

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

Criminal Appeal No. 5214 of 2005

Md. Abul Kashem alias Gofran and another.
í Appellants
-Versus-
The State
... Respondent

No one appears for the appellants

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

Judgment on 6.2.2012

Md. Ruhul Quddus, J:

This appeal under section 28 of the Nari-o- Shishu Nirjatan Damon Ain, 2000 at the instance of two accused is directed against order dated 15.11.2005 passed by the Nari-o-Shishu Nirjatan Damon Tribunal, Lakshmipur rejecting an application under section 265C of the Code of Criminal Procedure filed by the appellants for their discharge in Nari-o-Shishu Nirjatan Damon Tribunal Case No. 43 of 2005 and fixing next date for framing of charge.

Facts leading to this appeal, in brief, are that one Bibi Halima Khatun as complainant filed a petition of complaint before the Nari-o-Shishu Nirjatan Daman Tribunal, Lakshmipur on 15.1.2005 bringing allegation of committing rape on her minor daughter Rahima Begum for the first time on 25.11.2002 and thereafter several times. Consequently the victim Rahima Begum had become pregnant and delivered a baby. Earlier she (complainant) filed another petition of complaint being Petition Case No.9 of 2004 before the same Tribunal, when the learned

Judge passed an order of judicial enquiry to be conducted by a Magistrate of second class. In that event, the appellants proposed her to compromise the matter by giving legitimacy to the new-born baby, for which she did not proceed with the case. But subsequently the accused-appellants denied to do that, under which circumstance the complainant had to file the petition of complaint afresh.

Learned Judge of the Tribunal took cognizance of offence against the accused-appellants and proceeded with the case. Subsequently they filed an application under section 265C of the Code of Criminal Procedure for their discharge from the case. Learned Judge heard the application and rejected the same by order dated 12.4.2006 and fixed next date for framing of charge. Challenging the said order, the accused-appellants moved in this Court with the instant criminal appeal and subsequently obtained an ad-interim order staying all further proceedings in the case.

The matter appeared in the daily cause list on several days with name of the Advocate for appellants. It was taken up for hearing on 2.2.2012, but no one appeared to press the appeal. In view of its long pendency for more than six years, we took it up for hearing even in absence of the appellants and allowed the Assistant Attorney General to make his submissions.

Mr. Yousuf Mahmud Morshed, learned Assistant Attorney General submitted that there are specific allegations of committing rape on a minor girl against accused-appellant No.1 Md. Abul Kashem alias Gofran, out of which she had become pregnant and delivered a baby. In that view of the matter the application for discharge cannot be allowed and the learned Judge of the Tribunal rightly rejected the same.

We have gone through the materials on record including the impugned order. The petition of complaint shows that the victim Rahima Begum was a minor girl of 13 years. The allegation of rape is clearly directed against accused No.1 Md. Abul Kashem alias Gofran, but there is no specific allegation of abetment against two other co-accused namely, Mst. Joshtna Begum (accused No.2) and Md. Rafiqullah (accused No.3 and herein appellant No.2).

The record further shows that Petition Case No.9 of 2004, which was filed earlier to the present petition of complaint, was not decided on trial. In the earlier case, the accused-appellants were not acquitted, but the petition of complaint itself was rejected on an application for withdrawal of the case on compromise (vide Annex-B to the supplementary affidavit). In this regard it is to be kept in mind that the case was under section 9 (1) of the Nari-o-Shishu Nirjatan Ain, which is not a compoundable offence. Under the facts and circumstances of the present case, there is no legal bar to proceed with a second complaint on the self same occurrence.

It appears that when the victim Rahima Begum delivered a baby as a result of sexual intercourse performed on her allegedly by appellant No.1 Md. Abul Kashem alias Gofran, the informant being her mother filed the first complaint after she had failed to record an *ejahar* with the concerned police station. In our socio-cultural condition, a girl or any member of her family irrespective of their economic position generally do not disclose any occurrence of rape and try to keep it secret. In the present case, when the victim-girl delivered the baby, there was no way to keep it secret, but to establish the legitimacy of the unwanted new-born baby. Under the circumstances, the delay in filing the petition of complaint will not

brush aside the allegation, especially when, it is possible to determine the fatherhood of the baby very well by DNA test. When the baby is already born, no question of embellishment can be there. Since the victim-girl has been claimed to be a minor girl of 13 years, there is no scope of consent by her in performing the alleged sexual intercourse. Whether she was a girl of 13 years, it can be decided by proper medical and scientific examination and by taking evidence in due course of trial.

In view of the above, the impugned order of rejection of the application so far it relates to accused-appellant No.2 Md. Rafiq Ullah appears to be wrong. But we do not find any illegality in proceeding with the case against accused-appellant No.1 Md. Abul Kashem alias Gofran.

In the result, the appeal is allowed in part. The application for discharge in respect of accused-appellant No.2 Md. Rafiq Ullah is allowed and he is discharged from the case. The impugned order so far it relates to rejection of the application for discharge of the principal accused Md. Abul Kashem alias Gofran is maintained. The impugned order dated 15.11.2005 passed by Nari-o-Shishu Nirjatan Damon Tribunal, Lakshmipur in Nari-o-Shishu Nirjatan Damon Tribunal Case No. 43 of 2005 is modified to that effect. The Nari-o-Shishu Nirjatan Damon Tribunal, Lakshmipur is directed to proceed with the case in accordance with law.

Communicate a copy of the judgment.

Mohammad Marzi-ul-Huq, J:

I agree.