the convict-accused filed Criminal Appeal No. 152

of 2021 before the learned Sessions Judge, Naogaon. On transfer, learned Additional Sessions Judge, 1st Court, Naogaon heard and dismissed the appeal modifying the sentence of imprisonment from 10 years to 4 years and fine Taka 2,000/- by judgment and order dated 14.05.2023.

Being aggrieved by and dissatisfied with the judgment and order dated 14.05.2023, the petitioner preferred this instant Criminal Revision and obtained the Rule.

Mr. Syed Md. Zahangir Hossain, the learned Advocate appearing on behalf of the petitioner contends that the doctor (PW-10) categorically opined that no physical injury was found present on any part of the body of victim, no injury mark was detected in or around the anal region and no sign of sodomy could be detected and such medical opinion remained uncontroverted. However, the Courts below failed to appreciate the medical evidence which does not support the ocular testimonies of the prosecution witnesses and directly contradicts and completely negates the prosecution version of sodomy and as such, the conviction under Section 377 of the Penal Code is unsustainable in the eye of law. In support of

his contention learned Advocate relied upon the decision passed in the case ***of Nur Mohammad @ Bog Master Vs. The State,*** reported in 9 BLD(1989)314.

He further argues that there is glaring contradiction between the FIR and sworn version of its maker PW-1. Besides, the narrative made by PW-1, PW-3 and PW-4 in respect of rescuing the accused, alleged village Salish suffers from patent contradiction. Prosecution also failed to examine independent witness and to produce blood and semen stained apparels. Courts below seem to have utterly failed to appreciate and consider all these pertinent matters, in arriving at decision.

He next contends that the trial Court and Appellate Court failed to consider earlier discharge order that at the stage of framing of charge in passing which the learned Chief Judicial Magistrate found no prima facie materials and medical evidence in support of allegation and therefore the petitioner was rightly discharged. The later conviction without any fresh or stronger evidence is legally

unsustainable. The courts below failed to explain how evidence and materials which once found insufficient to frame charge suddenly became sufficient to convict beyond reasonable doubt and as such the impugned judgment and orders of the courts below involve an error of law occasioning failure of justice.

He submits that the convict-petitioner has served out a term of imprisonment of more than 4 years. Since he has served the sentence imposed upon him, he may be acquitted of the charges leveled against him for the ends of justice and to prevent further harassment the impugned judgment and order should be set aside.

On these grounds, the learned Advocate for the petitioner prays for making the Rule absolute.

Per contra, Mr. Md. Golamun Nabi, the learned Assistant Attorney General appearing on behalf of the State contends that there are specific allegations against the petitioner in the FIR, which were duly proved and corroborated by PW1.

He further submits that there is no illegality, infirmity or impropriety in the impugned judgments and orders; as such the Rule is liable to be discharged.

I have considered the submissions advanced by the learned Advocates for the respective parties and perused the impugned judgments and orders, Annexure and other materials on records.

The victim was admittedly examined by Dr. Md. Abdur Rahman (PW-10), the Medical Officer, within about twelve hours of the alleged occurrence. PW-10 categorically opined that "no physical injury was found present on any part of victim’s body, no injury mark was detected in or around the anal region and no sign of sodomy could be detected". PW-10 produced the medical report as exhibit-3 and proved it in his examination-in-chief. It appears that such medical opinion remained wholly unchallenged. This objective medical evidence directly contradicts and completely negates the prosecution version of forcible anal penetration allegedly causing bleeding, pain and injury, as asserted by PW-3

(victim) and PW-4 (mother of the victim) for which the prosecution offered no explanation whatsoever.

It appears that despite inconsistency found in deposition of PW-1, PW-3 and PW-4 the conviction seems to have been based solely on interested and contradictory testimony which reflects a grave misdirection in law by Courts below that resulted in gross miscarriage of justice.

Thus, totality of facts and gravely contradictory testimony lead to conclude that the prosecution having completely failed to prove the essential ingredients to constitute the offence arraigned, punishable under Section 377 of the Penal Code.

