

Present:

Ms. Justice Naima Haider

and

Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.914 of 1996

Altaf Hossain and another

... Appellants

-Versus-

The State

... Respondent

No one has appeared for the appellant

Ms. Rona Nahrin, A.A.G.

...for the respondent

Judgment on 17.4.2011

*Md. Ruhul Quddus, J:*

This appeal under section 30 of the Special Powers Act, 1974 is directed against judgment and order dated 30.6.1996 passed by the Special Tribunal No.6, Barisal in Special Tribunal Case No.89 of 1995 convicting appellant No.1 under sections 4 (b) and 9 of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 while convicting appellant No.2 under section 4 (b) of the said Ordinance and sentencing them thereunder to suffer rigorous imprisonment for ten years with a fine of Taka five thousand for each in default to suffer rigorous imprisonment for another one year.

Facts relevant for disposal of the appeal, in brief, are that the informant Rokeya Begum (P.W.1) lodged an *ejahar* with Babuganj Police Station, Barisal on 24.4.1995 against the appellants and four others alleging *inter alia* that they were members of *Sarbahara* Party and used to commit robbery in different places. The accused persons being equipped with *dao*, stick, cut rifle, iron rod and knife had appeared in front of her house and called with the name of her

husband at about 1/1.30 a.m. on 24.4.1995. At one stage they entered into the house breaking the door and kidnapped her daughter Rina Begum. As she and her husband had obstructed them, they beat her and her husband causing swelling injuries on different places of their bodies. They also snatched away her ornaments, *saris*, lather suitcase and cash money. She and the members of her family raised alarm, hearing which the witnesses rushed to the house. In morning she came to know that some people caught hold of appellant No.1 with her daughter and produced them to Uzirpur Police Station. On receipt of the news, she along with the witnesses rushed to Uzirpur Police Station and saw her daughter in custody of police. After coming back from Uzirpur, she lodged the *ejahar*. It was mentioned in the *ejahar* that appellant No.2 was the house tutor of her daughter Rina Begum and had developed an affair with her (Rina Begum), for which they gave her in marriage elsewhere. Because of giving her in marriage, the accused persons had become furious and out of grudge committed the occurrence.

The said *ejahar* gave rise to Babuganj Police Station Case No.6 dated 24.4.1995. The police, after investigation submitted charge sheet on 11.7.1995 against the appellants and three others and proposed release of another as no prima-facie case was found against him. The case after being ready for trial, was sent to the Nari-o-Shishu Nirjatan Damon Bishesh Adalat, Barisal and was registered as Nari-o-Shishu Nirjatan Damon Bishesh Case No.3 of 1995 under wrong notion. Subsequently it was detected that the case was triable by Special Tribunal and accordingly it was transferred to the Special Tribunal No.6, Barisal for hearing and disposal, wherein it was renumbered as Special Tribunal Case No.89 of 1995. The learned Judge of the Special Tribunal by his order dated 18.11.1995 framed charge against the accused persons including the appellants under section 4 and 9 of the Cruelty to Women (Deterrent Punishment)

Ordinance read with schedule 4 (b) of the Special Powers Act to which they pleaded not guilty and claimed to be tried.

The prosecution examined eleven witnesses in support of its case. After closing the prosecution, the learned Judge examined the appellants under section 342 of the Code of Criminal Procedure, to which they reiterated their innocence and examined five witnesses in defense. The defense case as it transpires from evidence of the defense witnesses as well as from the trend of cross-examination that the appellants were innocents. Out of love for appellant No.2, the victim Rina Begum voluntarily eloped with him. Earlier they had gone together to Dhaka and got married.

After conclusion of trial, the learned Judge of the Special Tribunal found the appellants guilty of offence under sections 4 (b) and 9 of the Cruelty to Women (Deterrent Punishment) Act and accordingly pronounced his judgment and order of conviction and sentence on 30.6.1996 as stated above, and acquitted three co-accused as the case was not proved against them. Against the said judgment and order of conviction and sentence, the appellants moved in this Court with the instant criminal appeal and subsequently obtained bail from this Court.

This appeal has been appearing in the cause list since 4.4.2011 i.e. before six days of starting the vacation. It was taken up for hearing on 13.4.2011, but no one appeared to press the appeal. In view of its long pendency for nearly fifteen years, we took it up for disposal even in absence of the appellant and allowed the learned Assistant Attorney General to make her submissions.

Ms. Rona Nahrin, learned Assistant Attorney General appearing for the State submitted that although there were some small inconsequential discrepancies in the evidence of the prosecution witnesses, it would not affect the case as there were no contradictions in material particulars. The prosecution

case was proved against the appellants beyond reasonable doubt and the learned Judge of the Special Tribunal rightly passed the judgment and order of conviction and sentence.

