Justice for Children in Bangladesh

An Analysis of Recent Cases

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EUROPEAN UNION

Save the Children

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Design & Layout: Masuma Pia/Matri

Cover Photo: Shafiqul Alam Kiron/Map Photo Agency

Published by: Save the Children
House No. CWN (A) 35, Road No. 43
Gulshan-2, Dhaka 1212
Bangladesh
Web: www.savethechildren.net

First Published: December 2012

ISBN NO: 978-984-33-8055-5

Project: Strengthening Non-State Actors (NSA) and Local Bodies (LBs) to Reduce Child Proverty and Promote Rights of Vulnerable Children (VC)/EuropeAid/128141/L/ACT/BD

This Publication has been produced with the assistance of the European Union. The Contents of this publication are the sole responsibility of the author and can no way be taken to reflect the views of the European Union or Save the Children.

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PREFACE

Mahatma Ghandi is reputed to have said 'a nation's greatness is measured by how it treats its weakest members'. In a similar line, a former Vice-President of the United States, Hubert Humphrey, stated that 'the moral test of a government is how it treats those who are at the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadow of life, the sick and the needy, and the handicapped'.

The founders of the new nation of Bangladesh certainly shared these sentiments, and the nation's constitution requires that the state provide the basic necessities of life to all, mandates free and compulsory education and measures to ensure public health and guarantees all fundamental human rights and freedoms and respect for the dignity and worth of the human person. Bangladesh was one of the first countries in the world to pass a Children's Act, to provide for the protection and support of children. More recently the National Child Policy of 2011 comprehensively sets out the measures that must be taken to protect and meet the needs of children.

However, necessary measures have not been taken to ensure that the rights of children are respected. In the field of juvenile justice, children are still imprisoned pending trial, their trials are delayed, and the measures that are mandated in the NCP to ensure that children are protected during the trial process are routinely ignored.

Even before they are arrested, the authorities fail to recognize the seriousness of abuse of children by parents, teachers, police and others with a duty of care, and make scant provision for either preventing such abuse of assisting children to obtain redress in the event of abuse. Most abuse goes unreported, but even so, the litany of cases of rape, sexual abuse, child marriage and physical mistreatment of children in the daily press makes harrowing reading.

There are few juvenile correction institutions, and these are well below acceptable standards, and on occasion children are still sent to adult prisons, placing them at risk of loss of innocence, health and life, and exposing them to adult criminal attitudes and behavior.

PREFACE

One reason why this situation persists is that there is a lack of knowledge on the part of all of those involved in the juvenile justice system – police, prosecutors, lawyers and court staff, magistrates and judges – of the relevant law. This publication is designed to rectify that problem, by ensuring that key judgments of Mr. Muhammad Justice Imman Ali, Honorable Justice of the Appellate Division of the Supreme Court of Bangladesh, are accessible and available to all.

However, the continuing failure to respect the rights of children in the juvenile justice system is also due to an even more disturbing factor, which is the indifference of many to the suffering that children suspected or accused of criminal activity, or charged with the same, face every day. It must never be forgotten that every person is innocent in the eyes of the law until they are found guilty by a proper court, and that all – innocent or guilty – deserve to be treated with respect. If this is true for adults, it is even more critical for children, who are the most vulnerable members of our society.

Michael McGrath
Country Director
Save the Children in Bangladesh

FOREWORD

I would like to believe that the justice delivery system for children in Bangladesh has improved in the last six years since the judgement in the case of Roushan Mondal [59 DLR 72]. However, I am constrained to say that juvenile justice in Bangladesh is still in its infancy. The Children Act 1974, though in the statute books for long, has been minimal in its use and implementation. After many years of providing training to hundreds of members of the subordinate judiciary, police personnel, officials of the Department of Social Welfare, NGO workers and others, I feel astounded at the lack of basic knowledge of fundamental legal principles involved in the subject matter, as demonstrated in the case of The State -versus- The Secretary, Ministry of Home Affairs and others, 16 MLR 254. This occurred in the year 2010. Nevertheless, I do not feel totally discouraged and take solace from the fact that I have not been able to impart training to everyone and feel encouraged by the interest and enthusiasm shown by those whom I have met over the years. The subject is now taken much more seriously. Perhaps introduction of the subject in university/college curricula would be beneficial.

Ms. Najrana Imaan, Barrister-at-Law, has devoted considerable time and energy in compiling this treatise. In spite of her engagement in other regular pursuits, she has spent long hours preparing this book. I am witness to her toils.

Having witnessed my endeavours to make people aware of the law concerning justice for children and to ensure its implementation, the author agreed to compile this treatise, based on my judgements. However, the parameters of the book are limited by the expanse of subjects covered in our judgements, which in turn is limited to the subject matters brought before the Court. Hence, not all topics concerning children have been covered by our judgements and for the same reason are not covered in this book. Particularly important topics such as children with disabilities, street children, children of imprisoned parents, children of prostitutes, children of broken marriages, early marriage of girls and boys, and the plight of orphans, etc. could not be dealt with in any of our judgements and hence do not feature in this book.

Of course, the author cannot be blamed for not covering all topics concerning children. However, it is hoped that as and when the occasion arises, she or another equally competent person will take on the task to enlighten us.

I take this opportunity to express my heart-felt appreciation to Save the Children for taking on the task of bringing the judgements of the High Court Division of the Supreme Court of Bangladesh to those who matter for the wellbeing of the children of this country. I also wish to put on record my gratitude to the author for taking on the task, which she did with avid enthusiasm, without realising the real extent of the burden coming on her shoulders.

This was the only way to bring all the judgements within the reach of the judiciary, legal practitioners and other actors concerned in the children justice scenario. I earnestly hope that the book will be of use to everyone who is interested in the welfare of the children of this country. It is an undeniable fact that every child has her/his rights enshrined in the Constitution and laws of the land as well as in international norms and directives. If by our dealing with any one child we are able to stem her/his deviant behaviour, we may have saved society from the clutches of another hardened criminal and from the economic burden of having to cater for a future habitual offender. If by giving proper and congenial surroundings to a deprived child, we manage to educate her/him, we create a good, productive citizen who in turn will raise a family free from poverty. Above all we endeavour to ensure for the children of this country their rights under the Constitution and national and international laws and norms, not out of any motive other than the fact that it is their right as a human being and a citizen of this country.

We all should, therefore, strive to ensure that the best interests of our children in all aspects of their lives are assured. The rights are theirs and the duty is upon us to ensure them.

Hon Justice Muhammad Imman Ali
Appellate Division
Supreme Court of Bangladesh

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INTRODUCTION

Over the last few decades, there has been an increased understanding worldwide of the vulnerability of children, and the consequent need for the protection of their rights and interests. The UN Conventions on the Rights of the Child (CRC) was drawn up as a result of this increased awareness. Although the UNCRC was signed and ratified by Bangladesh in 1990, the need for extra protection for children was recognised at a much earlier date. The Constitution of the People's Republic of Bangladesh makes provision for children's rights/interests to be given priority, correctly recognising children as being an underprivileged and vulnerable section of society.[1] Shortly after this, the Children Act, enacted in 1974, was drawn up exclusively to address the situation of children who find themselves coming into contact with the law in some manner, either as accused, or as victims, or witnesses. These two pieces of legislation, together with a number of other laws, form the legal infrastructure surrounding children in Bangladesh today.

Laws governing issues related to children in Bangladesh

The area of juvenile justice in Bangladesh is regulated by a number of laws, including the Children Act, 1974, the Children Rules 1976, and the Bangladesh Penal Code 1860, Majority Act 1875, Family laws: Child Marriage Restraint Act 1929, Family Laws Ordinance, 1961, Family Courts Ordinance, 1985 for custody and maintenance; Guardians and Wards Act, 1890, Vagrancy Act, 1943, Railways Act, 1890, Juvenile Smoking Act, 1919 while child workers are governed under the Labour Code 2006.

The laws governing children are scattered and varied. As a result, there are confusing inconsistencies in the legal framework. One example of this is with regard to the age until which a person is considered a child in the eyes of the law. This definition varies widely from law to law, with the Children Act defining a child as a person under the age of sixteen years, while the Majority Act 1875 very confusingly gives two definitions in the same section for when a person will be deemed to have attained majority, as either 18 years or 21 years of age, depending on the circumstances relating to guardianship of property. But generally, a person shall attain majority on reaching the age of 18 years. Even more strangely, the Child Marriage Restraint Act 1929 has differing definitions of a child depending on gender, with a female being a child until the age of 18, and a male until the age of 21. Due to such inconsistencies in the different laws, the legal framework relating to children has remained very unclear, which is made even worse by differing interpretations given in the case law.

The primary legislation that deals with children coming into contact with the justice system in Bangladesh is the Children Act 1974. At the time of its enactment, this was a very forward thinking piece of legislation, which realized correctly that children who come into contact with the justice system should be treated differently from adults. A child for the purposes of this law is defined as a person under the age of sixteen years.[2]

[1] Article 28(4), Constitution of the People's Republic of Bangladesh

[2] Section 2(f), Children Act 1974

According to the Act, special courts known as Juvenile Courts should be set up to deal with matters relating to children who come into contact with the law.[3] The Act defines the powers of the Juvenile Courts and lists the courts that may exercise the power of a Juvenile Court[4] where one has not been set up in a particular locality.[5] Under the provisions of the Act, a child may not, under any circumstances, be charged or tried with an adult offender.[6] If a child is accused of an offence for which he or she would normally be tried together with an adult, but for the provisions of the Act, the court will be bound to direct separate trials for the child and the adult.[7]

It is an accepted fact that children will need different treatment from adults due to their vulnerability, and this is reflected in the Act. The court may permit a child to be absent during trial if it is satisfied that the presence of the child is not essential for the purposes of the hearing.[8] Furthermore, the Act recognizes the need to protect the identity of children in the justice system, and prohibits the publication of any reports that might disclose the identity of children involved in any trial.[9] Publication of any report or picture of a child in breach of the Act is an offence punishable with imprisonment for a term up to two months and/or a fine.[10] When passing an order the Court must take into account the best interests of the child as well as her/his age, the circumstances and surroundings from which she/he comes, and most importantly, the report of the Probation Officer giving all the relevant details of the child.[11]

The Act generally discourages detention of children, and stresses that under no circumstances may a child be detained together with adult prisoners.[12] A child who has been arrested on a charge of a non-bailable offence, and cannot immediately be brought before a Court, may be granted bail by the Officer-in-Charge of the police station to which he or she has been brought.[13] If bail is not granted in these circumstances, the child may be detained in a remand home or a place of safety.[14]

With regard to punishment of children for an offence, the Act states that no child shall be sentenced to death, transportation (now imprisonment for life) or imprisonment.[15] The Act is quite clear on the fact that whenever there is any question of detention of a child, such detention must be in a certified institute, a remand home[16] or a place of safety, as defined in section 2(j) of the Act. There is nothing in the Act which authorises the detention of a child

[3] Section 3, ibid
[4] Section 5, ibid
[5] Section 4 and 5, ibid
[6] Section 6, ibid
[7] Section 6, ibid
[8] Section 11, ibid
[9] Section 17, ibid
[10] Section 46, ibid
[11] Section 15, ibid
[12] Section 51(2), ibid
[13] Section 48, ibid
[14] Section 49, ibid
[15] Section 51, ibid
[16] Established under sections 19 and 20 of the Act

in any prison, pending trial. After conviction, a child may exceptionally be sentenced to imprisonment[17].

Although there is no provision prohibiting corporal punishment of children, the Act does penalise cruelty to children, including assault, ill-treatment, neglect and abandonment, which causes a child suffering or injury to health, including physical and mental injuries. Such an offence is punishable with imprisonment for a term up to two years, and/or a fine.[18]

Status of implementation of existing laws

Although the laws have existed for a number of years, their proper implementation has been significantly lacking. There is an evident lack of knowledge of the laws among the actors who are most likely to be using them, particularly the police, magistrates and prosecutors. Added to this is a lack of monitoring on the part of the government to ensure that the provisions of the law are followed.

Incorporation of international instruments into national laws

Bangladesh is a party to the UN Convention on the Rights of the Child (CRC), having signed the convention on 26 January 1990, and ratified it on 3 August of the same year. As a signatory to this Convention, Bangladesh is under an obligation to adopt its provisions into the letter of the domestic law. However, in the twenty plus years since the Convention was ratified, nothing has been done to incorporate its provisions into national law through amendment of existing laws or enactment of new laws, apart from a minor change in sections 82 and 83 of the Penal Code raising the age of criminal responsibility. It may be argued that the incorporation of the provisions of the Convention into our national legislation would result in uniformity of laws and remove the confusing inconsistencies that exist in our legal framework relating to children. It would also ensure that our legislation is in conformity with international standards in the area of juvenile justice and protection of the rights of children.

The overarching principle of the Convention is that in dealing with children, the best interests of the child should be a primary consideration.[19] The Convention defines a child as any person under the age of 18 years.[20] The State is under an obligation to respect and ensure the rights of children without any sort of discrimination.[21] Further, the State should take legislative and administrative measures necessary for the implementation of rights under the Convention.[22]

Where a child is capable of forming his or her own views, the State is obligated to ensure that these views are taken into account in matters affecting the child, and that they are given due weight in accordance with the age and maturity of the child.[23] This provision would be especially relevant, for example, in situations relating to the custody of a victim child. The

[17] Proviso to section 51, ibid

[18] Section 34, ibid

[19] Article 3, UN Convention on the Rights of the Child

[20] Article 1, ibid

[21] Article 2, ibid

[22] Article 4, ibid

[23] Article 12, ibid

child should be able to give her/his views as to with whom she/he would prefer to live. A child is better placed to say which of her/his relatives would treat her/him more kindly. Of course, the decision to place a child in the care and custody of any particular person can be reviewed periodically.

The State must take measures to protect children from all violence, physical and mental, abuse, neglect, negligent treatment, maltreatment, exploitation, and sexual abuse.[24] In addition, children should be protected from being penalised for criminal activities which are in essence carried out by others, for example, when children are used as carriers of drugs and arms. This applies equally to situations where the treatment is coming from any person who has the care of the child, including parents and legal guardians. If parents or legal guardians use the child for criminal activity or do not give proper guidance then they may be considered inappropriate as care-givers or inadequate as custodians. In complying with this provision, it may be argued that the State must take steps to abolish all forms of corporal punishment. The issue of corporal punishment in schools is touched upon under Article 28 of the Convention, which ensures a child's right to education, and puts an obligation on the State to take measures to ensure school discipline is administered in a manner consistent with the child's human dignity, and in conformity with the Convention.[25] This concept is reiterated in Article 37 of the Convention, which ensures the protection of children from torture, cruel, inhuman or degrading treatment or punishment.[26] This article has broader application, and also deals with the arrest and detention of children and the treatment of children within the justice system. The provision allows for the protection from capital punishment or life imprisonment for anyone below the age of 18 years. It goes on to state that arrest and detention of children should be a measure of last resort and for the shortest appropriate time. Children deprived of liberty should be treated with dignity, and specifies that in these circumstances they should be separated from adults. The article also provides that children who have been deprived of their liberty must be given prompt access to legal and other assistance.[27] The aim is to guard and protect children and to prevent them from mixing and coming into contact with the criminal elements within the adult community and to ensure that the children are not stigmatised and victimised in their future lives.

