

LEX/BDAD/0015/2023

Equivalent/Neutral Citation: 20ADC(2023)824, 75 DLR(AD) (2023) 187, 14LM(AD) 2023 615, 11LNJ(AD)(2022)120

IN THE SUPREME COURT OF BANGLADESH (APPELLATE DIVISION)

Criminal Review Petition No. 55 of 2022

Decided On: 12.03.2023

The State **Vs.** Nurul Amin Baitha and Ors.

Hon'ble Judges/Coram:

Hasan Foez Siddique, C.J., Md. Nuruzzaman, Obaidul Hassan, Borhanuddin, M. Enayetur Rahim, Md. Ashfaqul Islam, Md. Abu Zafor Siddique and Jahangir Hossain, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: A.M. Aminuddin, Attorney General, S.M. Shahjahan, Senior Advocate and Mohammad Shaiful Alam, Assistant Attorney General Instructed by Haridas Paul, Advocate-on-Record

JUDGMENT

Hasan Foez Siddique, C.J.

1. Delay in filing this Criminal Review Petition is condoned.
2. The state has filed this Criminal Review Petition against the observation made by this Division in Criminal Petition for Leave to Appeal No. 495 of 2015 that the High Court Division has no right of converting the conviction under Section 11(Ka) read with Section 30 of the "নারী ও শিশু নির্যাতন দমন আইন, ২০০০" (The Ain), the special law to one under section 302/34 of the Penal Code.
3. Mr. A.M. Aminuddin, learned Attorney General appearing for the State, submits that the High Court Division, in appeal, has jurisdiction like trial Court/tribunal to amend/alter the charge if it, upon appreciation of the evidence came to the conclusion that in a case of killing of wife demanding dowry, found that the charge of demanding dowry has not been proved but charge of killing has been proved then the High Court Division is authorized to alter the conviction from 11(Ka)/30 of the Ain to one under section 302/34 of the Penal Code, since there is no possibility of the accused to be prejudiced in any way. He submits that if the provisions of Sections 25, 26, 27(3) and 28 of the Ain and Section 423 of the Code of Criminal Procedure are read in conjunction with each other, it would be apparent that High Court Division is authorized convert a conviction under Sections 11(Ka)/30 into a conviction under Sections 302/34 of the Penal Code. He further submits that in case of failure to prefer Criminal Petition for Leave to Appeal in the Appellate Division by the convict after disposal of his appeal by the High Court Division, the procedure would be difficult to decide the matter finally, particularly, when it is found that the case of demand of dowry is not proved but killing is proved, and, in such a situation, the order of remand of the case to the Sessions Judge for holding the trial afresh would be failure of justice and both the prosecution and defence shall be prejudiced seriously.
4. At the outset, for satisfactory understanding of the problem, it is needed to quote the provisions of Sections 25(1), 26, 27(3) and 28 of the Ain and the provisions of section 423 of the Code of Criminal Procedure as well which run as follows:-

5. Section 25(1) of the Ain:

২৫। (১) এই আইনে ভিন্নরূপ কিছু না থাকিলে, কোন অপরাধের অভিযোগ দায়ের, তদন্ত, বিচার ও নিষ্পত্তির ক্ষেত্রে ফৌজদারী কার্যবিধির বিধানাবলী প্রযোজ্য হইবে এবং ট্রাইব্যুনাল একটি দায়রা আদালত বলিয়া গণ্য হইবে এবং এই আইনের অধীন যে কোন অপরাধ বা তদনুসারে অন্য কোন অপরাধ বিচারের ক্ষেত্রে দায়রা আদালতের সকল ক্ষমতা প্রয়োগ করিতে পারিবে। (underlined by us)

6. Section 26 of the Ain:

২৬। (১) এই আইনের অধীন অপরাধ বিচারের জন্য প্রত্যেক জেলা সদরে একটি করিয়া ট্রাইব্যুনাল থাকিবে এবং প্রয়োজনে সরকার উক্ত জেলায় একাধিক ট্রাইব্যুনালও গঠন করিতে পারিবে; এইরূপ ট্রাইব্যুনাল নারী ও শিশু নির্ণাতন দমন ট্রাইব্যুনাল নামে অভিহিত হইবে।