In order to appreciate the submission of the learned Assistant Attorney General, let us examine the evidence and other materials on records. P.W.1, the informant Rokeya Begum although supported the prosecution case in her evidence, there are some variations from the *ejahar*. In *ejahar* she admitted Rina Begum's affair with appellant No.2, but in her deposition she kept silent. Similarly she stated in *ejahar* that she herself along with the witnesses went to Uzirpur Police Station, but in deposition she stated that only her men had gone there. In cross-examination she stated that the persons entered into the house did not assault them. She further stated that after commission of the occurrence she was senseless for two days and did not see who brought the message of her daughter's recovery from Uzirpur.

P.W.2, the victim Rina Begum also supported the prosecution case, but in cross-examination she admitted that she was residing at her husband's house till commission of the occurrence. In the same breath she corrected herself and stated that the occurrence took place after she came to her parent's house. P.W.3 Shahin Fakir, son of the informant and a student of class-V stated that during commission of the occurrence, he waked up and could recognize the appellants, who were forcefully taking away his elder sister.

P.W.4 Md. Ishak Molla, a neighbour of the informant stated that after commission of the occurrence he went to the house and found both the informant and her husband sick. He heard that some persons kidnapped their daughter. In the next morning he heard that the appellants and some others

kidnapped her. In cross-examination he stated that among others the Chowkider, Dafadar, Member and Chairman had rushed to the house after commission of the occurrence, and that he stated to the Investigating Officer that in an earlier occasion appellant No.2 and the victim had gone together to Dhaka. He further stated that he heard the names of the appellant from the informant on the following day.

P.W.5 Dr. Md. Delwar Hossain stated that on 24.4.1995 he had examined and treated a patient named Shahjahan Fakir with injuries from physical assault and issued him a certificate to that effect. In cross-examination he stated that the patient was not known to him before. He (patient) introduced himself as Shahjahan Fakir. He further stated that he had examined the patient sometime after 5 p.m on 24.4.1985.

P.W.6 A. Rahim Sarder, full brother of the informant stated that he was sleeping at the time of occurrence. Hearing the alarm raised by the inmates of the house of occurrence, he rushed there and heard that some robbers had kidnapped Rina Begum. In cross-examination he stated that he heard the names of the appellants after he had gone to Uzirpur. He further stated that he did not talk to the informant or her husband in the night of occurrence. He brought a doctor on call to the house and after treatment by the said doctor, the informant, her husband and son narrated the occurrence to him. P.Ws.7-8 Ashraf Ali Howlader and Md. Younus Molla were tendered by the prosecution and the defense cross-examined them.

P.W.9 Shahjahan Fakir stated that two years before the occurrence he gave her daughter in marriage with one Siddikur Rahman. In the night of occurrence 10/15 fifteen persons had kidnapped his daughter. Among them he

could recognize the appellants. He further stated that on receipt of the news of recovery of his daughter, the informant along with some others had gone to Uzirpur. In cross-examination he stated that he had lost his sense at the time of occurrence and was not examined by any doctor before he reached at Barisal in the next morning. He further stated that in going Uzirpur his wife was also accompanied by Chairman Ranjan Ali Sharif.

P.W.10 Md. Kamal Uddin Talukder, Magistrate of first class stated that on 7.5.1995 he recorded statement of the victim Rina Begum. In cross-examination he stated that he recorded the statement on blank paper. It was not mentioned as to where she made the statement and whether she made it voluntarily.

P.W.11 Nikhil Chandra Mondal, the then Officer-in-charge of Babuganj Police Station and Investigating Officer stated that after being assigned for investigation, he visited the place of occurrence, prepared the sketch map with index, and recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure. The *ejahar* was written by one Abdus Satter, who was neither examined nor made a witness in the case. He did not examine the informant's husband Shahjahan Fakir. He examined the accused Dilip (appellant No.2), who stated him that earlier he was converted to a Muslim. The said Dilip also supplied him a notarized affidavit to that effect. He (P.W.11) further stated that Ishak Molla (P.W.4) told him that appellant No.2 was the house tutor of victim Rina Begum and there was an affair of love between them, which converted appellant No.2 to a Muslim. P.W. 7 Ashraf Ali in his statement under section 161 of the Code also stated him the same facts and added that appellant No.2 and the victim had gone together to Dhaka.

On the other hand D.W.1 Ranjan Ali Sharif (Beer Pratik), former Chairman of Dehergati Union Parishad stated that in the night of occurrence 2/3 persons went to him and informed that the victim Rina Begum was missing. On receipt of the said news, he went to her house and met her mother (meaning the informant), who also disclosed that she was missing. D.W.2 Md. Ali Sharif, a charge sheet named witness stated that on the way to ferry ghat, he went to the house of occurrence on 25.4.1995 in the morning and heard that the victim Rina Begum was missing. Earlier she had gone to Dhaka with appellant No.2. He saw him (appellant-2) in the house of the victim many times before the occurrence. There was a *shalish* on their elopement, to which the informant did not respond. D.W.3 Md. Shahjahan Howlader, former Vice-Chairman of Dehergati Union Parishad stated that in the morning on 25.4.1985 the informant told him that the victim Rina Begum was missing. Earlier he heard that the victim Rina Begum went to Dhaka with appellant No.2. He (appellant-2) used to reside at the house of the informant and teach her daughter Rina Begum. D.W.4 Abdul Malek Howlader stated that he heard of elopement of Rina Begum. D.W.5 Habib Khalifa stated that on 25.4.1985 at morning he heard that the victim Rina Begum had gone with appellant No.2 voluntarily, and before that they had eloped to Dhaka.