This view gets support from the decision passed in the case of ***Nur Mohammad @ Bog Master vs. The State,*** reported in 9 BLD 314. In the cited case it has been held that the prosecution failed to prove the essential ingredient of penetration that the sole testimony of the alleged victim remained uncorroborated by any independent witness and there was absence of a medical report or medical opinion supporting the allegation of sodomy rendering the prosecution version inherently doubtful.

Material contradictions are evident in the case. In the FIR, PW-1 categorically stated that immediately after disclosure of the alleged incident by the victim, he along with his two brothers and nephew went to the house of the accused and attempted to bring the accused to their house, but the accused was forcibly rescued from the informant party by accused Nos. 2-5 in presence of local witnesses. However, in his deposition, PW-1 made a complete departure from the FIR by stating that when he and others went to the house of the accused he had already fled away.

PW-1, for the first time in course of testifying in Court stated that a large village *salish* attended by about 100-150 persons was held in connection with the alleged occurrence. But nothing has been mentioned in the FIR regarding the salish. The prosecution did not examine even a single *salishdar* or participant of the said *salish*, nor offered any explanation for such omission. This unexplained non-examination of natural and independent witnesses attracts an adverse inference against the prosecution.

It transpires that the indiscriminate implication of accused Nos. 2-5 in the FIR who were subsequently found to

have no involvement and were not sent up for want of evidence-clearly suggests prior hostility between the families and it lends support to the defence contention that the case was motivated by animosity.

The prosecution case is further riddled with irreconcilable contradictions between the testimonies of PW-1, PW-3 (alleged victim) and PW-4 (mother of the victim), which are wholly inconsistent with the objective medical evidence of PW-10. While PW-3 claimed that he screamed loudly for two minutes, and his apparels were soaked with blood and semen, PW-4 categorically admitted that she did not hear any scream and no neighbour heard any such scream.

However, the alleged blood and semen-stained clothes were neither produced before the police nor seized or exhibited in court. In such circumstances, the deliberate non-production of the alleged stained apparels attracts an adverse presumption under section 114(g) of the Evidence Act. These mutually destructive oral versions are further found to have been demolished by the testimony of PW-10, the Medical Officer, who found no injury whatsoever and no sign of

sodomy upon examination of the victim shortly after the alleged incident.

It transpires that the learned Chief Judicial Magistrate found no prima facie materials and medical evidence in support of the allegation and therefore he discharged the petitioner at the stage of framing of charge.

The record shows that the convict-petitioner has already served out a term of imprisonment of more than 4 years which was imposed upon him and he is not a habitual offender and has no previous criminal record.

For the foregoing reasons, the case of prosecution is riddled with insurmountable doubts and fatal inconsistencies that render the evidence wholly unreliable. The foundational allegations patently lack credible corroboration and are contradicted by the entirely of the medical and forensic evidence.

In view of the facts and circumstances discussed above, I am of the considered view that the prosecution has miserably failed to prove the charge against the petitioner

beyond reasonable doubt. The evidence on record is untrustworthy, uncorroborated, and insufficient to sustain a conviction. Consequently, the case against the accused-petitioner being highly doubtful, the benefit of doubt is extended to him and he is entitled to acquittal.

Thus both the Courts below committed an error of law in convicting the petitioner under Section 377 of the Penal Code and sentencing him there under to suffer rigorous imprisonment for 4(four) years and to pay fine of Taka 2,000/- (two thousand) which are liable to set aside.

In the result, the Rule is made absolute.

The judgments and orders of conviction and sentence passed by the Courts below are hereby set aside.

The petitioner is acquitted of the charge leveled against him.

Since the petitioner is enlarged on bail he is discharged from his bail bond immediately.

Let a copy of this judgment along with the lower Court's records be communicated to the concerned Court forthwith.

(*Md. Bashir Ullah, J*)

Md. Ariful Islam Khan
Bench Officer