Present:
Mr. Justice Mohammad Marzi-ul-Huq
and
Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.639 of 2003

Nazrul Gazi alias Nazrul Islam
...Appellant

-Versus-
The State
...Respondent

Mr. Md. Abdur Razzaque Miah, Advocate
... for the appellant

Mr. Yousuf Mahmud Morshed, A.A.G.
... for the respondent

Judgment on 17.1.2012

Md. Ruhul Quddus,J:

This appeal under section 24 of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 is directed against judgment and order dated 30.1.2003 passed by the Nari-o-Shishu Nirjatan Damon Tribunal, Khulna in Nari-o-Shishu Case No.152 of 1999 arising out of Botiaghata Police Station Case No.11 dated 15.11.1998 corresponding to G.R. No.131 of 1998 convicting the sole appellant under section 6(1) of the said Ain and sentencing him thereunder to suffer rigorous imprisonment for life.

Facts leading to this appeal, in brief, are that the informant Anukul Sarder (P.W.1) lodged an *ejahar* with Botiaghata Police Station, Khulna on 15.11.1998 alleging *inter alia* that in the night following 6.11.1998 at about 1/1.30 a.m. three dacoits had entered into his house, when his

brother Pulin Sarder went outside to respond natural call. The dacoits fastened all the inmates of house namely, his son, daughter, two brothers and their wives. They (dacoits) took gold made ear-ring of one of his sisters-inï law worth Taka 2400/-, brought his daughter at verandah and committed rape on her one by one. They (dacoits) called one of them as Nazrul, for which the informant came to learn one of their names. His (informantÕs) brother Sunil Sarder called the neighbours namely, Ananda Cowkidar (P.W.5) Jitendra Ranjon (P.W.6) and Kartick Chandra (P.W.4) and some others. Because of seeking advice from his relations, there was delay in lodgment of the *ejahar*.

Police recorded the case as Botiaghata Police Station Case No.11 dated 15.11.1998 under sections 392 and 376 of the Penal Code and after investigation submitted two charge sheets including the present one under section 6(1) of the Nari-o-Shishu Nirjatan Damon (Bishes Bidhan) Ain, 1995 (hereinafter called the Ain), which gave rise to Nari-o-Shishu Case No.152 of 1999 in the Nari-o-Shishu Nirjatan Damon Tribunal, Khulna. Learned Judge of the Tribunal by order dated 30.3.2000 framed charge against the appellant under section 6(1) of the Ain, to which he pleaded not guilty and claimed to be tried.

In order to prove its case, the prosecution examined eight witnesses including the informant, victim, an inmate of the house, three of their neighbours, Investigating Officer and the Doctor, who examined the victim after lodgment of the *ejahar*. Out of them P.W. 6 Jitendra Ranjon was tendered by the prosecution and the defense declined to cross-examine him.

After the prosecution was closed, the appellant could not be examined under section 342 of the Code of Criminal Procedure as in the meantime he had obtained bail, but subsequently did not turn up to the Tribunal at the concluding stage of trial. The defense case as it appears from the trend of cross-examination is that one Mostafa Chairman in collusion with police falsely implicated the appellant in the present criminal case because of land dispute with him.

Learned Judge of the Tribunal after conclusion of trial found the appellant guilty of offence under section 6(1) of the Ain and accordingly pronounced his judgment and order of conviction and sentence dated 30.1.2003 giving rise to the instant criminal appeal.

Mr. Md. Abdur Razzaque Miah, learned Advocate appearing for the appellant at the very outset submits that the present case is a case of no evidence. The prosecution hopelessly failed to prove its case against the appellant. The victim herself and other vital witnesses did not support the prosecution case, but the learned Judge of the Tribunal without proper assessment of those evidence convicted and sentenced him on mere suspicion and presumption, which is against the principle of criminal law and therefore, the impugned judgment and order should not sustain and the appellant is entitled to be acquitted.

On the other hand Mr. Yousuf Mahmud Morshed, learned Assistant Attorney General appearing for the State submits that with change of social condition and deterioration of law and order situation,

criminal law is also being changed. Learned Judge of the Tribunal correctly assessed the evidence, considered the social reality and awarded sentence upon the offender. There is no illegality in the impugned judgment and order of conviction and sentence and as such it does not call for any interference.

We have examined the evidence on record, gone through the impugned judgment and considered the submissions of learned Advocates of both the sides. It appears that P.W.1 is a hearsay witness. He was not present at home at the time of occurrence, and came back on the following day. In cross-examination he stated that at the instance of Mostafa Chairman, he had lodged the *ejahar,* which was written by the police sitting in police station. In writing the *ejahar*, police did not ask him anything. He only put his left thumb impression thereon. In the *ejahar*, Informantôs brother Pulin Sarder (P.W.2) was mentioned to be present at the time and house of occurrence. But while deposed, P.W.2 stated that he was not present there. P.W.3, the victim Provaty Sarder and P.W.4 Kartick Chandra, who is a neighbor and appeared at the place immediately after the occurrence, did not support the allegation of rape.

