

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 1341 OF 2000

In the matter of:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

-And-

In the matter of:

Bangladesh Legal Aid and Services Trust and
another

.....Petitioners

-Versus-

Bangladesh and others

.....Respondents

Mr. Md. Idrisur Rahman with
Mr. M.A. Mannan Khan and
Mr. Md. Ekramul Islam,

.....for the petitioner.

Mr. Naimur Alam Khandakar, D.A.G.

.....for the respondents.

Judgment on 06.11.2001

Present:

Shah Abu Nayeem Mominur Rahman, J.

And

Md. Arayes Uddin, J.

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Rule was issued calling upon the respondents to show cause why the trial, conviction and sentence of the child to imprisonment for life inflicted by the Courts and Tribunals of Bangladesh, not being Juvenile Court properly constituted under the law, being violative of the consistent/repeated directions of the High Court Division, should not be declared unconstitutional, illegal and without jurisdiction and is of no legal effect, and why the judgment and order of conviction and sentence dated 1-12-1998 passed by Mr. Ikter Ahmed, Bicharak (District and Sessions Judge), Nari-O-Shishu Nirjatan Daman Bishesh Adalat, Comilla, in Nari-O-Shishu Case No. 4 of 1998 convicting the petitioner No. 2 under sections 5(kha) and 5(gha) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 sentencing him to suffer imprisonment for life and also to pay a fine of Tk.1,000/- in default to suffer imprisonment for another one year for committing offence under section 5(kha) and further sentencing him to suffer imprisonment for 14 years and also to pay of Tk. 500/- in default to suffer imprisonment for another 6 months for committing offence under section 5(gha) having been passed without jurisdiction should not be declared illegal, without lawful authority and is of no legal effect.

Facts necessary to dispose of this Rule, in brief, is that the petitioner No. 1, the Bangladesh Legal Aid and Services Trust, hereinafter referred to as BLAST, is registered under the Companies Act, 1913. It is non profit trust and provides legal aid to people to enforce their human rights guaranteed by the Constitution and to uphold the supremacy of the Constitution. BLAST, on request, has filed this writ petition for the benefit of the convict Md. Alamgir Hossain. One Md. Junab Ali on 25-08-997 lodged F.I.R. at the Comilla Kotwali Police Station alleging that on 24-08-1997 at about 9-45 P.M. while his daughter Khodeza Begum was studying beside the window of their east Bhati dwelling but she cried out. Informant rushed there and saw that face and other parts of the body of his daughter burnt by acid. Earlier a goat belonging to the father of the convict ate saplings planted in the nursery of the informant and upon that his son beat the goat causing fracture on legs. Khodeza was taken to Comilla General Hospital and was admitted there for treatment. After investigation Police submitted charge-sheet against petitioner No. 2 Alamgir Hossain under sections 5(kha) and 5(gha) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995. Nari-O-Shishu Nirjatan Daman Bishesh Adalat took cognizance of the case and framed charges against Alamgir Hossain under sections 5(kha) and 5(gha) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995. The convict pleaded him not guilty and accordingly trial was held in the Court of the Nari-O-

Shishu Nirjatan (Bishesh Bidhan) Adalat. The convict Alamgir Hossain is a child below the age of 16 years and as such the trial as held and the judgment passed by the Special Tribunal is without jurisdiction in view of the provisions of section 5 of “The Children Act, 1974”. The learned Tribunal seriously erred in law in trying and punishing the petitioner No.2 when the Tribunal itself found the petitioner Alamgir Hossain under the age of 16 years. The conviction and the sentence passed against petitioner Alamgir Hossain by the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain is violative of the provisions of “The Children Act, 1974” as well as the fundamental rights guaranteed by the Constitution and also a violation of the directions of this Court in its various judgments. Being aggrieved and dissatisfied with the impugned judgment and order of conviction of petitioner No.2 in this particular case with the help of petitioner No.1 moved this Court and obtained the present Rule.

On behalf of the respondents no affidavit-in-opposition was filed.