(২) একজন বিচারক সমন্বয়ে ট্রাইব্যুনাল গঠিত হইবে এবং সরকার জেলা ও দায়রা জজগণের মধ্য হইতে উক্ত ট্রাইব্যুনালের বিচারক নিযুক্ত করিবে।

(৩) সরকার, প্রয়োজনবোধে, কোন জেলা ও দায়রা জজকে তাহার দায়িত্বের অতিরিক্ত হিসাবে ট্রাইব্যুনালের বিচারক নিযুক্ত করিতে পারিবে।

(৪) এই ধারায় জেলা জজ ও দায়রা জজ বলিতে প্রথমে অতিরিক্ত জেলা জজ ও অতিরিক্ত দায়রা জজও অন্তর্ভুক্ত।

7. Section 27(3) of the Ain:

২৭। (৩) যদি এই আইনের অধীন কোন অপরাধের সহিত অন্য কোন অপরাধ এমনভাবে জড়িত থাকে যে, ন্যায়বিচারের স্বার্থে উভয় অপরাধের বিচার একই সংগে বা একই মামলায় করা প্রয়োজন তাহা হইলে উক্ত অন্য অপরাধটির বিচার এই আইনের অধীন অপরাধের সহিত এই আইনের বিধান অনুসরণে একই সংগে বা একই ট্রাইব্যুনালে করা যাইবে। (underlined by us)

8. Section 28 of the Ain:

২৮। ট্রাইব্যুনাল কর্তৃক প্রদত্ত আদেশ, রায় বা আরোপিত দন্ড দ্বারা সংক্ষুব্ধ পক্ষ, উক্ত আদেশ, রায় বা দন্ডদেশ প্রদানের তারিখ হইতে ষাট দিনের মধ্যে, হাইকোর্ট বিভাগে আপীল করিতে পারিবেন।

9. Section 423 of the Code of Criminal Procedure:

423.(1)-The Appellate Court shall then sent for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the finding and

sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or for trial, or (2) alter the finding maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same;

(bb) in an appeal for enhancement of sentence, (1) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court competent to try the offence, or (2) alter the finding maintaining the sentence, or (3) with or without altering the finding, alter the nature or the extent, or the sentence so as to enhance or reduce the same;

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper.

10. Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

11. Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

12. As per provision of section 25(1) of the Ain, the provisions of the Code of Criminal Procedure have been made applicable for holding trial of the accused for commission of offences defined under the Ain when no procedure is specified in the Ain itself. Section 25(1) of the Ain clearly depicts that, except otherwise provided under the Ain, the provisions of the Code shall be applicable with regard to the filing of a complaint, investigation, trial and disposal of any offence under the Ain, and the Tribunal shall be treated as a Court of Sessions and can apply all the powers of a Court of Sessions while trying any offence under the Ain or any other offence thereof.

“টাইবুনালা একটি দায়রা আদালত বলিয়া গণ্য হইবে এবং এই

আইনের অধীন যে কোন অপরাধ বা তদনুসারে অন্য কোন অপরাধ বিচারের ক্ষেত্রে দায়রা

আদালতের সকল ক্ষমতা প্রয়োগ করিতে পারিবে।”

13. The words, of Section 25(1) of the Ain are significant. Those words clearly indicate that the Ain authorises the Tribunal to try both scheduled offence of the Ain and non-scheduled offence together and in such circumstances the Tribunal shall exercise all the powers of a Court of Sessions. Sub-Sections (2), (3) and (4) of Section 26 of the Ain relate to the appointment of the Judge of the Tribunal which provide that Judge of the Tribunal should be appointed from the District and Sessions Judges. The Government may give responsibility to the District and Sessions Judge to act as Judge of the Tribunal in addition to his charge if it feels necessary. It is also provided that Additional District and Sessions Judges are also to be included as District and Sessions Judge. Sub-section 3 of Section 27 of the Ain authorises Tribunal to try scheduled and non-scheduled offences jointly for the interest of justice following the provisions of the Ain. In view of the discussions made above we have no hesitation to hold that the scheduled offence of the Ain and offences defined in the Penal Code can be tried jointly by the Tribunal.