The State is also obligated under the Convention to recognize the right of children to protection from economic exploitation and from performing work that is hazardous or interferes with the child's education or is harmful to the child's health and development.[28] In other words, children must not be forced into doing dangerous work or to do work which would jeopardise their education. If necessary the State must take legislative or administrative measures to fulfil the provisions of this article.

The failure to incorporate the provisions of the Convention into domestic law so many years after its ratification is certainly a huge cause for concern. In a number of decisions the Courts

[24] Article 19, ibid
[25] Article 28, ibid
[26] Article 37 and 5, ibid
[27] Ibid
[28] Article 32, ibid

have recognised the need to incorporate the provisions of the Convention in our domestic law.[29] It has been held by the High Court Division that when dealing with cases involving children, it is an accepted principle that the provisions of international instruments may be taken into account where there is no conflict with domestic law, even if the provisions of the international instrument has not been reflected in national legislation.[30]

Judicial proactivism to address the gaps in the laws and their application

Where gaps in the law have been identified, the courts have stepped in to fill in the gaps and to clarify ambiguous legal provisions. The judges of the High Court Division of the Supreme Court of Bangladesh have stepped in and identified situations where the lower courts and the actors in the area of juvenile justice have misinterpreted the law and their powers and duties under the Act. A number of these cases will be discussed in Volumes 2 and 3 of this book.

Current Steps to address the needs of children

The Government of Bangladesh approved the National Child Policy (NCP 2011) on 14 February 2011. This is the second national policy relating to children after ratification of the UNCRC, the first having been drawn up in 1994. The NCP 2011 emphasises the necessity to respect the rights and dignity of children in all relevant spheres from the family to the education system. A child is defined under the NCP 2011 as any person under the age of 18.[31] A number of statutes have been enacted where a child has been defined as anyone under the age of 18 years, e.g. Domestic Violence Act 2011, Prevention of Trafficking Act 2011, and Vagrancy Act, 2011.

The NCP 2011 ensures that all necessary steps will be taken to protect children from all forms of violence, begging or physical, mental or sexual torture.[32] It goes on to state that the Children Act will ensure the right of children to participate in the judicial process when they come into conflict with the law, or in contact with the law.[33]

The implementation of the Birth and Death Registration Act 2004 is assured by the NCP 2011, so that registration will be carried out immediately on the birth of every child.[34]

The NCP 2011 ensures the gradual elimination of child labour.[35] It makes reference to the National Child Labour Elimination Policy 2010 (NCLEP 2010) and guarantees that a number of necessary steps set out in the NCLEP 2010 will be carried out. In particular, the NCP 2011 states that a suitable working environment must be ensured for the physical and mental wellbeing of the child. In this regard, it will be ensured that children are not employed in any antisocial, humiliating and dangerous work. In addition, daily hours of work and a designated

[29] Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69; State Vs. Metropolitan Police Commissioner, 60 DLR 660

[30] Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69

[31] Section 2.1, National Children Policy 2011

[32] Section 6.7.1, National Children Policy 2011

[33] Section 6.7.2, ibid

[34] Section 6.10.1, ibid

[35] Section 9, ibid

time of break will be guaranteed for children in the work force.[36] Further, it is stated that education and recreation facilities must be made available to the children on completion of their work hours.[37] The NCP 2010 goes on to state that children in the labour force need to be removed from the cycle of poverty, and for this purpose, steps need to be taken to involve their parents in work that will help to increase the family income.[38]

Incentives must be given to encourage working children to return to school, such as scholarships and stipends.[39]

The NCP 2011 recognises that the work of the National Committee on Women and Children's Development must be continued, which could help in ensuring the rights of women and children, and in the proper implementation of laws, rules and regulations relating to women and children.[40] Further, it assures that an Ombudsman for Children will be appointed in order to monitor the situation with regard to the rights of children and to ensure that the obligations under the CRC are being followed.[41]

It is asserted in the NCP 2011 that the development of children will be considered a priority in the country's development goals, and this will be reflected in the allocation of budget for the development of children.[42]

In addition to the NCP 2011 and NCLEP 2010, the Government of Bangladesh is in the process of amending and updating the Children Act, to incorporate some of the obligations under the UNCRC and other international instruments, as well as the recommendations made by the hon'ble Supreme Court of Bangladesh in their judgements from time to time.

[36] Section 9.1, ibid
[37] Section 9.2, ibid
[38] Section 9.7, ibid
[39] Section 9.8, ibid
[40] Section 10.1, ibid
[41] Section 10.3, ibid
[42] Section 14, ibid

VOLUME ONE

Case Headnotes

VOLUME SUMMARY

The Supreme Court of Bangladesh has given a number of landmark judgements on matters relating to children who come into contact with the law. These judgements have given some clarity to an area of law that has been confusing, since the laws that govern the area are largely inconsistent and contradictory. The judgements give a number of recommendations and directions that would serve to bring the area of juvenile justice in Bangladesh into conformity with internationally accepted standards as prescribed by international conventions such as the UN Convention on the Rights of the Child (CRC).

The judgements deal with a wide variety of issues that arise when dealing with children who come into contact with the justice system. These include issues relating to children who are involved in offences, the age at which a person should be considered a child for the purposes of the law, child workers, corporal punishment, the impact of international instruments, among many other things.

This volume is a compilation of headnotes taken from the judgements delivered by the hon'ble Supreme Court and is designed to act as an aid in identifying the most significant parts of those judgements, which may aid lawyers in the preparation of their cases involving children.

AGE

Age of criminal reponsibility:

It is a tragedy that the law enforcing agencies are unaware of the fundamental laws of the country, namely the Penal Code (section 82) which provides as follows:

"82. Nothing is an offence which is done by a child under nine years of age."

Any police personnel worthy of his badge could not arrest a child below the age of nine years, since that child would be immune from prosecution. **(Para 16)**

(State Vs. Secretary, Ministry of Home Affairs, and ors., 16 MLR (HCD) 254)

Whether or not the Court has jurisdiction to try the accused:

For our part we would consider the whole scenario on a different dimension. If one looks at the scheme of criminal process and trial, it is seen that, first of all, the jurisdictional aspect with regard to the accused is to be ascertained and established. In other words, it must first be established that the accused person is one who is within the jurisdiction of the Court to be tried. As a matter of fact the very first question to be ascertained before proceeding with the trial is whether the accused has the capacity to be tried. This aspect is generally taken for granted and is so obvious as to defy contemplation. In English Law it is irrebuttably presumed that a child under the age of 10 years is doli incapax, i.e. is incapable of committing a crime. [See s.50 Children and Young Persons Act 1933, as amended by s.16 of the Children and Young Persons Act 1963]. We have a similar provision in section 82 of the Penal Code, as amended by Act XXIV of 2004.

"82. Nothing is an offence which is done by a child under [nine] years of age."

Thus a child under 9 years of age, for example, although he may in common parlance 'commit some crime or other' would not be prosecuted as he is doli incapax, i.e. incapable of committing crime. A child above 9 and below 12 years of age who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion would also be exempt from criminal liability [s.83 Penal Code]. The same applies to the mentally disabled. No Court can assume jurisdiction over any such person as they do not have the capacity to commit any crime. When the accused is arraigned he may be found unfit to stand trial, in which case he will be removed to the mental hospital and the Court has no discretion in the matter. Thus, although the Court has jurisdiction over the offence, it cannot assume jurisdiction over the accused until he is found fit to plead. **(Para 23)**

Hence jurisdiction over the person is a precondition to the case proceeding to trial by any Court or Tribunal. Once it is established that a Court has jurisdiction over the accused then only the Court will go on to see whether it has jurisdiction over the offence alleged. Thereafter, the Court will proceed with the trial, if appropriate, and then conclude by passing judgement. **(Para 25)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Definition of a child:

A child is defined in section 2(f) of the Act as a person under the age of 16 years. Section 2(n) defines "youthful offender" as a child who has been found to have committed an offence. We shall see later that many international instruments and laws of some other countries define a child to be a person under the age of 18 years. It may be noted that in neighbouring India the Juvenile Justice Act 1986 defined 'juvenile' as under 16 years of age in case of a male and under 18 years in case of a female. Uniformity was brought to prevail by the Juvenile Justice (Care and Protection of Children) Act 2000 where 'juvenile' is defined as any person under 18 years of age. **(Para 28)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Philosophy behind separate justice system for juveniles:

The concept of juvenile justice has developed over the last 150 years or more and essentially follows the notion that a person of tender years does not have full control over his impetuous actions nor the mental maturity to realise the consequences of his conduct. To put it simply, they do not think in the same way as an adult and are more susceptible to act impulsively without considering the severity of the act or the likely end result. **(Para 29)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Point in time when age of accused is relevant:

In view of the international covenants, declarations and other instruments, we feel inclined to the view that the relevant date must be the date on which the offence is committed, otherwise the whole thrust of the law to protect those who are immature, impetuous, unwary, impressionable, young, fickle-minded and who do not know the consequences of their act, would be lost. It is the mental capacity of the offender at the time of committing the offence which is of crucial importance. **(Para 60)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

In at least two decisions of our High Court Division, ***Bablu (supra)*** and ***State vs Deputy Commissioner, Satkhira (supra),*** the relevant date has been taken to be the date of occurrence, which we believe, with respect, is the correct approach. On the other hand there are many decisions of our superior Courts holding the view that the relevant date is the date of framing charge or commencement of trial. In our humble and respectful view, this mis-interpretation arose initially due to the inaptly applied wording of section 6(1) of the Act, which provides as follows:

> *"6.* ***No joint trial of child and adult.****-(1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for any offence together with an adult."*

Dr. Malik submitted that this provision is concerned with the matter of separate trial for children and does not lay down the point in time at which the age will be relevant for the purpose of determining whether the accused is a child. We are inclined to agree with this submission, particularly in view of the stance taken by the Indian Supreme Court, bearing in mind the similar provision which exists in the (Indian) Juvenile Justice (Care and Protection of Children) Act, 2000:

> *"18.* ***No joint proceeding of juvenile and person not a juvenile.****-(1) Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, no juvenile shall be charged with or for any offence together with a person who is not a juvenile."*

We have noted earlier that the Indian Supreme Court has decided that the relevant date is the date of commission of the offence and not the date of trial. **(Para 60)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

We also bear in mind that the whole purpose of the Act may be defeated by the capricious dealings of the investigating agency, who may intentionally or whimsically delay the investigation and thereby deprive the accused the benefits of the Act. It is the act of the youthful offender done in a moment of indiscretion due to his lesser mental faculty that is being targeted by the Act. Therefore the relevant point in time at which to qualify for the benefits of the Act must be the time of the commission of the offence. We may refer to the reasoning found in a decision of the US Supreme Court,

> *"[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." JohnsonJohnson v. Texas, 509 U. S. 350, 359-362 (1993).* **(Para 62)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

In the light of our views above and bearing in mind the views already expressed by our Superior Courts, we would, with respect suggest that the 'relevant date' aspect for the purpose of jurisdiction of the Juvenile Court may be rethought and brought into line with the aims and purports of the children's legislation worldwide. **(Para 63)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Determination of age:

In view of the fact that the learned trial Judge opined that the accused was not a minor, it cannot be said that the provisions of section 66 of the Children Act were contravened. However, when the accused was claiming to be a minor, the learned Judge ought to have followed the provisions of section 66 of the Children Act in order to allay any possibility that the accused was indeed a minor and to give him an opportunity to prove his entitlement under the Children Act, 1974. In hindsight we find that later in the trial the learned Judge recording

the statement of the accused under section 342 of the Cr.P.C. wrote the age of the accused as 16, which would certainly mean that he was a minor at the time of commencement of the trial. Nevertheless, the fact that the accused was around 12 years of age at the time of the offence and at the time of recording his confessional statement under section 164 of the Code of Criminal Procedure cannot be ignored. **(Para 13)**

(Jaibar Ali Fakir v. The State, 28 BLD 627)

DUTIES

Duty of the Police on arrest of child accused:

1. To inform child's parents:

Sequentially the next step is when the child is brought to the police station. Section 13(2) of the Children Act provides as follows:

> *"13(2) Where the child is arrested, the Officer-in-Charge of the police-station to which he is brought shall forthwith inform the parent or guardian, if he can be found, of such arrest,....."*

But from the records we do not find any evidence that the police personnel involved in the apprehension and arrest of the children or the Officer-in-Charge of the police station (OC) were at all aware of the provisions of the Penal Code or the Children Act. For good reason the provisions have been incorporated in our law and it is a mandatory provision which the authorities are bound to follow. Yet we find failure of the police to follow the legal requirements. **(Para 17, 18)**

(State Vs. Secretary, Ministry of Home Affairs, and ors., 16 MLR 254)

It is stated in the F.I.R., lodged by a police officer at 14.15 on the date of occurrence (20.04.2008) that accused Arifa was 10 years old. Thus S.I. Ashim Kumar Das, who arrested her, cannot be faulted for doing so. But he could and should have tried to locate the girl's parents which he did not do. There is nothing on record to indicate that either he or the Officer-in-Charge of the police station took any steps in this regard. There is a clear mandate in section 13(2) of the Act, 1974 to do so. **(Para 6)**

As stated above they also appear to have ignored the provisions of section 13(2) of the Act. **(Para 11)**

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

2. To inform the Probation Officer:

Furthermore, it appears from the record that both the police officers were totally oblivious of the provisions of section 50 of the Act, 1974, which provides as follows:

> *"50.* ***Submission of information to Probation Officer by police after arrest.****-Immediately after the arrest of a child, it shall be the duty of the police officer, or any other person affecting the arrest to inform the Probation Officer of such arrest in order to enable the said Probation Officer to proceed forthwith in obtaining information regarding his antecedents and family history and other material circumstances likely to assist the Court in making its order."*

(Para 11)

(Secretary, Ministry of Home Affairs, and ors., 16 MLR 254)

The police, it appears, acted in violation of the provisions of the Act. At least, there appears to be no indication that they were aware of the above-noted provisions of law or made any attempt to comply with the requirements. The police station is two kilometres from the place of occurrence. But there is nothing in the reports produced before us to suggest that they made any attempt to locate the parents of the girl or any other relatives. No attempt was made to appoint a probation officer, which is the requirement of section 50, as quoted above.
(Para 12)