On behalf of the petitioner No.1 BLAST, the learned Advocate Mr. Idrisur Rahman submitted that the impugned judgment and order of conviction and sentence passed by the learned Special Tribunal, Nari-O-Shishu Nirjatan Daman Bishesh Adalat, is not sustainable in law since the Tribunal itself found that petitioner No. 2 is 14-15 years of age at the time of occurrence and under “The Children Act, 1974”, trial of children is exclusively within the jurisdiction of Juvenile Court and no other Court can take cognizance of any offence committed by the child i.e. below the age of 16 years. The learned Advocate has drawn our attention to the provisions of “The Children Act, 1974”, wherein powers of the Juvenile Court has been embodied in section 5. In that section it has been clearly laid down that a Juvenile Court has the exclusive jurisdiction to take cognizance of the offences committed by a child and ‘child’ has been defined in Section 2(f) of “The Children Act, 1974 which runs as: “Child” means a person under the age of sixteen years and when used with reference to a child sent to a certified institute or approved home or committed by a Court to the custody during the whole period of his detention notwithstanding that he may have attained the age of sixteen years during that period”. From the impugned judgement and order of conviction passed by the learned Tribunal it is found that the Tribunal came to a decision that the age of petitioner No. 2 Alamgir Hossain was 14-15 years at the time of occurrence. Accordingly the jurisdiction of the Nari-O-Shishu Nirjatan Daman Bishesh Adalat (Tribunal) was excluded by section 5 of the Children Act, 1974. The learned Advocate for the petitioner has relied on the decision in the case of State-Vs.-Deputy Commissioner, Satkhira and others reported in 45 DLR (HCD) 643. In that case a Division Bench of this Court held that “no child is to be charged with or tried for any offence together with an adult. The Child must be tried in the Juvenile Court and not in the ordinary Court. In the case of Shiplu and another –Vs.-The State reported in 49 DLR(HCD)53 it has been held that any order of conviction and sentence passed by the Trial Court not being a Juvenile Court in respect of an accused below the age of 16 years is liable to be set aside for want of jurisdiction, in view of “The Children Act, 1974”.

On behalf of the State, Mr. Taimur Alam Khandaker, the learned Deputy Attorney General, submitted, that age of the petitioner No. 2 has not been properly ascertained in the instant case as there was no medical report and as such the age of petitioner No. 2 should be ascertained by medical test. We are unable to accept the submissions of the learned Deputy Attorney General in view of the fact that the Tribunal on due consideration and discussion came to the decision that age of petitioner No. 2 Alamgir Hossain was 14-15 years at the time of trial. So the question of medical examination does not arise as the learned Tribunal came to a conclusive decision about the age of petitioner Alamgir Hossain.

On behalf of the petitioner No. 2, the learned Advocate Mr. Md. Idrisur Rahman submitted that the impugned judgment and order of conviction passed by the learned Tribunal is illegal, without jurisdiction and violative of the fundamental rights guaranteed by Article, 35 of the Constitution. The learned Advocate further submitted that apart from jurisdiction point it is a case of no evidence as there is no eye witness of the occurrence. The conviction and sentence of the petitioner No. 2 has been passed on the basis of an uncorroborated confessional statement of the convict who in his statement under section 342 Cr.P.C. clearly asserted that the confessional statement was procured through coercion and false promise of his release if he gives statement as per Police version. Since the Tribunal had no jurisdiction to take cognizance of the case against the convict-petitioner being barred by “The Children Act, 1974”, the learned advocate submits, that the whole trial and the impugned judgment and order of conviction is bad for non coram judice and void abinitio. That the learned Advocate for the petitioner contended that the charges framed against petitioner Alamgir Hossain under section 5(kha) and 5(Gha) of the Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 have not been proved, by any of the witnesses. Furthermore, the accused-petitioner is found to be a child, the ordinary Criminal Court loses its jurisdiction to try him and the entire trial becomes illegal and without jurisdiction in view of section 5 of “The Children Act, 1974”.

In the case of Bablu –Vs.- State reported in 1 BLD, 1981(HCD)454, Bakhtair Hossain Vs. The State reported in 47 DLR (HCD) 542 and Sheela Barse and another - Vs.- Union of India and others reported in AIR, 1973 the above view has been consistently held.

In the case of Sheela Barse and another vs. The Union of India and others reported in AIR, 1986(SC) 1777 it has been held that:

“If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the Statutes dealing with children provide that a child shall not be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to benefit influences, coarsening his conscience and alienating him from the society. It is a

matter of regret that despite statutory provisions and frequent exhortations by social scientists, there is still large number of children in different jails in the country as is now evidence from the reports of the Survey made by the District Judges pursuant to our order dated 15th April, 1986. Even where children are accused of offences, they must not be kept in jails. It is no answer on the part of the State to say that it has not got enough number of remand homes or observation homes or other places where children can be kept and that is why they are lodged in jails. It is also no answer on the part of the State to urge that the ward in the jail where children are kept is separate from the ward in which the other prisoners are detained. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. The State must set up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. On no account should children be kept in jail. If a State has not got sufficient accommodation in its remand homes, the children should be released on bail instead of being subjected to incarceration in jail.”

In the People’s Republic of Bangladesh, “The Children Act 1974” (XXXIX of 1974) (hereinafter called the Act) came into effect for Dhaka District vide Notification dated 11-09-1967 and for all other Districts it came into effect from 1st of June, 1980. Sections 2(F)6, 8, 15, 48, 49, 50, 51, 53, 54, 66 and 71 of the Act deal with trial of juvenile offenders and the definition of child as appearing in sections 2(F) of the Act provides that a boy under the age of 16 is called a child. Section 6 provides that no joint trial of the child and adult can be held. No child is to be charged with, or tried for, any offence together with an adult even if the offence may be same of the child and adult. Adult must be tried separately. The child must be tried in the Juvenile Court and not in ordinary Court. Section 8 speaks that only the adult can be committed to Court of Sessions and the Juvenile Court will take cognizance of the juvenile offenders. Section 15 of the Act shows the factors to be taken into consideration for orders by the Court with regard to juvenile offenders. The characters and the age of the child and the circumstances in which the child is living are to be considered. Sections 48 and 49 of the Act provide that when a child is arrested in a non-bailable offence and cannot be brought forthwith before the Court, the officer-in-charge of the Police Station may release him on bail and if bail cannot be granted, the officer-in-charge of the Police Station shall keep him detained in a remand or place of safety until he can be brought before the Court. If bail cannot be granted, the Court shall send him to remand home or a place of safety. Sections 50-54 provide as to how the Juvenile offenders are to be treated and tried in different manners by the Court. Section 41 provides even the word conviction and sentence cannot be used in relation to children and section 51 of the Act provides that life sentence cannot be awarded to a child. So, the provisions of “The Children Act, 1974” have provided different processes and modes of arrest, detention and trial of the juvenile offenders below the age of 16 years.

In view of the discussions made above and considering the provisions of law and the decisions of the Superior Courts of this Sub-Continent we find that the trial of petitioner No. 2 Alamgir Hossain has been held by the Bicharak (Judge) Nari-O-Shishu Nirjatan Daman Bishesh Adalat is without Jurisdiction and without lawful authority and as such the impugned judgment and order of conviction is void ab initio.

As has been referred above, in the case of Shiplu and another Vs. State reported in 49 DLR (HCD) 55 a Division Bench of this Court held that:

“Having considered this question in the light of the evidence on record, we hold that the trial Court failed to apply its judicial mind as to the age of appellant Shiplu, who appears to have been below the age of 16 years at the time of trial. This makes the order of conviction and sentence passed by the trial in respect of appellant Shiplu as liable to be set aside for want of jurisdiction.”

Further on scrutinizing the deposition of the witnesses, certified copy of which were produced before us by the learned Advocate for the petitioner Alamgir Hossain, it appears that there is no evidence to support the order of conviction and sentence as the charge brought against accused Alamgir Hossain has not been proved by a single witness. The order of conviction has been passed on the basis of his uncorroborated confessional statement. The confession made by a child is of no legal effect, more so, when the child (convict hereof) in his written statement under section 342 Cr.P.C. categorically stated that the confessional statement was procured through coercion, threat and false promise to release him on giving the statement before the Magistrate as tutored by the Police as evidenced by Annexure-‘A’ to the writ petition. The convict had no maturity to understand the consequences of such confessional statement. The Tribunal Court considered the confessional statement holding that the confessional statement was recorded on the date the convict was arrested, which is not correct and true. As per case record, statement of the convict under section 342 Cr.P.C. (Annexure-‘A’) the convict was produced before the Magistrate for recording his confessional statement after two days of Police remand and that confessional statement under no circumstances be voluntary since the accused is mere a child.

Before parting with the matter we are constrained to put on record that how a Sessions Judge could ignore “The Children Act, 1974”, more so when previously, on several occasions, the High Court Division in different judgments passed, directed all concern to take care as to the trials of Juvenile offenders, and particularly in the case of State-Vs.-Deputy Commissioner, Satkhira and others reported in 45 DLR (HCD) 643. We also appreciate the move of the petitioner No. 1 Bangladesh Legal Aid and Services Trust for bringing this matter before this Court.

In the result, this Rule is made absolute without any order as to cost. The impugned judgment and order of conviction and sentence dated 1-12-1998 passed by Mr. Ikhtedar Ahmed, Bicharak (District and Sessions Judge), Nari-O-Shishu Nirjatan Daman

Adalat, Comilla, in Nari-O-Shishu Nirjatan Case No. 4 of 1998 is hereby set aside. Let the petitioner No. 2 Alamgir Hossain be set at liberty forthwith if not wanted in connection with any other case.

The respondents No. 2 and 4 are directed to instruct the law officers of the Government to take due care in conducting the cases of juvenile offenders under the “The Children Act, 1974” and accordingly let a copy of this judgment and order be sent to the respondent Nos. 1 and 2 for supply of the copy thereof to all the Deputy Commissioners for onward transmission to all Government law officers.

Further, let a copy of this judgment and order be sent to the learned Registrar, Supreme Court of Bangladesh, to ask for an explanation from Mr. Ikhtedder Ahmed, District and Sessions Judge, the author of the impugned judgment and order convicting and sentencing the petitioner No. 2 of this Writ Petition, in Case No. 4 of 1998 as Bicharak, Nari-O-Shishu Nirjatan Daman Bishesh Adalat, Comilla, as to how he could award sentence of imprisonment for life to a Juvenile offender and ignored “The Children Act, 1974”; and further to send a copy of this judgment and order to all Sessions Judges of the Country advising them to discuss on “The Children Act, 1974” with judicial officials working under their respective judgship.

Md. Arayes Uddin.

Shah Abu Nayeem Mominur Rahman, J:

I agree.

S. A. N. M. Rahman.