From a close reading of the evidence on records, it appears that in the *ejahar* P.W.1 admitted her daughter's affair with appellant No.2, but in her deposition she kept silent. Similarly she stated in *ejahar* that she herself along with the witnesses went to Uzirpur Police Station, but in deposition she stated that only her men had gone there. In cross-examination she stated that the persons entered into the house did not assault them. She further stated that she was senseless for two days after the occurrence. P.W.11, the Investigating Officer stated that the *ejahar* was written by one Abdus Satter, who was neither

examined under section 161 of the Code nor made a witness in the case. Naturally, a question arises as to how and when the informant lodged the *ejahar*.

P.W.2 the victim Rina Begum herself admitted in cross-examination that she was residing at her husband's house till the occurrence took place. Although in same breath she corrected herself and stated that the occurrence took place after she came to her parent's house, certainly it creates a doubt over the allegation of kidnapping her from her parent's house.

P.W.1 in her deposition stated that at the time of occurrence, the accused persons described themselves as members of *Sarbahara* Party, while P.Ws.2 and 9 stated that they described themselves as police men.

P.W.4 stated that he brought a doctor on call to the house of occurrence, while P.W.9 himself stated that no doctor examined him till he reached at Barisal in the next morning. P.W.5 Dr. Delwar Hossain stated that he had examined Shajahan Fakir sometime after 5.00 p.m on 24.4.1985. As he was allegedly injured at 1/1.30 a.m, it was quite usual that he would be taken to the doctor immediately after the occurrence or at least in the next morning.

P.W. 9 stated that he gave her daughter in marriage with Siddikur Rahman before two years of the occurrence, while P.W.2 the victim herself stated that she got married one month before and P.W.3 her brother stated that her marriage was solemnized 2/3 months before the occurrence. The prosecution did not produce the marriage registration of the victim. So it appears that there are contradictions in narration of facts by the prosecution witnesses, which also cast doubt over the case.

The statement of victim Rina Begum was recorded under section 164 of the Code of Criminal Procedure on 7.5.1985 i.e. twelve days after her recovery. It is not clear what prevented to record her statement immediately after her recovery. Moreover it is apparent on the evidence of the Magistrate that her statement was not recorded in accordance with law and it was recorded on plain

paper, not on a prescribed form. Even then if we consider the statement, it is not unlikely that after the victim was given in custody of her parents, she was changed and emotionally influenced by her parents. P.W.3 Shahin Fakir was a minor boy and in the facts and circumstances it is not unlikely that he was tutored by his parents.

P.W.4 Ishak Molla, an independent witness stated that he rushed to the house of occurrence immediately after the occurrence. In cross-examination he stated that he heard the names of the appellants from the informant on the following day. P.W.6 A. Rahim Sarder, full brother of the informant stated that after hearing the alarm from the house of occurrence, he also rushed there. In cross-examination he stated that he heard the names of the appellants after he had gone to Uzirpur. If the appellants were recognized by the inmates of the house, they could have disclosed their names immediately after the occurrence to the said relations and local-witnesses who rushed there. Therefore it is very much doubtful whether the appellants were recognized at the time of occurrence, or their names were inserted as an outcome of after thought. P.W. 4 Ishak Molla in his statement under section 161 of the Code of Criminal Procedure stated that appellant No.2 used to visit the house of victim Rina Begum and earlier they had eloped to Dhaka. This statement was corroborated by P.W.11, the Investigating Officer and all of the defense witnesses including D.W.2, who is named in the charge sheet. In such circumstances, a reasonable doubt arises whether the appellants had kidnapped the victim, or she voluntarily had gone with appellant No.2.

The learned Judge of the Special Tribunal in passing the impugned judgment and order of conviction did not discuss and consider all the above mentioned discrepancies, inconsistencies and contradictions in the evidence of the prosecution witnesses in juxtaposition with the prosecution case.

In view of the above discussion, the evidence on records and the attending facts and circumstances, the prosecution case cannot be said to have been proved beyond reasonable doubt and the appellants are entitled to be acquitted on the point of benefit of doubt.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 30.6.1996 passed by the Special Tribunal No.6, Barisal in Special Tribunal Case No.89 of 1995 is hereby set aside. The appellants are released from their bail bonds.

Send down the lower Court records.

Naima Haider, J:

I agree.