14. The Nari-O-Shishu Nirjatan Daman Tribunal is also a Court of Sessions of original jurisdiction as per provision of section 25 of the Ain since it has been specifically said in the Ain that the Tribunal shall be deemed to be a Court of Sessions. The words “টাইবুনালা একটি দায়রা আদালত বলিয়া গণ্য হইবে ” in legislation clearly expressed the intention of the Legislature that the Tribunal is to be act as Court of Sessions which is deeming provisions and are to strictly limited to the statutory purpose they are created for. It is our duty to ascertain the purpose for which such fiction is created. A deeming provision must be construed contextually and in relation to the legislative purpose. Section 25 of the Ain must lead to the inescapable conclusion that the statutory fiction laid down in it must be resorted to and full effect must be given to the language employed. Such deeming provision has been introduced to mean that the tribunal shall be deemed to be the Court of Sessions of original jurisdiction. That is, the Tribunal is a Court of original criminal jurisdiction and to make it functionally oriented some powers were conferred by the Ain setting it up and except those specifically conferred and specifically denied it has to function as a Court of original criminal jurisdiction not being hide bound by the terminological status or description of a Court of Sessions. Under the Ain, it will enjoy all powers which a Court of Sessions enjoys save and except the ones specifically denied. The Tribunal is empowered to take cognizance of the offences directly. Such power should only be exercised in such circumstances when the same is needed considering the facts of the case to serve the interest of justice. The presumption is that the legislature while enacting a law has a complete knowledge of the existing laws on the subject matter and the law to be or is newly enacted. To our mind, the Tribunal has all the powers of a Court of Sessions and that the Tribunal shall be deemed to be a Court of Sessions. The provisions of the Code of Criminal Procedure are applicable to all the proceedings under the Ain including proceedings before the Tribunal except to the extent they are specifically excluded.

15. Section 28 of the Ain only talks about the forum of appeal and the time frame within which an appeal is to be filed, but there is no provision under this Ain which specifies the power of the Appellate Court while disposing it. The observation of this Division that the provisions of the Code are applicable only with regard to filing complaint, investigation and trial but do not extend to the stage of an appeal against conviction is required to be reconsidered since it has been clearly mentioned under section 25 that the provisions of the Code shall be applicable with regard to the disposal of any offence, which includes disposal of an offence at the appellate stage.

16. The word appeal has not been defined in the Code of Criminal Procedure. It is a prayer or grievance to the higher Court for reconsideration of a judgment passed by the subordinate Court. The High Court Division is the highest Court of appeal which enjoys the most extensive discretionary and plenary powers in the cases of appeals. The accused has been given the right to appeal under the Ain and the Code against the judgment of the Tribunal as well as the Court of Sessions. It is true that an appeal is not retrial of the case. However, the High Court Division while considering a statutory appeal against conviction is authorized to examine all evidence admitted in the trial Court word to word and legal issues as well. In appeal against the order of conviction the Appellate Court harbors a position of great responsibility especially when it comes to administering justice. The High Court Division has the authority to reconsider and reassess the evidence and alter the judgment and order of conviction awarded by the Court and the Tribunal. Appeal is a statutory right conferred upon parties carrying with it a right of rehearing on law as well as fact.

17. Section 423 of the Code of Criminal Procedure gives wide power to the Appellate Court to alter the findings and sentence. In the case of Imranullah V. Crown 6 DLR (FC)

65, Akram J observed that the statutory right of appeal confers a right of re-hearing of the whole dispute unless expressly restricted in scope and the Appellate Court is not confined to the reasons which have been given by the Court below as the grounds of its decision. In an appeal under section 423, the Appellate Court has to consider the controversy entirely afresh, both as regards facts and as regards law, and can substitute its own opinion in place of the decision taken by the lower Court. In the case of *Ashraf Mia v. Bangladesh* 27 DLR (AD) 106, this Court observed that, "After having come to a finding that the evidence showed that the appellants may have committed some other offence with which they should be charged, the learned Judges of the High Court are competent to decide the question of the guilt of the appellant themselves instead of sending back the case for retrial. The test to be adopted by the Court while deciding upon an addition or alteration of a charge is that the material brought on record needs to have a direct link or nexus with the ingredients of the alleged offence. The Court must exercise its power judiciously and ensure that no prejudice is caused to the accused. The only constraint on the Court's power is the prejudice likely to be caused by the addition or alteration of charges. "Add to any charge" means an addition of a new charge and alteration of charge is changing or variation of existing charge or making it a different charge. In the instant case charge was framed for the commission of offence that the respondent had killed his wife demanding dowry, but it is proved that he had killed his wife but demand of dowry has not been proved. Since the Tribunal has authority to try scheduled and non-scheduled offence together and it is authorized to act as Court of Sessions, we do not find any jurisdictional error if the accused is convicted and sentenced for the charge of killing wife. Such analogy is also applicable for the Appellate Court as well.