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

3. To consider bail of the child accused:

At the very first instance, the police officer dealing with the child has a responsibility to consider bail. If the offence alleged is bailable, then bail is to be granted as of right. Under section 48 of the Act, 1974, the officer has to consider bail even if the child is arrested for a non-bailable offence. Section 48 of the Act provides as follows:

> *"48.* ***Bail of child arrested.*** *- Where a person apparently under the age of sixteen years is arrested on a charge of a non bailable offence and cannot be brought forthwith before a Court, the Officer-in-Charge of the police station to which such person is brought may release him on bail, if sufficient security is forthcoming, but shall not do so where the release of the person shall bring him into association with any reputed criminal or expose him to moral danger or where his release would defeat the ends of justice."* **(Para 8)**

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

It appears from the order sheet of the Court of the learned Chief Metropolitan Magistrate that Arifa was produced before the Court on 21.04.08. It is not apparent where she was kept during the night of 20.04.08. Section 49 (1) of the Act, 1974 provides as follows:

> *"49.* ***Custody of child not enlarged on bail.****-(1)Where a person apparently under the age of sixteen years having been arrested is not released under section 48, the Officer-in-Charge of the police-station shall cause him to be detained in a remand home or a place of safety until he can be brought before a Court."*

There is nothing on record to suggest that Arifa was sent to any remand home or place of safety either on 20.04.2008 or after she was produced before the Magistrate on 21.04.2008.
(Para 9, 10)

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

In forwarding Arifa to the Court of learned Metropolitan Magistrate, the police officer, S.I. Shibu Prasad Dutta had observed that Arifa was a 10 year old child and accordingly she must be dealt with under the provisions of the Act, 1974. Having said that, he prayed that the accused be kept in jail custody till the conclusion of the investigation and he strongly opposed

her release on bail. **So much for the knowledge of the Children Act!** He obviously needs more training and better knowledge about the provisions of the Children Act. **(Para 7)**

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

Duty of the Public Prosecutor:

We also note from the order of the learned Magistrate dated 24.01.2010 that instead of assisting the Court in releasing the two non-prosecutable children, the learned advocate appearing on behalf of the State, rather drew the Court's attention to the fact that it was a case under Narcotics Control Act, thereby hinting at the gravity of the offence. The learned Public Prosecutor (PP) or anyone appearing on his behalf is equally liable to have a thorough knowledge of the provisions of law and to act in accordance with the law and, above all, to ensure that all others, including the investigating agencies and the judiciary, are made aware of the relevant provisions of law. It is his duty to assist the Court to come to a just and fair decision in accordance with the law. Quite clearly, the learned advocate appearing for the State was himself ignorant of the law. **(Para 31)**

(State Vs Secretary, Ministry of Home Affairs, and ors., 16 MLR 254)

Duty of Probation Officers:

In the facts of the instant case it appears that a Probation Officer has been appointed by the Court, who has duties as detailed in Section 16 and 31 of the Act, 1974 and Rule 21 of the Children Rules 1976 (the Rules, 1976). The trial Court or appellate Court is not in a position to ascertain the physical aspects with regard to the family background, character of the accused and the circumstances in which he or she was brought up. For this reason it is imperative that the Court should rely on a report from the probation officer, who will go to the locality, if necessary, to ascertain all the factual aspects necessary for the Court to come to a decision with regard to the child. **(Para 34)**

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

The earliest reference to a probation officer is found in the order of the learned CMM dated 20.05.08. This appointment should have been made by the police on 20.04.08, when the girl was first arrested, as dictated by section 50 of the Act. However, though late, the appointment of the probation officer was made on 20.05.2008 by the learned CMM, and we appreciate this action as better late than never. **(Para 20)**

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

Duty of Magistrates:

1. Consider jurisdiction:

In view of the fact that she was found by the learned CMM to be above nine years of age, the Court was then bound to consider application of section 83 of the Penal Code to the facts of the case. Section 83 provides as follows:

> *"83. Nothing is an offence which is done by a child above [nine] years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion."*

In the face of such legislation it is the bounden duty of the Court in every case to ascertain whether the accused would fall into the category provided by section 83, quoted above. It would be all the more necessary for the Court to go through this exercise in view of the reality of our society that in the vast majority of the cases the accused persons from the poverty-stricken sector of our society remain undefended or poorly defended. **(Para 22)**

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

.. where the accused is barely above the age of full exemption from criminal prosecution, it would be incumbent upon the Court to ascertain that the accused understood that the item she was carrying was contraband, that what she was doing was illegal, that she appreciated the consequence of supplying the item to others, and whether she was at all aware of the effect of drugs and whether or not she was simply obeying the orders of her elders out of deference or fear. The Court must consider whether the accused child is capable of having the *mens rea* to commit the offence alleged. In our view it is necessary for the Court to visualize the position of the child and to try and appreciate his or her mental state in doing the act for which she or he is being prosecuted. We hasten to add that our comments are meant to be for consideration generally and should not prejudice the Court in any way when dealing with the accused in the instant case. It is for the Court dealing with any particular case to consider all the relevant legal provisions and all the prevailing circumstances before reaching any decision on the issues raised in the case. **(Para 23)**

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

2. Consider bail of the accused child:

It is clear that at this juncture the learned Additional Chief Metropolitan Magistrate did not consider the provisions of the Act, 1974. The learned CMM points out that the accused was not brought before the Court, which is not borne out by the order sheet. He also states that in Khulna Jail there is a separate ward for the safe custody of accused women and children. There is nothing on record to indicate that Arifa was ordered to be kept in safe custody separately from other adults. On 22.04.08 an application for bail was filed, which was kept for

hearing on 23.04.08. In such situation section 49(2) of the Act, 1974 is applicable, which provides as follows:

> *"49(2) A Court, on remanding for trial a child who is not released on bail, shall order him to be detained in a remand home or a place of safety."*

The above provision is very clear. As soon as a child is brought before the Court bells should be ringing in the minds of the Judge to remind him that provisions of the Children Act are applicable. He should immediately consider all possible means of releasing the child, unless there is good reason to keep her/him in detention. Here the learned Additional Chief Metropolitan Magistrate appears to have even forgotten **the proviso to section 497 of the Code of Criminal Procedure**, which allows granting of bail to a child even in cases involving non-bailable offences. The order sheet of the learned Additional Chief Metropolitan Magistrate shows that on 21.04.08 Arifa was sent to jail custody with a custody warrant. On 23.04.08 Arifa was ordered to be taken to safe custody. No mention was made that she must be kept separated from adult detainees. Also there is nothing on record to indicate that any other steps were taken to ascertain alternative measures regarding her custody. **(Para 14, 15)**

(State Vs The Metropolitan Police Commissioner, 60 DLR 660)

The learned Senior Judicial Magistrate (in charge) recorded in the order sheet dated 23.01.2010 as follows:

> "আসামীদেরকে জিজ্ঞাসাবাদে আদালতের নিকট প্রতীয়মান হয় যে, শামীম (৯) ও তাসলিমা তাদের কৃত কর্মের ফলাফল সম্বন্ধে বোধ সম্পন্ন নয়। এমতাবস্হায় তাদের জবানবন্দি রেকর্ড করা হলো না।"

When the learned Magistrate becomes aware that a child is below the age of nine years or a child between the age of nine and twelve years is not able to understand the consequence of his act, then he should have immediately realised that no offence could have been committed and he should have immediately released the two children, who were obviously not capable of committing an offence under the law. The learned Magistrate should have reprimanded the police officer for arresting children who are incapable of committing an offence and should have directed the children to be taken back to their parents forthwith. Shocking though it is, the learned Magistrate is apparently oblivious of the provisions of the Penal Code.
(Para 26, 27)

(State Vs Secretary, Ministry of Home Affairs, and ors., 16 MLR 254)

We find it outrageous that the learned SJM would be so ignorant of the provisions of a fundamental law within the criminal justice system, namely the Penal Code. When a child is exempt from prosecution either under section 82 of the Penal Code or upon inquiry under section 83 of the said Code, no question of arrest, custody or handing over on bond at all arises. It was wrong for the Magistrate to expect that anyone would apply for the bail or custody of those two children. They should have been sent to their parents immediately.
(Para 28)

(State Vs Secretary, Ministry of Home Affairs, and ors., 16 MLR 254)

It is equally obvious that the learned Magistrate was ignorant of the provisions of section 2(j) of the Act. There is absolutely no reason why a prison should be considered as a place of safety. On the contrary, we find that from the year 2003 the High Court has laid down that no children, even after conviction, should be found in the jails. We cannot accept that the learned Magistrate did not find any other suitable place when the Kishore Unnayan Kendra in Gazipur is a mere one and half hour's distance by road. **(Para 29)**

(State Vs Secretary, Ministry of Home Affairs, and ors., 16 MLR 254)

On 31.01.2010 the matter was transferred to the Senior Judicial Magistrate. From the order dated 02.02.2010 it appears that the learned advocate appearing on behalf of the three children produced their Birth Registration Cards, from which it was apparent that the eldest child was aged 13½ years and two younger ones were 8 years and 6½ years respectively. Having come to such a finding we are astounded that still the learned Senior Judicial Magistrate refrained from releasing the two children aged 8 years and 6½ from the binds of a criminal proceeding. **(Para 32)**

(State Vs Secretary, Ministry of Home Affairs, and ors., 16 MLR 254)

BAIL

The underlying theme of international covenants and instruments relating to children is that they are to be enlarged on bail and to be detained only as a last resort. **(Para 25)**

(State Vs Metropolitan Police Commissioner, 60 DLR 660)

Section 49 of the Act, 1974 provides that if a child, who is accused of an offence, is not released on bail then the Court shall order him/her to be detained in a remand home or a place of safety. **(Para 25)**

(State Vs Metropolitan Police Commissioner, 60 DLR 660)

..if the learned Judge, before whom the matter appears for trial, feels inclined, he may consider the bail matter, particularly bearing in mind the probable unsuitability of safe home atmosphere for a child of such tender age. However, the bail may be subject to custody of the girl being given to any person considered suitable by the learned Judge. The Court, in all circumstances, must ensure the best interests of the child. **(Para 26)**

(State Vs Metropolitan Police Commissioner, 60 DLR 660)

On 24.01.2010 a bail application was moved on behalf of the three children. An application for bail is only warranted when a person, against whom an allegation of criminal offence is brought, is at all liable to be apprehended, prosecuted and kept in custody. No question of bail otherwise arises. In such view of the matter granting of bail to a seven year old and nine year old, who has no understanding about the offence, is unwarranted. **(Para 30)**

(State Vs Secretary, Ministry of Home Affairs, and ors.,
16 MLR 254)

Separate trial for children:

We are of the view that for proper administration of justice for children, until such time as Juvenile Courts are set up in each district, there must be a Court designated as being dedicated to hear cases involving children, otherwise the requirement of the law to have expeditious hearings will be frustrated. Reference may be made to **Rule 3** which requires hearing of children's cases at least once a week. This is not possible since the Courts are otherwise busy hearing the regular criminal cases, which are given priority. Hence, one Court in each district must be designated as being a Court dedicated to hear cases involving child offenders so that children's cases can be heard and disposed of on priority basis [**Art.37(d) CRC**]. Legal Aid must be made available in all matters involving children so that no child remains unrepresented [**Art.40(2)(b)(ii)CRC**]. Make Probation Officers available on call round the clock in all parts of the country to enable proper and effective implementation of **section 50 of the Children Act**. Similarly, places of safety must be set up, at least one in every district and local health clinics must be empowered for the purpose of medical examination of victims so that the need to detain victims in custody will be considerably reduced. **(Para 28)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors, 29 BLD 656)

The finding of this Court in ***State Vs. Deputy Commissioner, Satkhira and others*** (supra) is that no child is to be tried with an adult and a child must be tried by the Juvenile Court. The decision in the ***Shiplu*** case, cited above, is that the judgement and order of conviction passed by the trial Court, not being a Juvenile Court, and the accused being below the age of 16 years, is to be set aside for want of jurisdiction. ***Monir Hossain (Md) @ Monir Hossain vs State, 53 DLR 411*** was a case which was remanded by the High Court for assessment of the age of the accused upon setting aside the conviction for lack of jurisdiction. The ***Baktiar Hossain*** case (supra) was sent on remand where this Court gave specific direction to examine the accused with a view to ascertaining his age and then, if he was found to be below 16, to be tried by the Juvenile Court, otherwise to be tried by the Special Tribunal. In the more recent case of ***Bangladesh Legal Aid and Services Trust vs Bangladesh and others, 57 DLR 11*** it was noted that children are entitled to be tried by the Juvenile Court and not to be tried jointly with adults. There is one other case, namely ***State vs Shukur Ali, 9 BLC 239*** where a different view was taken by a Division Bench of this Court. In that case the trial was of an offence under Section 6(2) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995. The accused for the first time, when before the appellate Court, claimed to have been below the age of 16 at the time of trial. Before the High Court Division the argument was put forward that he ought to have been tried by the Juvenile Court. In support a number of decisions were cited namely, the ***Shiplu*** case cited above, ***Kawsarun Nessa and another vs. State, 48 DLR 196, Abdul Munem Chowdhury @ Momen vs. State, 47 DLR (AD) 96, Md. Shamim vs The State, 19 BLD 542 and Bangladesh Legal Aid and Services Trust vs Bangladesh and others, 22 BLD***

206. After considering the above decisions, the Court distinguished all the cases apart from the case of ***Abdul Momen Chowdhury***, which was taken to support the contention that a child cannot be tried by the Juvenile Court, since there is a bar under Section 3 of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, which gives exclusive jurisdiction to the Tribunal for hearing such cases. The Hon'ble Judges distinguished the other cases, particularly cases triable by the Tribunal, since section 3 of the relevant enactment, which seemingly ousts the jurisdiction of the other Courts under other laws, was not brought to the notice of the Court. However, on close scrutiny of the decision we find that the case of ***Abdul Momen Chowdhury*** does not in fact support the contention that the case concerning a child cannot be tried by the Juvenile Court. On the question of challenge to jurisdiction on the ground of age, we note that in the instant case the issue of age was raised at the earliest stage and the learned Judge found the accused to be a minor. **(Para 22)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Jurisdiction of Court to try the offender:

For our part we would consider the whole scenario on a different dimension. If one looks at the scheme of criminal process and trial, it is seen that, first of all, the jurisdictional aspect with regard to the accused is to be ascertained and established. In other words, it must first be established that the accused person is one who is within the jurisdiction of the Court to be tried. As a matter of fact the very first question to be ascertained before proceeding with the trial is whether the accused has the capacity to be tried. This aspect is generally taken for granted and is so obvious as to defy contemplation. In English Law it is irrebuttably presumed that a child under the age of 10 years is *doli incapax*, i.e. is incapable of committing a crime. [See s.50 Children and Young Persons Act 1933, as amended by s.16 of the Children and Young Persons Act 1963]. We have a similar provision in section 82 of the Penal Code, as amended by Act XXIV of 2004.

"82. Nothing is an offence which is done by a child under [nine] years of age."

Thus a child under 9 years of age, for example, although he may in common parlance 'commit some crime or other' would not be prosecuted as he is *doli incapax*, i.e. incapable of committing crime. A child above 9 and below 12 years of age who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion would also be exempt from criminal liability [s.83 Penal Code]. The same applies to the mentally disabled. No Court can assume jurisdiction over any such person as they do not have the capacity to commit any crime. When the accused is arraigned he may be found unfit to stand trial, in which case he will be removed to the mental hospital and the Court has no discretion in the matter. Thus, although the Court has jurisdiction over the offence, it cannot assume jurisdiction over the accused until he is found fit to plead. **(Para 23)**

Hence jurisdiction over the person is a precondition to the case proceeding to trial by any Court or Tribunal. Once it is established that a Court has jurisdiction over the accused then only the Court will go on to see whether it has jurisdiction over the offence alleged. Thereafter,

the Court will proceed with the trial, if appropriate, and then conclude by passing judgement. **(Para 25)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

It may be pointed out at this juncture that there is no provision equivalent to section 5(3) that serious offences under any special laws, such as the Arms Act, 1878 or the Special Powers Act, 1974, both of which predate the Children Act, or Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 etc. are to be tried by the appropriate Tribunal in accordance with provisions of Children Act. Until such incorporation juveniles charged with offences falling under special law will have to be dealt with by the Juvenile Court in accordance with provisions of the Children Act, which, in our view, is of universal application and approach, irrespective of the offence alleged, as illustrated by the observations and references made above. **(Para 52)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Ascertaining age of offender:

In the case before us, the learned Sessions Judge sent the case for trial by the learned Additional Sessions Judge, First Court and Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah. This clearly defeated the purpose of the trouble taken by him to ascertain the age of the accused under the provisions of section 66(1) of the Act. It further appears that at the time of framing the charge, the learned judge, in a feint and half-hearted way proclaimed himself as the Juvenile Court and framed charge against the accused under section 6(2) of the Ain. This is clearly a patent contradiction in terms. Moreover, there is nothing on record to show that all the formalities of a juvenile trial were followed. On the contrary, the offender has all along been described as an 'accused' which is not a term found in the Act. Moreover, the sentence passed clearly shows that the learned judge lost sight of the provisions of the Act. We also do not know whether the other aspects of informality of the proceedings before a Juvenile Court, i.e. lax procedures and absence of publicity and members of public apart from parents/guardian of juvenile and his representative, and even the dispensation with attendance of the child which are provided by the various provisions of the Act, were followed during the trial.

Section 66(1) of the Act provides as follows:

> *"66. Presumption and determination of age.-(1) Whenever a person whether charged with an offence or not, is brought before any criminal Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child, the Court shall make an inquiry as to the age of that person and, for that purpose, shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be."*

This section is, therefore the first and foremost procedural consideration when any criminal Court is faced with a person brought before it, who appears to the Court to be a child. It comes even before the consideration of any offence, whether charged or not. In our view the

mandate of the section is indicative of the need to establish jurisdiction of the Court over the accused even before he is charged with any offence. **(Para 53, 54)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

... we are of the view that since the jurisdiction over the offences contained in the special laws are not specifically excluded by inclusion in section 5(3) of the Children Act, jurisdiction over offences committed by youthful offenders will be exercised by the Juvenile Court. Had the legislature intended otherwise an amendment could easily have been incorporated in section 5(3) giving jurisdiction over offences under the special laws to the respective Tribunals set up under those laws. This not having been done, we are of the view that the Children Act, being a special law in respect of, inter alia, trial of youthful offenders, preserves the jurisdiction over them in respect of all offences under any law, unless specifically excluded. **(Para 55)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Mode of trial of child offender:

Finally we may comment upon the nomenclature of the 'Court' dealing with juveniles/children. In England the "Juvenile Court" is now called the "Youth Court". Most countries still retain the title "Juvenile Court". In India the task of dealing with juveniles in conflict with the law is entrusted upon the "Juvenile Justice Board". In Scotland it is a "Panel" who conducts the "Children's Hearings". It matters little by what name the "justice-provider" is called. However, in view of the fact that our Children Act deals with children who are destitute, neglected and vulnerable to cruelty and abuse as well as delinquent children, and therefore, is concerned with children of every age, we would suggest a more neutral term, such as "Children's Justice Panel" or "Children's Justice Board" in order to encompass the non-delinquent children whom the Act also seeks to protect. **(Para 71)**

(State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

SENTENCING

Sentencing children tried under the provisions of the Children Act:

Sections 52 and 53 of the Act are the substantive provisions of law which provide for sentencing a child offender upon conviction of an offence punishable with death, transportation (which is now imprisonment for life, viz. Ordinance No.XLI of 1985) or imprisonment. Section 52 provides as follows:

> *"52.* ***Commitment of child to certified institute:-*** *Where a child is convicted of an offence punishable with death, transportation or imprisonment, the Court may, if it considers expedient so to deal with the child, order him to be committed to a certified institute for detention for a period which shall be not less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years."*

Hence section 52 is the substantive provision of law which provides for punishment of a child upon conviction of an offence and section 53 provides an even more lenient alternative at the discretion of the Court in a fit case. Perhaps these two sections should have been placed in the statute before section 51 which is a non-obstante provision. On the other hand, section 51 has perhaps been placed before the substantive sentencing provisions because of its very fundamentally important character, i.e. the modes of punishment which are not permissible to be inflicted upon children. Section 51(1) provides as follows:

> *"51.* ***Restrictions on punishment of child:-****(1) Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment: Provided that when a child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient or when the Court is satisfied that the child is of so unruly or of so depraved character that he cannot be committed to a certified institute and that none of the other methods in which the case may legally be dealt with is suitable, the Court may sentence the child to imprisonment or order him to be detained in such place and on such conditions as it thinks fit:*
>
> *Provided further that no period of detention so ordered shall exceed the maximum period of punishment to which the child could have been sentenced for the offence committed: (emphasis added)*
>
> *Provided further that at any time during the period of such detention the Court may, if it thinks fit, direct that in lieu of such detention the youthful offender be kept in a certified institute until he has attained the age of eighteen years."*

Hence the importance of section 51(1) is that the punishments which cannot be imposed on a child upon conviction are placed first and foremost in order to give the provision primacy and more emphasis. The purport of the section is that no child shall be sentenced to "death or imprisonment for life or imprisonment" (emphasis added). In our view this clearly indicates the intention of the legislature to keep children, as far as possible, outside the system of incarceration in prisons. Then the first proviso to section 51(1) provides exceptions to the substantive provision giving instances when a sentence of imprisonment may be imposed. Moreover, in fact the law intends to protect youthful offenders (defined in section 2(n) as any child who has been found to have committed an offence). This is further highlighted by

section 51(2), which provides that a youthful offender sentenced to imprisonment shall not be allowed to associate with adult prisoners.

Clearly the substantive provision of section 51(1) is an exception to the general law. **(Para 24, 25, 26)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

.. in the case of an offence punishable under section 302 of the Penal Code, the prescribed punishment is a sentence of death or imprisonment for life. However, in case of children such punishment cannot be imposed. But then there is an exception to the exception. A sentence of imprisonment may be imposed on a child upon conviction, if the Judge conducting the trial forms the opinion that the offence is of so serious in nature that no punishment under the provisions of this Act which he is authorised to inflict (i.e. under sections 52 and 53 of the Act) is sufficient or if the Court is satisfied that the child is of so unruly or so depraved character that he cannot be committed to a certified institute. Thus, the crux of the proviso is that there must be an opinion and/or satisfaction of the Judge. **(Para 26)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

We agree with the submissions of the learned *amici curiae* that in the absence of any clear opinion expressed by the Judge that the offence was so serious and the punishment authorised by the Act was not sufficient, or that he was satisfied that the child was of so unruly or so depraved character that he could not be committed to a certified institute, the sentence of imprisonment is untenable. **(Para 26)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

We are inclined to agree with his submissions that the inclusion of the word "ঞঔৎঔয়া" in the sentencing portion of the judgement is improper or perhaps the learned Judge misconceived the provisions laid down in section 52 of the Act in awarding the sentence. **(Para 26)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

Detention as sanction against children convicted of any offence:

Section 52 of the Act provides for detention of any child in a certified institute for a period which shall not be less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of 18 years. We agree with Mr. Islam that the last part of the section quite clearly indicates that the maximum sentence that a child may be awarded under section 52 will end on his attaining the age of 18 years and, therefore, he may not be kept in detention after his 18th birthday. When section 52 of the Act is invoked then imprisonment is out of the question. **(Para 27)**

On the other hand, it is always possible at any time to revert a child from prison, if imprisonment or detention in some other place was ordered under the first proviso to section 51(1), to a certified institute, as provided by the third proviso. This, therefore, fortifies the view that children should not ordinarily be sentenced to imprisonment, unless absolutely necessary where exceptional circumstances exist, and then only as a matter of last resort and for the shortest appropriate period of time. **(Para 28)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

Children to be kept in prison as a last resort and for the shortest period of time:

At this juncture we may also advert to the second proviso to section 51(1), which is quoted above. With all due respect, we are constrained to observe that it appears that this provision was not considered in its proper context and perspective in the case of ***Munna***, cited above. We cannot agree with Mr. Mahmood's view that the word 'detention' used in the second and third provisos must refer to the prison sentence imposed under the first proviso. Our view is that 'detention' in the second and third provisos refers to 'detained' (in such place) in the first proviso. What it means is that when the Court is satisfied that the child is of so unruly or so depraved character that he cannot be committed to a certified institute, then he may be sent to prison or be 'detained' in such place and on such conditions as it thinks fit. As mentioned above, the third proviso contemplates sending the youthful offender back to a certified institute after a period of detention in the place where he was sent under the first proviso, to be detained there until he attains the age of eighteen years. **(Para 28)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

Maximum period of custody in case of child offender:

The second proviso to section 51(1) mandates that the detention as mentioned in the first proviso shall not exceed the maximum period of punishment to which the child could have been sentenced for the offence committed. For proper appreciation of this provision one must keep in view the fact that the offender is a child to whom the provisions of the Children Act, 1974 apply and that the substantive sentencing provision is contained in sections 52 and 53. As we have discussed above, section 52 permits a child to be sentenced to detention in a certified institute, even in cases where the offence is punishable with death or imprisonment for life or imprisonment. All penal offences are, therefore, covered. But at the same time all other penal sanctions are excluded. Thus, it follows that upon conviction of any offence under any law the sentence must be awarded in accordance with the sentencing provisions of the Children Act, 1974 and the maximum sentence that could have been imposed on a child upon conviction of any offence would have been detention in a certified institute for 10 years or up to the date of his attaining the age of 18 years, whichever is earlier. In exceptional circumstances a sentence of imprisonment may be imposed under the first proviso to section 51(1) of the Act. It follows, therefore, that on conviction under section 302, for example, if the learned Judge expresses

his view that the first proviso is attracted, an offender may be sentenced to imprisonment or detention in some place other than a certified institute but that order of detention cannot be in excess of 10 years. Likewise, if the learned Judge chose to impose a sentence of imprisonment, then that also could not exceed 10 years, since the reason for imposing the sentence of imprisonment or detention in some place other than a certified institute would have been based on the same opinion/satisfaction. The law provides that in the event of such detention the learned Judge may direct that the child be returned from that place of detention to be detained in a certified institute up to the age of 18 years. However, with all due respect to all concerned, we fully agree with the learned *amici curiae* that the sentence of imprisonment for 14 years in the ***Munna*** case does not stand to reason. Moreover, although both the appellants were children at the time of the trial, the case was not tried following the provisions of the Children Act, 1974 and, therefore, there was no question of the learned trial Judge's formation or expression of opinion/satisfaction as required by the first proviso to section 51(1). **(Para 29)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

Leniency in punishing child offenders:

We may also point out at this juncture that the Act itself provides alternative and less draconian punishment in section 53, as an alternative to that which may be imposed under section 52. Be it noted that section 53 applies equally to serious offences as mentioned in section 52. The learned trial Judge has discretion under section 53 of the Act to deal with the child more leniently and, instead of sentencing the child to detention under section 52, may choose one of the alternative methods of punishment as provided in section 53, including discharge with or without condition. However, this is where the learned Judge must exercise his discretion judiciously and cautiously in a fit case. It is always necessary to bear in mind that there must be proportionality between the offence committed and the sentence imposed. This is where the learned Judge must weigh in the balance all facts relating to the antecedents and background of the child, which he should glean from the use of the services of the Probation Officer. **(Para 33)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

Attitude of judiciary in sentencing:

To even consider any form of retributive or deterrent punishment in the guise of protection of society would be a regressive step shutting our eyes to our obligation to provide a congenial environment in which our children may grow and flourish into worthy citizens. At all times the welfare and the best interest of the child must be kept in the mind. **(Para 34)**

Yet again we express our views with the direction that the authorities concerned, including the Police, Judiciary and the Probation Service are to accord importance in interpreting and implementing the Act and the Rules in order to take appropriate action in respect of children who come before them in accordance with the laws of the land, keeping in mind the best

interest of the child. **(Para 35)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

Tendency to demonise deviant children:

We note that when it comes to children committing more serious crimes, they are tried effectively as adults and the best interests of child takes back-stage as a mere slogan. This is in spite of the clear mandate in Article 3 of the CRC for State Parties to ensure that in all actions concerning children taken by institutions, including Courts of law, the best interests of the child shall be a primary consideration. The age old attitude of demonising children who commit serious crimes is to be deplored. Courts should at all times consider the reasons behind the deviant behaviour of the child and after taking into account all the attending facts and circumstances decide what treatment would be in the best interests of the child.
(Para 40)

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

Legality of statutory mandatory death penalty:

When the legislature prescribes any punishment as a mandatory punishment the hands of the Court are thereby tied. The Court becomes a simple rubberstamp of the legislature. Upon finding the accused guilty, the Court can do no more than impose the mandatory punishment, which the legislature has prescribed for that offence. This certainly discriminates and prejudices the Court's ability to adjudicate properly taking into account all the facts and circumstances of the case. **(Para 38)**

(BLAST vs Bangladesh, 63 DLR 10)

In the case of ***Reyes*** their Lordships (in the Privy Council) considered the submission of counsel that 'a sentencing regime which imposes a mandatory sentence of death on all murderers, or all murderers within specified categories, is inhuman and degrading because it requires the sentence of death, with all the consequences such a sentence must have for the individual defendant, to be passed without any opportunity for the defendant to show why such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the defendant's criminal culpability.' With respect, we would share the same view and observe that where the appellant is not a habitual criminal or a man of violence, then it would be the duty of the Court to take into account his character and antecedents in order to come to a just and proper decision. But where the law itself prescribes a mandatory punishment then the Court is precluded from taking into consideration any such mitigating or extenuating facts and circumstances. **(Para 38)**

In Bangladesh there is no provision or scope to argue in mitigation or to bring to the notice of the Court any extenuating facts and circumstances in any given criminal trial. There is no provision of sentence hearing. Such a provision existed in 1982 as section 255K of the Code of Criminal Procedure, but the provision was abolished in 1983. It is our view that it is imperative that such provision should exist, particularly in view of the fact that in our country the adversarial system denies the accused any opportunity to put forward any mitigating circumstances before the Court. Even the most senior advocates will fight tooth and nail to maintain their client's innocence. As a result, in our criminal justice system, the accused from the beginning to the end of the trial will maintain a plea of 'not guilty' and since no separate date is fixed for sentencing the accused, there is thereby no opportunity to put forward any mitigating or extenuating circumstances. **(Para 39)**

(BLAST vs Bangladesh, 63 DLR 10)

In the light of the discussions, we are of the view that any mandatory provision of law takes away the discretion of the Court and precludes the Court from coming to a decision which is based on the assessment of all the facts and circumstances surrounding any given offence or the offender, and that is not permissible under the Constitution. The Court must always have the discretion to determine what punishment a transgressor deserves and to fix the appropriate sentence for the crime he is alleged to have committed. The Court may not be degraded to the position of simply rubberstamping the only punishment which the legislature prescribed. There is such finality and irreversibility in the death penalty. If the discretion of the Court is taken away then the right of the citizen is denied. **(Para 42)**

(BLAST vs Bangladesh, 63 DLR 10)

However, so far as the point in issue before us, we are of the view that the mandatory provision of death penalty given in any statute cannot be in conformity with the right accruing to the citizen under the Constitution and, accordingly, we find that section 6(2) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 is ultra vires the Constitution. We would venture further to say that, in view of our discussion above, any provision of law which provides a mandatory death penalty cannot be in accordance with the Constitution as it curtails the Court's discretion to adjudicate on all issues brought before it, including imposition of an alternative sanction upon the accused found guilty of any offence under any law. **(Para 45)**

(BLAST vs Bangladesh, 63 DLR 10)

POWER OF THE STATE TO RELEASE ON GOOD BEHAVIOUR

We note from Rule 9 of the Children Rules, 1976 that the inmates of the certified institute or approved home are constantly and continuously monitored with regard to their background, character, performance etc. Rule 9 of the Rules provide as follows:

> *"9. **Management of certified institutes.**-(1) The Superintendent shall maintain case file for each inmate separately containing detailed information about the family background, character, aptitude, performance in education, training and such other matters as he may consider necessary.*
>
> *(2) The governing body of a certified institute shall exercise such powers and shall conduct its, business in such manner as the Director may determine, and the decisions of the governing body shall require approval of the Director."*

It appears to us, therefore, that the intention of the legislature is to ensure assessment of the children who are sentenced to detention in order to gauge the improvement in their character and behaviour with the view to setting them at liberty either conditionally or without condition. **(Para 30)**

In our view, any offender who shows sufficient improvement in his character and behaviour in the assessment of those who are given the duty to assess his development may be discharged before the completion of his sentence of detention. That is the purpose of the law. **(Para 31)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

Alternative custody in case of children -place of safety under the law:

Duty of Police under section 49(1) of the Act:

It appears from the order sheet of the Court of the learned Chief Metropolitan Magistrate that Arifa was produced before the Court on 21.04.08. It is not apparent where she was kept during the night of 20.04.08. Section 49 (1) of the Act, 1974 provides as follows:

> *"49.* ***Custody of child not enlarged on bail****.-(1)Where a person apparently under the age of sixteen years having been arrested is not released under section 48, the Officer-in-Charge of the police-station shall cause him to be detained in a remand home or a place of safety until he can be brought before a Court."*

There is nothing on record to suggest that Arifa was sent to any remand home or place of safety either on 20.04.2008 or after she was produced before the Magistrate on 21.04.2008. **(Para 9, 10)**

(State vs The Metropolitan Police Commissioner, 60 DLR 660)

Duty of Court under section 49(2) of the Act:

Section 49 of the Act, 1974 provides that if a child, who is accused of an offence, is not released on bail then the Court shall order him/her to be detained in a remand home or a place of safety. **(Para 25)**

(State vs The Metropolitan Police Commissioner, 60 DLR 660)

... the Court may consider the third alternative, i.e. placement with any close relatives who might be willing to take the girl into their custody. Failing that, the Court would look to other distant relatives/any other benevolent person, who might agree to take the girl into their custody at their risk and responsibility. In this respect fostering might be a realistic alternative. **(Para 33)**

(State vs The Metropolitan Police Commissioner, 60 DLR 660)

Custody of children who are victims:

The relevant provision of law dealing with custody of victim children is found in section 58 of the Children Act, 1974, which provides as follows:

> *"58.* ***Order for committal of victimised children****.-The Court before which child is produced in accordance with section 57 may order the child-*
>
> *(a) to be committed to a certified institute or an approved home until such child attains the age of eighteen years or, in exceptional cases, for a shorter period, the reasons for such shorter period to be recorded in writing, or*

(b) to be committed to the care of a relative or other fit persons on such bond, with or without surety, as the Court may require, such relative or fit person being willing and capable of exercising proper care, control and protection of the child and of observing such other conditions including, where necessary, supervision for any period not exceeding three years, as the Court may impose in the interest of the child.

Provided that, if the child has parent or guardian fit and capable, in the opinion of the Court, of exercising proper care, control and protection, the Court may allow the child to remain in his custody or may commit the child to his care on bond, with or without surety, in the prescribed form and for the observance of such conditions as the Court may impose in the interest of the child."

The learned Senior Judicial Magistrate in his written explanation sent to this Court stated that since he did not receive any prayer for releasing the victim girl to the custody of the parents he ordered for her to be sent to the safe home.

Upon a careful reading of the relevant section of law it appears to us that the proviso has an over-riding effect, inasmuch as if the child has a parent or guardian fit and capable in the opinion of the Court of exercising proper care, control and protection, then the custody of the victim girl is to be given to her parents and that would obviate the need for the Court even to consider the other two alternatives, namely committing her to a certified institute or approved home or committing her to care of a relative or other fit person. We do not find from the above mentioned section of the Children Act that there is any requirement for an application to be made by the parents. On the contrary, in view of the age of the victim girl, who was seven years old at the relevant time, and had been brutally raped, we feel that the learned Judge should have realised that it would be inhuman to separate such a tender-aged girl from her parents and send her to a safe home. We find from subsequent records that the girl was crying to go to her mother and the mother was crying to have her back home. This must be sufficient notice to anyone that the girl is required to be given to the custody of her parent. Moreover, we note from the order sheet of the learned Magistrate that on 07.04.2009 there was a written application made by the Officer-in-Charge of the police station to allow the mother of the victim to stay with her in the safe home. At that stage it should have been abundantly clear to the learned Magistrate that the parents of the girl were eager to have her custody. Even then the learned Magistrate was not sufficiently moved either by sentiment, compassion or by requirement of law to release the girl to the custody of her parents.
(Para 13, 14, 15)

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

DETENTION

Section 49 of the Act, 1974 provides that if a child, who is accused of an offence, is not released on bail then the Court shall order him/her to be detained in a remand home or a place of safety. **(Para 25)**

(State vs Metropolitan Police Commissioner, 60 DLR 660)

Section 2(j) of the Act provides as follows:

> *"(j) "place of safety" includes a remand home, or any other suitable place or institution, the occupier or manager of which is willing temporarily to receive a child or where such remand home or other suitable place or institution is not available, in the case of a male child only, a police station in which arrangements are available or can be made for keeping children in custody separately from the other offenders;"*

There is, therefore, no provision in the Act for keeping a female child in the police station overnight. In the absence of any explanation, it would appear that the girl was kept in unlawful custody overnight. It is not a solution under the law to keep a female child with an older female. Even in the case of a male child, the section provides that such child may be kept in the police station overnight, if there is room to keep him separate from other offenders.

(Para 22, 23)

(State Vs. Secretary, Ministry of Home Affairs & ors., 16 MLR 254)

It is equally obvious that the learned Magistrate was ignorant of the provisions of section 2(j) of the Act. There is absolutely no reason why a prison should be considered as a place of safety. On the contrary, we find that from the year 2003 the High Court has laid down that no children, even after conviction, should be found in the jails. We cannot accept that the learned Magistrate did not find any other suitable place when the Kishore Unnayan Kendra in Gazipur is a mere one and half hour's distance by road. **(Para 29)**

(State Vs. Secretary, Ministry of Home Affairs & ors., 16 MLR 254)

The children wing of the prison is meant for children who have been convicted and who cannot be placed in detention in any certified institute in accordance with the law. Certainly the children wing in the prisons are not meant to be used for children who are kept on remand or simply kept overnight as a place of safety. The prison cannot in any event be classified as a place of safety. It transpires that a seven year old girl was kept in the female ward of the prison. Even that is not sanctioned by the law and must be avoided at all costs. The law requires that children kept in any confinement, must be kept separate from adults and convicted prisoners should not be allowed to mix with those under trial.

Evidently the little girl was kept in the female wing of the District Jail in utter violation of the law in every respect. **(Para 34, 35)**

(State Vs. Secretary, Ministry of Home Affairs & ors., 16 MLR 254)

Children not to be kept in prisons:

It is a fundamental aspect of the Children Act that children are not to be kept in custody within the prisons, during the pendency of any trial of the child. The law permits the Court to enlarge any child alleged to have committed a non-bailable offence on bail under the proviso to section 497 of the Code of Criminal Procedure. Section 49(2) of the Children Act provides that if the Court does not grant bail, then the child shall be ordered to be detained in a remand home or place of safety. Section 2(j) of the Children Act defines a place of safety as follows:

> *"2(j) "place of safety" includes a remand home, or any other suitable place or institution, the occupier or manger of which is willing temporarily to receive a child or where such remand home or other suitable place or institution is not available, in the case of a male child only, a police-station in which arrangements are available or can be made for keeping children in custody separately from the other offenders."*

We note that, therefore, the Court has no authority whatsoever to send any child during the pendency of a trial to be held in custody within any prison. A place of safety is clearly defined in the Act itself and no mention is made to the effect that any prison will be a place of safety for any child. A child is defined within section 2(l) of the Children Act as any one below the age of 16. There is no provision within the Children Act or any other law which permits any judge to send a child during the pendency of a trial to be held in custody within any prison. Had it been intention of the legislature to allow any child to be kept in custody in a prison that provision could have been mentioned in section 49(2) and the word 'jail' could have been added in the definition of place of safety in section 2(j) of the Children Act. It is quite clear, therefore, that no child can be sent to jail custody during the pendency of a trial. **(Para 5)**

(The State Vs. Bangladesh & Ors, 19 BLT 376)

We are aware that in some parts of the country there are a number of safe homes provided for the purpose of housing women and female children. However, we do not find that there are any "safe home" or places of safety provided for male children throughout the country. We recall that in the judgement in the case of ***State v. Secretary, Ministry of Law, Justice & Parliamentary Affairs and others, 29 BLD 656***, we recommended that the government must provide sufficient numbers of safe homes within an accessible distance of every district. We again reiterate our recommendation that unless sufficient numbers of safe homes are provided for housing children, who are not granted bail, particularly male children, then injustice will be done. The State is failing in its duty to provide facilities which it is duty bound to provide. In any event we do not find any provision within the law to keep any under-trial children or children who are not alleged offenders in custody within the jails of this country. **(Para 10)**

(The State Vs. Bangladesh & Ors, 19 BLT 376)

...the learned Judges must be aware that children cannot under any circumstances be kept in prison pending trial. It is the responsibility of the Department of Social Welfare to provide either a safe home, remand home or any other suitable place where children who have come into contact with the law may be kept during the pendency of their trial, if they are at all to be kept in custody. **(Para 11)**

(The State Vs. Bangladesh & Ors, 19 BLT 376)

We find that these children held in the prisons, whose age is below 16 years, are being held there illegally and without lawful authority and are to be removed from prison forthwith. **(Para 12)**

(The State Vs. Bangladesh & Ors, 19 BLT 376)

CONFESSIONAL STATEMENT OF A MINOR

Although, there is no law in our country regulating the mode of recording confessional statements of minors, it can be seen from jurisdictions other than ours that the Courts are always careful when taking into consideration confessions made by accused who are minors. Indeed in countries such as the United States of America and Australia confessional statements of minors cannot be recorded in the absence of their parent, guardian or custodian. Moreover, one must also bear in mind the essence and philosophy behind the Children Act, 1974. By their nature children are not mature in thought and cannot be expected to have the same level of understanding of legal provisions and appreciation of the gravity of situations in which they find themselves. So much so that it is an accepted phenomenon that children will act impetuously and do not always appreciate the consequences of their actions, criminal or otherwise. In a situation when they are under apprehension they are liable to panic and say and do things which, in their estimation, are likely to gain their early release. **(Para 14)**

(Jaibar Ali Fakir v. The State, 28 BLD 627)

In the facts and circumstances discussed above, we are of the view that it would be entirely unsafe to rely upon the confessional statement of a child, as defined in the Children Act, 1974, without corroboration of the fact that he made the confession voluntarily and knowing the consequence of waiving his right to remain silent. There being no such corroboration in this case, we find that it is unsafe to rely on the confession. **(Para 23)**

(Jaibar Ali Fakir v. The State, 28 BLD 627)

In the facts of the instant case, in view of the timing of the two statements of Jaibar Ali Fakir recorded by the Magistrate, firstly as a witness and, secondly as an accused, and the doubts which arise with regard to his whereabouts in the interim period, we are of the view that the confessional statement could not in any event be taken into consideration as the basis of the conviction. Moreover, in cases of this nature such statements ought not to be accepted as the sole basis of the conviction, without corroboration. **(Para 24)**

(Jaibar Ali Fakir v. The State, 28 BLD 627)

Furthermore, we are of the view that, although our law does not provide for presence of any parent, guardian or custodian at the time of recording confessional statement, the children of our country are no different from the children of any other country and they ought to get the protection of the law so that they do not make false confessions or confessions under threat or coercion. We feel, therefore, that prudence demands that when children are taken to record their confessional statements, they must be accompanied by a parent, guardian, custodian or legal representative. **(Para 25)**

(Jaibar Ali Fakir v. The State, 28 BLD 627)

CORPORAL PUNISHMENT

Generally, corporal punishment, i.e. punishment inflicted on the body, as a form of discipline has been exercised across the world possibly from the first existence of family on earth. Corporal punishment includes hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In addition, there are other non-physical forms of punishment, including, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child. Parents rebuke and chastise their own children for all sorts of behaviour which is not to their liking. In fact children bear the brunt of so-called disciplinary action from everyone older in age or bigger in size. Corporal punishment imposed upon children of all ages by parents and teachers is an every-day affair and has been going on through the ages.

As we have noted from the materials placed before us, the severity of the punishment ranges from verbal abuse/rebuke to physical violence by the use of the limbs or other implements varying in size, shape and degree of lethalness. Conversely, the effect of the corporal punishment manifests in various forms and varies with the mental and physical state and stature of the child and can range from the not so visible psychological effect to the patent physical injury requiring hospitalisation, and occasional death. Constant and prolonged rebuke can also lead to suicide of the child. **(Para 24, 25)**

(BLAST & Anr. v. Secretary Ministry of Education & Ors., 31 BLD 201)

Article 35 of our Constitution deals broadly with protection of citizens in respect of trial and punishment. Clause (5) of article 35 provides that "no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment." Taken one step further, it should be obvious that if any person is protected from "torture or to cruel, inhuman or degrading punishment or treatment" after conviction of a criminal offence, then it stands to reason that a child shall not be subjected to such punishment for behaviour in school which cannot be termed criminal offence. **(Para 30)**

(BLAST & Anr. v. Secretary Ministry of Education & Ors., 31 BLD 201)

CHILD WORKERS

Age:

We are of the view that it is high time that the work done in the domestic sector is recognised as such and the rights of these workers ensured by incorporating the workers of the domestic sector within the definition of 'worker' in the Labour Act, 2006. **(Para 16)**

So far as the work of children is concerned, we note that the new Children Policy of 2011 defines a child as anyone up to the age of 18. At long last the definition of a child has come into line with the definition as recognised internationally. The Labour Act, 2006 defines a child in section 2 sub-section (63) as anyone below the age of 14 and defines anyone between the ages of 14 to 18 as an adolescent. **(Para 21)**

(BNWLA v. Cabinet Division, Secretariat, Dhaka & Ors., 31 BLD 265)

At this juncture, we may simply point out that for the sake of uniformity a child should be defined in all laws as anyone below the age of 18, and, if necessary, the restriction or concession to allow children of a certain age to work may be defined in the Labour Act as has been done. Therefore, children up to the age of 14 may not be engaged in doing work as mentioned in section 34 of the Labour Act. The law is relaxed to some extent by section 44 which provides that a child who has reached the age of 12 years may be engaged in light work, if it does not harm his health or if his education is not hampered. **(Para 22)**

Section 34 also provides that an adolescent, i.e. a child between the age of 14 and 18, may be engaged to do work so long he has a certificate from a registered medical practitioner certifying his fitness. We are of the view that the same provision could apply to children working in the domestic sector. **(Para 24)**

(BNWLA v. Cabinet Division, Secretariat, Dhaka & Ors., 31 BLD 265)

...Factories Act, 1965 was abolished by the Labour Act, 2006, but all the relevant provisions have been re-enacted in sections 51 to 60 of the current law. With regard to the age of workers, section 2(Ka) of the Factories Act described as "adolescent" someone between the age of 16 to 18 years and an "adult" as someone who has completed the age of 18 years and a "child" as anyone who has not completed the age of 16 years. A "young person" is one who is a child or an adolescent. He pointed out that section 66 of the Factories Act, 1965 prohibited the employment of any child who had not completed 14 years of age and section 67(Ka) provided that non-adult workers between the age of 14 to 18 years would not be allowed to work unless a certificate of fitness was granted for the purpose under section 68 of the Act. **(Para 4)**

(Ain-o-Salish Kendra vs Bangladesh, 63 DLR 95)

Laws regulating child labour:

We are of the view that the beneficial provisions outlined in the three policy documents namely, Domestic Worker Protection and Welfare Policy 2010 (Draft), National Elimination of Child Labour Policy, 2010 and the Children Policy 2011 must be brought into effect at once so that the benefits of the provisions of those policies may be given to the domestic workers and, in particular, to the children in domestic work. It is our view that at any cost children below the age of 12 should not be allowed to engage in any type of work, including domestic work, and we believe that is the intendment of the Domestic Worker Protection and Welfare Policy, 2010 (Draft) which in turn reflects the provisions of the Labour Act as found in section 44. Quite clearly, the children below the age of 12 are required to go to school. The national policy on education is such that the primary education is compulsory for all children and for such Education Policy to be effective and meaningful children below the age of 12 should not be made to work under any circumstances. **(Para 33)**

(BNWLA v. Cabinet Division, Secretariat, Dhaka & Ors., 31 BLD 265)

Since the time of British rule there have been many laws protecting children from the harsh world of hazardous labour. The Employment of Children Act, 1938 (repealed by the Labour Act 2006) provided as follows:

> *"3(3) No child who has not completed his twelfth year shall be employed, or permitted to work, in any workshop wherein any of the processes set forth in the Schedule is carried on :*
>
> .....
>
> *THE SCHEDULE*
>
> *List of Process:*
>
> *1. Bidi-making*
> *2. Carpet-weaving*
> *3. Cement manufacture, including bagging of cement*
> *4. Cloth-printing, dyeing and weaving*
> *5. Manufacture of matches, explosives and fireworks*
> *6. Mica-cutting and splitting*
> *7. Shellac manufacture*
> *8. Soap manufacture*
> *9. Tanning*
> *10. Wool cleaning."*

Clearly the above processes were recognised as hazardous preoccupations for children of tender years, and yet thousands of children of this country are engaged in such hazardous labour, in spite of laws providing sanction for violation of the laws. Unfortunately the sanction for violation as provided in section 4 of the above mentioned Act was a fine which could extend to five hundred taka. With the introduction of new law, namely the Labour Act 2006 the penalty has been increased to a fine of five thousand taka as provided by section 284. It may be noted that the Employment of Children Act, 1938 was replaced in India by the Child

Labour (Prohibition and Regulation) Act, 1986. Section 14 of the Act has provided for punishment up to 1 year imprisonment (minimum being 3 months) or with fine up to Rs.20,000 (minimum being ten thousand) or with both to one who employs or permits any child to work in contravention of provisions in section 3. It is no wonder that the employers of child labour in this country choose to pay the fine in the rare event of being prosecuted. **(Para 15, 16)**

(Ain-o-Salish Kendra vs Bangladesh, 63 DLR 95)

Recommended steps:

The current initiative to make school compulsory up to Class VIII is laudable. However, for compulsory education to be a reality and effective for those to whom it matters most, there must be other financial benefits, sufficient to entice the student population to attend school and also to continue attending school. Good quality teaching in the schools must also be ensured. Absenteeism on the part of the teachers is rampant. Rather than being committed to teaching the students during school hours, it is more lucrative for them to teach the same students privately for a fee. The want of the teachers must also be satiated to prevent their engaging in other activities in order apparently to supplement their income. So, effective measures must be put in place to ensure that children, who do attend school, are given adequate stipend provided by the State, which will be sufficient incentive for their parents to send them to school and for the children also to attend regularly and have a meaningful education which will be a benefit to them in their future lives. **(Para 25)**

(Ain-o-Salish Kendra vs Bangladesh, 63 DLR 95)

Steps must be taken to ensure that children engaged in harmful work must be registered as such and their movements must be monitored, making sure that all facilities such as education, rest and leisure are ensured. A system of registration and monitoring of domestic child workers, for example would deter the employers from physically and sexually abusing them. Newspaper reports indicate the extent of the problems faced by the domestic child workers, including instances where they have committed suicide or were murdered. **(Para 26)**

(Ain-o-Salish Kendra vs Bangladesh, 63 DLR 95)

BEST INTERESTS OF THE CHILD

The Best Interests of the child a primary consideration:

...if the learned Judge, before whom the matter appears for trial, feels inclined, he may consider the bail matter, particularly bearing in mind the probable unsuitability of safe home atmosphere for a child of such tender age. However, the bail may be subject to custody of the girl being given to any person considered suitable by the learned Judge. The Court, in all circumstances, must ensure the best interests of the child. **(Para 26)**

(State vs Metropolitan Police Commissioner, 60 DLR 660)

Safe custody as last resort:

From the explanation of the learned Senior Judicial Magistrate, 2nd Court, Sylhet, it appears that he was also under a misconception of the law when he seemingly passed an order for keeping the girl in safe custody when the law required that the safe custody should be only the last resort and the parents, if they are fit and capable, should get precedence so far as custody of the victim girl is concerned. To our mind, the learned Magistrate who believes that an application from the parents is necessary, and under that misconception ordered the girl to be held in safe custody, acted illegally and inhumanely in the facts and circumstances of the case. It is only natural that the best interests of a seven year old child can only be served when she is allowed to remain in the custody of her parents. **(Para 17)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

No legal requirement for parents to apply for custody:

Moreover, we find that on 07.04.2009 there was an application by the Officer-in-Charge of the concerned police station indicating that the girl needed to be with her mother. This clearly is an indication that the parent wished to have the custody of the girl and there can be no earthly reason why at this stage the learned Magistrate did not allow the girl to go to the parents. Quite clearly, the learned Magistrate acted in total violation of the provisions of law. **(Para 42)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

Child's views to be considered:

When it is apparent that the girl was crying to be with her mother, that clearly is an expression of the view of the child to be with her mother and in compliance with Article 12 of the CRC the learned Magistrate should have given effect to it. A crying child is itself a patent application before any right-thinking person that s/he wants to be with her/his mother. We feel that the learned Judge is bound to take into account the child's view. There is nothing on record to suggest that the learned Magistrate at all considered the views of the child which shows abject ignorance of the international provisions, which are meant to be for the welfare

and wellbeing of children. **(Para 42)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

Right to be not subjected to cruel and inhuman treatment:

Moreover, the tearing away of a seven year old female child from the bosom of her mother can be nothing other than cruel and inhuman treatment which is contrary to Article 27 of the CRC as well as Article 35(5) of our Constitution. The learned Magistrate has clearly acted in contravention of the provisions of law, the Constitution and the CRC, to which Bangladesh is a signatory. He has caused immeasurable human suffering to the victim girl and her parents. **(Para 42)**

The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

Need for building awareness and sensitisation of judiciary to the rights of the child:

It is abundantly clear that the lower judiciary is not sensitised enough nor indeed sufficiently aware of relevant provisions of law to cope with a situation of this nature. It does not take a lot of intelligence to realize that a seven year old girl, who had been raped and severely traumatised, needs the company and succour of her mother and yet the learned Magistrate caused even more trauma by wrenching the girl apart from her mother and putting her in a safe home totally isolated from her family at the time of her greatest need. Such a decision of the learned Magistrate clearly shows his lack of appreciation of the severity and gravity of the situation and the feelings of the victim girl. **(Para 42)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

Knowledge of domestic and international laws and norms:

Moreover, his interpretation of the law shows his callous disregard for both our domestic law as well as international instruments. We would only remind all members of the judiciary that according to the decision in the case of ***Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69***, unless the provisions of the international instrument conflict with our domestic law, as signatories to those instruments, we are obliged to implement and apply the provisions of those instruments. **(Para 42)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

In spite of deviant behaviour – best interests still primary consideration:

We note that when it comes to children committing more serious crimes, they are tried effectively as adults and the best interests of child takes back-stage as a mere slogan. This is in spite of the clear mandate in Article 3 of the CRC for State Parties to ensure that in all actions concerning children taken by institutions, including Courts of law, the best interests of the child shall be a primary consideration. The age old attitude of demonising children who commit serious crimes is to be deplored. Courts should at all times consider the reasons behind the deviant behaviour of the child and after taking into account all the attending facts and circumstances decide what treatment would be in the best interests of the child.
(Para 40)

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

ANONYMITY OF CHILD

Aim of law - Protection of Children from stigma and victimisation:

Finally, we must again reiterate that section 17 of the Act prohibits the publicity in relation to any child who is involved in any case or proceeding in any Court under the Children Act, which leads directly or indirectly to the identification of such child, nor shall any picture of such child be published. We appreciate that the newspaper has brought to the notice of the public at large the illegality which have been committed by the law enforcing agencies and the judiciary, but at the same time, we must insist that they refrain from identifying children who are alleged to have committed criminal offences and are again reminded of provisions of 17 of the Children Act and the sanction that is provided under section 46 of the Children Act. **(Para 38)**

(State Vs. Secretary, Ministry of Home Affairs & ors., 16 MLR 254)

In view of the fact that the matter involves a child, we wish to remind all concerned that section 17 of the Children Act, 1974 provides that the picture, name and identity of a child offender shall not be published in the media and any such publication would be an offence under the said Act. Hence, the publication of any photograph or the real name, address and identity of the detenu is strictly prohibited in any form or manner whatsoever in any electronic, print or other media. **(Para 39)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

TREATMENT OF CHILDREN DIFFERENT TO ADULTS

The Children Act, 1974 provides for special consideration for children who come face to face with the law. They are dealt with differently due to their immaturity and vulnerability. By the same token, children who are produced for questioning by the police or for recording their statement by a Magistrate under section 164 of the Cr.P.C., either as a witness or as an accused, must be dealt with differently from adults. They must be accompanied by a parent, guardian, custodian or legal representative. **(Para 25)**

(Jaibar Ali Fakir v. The State, 28 BLD 627)

We can only reiterate the submissions of Mr. Islam and Mr. Mahmood that the intention of the legislature in enacting the Children Act is to treat young offenders differently and to give them the opportunity to be reformed and rehabilitated since our entire sentencing policy is reformative, not retributive. We would suggest that the aim of the law is to treat the deviant child to make him a better citizen as the punishment prescribed is purposely lenient and meant to reform and rehabilitate him. **(Para 33)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

Referring, inter alia, to the (Indian) Children Act, 1960, Krishna Iyer, J. in the case of ***Hiralal Mallik v. the State of Bihar, 1977 (4) SCC 44***, observed as follows:

> *"Conceptually, the establishment of a welfare-oriented jurisdiction over juveniles is predicated and over-judicialisation and over-formalisation of Court proceedings is contra-indicated. Correctionally speaking the perception of delinquency as indicative of the person's underlying difficulties, inner tensions and explosive stresses similar to those of maladjusted children, the belief that Court atmosphere with forensic robes, gowns and uniforms and contentious disputes and frowning paraphernalia like docks and stand and crowds and other criminals marched in and out, are physically traumatic and socially stigmatic, argues in favour of more informal treatment by a free mix of professional and social workers and experts operating within the framework of the law. There is a case to move away from the traditional punitive strategies in favour of the nourishing needs of juveniles being supplied by means of treatment oriented perspective. This radicalisation and humanisation of juveniles has resulted in legislative projects which jettison procedural rigours and implant informal and flexible measure of freely negotiated non-judicial settlement of cases."*

With respect we agree. Let our children see not the rigours of our system but the compassion of our treatment of their indiscretion. **(Para 30)**

The overall aim is therefore not to punish the offender, but to seek out the root of the problem, in other words, not treating the delinquents as criminals, but treating the cause of their criminality and directing them on a path which will be acceptable to mainstream society in order to ensure their rehabilitation. More so in our case, since our penal policy is basically reformative and not retributive. **(Para 44)**

(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

We may also refer to the relatively more recent document on the subject: ***United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines")*** adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990. The guidelines are aimed at preventing crime by preventing juvenile delinquency by engaging juveniles in activities which will steer them away from criminal activities. The Guidelines recognise that the adolescent years are to be used for moulding the character of the youth and that *'youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood.'* The emphasis is to urge society to provide facilities for the youth so that their propensity towards deviant behaviour and the opportunity to commit delinquent acts is reduced. Thus the community is loaded with the responsibility of providing positive, proactive programmes to keep the youth occupied and kept on the path perceived to be correct by society and also to bring those who have deviated back to the acceptable path by ensuring proper education and socialisation, i.e. reformation and rehabilitation. **(Para 45)**

(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Thus the thrust of the international declarations, rules, covenants and other instruments is towards reformation and rehabilitation of youthful offenders and for establishment of facilities for proper education and upbringing of youths so that they are prevented from coming into conflict with the law. In the event that a child or juvenile does come into conflict with the law, then the aim is to provide a system of justice which is 'child-friendly' and which does not leave any psychological scar or stigma on the child, and, on the contrary, prepares him for a fruitful future. **(Para 46)**

(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Children Act to protect and preserve the rights of children:

We believe that the Children Act 1974 was promulgated as a direct manifestation of Article 28(4) of the Constitution, which has been placed in the Part III – under the title **"Fundamental Rights"**, and at the same time in response to, and with a view to fulfilling the mandate of, the relevant international instruments of the UN mentioned above.

Article 28(4) of the Constitution provides as follows:

> *"Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens."*

Thus the framers of the Constitution have given the power even to promulgate discriminatory laws favouring the womenfolk and children. Hence it can be said that the Act is a beneficent legislation purposely enacted to give beneficial effects to a particular community of women and children and once enacted the rights which accrue cannot be frittered away by subsequent enactment. **(Para 49)**

The Act incorporates provisions of international covenants in order to safeguard the juvenile from exposure to the rigours of Court process and the stigma of trial and conviction. Hence the requirement for separate trial from adults has been incorporated in section 6 of the Act. It may be noted that section 6(2) of the Act emphatically gives this provision precedence over all other provisions of any laws which may dictate joint trials, including section 239 of the Code of Criminal Procedure. **(Para 50)**

(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Provisions in case of allegation of serious of fence tria ble by Court of Session:

We note that our legislature has catered for cases of youthful offenders involved in serious crimes by enacting section 5(3) of the Act, which provides as follows:

> *"When it appears to a Juvenile Court or a Court empowered under section 4, such Court being subordinate to the Court of Session, that the offence with which a child is charged is triable exclusively by the Court of Session, it shall immediately transfer the case to the Court of Session for trial in accordance with the procedure laid down in this Act."* **(Para 50)**
>
> ***(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)***

Provisions of Children Act applica ble:

Thus even when it is mandated by law for the trial to be conducted by a Sessions Judge, the proceedings must take place in accordance with the provisions of the Act. In other words, the juvenile will get the benefit of all the rights to which he would be entitled had the proceedings taken place in the Juvenile Court. That, we believe, follows the spirit and intendment of the international instruments which crave for the well-being of the youthful offender and enjoin segregation of youths from adults at all stages from apprehension to incarceration. **(Para 50)**

(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Court atmosphe re unli ke adult trial:

The aspect of segregation is highlighted further by section 7(2) of the Act, which provides as follows:

> *"In the trial of the case in which a child is charged with an offence a Court shall, as far as may be practicable, sit in a building or room different from that in which the ordinary sittings of the Court are held, or on different days or at different times from those at which the ordinary sitting of the Court are held."*

This is emphasised further by the provisions of section 8 (1) of the Act, which provides:

> *"When a child is accused along with an adult all having committed an offence and it appears to the Court taking cognisance of the offence that the case is a fit one for committal to the Court of Session, such Court shall, after separating the case in respect of the child from that in respect of the adult,*

direct that the adult alone be committed to the Court of Session for trial." **(Para 51)**

(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

No joint trial of child of fender with adult accused:

Thus under our laws there is no chance of joint trials of a youthful offender and an adult. No matter what offence is alleged, irrespective of the seriousness of the act, a juvenile is to be tried separately from adults and in accordance with provisions of the Act. If the case is triable by the Court of Session only, then the case of the juvenile is to be dealt with under section 5(3) of the Act. Our courts have strictly interpreted this provision in a number of cases, including the State vs Deputy Commissioner, Satkhira, 45 DLR 643. **(Para 51)**

(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

APPLICATION OF INTERNATIONAL INSTRUMENTS

Bangladesh ratified the UN Convention on the Rights of the Child in August of 1990. As a signatory to the convention Bangladesh is duty bound to reflect the above Article as well as other articles of the CRC in our national laws. We are of the view that the time is ripe for our legislature to enact laws in conformity with the UNCRC. This would also give the opportunity to iron out some of the difficulties faced so far in relation to the date relevant for determining the age of the accused for the purpose of jurisdiction of the Juvenile Court and at the same time it may be spelt out that this legislation will take precedence over all other laws when matters relating to children are in issue. We feel that if the goal of the legislation is to protect children, who are our treasures and future generations, and to give them benefits which they would not otherwise get in a Court dealing with adult offenders, then they must get that benefit for whatever offence they may be alleged to have committed. The seriousness of their action may be reflected in the severity of the order passed by the Juvenile Court. But the child, in our view, must be dealt with by a Court geared to hear matters relating to children.
(Para 65)

(State vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

Under normal circumstances any child ordered by the Court to be enlarged on bail would go to the parents; normally the best interests of any child would demand that it be kept in the custody of the parents. In this regard we get some guidelines from the United Nations Convention on the Rights of the Child (UNCRC). Bangladesh was one of the first signatories to the Convention and is bound to take steps for implementing the provisions thereof. Being signatory we cannot ignore, rather we should, so far as possible, implement the aims and goals of the UNCRC. The matter of international covenants/conventions and their incorporation into national laws was considered in a decision of the Indian Supreme Court in ***People's Union for Civil Liberties v. Union of India, 1997 SCC (Cri) 434***. Their Lordships made extensive reference to an Australian decision in ***Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 69 Aus LJ 423***. In the latter case the applicability of the UNCRC was in issue. Mason C.J. stated the position as follows:

> *"It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute..... [B]ut the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law."* HisLordship went on to say, *"The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the Courts as a legitimate guide in developing the common law."* Jeevan Reddy J. delivering the judgement in the *People's Union for Civil Liberties* case, cited above, after deliberation on the Australian decision, stated as follows: *".... the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and hence, enforceable as such."* **(Para 27)**

Our Appellate Division also propounded a similar view in ***Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69***. B.B. Roy Chowdhury J. stated as follows:

> *"True it is that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts."*

His Lordship went on to say that they would be enforceable if the provisions are incorporated into the domestic law and that Courts should not ignore the international obligations, which a country undertakes. If domestic laws are not clear enough or there is nothing therein, the national Courts should draw upon the principles incorporated in the international instruments. If domestic law is inconsistent with international instrument, then the Court must respect national law, but shall draw attention of the law makers to such inconsistencies. **(Para 28)**

So, it is an accepted principle that international covenants, conventions treaties and other instruments signed by State parties are not considered to be binding unless they are incorporated into the laws of the land. To our knowledge Bangladesh has not yet incorporated all the provisions of the UNCRC into its national laws. On the other hand our domestic laws do not contain the beneficial provisions of the UNCRC and they also are not in conflict with our domestic laws, save and except Article 21 regarding adoption. They may, therefore, be considered if it would be in the best interests of the child. **(Para 29)**

(State vs Metropolitan Police Commissioner, 60 DLR 660)

The underlying theme of International Covenants and instruments relating to children is that they are to be enlarged on bail and to be detained only as a last resort. **(Para 25)**

(State vs Metropolitan Police Commissioner, 60 DLR 660)

... we are somewhat perturbed to note that the authorities concerned and the agencies involved in dealing with children are still unfortunately unaware of the relevant provisions of the law and international instruments which are in a way binding upon us. Whether or not provisions of international instruments are binding was discussed in the case of State v. Metropolitan Police Commissioner, 60 DLR 660. In this regard we may again refer to the decision in the case of ***Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69***, where his Lordship B.B. Roy Chowdhury, J. pointed out that although the provisions of international instruments are not binding unless they are incorporated in the domestic law, they should not be ignored. His Lordship went further to say that beneficial provisions of the international instruments should be implemented as is the obligation of a signatory State. We note that in the same vein we mentioned in the case of ***State Vs. Metropolitan Police Commissioner, 60 DLR 660*** that as signatory Bangladesh is obliged to implement the provisions of the CRC. We also stated in that case that if the beneficial provisions of the international instruments do not exist in our law and are not in conflict with our law, then they

ought to be implemented for the benefit and in the greater interests of our children. But sadly the provisions of the international instruments are rarely, if at all, implemented. Moreover, proper implementation of the provisions of our existing law is sadly lacking and often ignored. **(Para 24)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

We find that the neglect of the Bangladesh Government to implement the provisions of the CRC has led to numerous anomalies in our judicial system when dealing with cases where an offender and/or the victim are children. A glaring example can be found in the Railways Act, 1890 where in section 130 (1) the provisions of sections 82 and 83 of the Penal Code have been overridden, thus making children below the age of 9 years liable to be prosecuted and punished for offences under the Railways Act. Quite clearly this is patently contrary to the intent and purpose of the provisions relating to children both in the Children Act and the international instruments. Had there been a proper assimilation of our laws then such a glaring discrepancy or incongruity would not have arisen. Another glaring anomaly is found in the Children Rules, 1976 where the punishment that can be awarded to a child who attempts to run away in violation of the Code of Conduct of the Detention Centre, is caning. This is in stark contradiction with the UN Instrument relating to punishment for children and the prohibition of corporal punishment. **(Para 25)**

We would, therefore, strongly recommend that immediate steps must be taken by the Government to enact laws or amend the existing law in order to ensure implementation of all the provisions of the CRC, which are beneficial to children and also to minimise the anomalous situations which arise when dealing with children. In particular, in order to avoid further complications in the proper application of the existing laws, prompt action must be taken to ensure that the definition of 'child' is uniformly fixed in all statutes as anyone below the age of 18 years [**Art.1 CRC**]; the date relevant for considering the age of the accused is the date of commission of the offence, which is fundamental to the concept of protection of children who are not fully mature and do not appreciate the consequence of their actions [explained in detail in the ***Roushan Mondal*** case]; in all matters where a child is an accused, victim or witness, the best interests of the child shall be a primary consideration [**Art.3 CRC**]; that a child's views shall be considered by the Court [**Art.12 CRC**]; in ALL cases where a child is accused of commission of any offence under the Penal Code or under any special law he is to be tried by a Juvenile Court or any other appropriate Court or Tribunal in accordance with the provisions of the Children Act and Children Rules [discussed in Roushan Mondal]; the use of children for the purpose of carrying drugs or arms or in any other activity which exposes them to physical and moral danger or any harm must be made a criminal offence to be tried under the Children Act [**Art.33 CRC**]. **(Para 27)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

In a recent decision by the learned Judge of the Nari-o-Shishu Nirjatan Daman Tribunal, Sirajgonj in Nari-o-Shishu Case No.764 of 2006, the learned Judge commented as follows:

"এখানে একটা বিষয় উল্লেখ করা প্রয়োজন ১৮ বছরের কম বয়সী বালককে মৃত্যুদন্ড দেওয়া যাবে না তা আইনে নাই। "

It is correct that the Children Act defines a child to be anyone below the age of 16 years and, therefore, there is no prohibition in our law to award a sentence of death upon conviction of an accused aged sixteen years and above. However, applying the decision of the Appellate Division in the case of ***Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69***, the provisions of the CRC and ICCPR should be applied and hence there should not be any sentence of death awarded to an accused below the age of 18 years. Moreover, the learned Judge referred to a decision in the case of ***The State Vs. Tasiruddin, 13 DLR 203***, in support of his contention that the death sentence may be awarded to someone below the age of 18, little realizing that in that particular case there were references to several other decisions of the subcontinent where the death sentence was commuted to imprisonment for life on the ground of youthfulness of the offender and in the very case referred by the learned Judge death sentence had been commuted and yet the learned Judge went ahead to impose the penalty of death on the accused who was allegedly below the age of 18 years. We only mention the above case in order to highlight the fact that anomalies are arising in the decisions of our Courts purely due to the fact that our laws are not consistent and in conformity with the provisions of the international instruments to which we are signatory. **(Para 43, 44)**

(The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors., 29 BLD 656)

It is by now well established that the provisions of international instruments, of which Bangladesh is a signatory are to be implemented in our domestic laws. There is an obligation, which we should not ignore, as was held in ***Hussain Mohammad Ershad vs Bangladesh & others, 21 BLD (AD) 69 and State v. Metropolitan Police Commissioner, 60 DLR 660.*** **(Para 17)**

(Ain-o-Salish Kendra vs Bangladesh, 63 DLR 95)

We are also obliged to implement various beneficial provisions of international conventions, covenants and treaties, such as the UN Convention on the Rights of the Child (UNCRC) and International Covenant on Civil and Political Rights (ICCPR), of which Bangladesh is a signatory. **(Para 32)**

(Fahima Nasrin vs Bangladesh, 61 DLR 232)

VOLUME TWO

Case Summaries

VOLUME SUMMARY

This volume is a compilation of summaries of the judgements delivered by the Supreme Court of Bangladesh on issues related to children in the juvenile justice system. The summaries contain brief facts of the case, the hon'ble Court's discussions regarding the issues involved in the case and the findings and directions of the hon'ble Court.

The summaries are designed to function as a research tool for practitioners to aid them in their case preparation, so that they may decide on what judgements might best support their case.

Jaibar Ali Fakir- versus- The State, 28 BLD 627

This was a Criminal Appeal against an order of the Sessions Court, Joypurhat, under which the appellant, Jaibar Ali Fakir, was convicted of murder and abetment and sentenced to imprisonment for life.

The facts of the case, in chronological order, were as follows:

- On 19.2.81, the dead body of Meher Ali was recovered from a well at the Baroshibaloy Mondir in village Belamla. Police came to the place of occurrence, held an inquest and sent the body to the morgue for post mortem examination, which was done on 20.2.81.
- On 26.2.81, a First Information Report (FIR) was lodged by the victim's brother, Afaz Uddin, naming seven accused persons alleging that they forcibly took the victim away and after killing him, threw him into the well.
- During the course of investigation it was found by the officer investigating the case (I.O.) that the F.I.R. was false and that the appellant Jaibar Ali Fakir, Dulal Kazi and Ayub Hossain as well as Dudum (absconding) who is the son of the victim Meher Ali, were the persons who killed the victim.
- The I.O. took steps for recording the confessional statements of accused Jaibar Ali Fakir and Dulal Kazi as well as of prosecution witness Saleha Khatun (PW5), the 2nd wife of deceased Meher Ali, under section 164 of the Code of Criminal Procedure (Cr.P.C.).
- On 8.6.81 the I.O. produced Jaibar Ali Fakir before a Magistrate for recording his statement as a witness under section 164 of the Cr.P.C. In the statement the accused appeared to have implicated himself in the murder of the victim. However, there was no record to show that he was immediately arrested for the crime.
- The accused was subsequently brought to the Magistrate's Court under arrest on 7.7.81 and again he was forwarded to a Magistrate First Class for recording his confessional statement "judicially".
- On 8.5.82, charge sheet was submitted against the accused persons under sections 302/201/34 of the Penal Code.
- Charge was framed on 2.8.84 against the four accused persons, although the case was not ready due to the fact that accused Dudum was absconding and the formalities had not been fully complied with.
- Subsequently, charge was framed again on 16.3.85 under sections 302/109 of the Penal Code which was read over and explained to the accused present in Court, to which they pleaded not guilty and claimed to be tried.
- The prosecution examined 11 witnesses.
- The defence case was one of innocence and false implication.
- During the trial, the appellant was examined under section 342 of the Cr.P.C., and filed a written statement to the effect that the confessional statement was extracted from him through police torture and illegal confinement in police custody for 21 days.
- The learned Judge recording the statement of the accused under section 342 of the Cr.P.C. wrote the age of the accused as 16.

Discussion of the hon'ble High Court Division

The hon'ble High Court Division noted in its judgement that from the trend of witness examination, it was apparent that the sole basis of the conviction of the appellant was his statement recorded under section 164 of the Cr.P.C. by a Magistrate, who was not examined before the Court. The hon'ble Court further noted from the records that while the appellant had claimed to be a minor at the time of trial, the learned trial Judge did not accept that he was a minor even though the record supported the fact that he was a minor.

The hon'ble Court accepted that in view of the fact that the learned trial Judge opined that the accused was not a minor, it could not be said that the provisions of section 66 of the Children Act were contravened. However, it stated that since the accused was claiming to be a minor, the learned judge ought to have followed the provisions of section 66 of the Children Act in order to allay any possibility that the accused was indeed a minor and to give him an opportunity to prove his entitlement under the Children Act, 1974. The hon'ble Court observed that since, during the trial, the learned Judge recording the statement of the accused under section 342 of the Cr.P.C. wrote the age of the accused as 16, this would mean that the accused must have been a minor at the time of commencement of the trial. The hon'ble Court opined that the fact that the accused was around 12 years of age at the time of the offence and at the time of recording his confessional statement under section 164 of the Code of Criminal Procedure could not be ignored.

Since the accused was claiming to be a minor, the learned judge ought to have followed the provisions of section 66 of the Children Act)

While comparing the statement of Jaibar Ali Fakir recorded as a witness under section 164 of the Cr.P.C. and the statement recorded as a judicial confession 21 days later, the hon'ble Court noted that both statements were almost identical. The Court was particularly interested in the whereabouts of the accused during the interim period from 8.6.81, when he appeared to have confessed his guilt before a Magistrate, and 7.7.81, when a confession was recorded by a Magistrate "*judicially*". The Court took into account the explanation given by the appellant, under section 342 of the Cr.P.C., where he stated that at the relevant time he was a student of Class-VI and that the police took him to the police station and beat him and told him to say the names of Ayub, Hamid, Chunnu and Dudum as the assailants of Meher Ali and after giving him some more beating he was taken to the Magistrate. When he declined to say anything before the Magistrate he was again taken outside and threatened that if he did not state before the Magistrate as directed he would again be taken to the police station. So the accused gave the statement at the dictates of the police. Thereafter, from there he was taken before the Magistrate and told to repeat before the Magistrate what he had told the Magistrate earlier. That having been done, he was sent to jail custody. In the view of the hon'ble Court, this narration showed that after his first "*admission*" before the Magistrate as a witness, indicating his complicity in the murder, the accused was taken into police custody and again produced before the Magistrate on 7.7.81 for recording his confessional statement "*judicially*".

The Court was of the view that the accused would not have been released by the police after he made the statement before the Magistrate as a witness on 8.6.81 admitting that he was involved in the killing of the victim.

Findings and directions

The hon'ble Court commented that although there is no law in our country regulating the mode of recording confessional statements of minors, it can be seen from other jurisdictions that the Courts are always careful when taking into consideration confessions made by accused who are minors. The hon'ble Court gave examples of countries such as the United States of America and Australia, where confessional statements of minors cannot be recorded in the absence of their parent, guardian or custodian. The Court opined that by their nature children are not mature in thought and cannot be expected to have the same level of understanding of legal provisions and appreciation of the gravity of situations in which they find themselves. So much so that it is an accepted phenomenon that children will act impetuously and do not always appropriate the consequences of their actions, criminal or otherwise. In a situation when they are under apprehension they are liable to panic and say and do things which, in their estimation, are likely to gain their early release.

The hon'ble Court gave examples of countries such as the United States of America and Australia, where confessional statements of minors cannot be recorded in the absence of their parent, guardian or custodian. The Court opined that by their nature children are not mature in thought and cannot be expected to have the same level of understanding of legal provisions and appreciation of the gravity of situations in which they find themselves.

It was the view of the hon'ble Court that juveniles in our country should not be seen as different to those in other parts of the world. Rather it should be recognized that our youths are at a greater disadvantage, since they are deprived of the advanced media and information sources available in developed countries, and in most cases are uneducated.

The Court further stated that we must also bear in mind the age of the accused at the time of the occurrence and at the time of the alleged confessional statement. It opined that children are impressionable, gullible and more ready to admit guilt for other ulterior reasons, and referred to research which shows that children will falsely confess to have committed a crime when they believe that they may get some benefit as a result.

.. it would be entirely unsafe to rely upon the confessional statement of a child, as defined in the Children Act, 1974, without corroboration of the fact that he made the confession voluntarily and knowing the consequence of waiving his right to remain silent. Since there was no such corroboration in the present case, the Court held that it was unsafe to rely on the confession.

The hon'ble Court expressed the view that it would be entirely unsafe to rely upon the confessional statement of a child, as defined in the Children Act, 1974, without corroboration of the fact that he made

the confession voluntarily and knowing the consequence of waiving his right to remain silent. Since there was no such corroboration in the present case, the Court held that it was unsafe to rely on the confession.

In the facts of the instant case, in view of the timing of the two statements of Jaibar Ali Fakir recorded by the Magistrate, firstly as a witness and, secondly as an accused, and the doubts which arise with regard to his whereabouts in the interim period, the Court expressed the view that the confessional statement could not in any event be taken into consideration as the basis of the conviction. It further stated that in cases of this nature such statements ought not to be accepted as the sole basis of the conviction, without corroboration.

The Court further recommended that even though our law does not provide for this, when children are taken to record their confessional statements, they must be accompanied by a parent, guardian, custodian or legal representative, so that they do not make false confessions or confessions under threat or coercion.

... when children are taken to record their confessional statements, they must be accompanied by a parent, guardian, custodian or legal representative, so that they do not make false confessions or confessions under threat or coercion.

The hon'ble Court reminded us that the Children Act, 1974 provides for special consideration for children who come face to face with the law, and that they are dealt with differently due to their immaturity and vulnerability. The Court expressed the view that as such, children who are produced for questioning by the police or for recording their statement by a Magistrate under section 164 of the Cr.P.C., either as a witness or as an accused, must be dealt with differently due to their immaturity and vulnerability. The Court expressed the view that as such, children who are produced for questioning by the police or for recording their statement by a Magistrate under section 164 of the Cr.P.C., either as a witness or as an accused, must be dealt with differently from adults. They must be accompanied by a parent, guardian, custodian or legal representative.

State v Secretary, Ministry of Law, Justice & Parliamentary Affairs and others (SUO MOTU RULE NO.5621 OF 2009), 29 BLD 656

This was a Suo Motu Rule, regarding custody of a child, issued in response to a news item, which was first broadcast on 10.04.2009, at about 9:00 p.m. on Television Channel I.

Facts

It was reported that a minor girl by the name of S. [the identity of the girl is withheld in compliance with the provisions of section 17 of the Children Act, 1974 and section 14(1) of the Nari-o-Shishu Nirjatan Daman Ain, 2000] was allegedly raped by her neighbour and distant relative [identity withheld]. The parents of the girl, after getting treatment for her from a local clinic, took her for better treatment to the Osmani Medical College Hospital, Sylhet and, thereafter, took her to the Osmani Nagar Police Station on 27.03.2009 in order to lodge a First Information Report (F.I.R.). Police, after recording the case, sent the girl to the Court of the learned Magistrate, who ordered the girl to be kept in safe custody at the Safe Home in Bagbari, Sylhet, managed by the Department of Social Welfare.

It was reported that being aggrieved by the occurrence which took place, the parents of the victim girl took her before the authorities in order to seek justice and the 7 (seven)-year-old child, who was a student of Class III at the time, was sent to safe custody. She was so young that she could not sleep without her mother. The report further indicated that the parents were not allowed to visit the girl and the Magistrate would not give the girl to the *jimma* (custody) of her father. It was also reported that one well-wisher of the locality spent Tk.26,500/- on publicity in a newspaper addressed to the Prime Minister, but nothing had yet been done at the time of issuance of the Rule.

Having found the reported events to be disturbing, especially since it appeared that the little girl was being held in safe custody without lawful authority while her parents, who were willing and capable of keeping her, were allegedly denied her custody, the hon'ble Court issued a Suo Motu Rule upon the respondents to show cause as to why S. should not be released from the Safe Home of the Department of Social Welfare and be dealt with in accordance with law. Pending hearing of the Rule, S. was directed to be released from custody forthwith to the *jimma* of her father. The Metropolitan Police Commissioner, Sylhet was directed to ascertain and report within seven days, narrating the events leading up to the confinement of the seven-year-old girl S. in the safe home. The Chief Judicial Magistrate was directed to give an explanation within seven days as to under what authority he had passed the order of safe custody of a victim girl aged seven years, refusing custody to her parents.

In due course the hon'ble Court received a response from the Police authority, Sylhet, dated 16.04.2009. The Police Commissioner in his memo dated 20.04.2009, narrated that the case was recorded under section 9(4)(Kha) of the Nari-o-Shishu Nirjatan Daman Ain with Osmani Nagar Police Station on 27.03.2009 where the father of the victim was the informant. The victim was produced at the police station by her parents. The investigating officer referred the victim to the Local Government Health Complex for treatment on 27.03.2009. The local health complex referred the victim to MAG Osmani Medical College Hospital, Sylhet, for examination, where she was produced on 29.03.2009. In the meantime she was kept in the *jimma* of her parents. After her medical examination at the OCC (Outdoor Crisis Centre) the

victim was handed over to the investigating officer on 31.03.2009 and the investigating officer on the same day forwarded the victim to the Court of the learned Magistrate for recording her statement under section 22 of the Nari-o-Shishu Nirjatan Daman Ain. The learned Magistrate did not have time to record the statement on that day and sent the victim to the safe home on 31.03.2009 and her statement was recorded on the next day, i.e. on 01.04.2009. After recording her statement the learned Magistrate again sent her to the safe home. In the meantime the Officer-in-Charge of Osmani Nagar Police Station made a prayer to the Court for allowing the victim's mother to stay in the safe home with her daughter S. The learned Magistrate did not allow this prayer on the ground that the matter is within the exclusive jurisdiction of the Nari- o-Shishu Nirjatan Daman Tribunal. The Magistrate sent the case record to the Nari-o-Shishu Nirjatan Daman Tribunal for proper order in the matter. At that time the father of the victim also filed a Criminal Miscellaneous Case in the Nari-o-Shishu Nirjatan Daman Tribunal for taking *jimma* of his daughter S. By order dated 12.04.2009 the Tribunal placed the victim in the *jimma* of her father.

It is stated in the explanation of the learned Chief Judicial Magistrate, Sylhet that on 31.03.2009 the victim was not produced before him and he did not pass the order for sending her to the safe home. He explained that it was the Judicial Magistrate, 1st Class, before whom the girl was produced, who ordered her safe custody and on the following day recorded her statement under section 22 of the Nari-o-Shishu Nirjatan Daman Ain and on that date neither the parents of the victim nor the police officer who brought her before the learned Magistrate, either in writing or verbally, made any request to give the custody of the victim to her parents. He further stated that on 01.04.2009 the learned Magistrate, after recording the statement of the victim, did not pass any other order to send the girl to the safe home. Subsequently, on 07.04.2009 the Officer-in-Charge of Osmani Nagar Police Station lodged an application with a prayer to allow the victim's mother to remain with her in the safe home. Although, that application was made before the learned Chief Judicial Magistrate, Sylhet, in fact it was not placed before the learned Chief Judicial Magistrate, Sylhet; rather it was placed before the learned Magistrate, 1st Class, who recorded the victim's statement, who rejected the application on the ground that the same was beyond jurisdiction. On the other hand the case docket was ordered to be sent to the Nari-o-Shishu Nirjatan Daman Tribunal. Even at that time there was neither any oral or written prayer to give custody of the girl to her parents. Ultimately, on 10.04.2009 the request for the record from the Nari-o-Shishu Nirjatan Daman Tribunal in connection with Miscellaneous Case No.89 of 2009 dated 07.04.2009 was received and the records were sent to the Tribunal and on 12.04.2009 the victim was handed over to the custody of her parents. The learned Chief Judicial Magistrate, Sylhet also forwarded with his explanation photocopies of the order sheets relating to the matter which was then pending before the Court of the Magistrate.

The hon'ble Court subsequently also sought an explanation from the learned Magistrate, 1st Class who had sent the victim girl to safe custody. By his Memo dated 25.5.2009 the learned Senior Judicial Magistrate, 2nd Court, Sylhet explained that the victim S. (7) was produced before him on 31.03.2009 in the afternoon for recording her statement under section 22 of the

Nari-o-Shishu Nirjatan Daman Ain, 2000. