12 SCOB [2019] HCD

HIGH COURT DIVISION

(CRIMINAL REVISIONAL JURISDICTION)

DIST-DHAKA

CRIMINAL REVISION NO.2367 OF 2018

Begum Khaleda Zia, Former Prime Minister, wife of Shaheed President Ziaur Rahman

.....…*Accused petitioner.*

-Versus-

Anti-Corruption Commission (ACC), Dhaka and another

…….. *Opposite parties.*

Mr. AJ Mohammad Ali, Senior advocate with Mr. Kayser Kamal, Advocate & Mr. Md. Aminul Islam, Advocate .....For the accused-petitioner.

Mr. Md. Khurshid Alam Khan, Advocate .....For the ACC

Mr. Md. Jahangir Alam, DAG with Mr. Md. Jashim Uddin, AAG & Mr. Shafquat Hussain, AAG ..... For the State

The 14th day of October, 2018

Present:
Mr. Justice Obaidul Hassan
And
Mr. Justice S M Kuddus Zaman

Cr PC section 540A;

In the case at hand, we find that the Petition under section 540A was filed by the Public Prosecutor, though it has not been expressly mentioned whether the Public Prosecutor can file such an application; the Code does not prevent the Public Prosecutor from filing as such. The case reported in *14 DLR*, aides us in concluding that, where there is no such provision preventing the Public Prosecutor from filing such an application, there is no harm if the Public Prosecutor draws the attention of the Court by filing such an application for the sake of expedition and deliverance of Justice. ... (Para 21)

Mr. Justice Obaidul Hassan
And
Mr. Justice S M Kuddus Zaman

Judgment

1. The petitioner Begum Khaleda Zia has filed this application under section 10(1A) of the Criminal Law Amendment Act 1958, with a prayer to "issue rule, calling upon the opposite party to show cause as to why the order dated 20/9/2018, passed by the learned Special Judge, Court No.5, Dhaka in special case No. 18 of 2017, arising out of Tejgaon Police station, case No. 15, dated 8/8/2011, corresponding to ACC GR No.84, of 2011 under section 5(2) of the Prevention of Corruption Act 1947, read with section 109 of the Penal Code allowing the application for dispensing with personal attendance of the accused petitioner under section 540A of the Code of Criminal Procedure 1898, filed by the learned Public Prosecutor and thereby directing to proceed with the case in the absence of the accused petitioner, should not be set aside."

2. In addition to the above prayer, she also prayed for staying the proceedings of special case No. 18 of 2017, arising out of Tejgaon Police station case No. 15, dated 8/8/2011, corresponding to ACC GR No. 84 of 2011, under section 5(2) of the Prevention of Corruption Act 1947, read with section 109 of the Penal Code before the learned Special Judge, Special Judge Court No.5, Dhaka.

3. The prosecution story, in short, is that former Prime Minister Begum Khaleda Zia during her regime from 2001 to 2007 formed a trust namely "Shsheed Ziaur Rahman Charitable Trust", which was registered in Gulshan Sub-Registry Office vide Registration No.IV-33, dated 26.10.2004 No.6, Shaheed Moinul Road, Dhaka, the then residence of Begum Zia, was used as the address of the trust and Begum Khaleda Zia was the 1st Trustee of the trust and her two sons Tarique Rahman and Arafat Rahman were the members of the Trust. Begum Khaleda Zia as the 1st Managing Trustee on 09.01.2005 opened a savings account being No.34076165 with the Sonali Bank, Prime Minister's Office Branch and after opening the account collected money from different illegal sources by using her official power and deposited to the said account.