18. Where the order of retrial is likely to prejudice the accused persons and evidence on record is sufficient to dispose of the case by the High Court Division, order of fresh trial or re-trial cannot be supported. It will cause unnecessary sufferings to the accused without yielding any different outcome. We should always keep in mind that the enormous increase in crime-rate has led to unprecedented rise in the number of criminal cases. The large number of cases pending in criminal Courts over-burden the work of the Courts. The order of retrial would certainly further increase the cases so it is to be discouraged. In the case of *Ramankutty Gupta V. Avara*, MANU/SC/1564/1994 : AIR 1994 SC 1699 it was observed by the Supreme Court of India that it must be noted that the procedure is the handmaiden for justice and unless the procedure concerns the jurisdictional issue, it should be qualified to subserve substantial issue. Therefore, technicalities would not stand in the way to subserve substantive justice, except when the question of jurisdiction arises.

19. The law which provides a method of aiding and protecting the substantive law, it is procedural law. The procedure is a term used to express the mode of proceeding by which a legal right is enforced. It means the manner and form of enforcing the law. The purpose of procedural law is to ease and advance justice. The Court must not take an overly technical approach while interpreting and administering procedural enactments. When substantial justice and technical peculiarities are set against each other, the point for doing substantial justice should get much importance. The functions of the procedural law is to facilitate justice. It is always subservient to substantive law. The provisions of the Ain and the Code, invaluable as canalizing the exercise of the trial as well as appellate power, must be informed by and be subservient to the normative import of the Supreme Lex list they run aground and be wrecked section of the Ain provided an unconditional right of appeal. The Ain provides both substantive penal provision as well as some procedural provisions for controlling, regulating and achieving the object of the rest substantive portion.

20. The laws of procedure are devised for advancing justice and not impeding the same. The main object and purpose of enacting procedural laws is to see that justice is done to the parties. The Ain contains no provision relating to framing of charge. Hence, in view of Section 25(1), the provisions of the Code which relate to framing of charge are applicable to the Ain. Section 227 of the Code clearly mentions that Any Court may alter or add to any charge at any time before judgment is pronounced. In view of this section it becomes very clear that the High Court Division as the appellate authority in the present case has the power to alter the charge framed by the Tribunal and convict the accused on the same.

21. In section 238 of the Code, it has been provided that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitute a complete minor offence, and such combination is proved, he may be convicted of the minor offence though he was not charged with it. The section further provides that when a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted for commission of minor offence, although he is not charged with it.

22. In the present case although the accused were charged with the offence of murder for dowry under Sections 11(Ka)/30 of the Ain, on the proven facts they were convicted for the offence of murder only under section 302/34 of the Penal Code. In terms of punishment, it is very much clear that an offence under Section 11(Ka) of the Act is graver than an offence punishable under section 302 of the Penal Code. Hence, an offence under section 302 of the Penal Code can be considered as a minor offence than that of an offence under Section 11(Ka) of the Ain and therefore, framing of charge was not required for conviction. In the case of *State v. Sree Ranjit Kumar Pramanik* LEX/BDHC/0150/1991 : 45 DLR 660, it was observed that an offence to be a minor offence to a major one must be a cognate offence to the major one, having the main ingredients in common. Although punishable under different laws, both the offences in question in the present case share similar main ingredients. Both sections 11(Ka) of the Ain and 302 of the Code deal with the offence of murder, the main difference between these two sections is that section 302 is a general section for punishing murder and section 11(Ka) is a special section for punishing murder for dowry. In comparison to an offence of committing murder only, an offence of committing murder for obtaining dowry is considered much more severe and this is very much evident from the punishment provided for this offence.

23. The Supreme Court of India in the case of *Rohtas and ors. Vs. State of Haryana* (<https://indiankanoon.org>) observed that the only controlling objective while deciding on alteration is whether the new charge would cause prejudice to the accused, say if he were to be taken by surprise or if the belated change would affect his defence strategy. The Procedure authorises to give a full and proper opportunity to the defence but at the same time to ensure that justice is not defeated by mere technicalities. The Appellate Court has wide power to alter and amend the charges which may have been erroneously framed earlier. It must necessarily be shown that failure of justice has been caused, in which case a re-trial may be ordered. [*Kantilal Chandulal Mehta v. State Maharashtra*, MANU/SC/0111/1969 : MANU/SC/0111/1969 : (1969) 3 SCC 166].

24. In order to convict a person under minor offence, though charged under major offence, the ingredients constituting the offence under the minor offence should be common as that of the ingredients constituting major offence and to convict him, some of the ingredients of the major offence could be absent. Since the offence under Sections 11(Ka)/30 of the Ain is a graver offence wherein the charge as to killing of the

wife has been framed along with charge of demanding dowry than that of the case under Section 302/34 where the charge of killing of any person is usually brought against accused, we are of the view that the alternation of charge from 11(Ka) of the Ain to Section 302 of the Penal Code will not cause prejudice to the accused.

25. The interest of justice should be the ultimate goal in the use of this power. In *Thakur Shah V. Emperor* MANU/PR/0096/1943 : AIR 1943 PC 192; the Privy Council said, "The alteration or addition is always, of course, subject to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred." The purpose behind providing Courts with the right to alter charges is to avoid a miscarriage of justice.

26. Joint trial of different offences under different enactments does not vitiate proceedings in the absence of prejudice to the accused, particularly when the special enactment authorizes the Court to try different offences jointly where a charge is framed for one offence but offence committed is found to be some other than the one charged, provided, the same facts can sustain a charge for the latter offence, the accused can be convicted for such an offence. Even if the facts proved are slightly different from those alleged in the charge, a conviction based on the facts proved would be legal.

27. The Appellate Court's jurisdiction is co- extensive with that of the trial court in the matter of assessment, appraisal and appreciation of the evidence and also to determine the disputed issues.

28. The High Court Division has a wide appellate jurisdiction over all Courts and Tribunals in Bangladesh inasmuch as it may, in its discretion, from any judgment and order of conviction and sentence passed by any Court of Sessions and Tribunal. When the Tribunal is empowered to try a case as Tribunal as well as Court of Sessions, we are of the view that it could not be without jurisdiction in view of the facts and circumstances of the particular case to conform the judgment and order of conviction under Section 11(Ka) converting or altering charge to one under Section 302 of the Penal Code. The technicalities must not be allowed to stand in the way of importing justice. It is observed that depending on the facts and circumstances of a particular case in the larger interest of justice the Court may overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties and the Court may pass any appropriate order which will serve the interest of justice best. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. It is intended to achieve the ends of justice and normally, not to shut the doors of justice for the parties at the very threshold.

29. Accordingly, we find substances in the submission of the learned Attorney General that the finding of this Division that High Court Division is not authorized to convert the conviction under Sections 11(Ka)/30 of the Ain into one under Sections 302/34 of the Penal Code is not correct view, hence such observation is liable to be reviewed.

30. Our final conclusion is that the High Court Division as an Appellate Court has the jurisdiction to convert the conviction under Section 11(Ka)/30 of the Ain to one under Sections 302/34 of the Penal Code as appeal is the continuation of an original case. An Appellate Court has the same power as that of the trial Court i.e. the Tribunal and therefore, as an Appellate Court the High Court Division in the present case is

competent to convert the conviction to secure the ends of justice. Undoubtedly such an Act of the High Court Division shall in no way prejudice the accused and State; otherwise order of remand shall entail unnecessary time, money and energy due to fruitless or useless prosecution and defence. Similarly, the Tribunal which is created under the Ain shall be deemed to be the Court of Sessions of original jurisdiction and, is entitled to alter/amend the charge framed under Section 11(Ka) of the Ain to one under Section 302 of the Penal Code and to dispose of the case finally in accordance with law if the accused is not otherwise prejudiced.

31. Accordingly, the observation made in the body of the judgment in that regard is reviewed and hereby expunged.

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