P.W.5 Ananda Cowkidar, who appeared at the place of occurrence on call by Sunil Sarder stated that he heard about commission of rape on Provaty during the dacoity. He further stated that the informantôs brother Sunil Sarder did not tell him whether they could recognize any dacoit at the time of occurrence.

P.W.7 Doctor Md. Baker Hossain stated that he was posted to Government School Health Clinic, Khulna as a Medical Officer on 15.11.1998, when he held medical examination of the victim and found signs of rape on her person. He proved his medical report as an exhibit.

P.W.8 Md. Shamsul Islam Khan, a Sub-Inspector of Police and the Investigating Officer stated that he was posted to Botiaghata Police Station, Khulna on 15.11.1998. He himself had recorded the case and took up the investigation. During investigation, he visited the place of occurrence, prepared sketch-map with index and recorded statements of witnesses under section 161 of the Code of Criminal Procedure. He also arranged for medical examination of the victim.

It further appears that learned Judge of the Tribunal convicted and sentenced the appellant on the presumption that the informant and other prosecution witnesses were poor and helpless people having no influence over the society. Therefore, they were not confident and courageous to speak the truth. He also observed that during cross-examination the appellant did not put any question to the prosecution witnesses to the effect whether there was any enmity between the informant and accused.

It is to be kept in mind that in a criminal case the prosecution is to prove its case beyond all reasonable doubt. Definitely any question or suggestion put towards a prosecution witness during cross-examination by the defense may strengthen his case, but his failure to do so is not

fatal. The defense has no obligation to put any particular suggestion or question in support of his case.

In the present case, the defense put specific questions during cross-examination of P.W.1, and dug out the facts and background, under which the appellant was implicated in the case by a local Chairman in collusion with the police having land dispute with him. As P.Ws.2 and 3 did not support the prosecution case, there was no necessity to put so many questions towards them.

It is correct that in many cases the poor people do not get any social support and do not dare to speak truth against notorious criminals. Sometime the innocent citizens do not dare to speak against the criminals because of fear of life and honour. But only because of this social reality an accused person cannot be convicted without minimum credible evidence. There is nothing on record to prove that the informant party was poor or helpless, or that the witnesses were threatened, influenced or gained over. More so, there is a delay of nine days in filling the *ejahar* and explanation of such delay as offered in *ejahar* that because of taking advice from relations, delay in lodgment of *ejahar* caused, is not acceptable. It rather indicates subsequent embellishment on the prosecution case, which lends support from the facts revealed during cross-examination of the informant (P.W.1).

It has been stated in the *ejahar* that the unknown dacoits called one of them as Nazrul, but it is not clear in the *ejahar*, charge sheet or in evidence of any prosecution witness as to how they ascertained the

identity and address of the appellant. In the medical report, it is not clear as to how signs of rape were available on the person of victim even after nine days of the alleged occurrence.

Although the way prosecution witnesses including the victim deposed, casts serious doubt that they were threatened, influenced or gained over by the defense. But it may also happen that subsequently the informant and the inmates of his house realized their mistake to implicate the appellant by his name and address at the instance of his rival Mostafa Chairman in collusion with police. They were repentant and deposed in a manner so that the appellant could be acquitted. Therefore, the grounds of conviction as taken by learned Judge of the Tribunal is a suspicious circumstance, but not determinative of guilt against the appellant.

It is pertinent to mention that out of self same occurrence and same *ejahar*, another trial was commenced under section 392 of the Penal Code against the appellant in Sessions Case No.9 of 2003. The appellant was acquitted in that case by judgment and order dated 9.8.2004 passed by the Assistant Sessions Judge, Second Court, Khulna (vide annex-D to the application for bail).

Under the facts and circumstances and on perusal of the evidence on record, we do not find that the charge of rape against the appellant has been proved beyond reasonable doubt and as such the

impugned judgment and order of conviction and sentence should not sustain.

In the result, the appeal is allowed. The judgment and order of conviction and sentence dated 30.1.2003 passed by the Nari-o-Shishu Nirjatan Damon Tribunal, Khulna in Nari-o-Shishu Case No.152 of 1999 is hereby set aside. The appellant is acquitted of the charge and be set at liberty forthwith, if not wanted in connection with any other criminal case.

Send down the lower Courtôs record.

Mohammad Marzi-ul-Huq, J:

I agree.