4. On 16.01.2005 by using the name of Metro Makers and Developers Ltd. the following moneys were deposited to the said account from Shahjalal Bank Ltd., Dhanmondi Branch. The Managing Director of Metro. Makers and Developers Ltd. Mr. A.F.M Jahangir informed that they never donated any money to the "Ziaur Rahman Charitable Trust." He also informed that Assistant Personal Secretary of the then Mayor of Dhaka City Corporation Mr. Monirul Islam managed to deposit the said money to the account of the said Trust by using the name of his company. Mr. Monirul Islam Khan informed that Political Secretary of the then Prime Minister Mr. Abul Haris Chowdhury gave him the money to deposit to the said account through pay-order. On 18.01.2005 Assistant Private Secretary of Political Secretary of the then Prime Minister Md. Ziaul Islam deposited BDT 27,00,000.00; apart from that huge amount of money was deposited to the said account on different dates, which he deposited at the instruction of Abul Haris Chowdhury, the Politice Secretary of the then Prime Minister.

5. Mr. Harunur Rashid, Assistant Director (Special Inquiry and Investigation-1), Anti Corruption Commission (ACC), Head Office, Dhaka as investigation officer investigated the case perfunctorily and after investigation submitted charge sheet being No.27 dated 16.01.2012 under section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code against the petitioner and 3(three) others.

6. The case record was transmitted to the Metropolitan Sessions Judge and Ex-Officio Senior Special Judge, Dhaka and the case was registered as Special Case No.05 of 2013. Thereafter, the case record was transmitted to the Special Judge, Court No.5, Dhaka for holding trial and the case was renumbered as Special Case No.18 of 2017.

7. On 19.03.2014 the Special Judge framed charge against the petitioner under section 5(2) of the Prevention of Corruption Act, 1947 read with section 109 of the Penal Code which was read over to her to which she pleaded not guilty and prayed for trial.

8. Out of 36(thirty six) charge sheeted witnesses the prosecution examined the following 33(thirty three) witnesses in order to prove the case.

9. After conclusion of the examination of the witnesses the petitioner was examined under section 342 of the Code of Criminal Procedure and the petitioner again claimed to be the innocent and prayed for trial and on 21.12.2017 i.e. on the date of argument she submitted a written statement.

10. The case was against fixed for argument on 25.02.2018, but the petitioner could not be produced before the Court from jail because of her illness and consequently the case was adjourned. Subsequently, several dates were fixed for arguments of the case, but because of the same reason the petitioner could not be produced before the Court and the case was adjourned.

11. On 05.09.2018 on the fixed dated of hearing of the case the learned advocates for the petitioner went to the Special Judge, Court No.5, Dhaka at Alia Madrasha, Makshibazar, Dhaka for conducting the case and came to know for the first time that the Court has already been shifted to the old Central Jail, Nazimuddin Road, Dhaka. Thereafter, on 12.09.2018 the learned advocate for the petitioner appeared before the Court inside the old Central Jail and filed an application for adjournment of hearing of the case till recovery from hear illness and also filed an application for extension of bail and after hearing the learned advocates of both sides the Court was pleased to fix the next date on 13.09.2018 for further hearing.

12. On 13.09.2018 the Public Prosecutor filed an application under section 540A of the Code of Criminal Procedure praying for dispensation with the personal attendance of the petitioner and for proceeding with the case in her absence. After hearing the learned advocates of both the parties the learned Special Judge, Court No.5, Dhaka by order dated 20.09.2018 allowed the application under section 540A of the Code of Criminal Procedure for dispensation with the personal attendance of the petitioner and directed to proceed with the case in her absence. The next date of the case is on 30.09.2018.

13. Mr. A J Mohammad Ali, learned Advocate in support of the application submitted that the learned Special Judge, Court No.5, Dhaka passed the impugned order, dispensing with the personal attendance of the petitioner and directing to proceed with the case in her absence, without applying his judicial mind and as such the same is liable to be set aside. He also submitted that the privilege of section 540A of the Code of Criminal Procedure can only be sought by the accused. The public prosecutor is in no way entitled to file such application for dispensation with the personal attendance of an accused. This aspect of law was not considered by the learned Special Judge, Court No.5, Dhaka while passing the impugned order and as such the same is liable to be set aside. He also submitted that the learned Special Judge failed to appreciate that order of dispensation with the personal attendance of an accused cannot be passed in her absence while the accused is in custody inasmuch as if the order of dispensation with the personal attendance is passed in her absence the accused will highly be prejudiced and as such the impugned order is liable to be set aside for ends of justice. He further submitted that the learned Judge of the Court below did not take into consideration that an application under section 540A of the Code of Criminal Procedure is not maintainable when the accused is in custody and as such the impugned order is liable to be set aside in the interest of justice. In support of the submissions Mr. Mohammad Ali referred to two cases; ***Emperor Vs RadharamanMittra (accused) AIR 1930 Allahabad, page 817*** and ***Jagdish Narayan Bajpai (applicant) Vs Emperor through Ram Gopal and Others AIR 1940 Allahabad, page 178***.

14. Mr. Md. Khurshed Alam Khan, learned advocate, appearing on behalf of the opposite party No.1, the Anti-Corruption Commission (ACC); drawing our attention to *page no.126 and 136* of the petition, submitted that the learned Public Prosecutor, during trial, drew attention of the learned Judge of the trial Court to the Jail Custody in which, it is written that "Khaleda Zia is Unwilling to appear before the Court, which indicates that she does not want to come to court, which prolongates the trial." He also submitted that on 5/9/2018, the petitioner appeared before the court and said that ***"আমি বারবার আদালতে হাজির হতে পারবো না।"*** And thereafter, on 12/9/2018 and 13/9/2018, the petitioner did not appear before the court. In jail custody, on both dates, it was mentioned that ***"তাঁকে বিজ্ঞ আদালতে হাজিরার জন্য জানানো হলে তিনি বিজ্ঞ আদালতে আসতে পারবেন না বলে জানান (অনিচ্ছুক)।"***. He also submitted that in Jail Custody, it has also been mentioned that***"বিজ্ঞ আদালতে হাজিরার জন্য অনুরোধ করা হলে তিনি বিজ্ঞ আদালতে যেতে অপারগতা প্রকাশ করেন।".*** From this, it is quite clear that, it is not a situation rendering the accused incapable; rather it is one where the accused petitioner is merely unwilling. He further submitted that the learned Public Prosecutor only drew the attention of the court, to the idea that if she is so unwilling to appear in court, that her presence may be dispensed with for the continuance of the trial. He also submitted that in absence of any application from the Public Prosecutor, learned judge himself could have dispensed with the appearance of the accused petitioner. However, there is nothing barring the Public Prosecutor (appearing for opposite party No.1) from filing such an application under section 540A of the Code of Criminal Procedure 1898. Furthermore, he submitted that the attempt taken by the accused petitioner, bringing the present application before this Court is nothing but a regrettable practice to delay the deliverance of justice and the completion of the trial. Hence, he prays for the rejection of the application, summarily.

15. After having considered the submissions by counsels of both sides, having gone through the application and the papers annexed, particularly the impugned order; we are of the view that it is a new phenomenon for our judicial arena.

16. It appears from the record that the First Information Report (FIR) was launched against the accused petitioner on 08.08.2011 and the charge sheet was submitted on 16.01.2012. Charges were then framed on 19.03.2014, against the accused petitioner and two others. Thereafter, the trial began. Out of 36 charge sheeted witnesses, the prosecution has managed to examine as many as 33 witnesses so far, in order to prove the case. All of these witnesses have then been cross-examined. After conclusion of the witnesses' examination, the accused petitioner was examined under section 342 of the Code of Criminal Procedure 1898 where the Accused Petitioner claimed innocence and prayed for trial. It must be mentioned that on 21.12.2017, the date for arguments, the petitioner submitted a written statement, which she was supposed to submit on the date of her examination under section 342. Thereafter, on 25.02.2018, a date was fixed for arguments. However, the accused petitioner could not be produced before the Court, for her ill health.

17. Since then, till the date fixed for arguments, the accused petitioner took 32 adjournments and then submitted her written statement on 21.12.2017. Records also show that on 30.01.2018, the prosecution, concluded their arguments. Then the arguments on behalf of the co-accused, Ziaul Islam Munna and Monirul Islam Khan began.

18. Since the accused petitioner took 32 adjournments and did not appear before the Court for a significant amount of time (since 25.02.2018 to 07.08.2018) and subsequently the Jail authority informed the Court that she is not willing to attend Court. In the circumstances it is also argued by the prosecution that since there are two more accused, who have almost

completed their arguments and the accused petitioner has submitted a written statement at the time of examination under section 342 of the Code of Criminal Procedure 1898, it is not essential for her to remain present in Court; she may be well represented by her existing team of lawyers. It also appears from the record that the petitioner on 05.09.2018, remained present in the Court and proclaimed that ***"আমি বারবার আদালতে হাজির হতে পারবো না।".*** The Court then fixed a date for 12/9/2018, on which date, the learned advocate on behalf of the Accused Petitioner sought yet another adjournment and prayed for bail till the Accused Petitioner recovers. The learned Judge accepted the prayer for adjournment and fixed the following date for her appearance. She once again failed to appear and in Jail Custody, a statement was produced by the Jail Authority ***"বিজ্ঞ আদালতে হাজিরার জন্য অনুরোধ করা হলে তিনি বিজ্ঞ আদালতে যেতে অপারগতা প্রকাশ করেন।"***. In these circumstances the prosecution filed an application under section 540A of the Code of Criminal Procedure, asking the Court to proceed with the trial having dispensed with the need for personal appearance of the accused petitioner. In this regard the learned Judge framed four issues:

1. Whether the Public Prosecutor can file an application under section 540A of the Code of Criminal Procedure 1898
2. Whether only the accused can file such an application
3. Whether the Court can proceed with the case applying the provisions of section 540A, while the accused is in custody
4. Whether the Court can, of its own volition, exercise its discretion in applying section 540A, without any application from either side.

19. To find the answers of the question, the learned Judge, without finding any decision from our jurisdiction, looked to the decisions under the Jurisdiction of the Neighbouring nation of India. In doing so, he considered the cases reported in *AIR 1970 Raj. 102 (103), 1979 (47) Cut LT 103 (105) Orissa, 1991 CriLJ 2299 (2303) (AP).* He also considered the cases reported in *(1990) 3 Orissa, Cri R 577 (580), the cases of Basil Banger Lawrance vs Emperor, AIR (20) P.C. 218* and *Aditya PD Bagchi Vs Jogendranath AIR (35) 1948 All. 393, Sultan Singh Jain Vs The State AIR, AIR 1951 All 864 (866)* and also the cases of *Lalit Mohan Dev Burman Vs Hridoy Ranjan Dev Burman AIR 1958 Tripura 17(18).* He also considered the case of *Gulam Mohammad Azimuddin and Others Vs State AIR 1959 Madhyapradesh 147, 151, 2005(4) Cur Cri R 353(354).*

20. From all the above-mentioned cases it appears that, the Court has ample powers to exercise its discretion under section 540A at any stage of the trial process. Considering these decisions, the learned Trial Court concluded that since the Accused Petitioner was unwilling to attend Court, the other co-accused should not be deprived of their right to Justice by adjourning the case again and again, thus he exercised his discretion under section 540A, by entertaining the application filed by the Public Prosecutor. It has also been observed by the Trial Court that, although there is no express provision allowing the Public Prosecutor to file this application under section 540A; nonetheless, there is no provision barring the Public Prosecutor from doing so, either. In the circumstances at hand, we also searched, the Bangladeshi Jurisdiction to seek guidance from the Apex Court. Unfortunately, there are not many decisions from our jurisdiction on the subject matter. However, from the case of ***Mr.Nalinikanta Sen, Petitioner Vs M Siddiq, Opposite Party, reported in 14 DLR 1962 page-355****,* we have found some guideline. A Division Bench comprising of their Lordships Mr. Justice Asir and Mr. Justice SU Ahmed, observed that *"while considering certain provisions of the Code of Civil Procedure in the case of* ***Muhammad Sulaiman Khan and others v. Muhammad Yar Khan and another, ((AIR 11 Allah 267 FB) Mahmood, J.,*** *observed at page 287 of the same report that it was an undoubted principle of law that*

everything was to be taken as permissible unless there was some prohibition against it. Similarly while dealing with the question as to whether there was an inherent jurisdiction of the Court of Sessions to discharge the Jury before the verdict for misconduct or other similar and sufficient ground and to empanel another, it was observed by Buckland, J., in the case of ***Rahim Sheikh v. Emperor, (ILR 50 Cal 872 P.875)*** *that so far as it dealt with any point specifically the Code of Criminal Procedure must be deemed to be exhaustive and the law must be ascertained by reference to its provisions but where a case arose which obviously demanded interference and it was not within those for which the Code specifically provided, it would not be reasonable to say that the Court had not the power to make such orders as to ends of justice required. It was also held by a Division Bench of the Calcutta High Court in the case of* ***Nagen Kundu and another v. Emperor, (AIR 1934 Cal 428)*** *that so far as it dealt with any point specifically by the Code of Criminal Procedure should be deemed to be exhaustive as the law should be ascertained by reference to its provision but where a case arose which demanded interference and it was not within those for which the Code specifically provided it would not be reasonable to say that the Court had not the power to make such order as the ends of justice required. In the case of* ***Hansraj Harijiwan Bhate and others v. Emperor, (AIR 1940 Nagpur 390)*** *held that the Code of Criminal Procedure was an exhaustive one only with regard to matters specifically dealt with by it. Absence of any provisions on a particular matter did not mean that there was no such power and the Court might act on the principle that every procedure should be understood as permissible till it was shown to be prohibited by law. Keeping these propositions of law in view it seems clear to us that a Court of Law has got inherent powers which can be exercised in cases not covered directly by any specific provision of the Code provided ends of justice required so. In the present case the opposite party admittedly appears to be a victim of a bad type of tuberculosis. Even if it is assumed that there is no specific provision in the Code of Criminal Procedure which empowers the Trial Court to grant exemption of personal attendance and allow his representation through a lawyer on condition that he should appear on call yet in view of the principle laid down in the cases referred to above we do not think it unreasonable to hold that the trying Court had inherent powers for ends of justice to make an order as made in the present case."*

21. In the case at hand, we find that the Petition under section 540A was filed by the Public Prosecutor, though it has not been expressly mentioned whether the Public Prosecutor can file such an application; the Code does not prevent the Public Prosecutor from filing as such. The case reported in *14 DLR*, aides us in concluding that, where there is no such provision preventing the Public Prosecutor from filing such an application, there is no harm if the Public Prosecutor draws the attention of the Court by filing such an application for the sake of expedition and deliverance of Justice.

22. Mr. A J Mohammad Ai, submitted that before the Trial Court had decided, the Accused Petitioner should have been allowed to engage her representative. Upon an Inquiry from the Court, the Learned Advocate said that the present lawyers are in the Court to defend the case of the petitioner. They cannot be termed as the representative of the petitioner, while she has been exempted from appearing in Court. In this regard, we have searched the meaning of the word "representation". *According to the Law Lexicon, the word "representation" does not merely mean filing a warrant of appearance or a 'vakalatnama', it implies that the advocate appears in person or through a duly authorised advocate on behalf of the party when the matter is called out for hearing. An advocate cannot be said to have represented a party when the advocate himself is not present. A representation before Court, always implies that a person is present in Court on behalf of someone else.* Thus, we are

convinced that the accused petitioner is adequately represented by her team of advocates. As such, we find that the learned Trial Judge was not wrong for not asking the Accused Petitioner to appoint a representative before passing such an order.

23. We are also of the view that:

The Rule of Law and the principles of Criminal Justice believes and demands that the accused be present at his/her own trial; ideally for the entirety of it. The principle and such laws exist to benefit the accused and give him/her the opportunity to explain himself/herself and address the charges laid against him/her. This is a right allowed to him/her. However, it must be remembered that this benefit is extended to him/her for the sake of justice. Justice, therefore, cannot be held hostage by the whims of the accused in the execution of his/her rights.

24. If the accused chooses to forego this benefit, it is entirely his/her prerogative. However, in exercising his/her prerogative, Justice cannot and should not be obstructed. As such, trials may and should continue in the case where the accused chooses to absent himself/herself from his/her trial, even where he/she has been ordered to appear at the trial.

25. These principles were considered in Hayward [2001] QB 826, where the Court of Appeals in the United Kingdom laid down a series of principles to be considered in a scenario where the accused voluntarily chooses to absent themselves from their own trial (D15.86 Blackstone's Criminal Practice 2018).

26. **Principles to be Considered In Hayward [2001] QB 862, the Court of Appeal considered the principles which the trial judge ought to apply when dealing with an absent defendant, and summarised them as follows.**

(a) An accused has, in general, a right to be present at his trial and a right to be legally represented.

(b) Those rights can be waived, separately or together, wholly or in part, by the accused himself:

(i) they may be wholly waived if, knowing or having the means of knowledge as to when and where his trial is to take place, he deliberately and voluntarily absents himself and/ or withdraws instructions from those representing him;

(ii) they may be waived in part if, being present and represented at the outset, the accused, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.

(b) The trial judge has a discretion as to whether a trial should take place or continue in the absence of an accused and/or his legal representatives. The judge is required to warn the defendant at the Pre-Trial Preparation Hearing of the risk of the trial continuing in his absence.

(c) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the accused is unrepresented.

(d) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

(i) the nature and circumstances of the accused's behaviour in absenting himself from the trial or disrupting its continuation, and, in particular, whether his

behaviour was deliberate, voluntary and such as plainly waived his right to appear;

(ii) whether an adjournment might result in the accused being caught or attending voluntarily and/or not disrupting the proceedings;

(iii) the likely length of such an adjournment;

(iv) whether the accused, though absent, is, or wishes to be, legally represented at the trial or has waived his right to representation;

(v) the extent to which the absent accused's legal representatives are able to present his defence;

(vi) the extent of the disadvantage to the accused in not being able to give his account of events, having regard to the nature of the evidence against him;

(vii) the risk of the jury reaching an improper conclusion about the absence of the accused (but see (f) below);

(viii) the seriousness of the offence to the accused, victim and public;

(viii) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(ix) the effect of delay on the memories of witnesses;

(xi) where there is more than one accused and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

(f) If the judge decides that a trial should take place or continue in the absence of an unrepresented accused, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the accused as the evidence permits. In summing-up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case.

27. It is evident from this paragraph, that it is indeed possible for a trial to continue without the presence of the accused, where the accused has chosen to voluntarily absent themselves from their own trial.

28. It is important at this stage to recognize that the recording of evidence during trial requires the presence of the accused more. This is from a pragmatic view of the trial. The evidentiary stage is the only time at which the accused is able to express their views and concerns and in doing so address the charges laid at them. Although it is, of course, desirable for the accused to be present during the argument stage of the trial, it is less important since, the arguments are usually prepared by the Advocates, based on the instructions of the accused. This is to say that, at times where the accused has chosen to absent themselves from the trial, and in particular, during the argument stage; assuming they have representation, the Court may take the view that for the sake of delivering appropriate Justice, the trial should continue in their absence. It should go without saying that the Rights of the accused under the principles of Criminal Justice must be preserved, and thus, this approach should be taken with the **greatest of caution**.

29. While it is important to give the accused every opportunity to be present at their own trial, it is equally important to deliver Justice and to prevent the obstruction of the same. If there happens to be a practice where the trial process is halted due to the accused's desire to exercise their prerogative to not appear; it could prove fatal to the Criminal Justice System.

To avoid such "hostage" scenario, there ought to be, as argued above, the opportunity to continue a trial in the absence of a non-cooperative defendant.

30. The law and all facets of the law must apply to all individuals equally. While it is true that in the Bangladeshi Prison Systems there are classifications of prisoners; but this classification was created in order to extend a degree of comfort to a certain class of individuals. The classification is based for too many reasons, including the nature of the crime, the social status of the individual, etc. Begum Khaleda Zia is deemed to be a prisoner of the highest class. Her status as the former Prime Minister of the country must allow her this modicum of respect. However, as stated earlier, the law must equally apply to all. As such, the Court is hence left with one of two options. Either, Begum Khaleda Zia is to be forced into appearing in Court or alternatively, she may be allowed to exercise her right to not appear in Court, while allowing the Court to exercise their prerogative under section 540A of the Criminal Procedure Code 1898 and continuing with the trial or inquiry in her absence.

31. Having said so, the concerns regarding section 540A must now be addressed. The Applicants have raised three chief concerns within their submissions and they will be addressed in turn.

32. The applicant addresses the following concern: that the *"privilege of section 540A of the Code of Criminal Procedure can only be sought by the accused; the public prosecutor is in no way entitled to file such application for dispensation with the personal attendance of the accused."* While this has become a common practice that the accused themselves are the ones to make such an application, it is however true that nothing in section 540A of the Code of Criminal Procedure bars the prosecution to make such an application and nothing indeed bars the court from making such an order of its own volition. As such, it is only normal for such an application to be made. However, of course, it must be with great caution that such an order is made by any Court. As addressed above, such guidelines for consideration has been provided in the case of ***Hayward [2001]*** in the UK. Indeed, it is at the Judge's discretion as to the direction in which they believe that the scales of Justice might tip.

33. The scenario at hand is unusual in that while being in custody and fully aware of the trial's timing and location, the accused chooses to absent herself. Indeed, this is a rare case and perhaps, the first of its kind in this Jurisdiction. However, that should not mean that the laws at hand must conform to what is merely in practice and not allow itself to take into consideration the pragmatic necessities of the Criminal Justice System. By not submitting herself before the court, though it may be her prerogative to do so, the accused risks the trial proceeding in her absence. Hence, it is well advised that the accused at least be there to address the charges laid against her. In the case at hand this stage is over. The accused was present at the time of framing of charge and recording statement of the witnesses. Even she submitted her written statement at the time of examining her under section 342 of the Code of Criminal Procedure.

34. The applicant claims that the court should have allowed the accused to engage a lawyer of her choice before making such an order. It is on record that this accused has, at her disposal, the advice of one hundred and twenty-six lawyers, standing as her representations. The language in sections 205/540A of the Code of Criminal Procedure gives no special meaning to the word "representation" or "pleader". This is to suggest that a new advocate is not at all necessary to be appointed in favour of the accused, in consideration of the

application at hand. Her current team of representatives (Advocates) can easily suffice for the role suggest in these sections. As such the Court has evidently not failed in their duties to allow such an opportunity to the accused.

35. Finally, the applicant claims that "*the learned Judge failed to take into consideration that an application under section 540A of the Code of Criminal Procedure is not maintainable when the accused is in custody."* However, similar to the argument above; there is no specific provision in section 540A of the Code of Criminal Procedure that states that such an application may only be made where the accused is not in custody. The application under section 540A of the Code of Criminal Procedure clearly is intent on ensuring the deliverance of Justice, especially when faced with a non-cooperative accused. Whether the accused is in custody or not has no direct relation to the application of section 540A and as such, the learned Judge has not failed in his considerations.

36. We do not find any illegality in the order passed by the learned Special Judge, Court No.5, Dhaka and there is no substances in the submissions of the learned advocate for the accused petitioner.

37. Hence, it is ordered that in light of the scenario before us, we are constrained to direct the learned Judge of the Special Judge, Court No.5, Dhaka that the trial must continue on the next date as fixed, regardless whether the accused is present in Court or otherwise.

38. With the above observations and direction, the application is **rejected, summarily.**

39. However, we are of the view that in order to assist her to make her appearance in Court, provided that such is her wish, she must be extended adequate facilities, as per Jail Code.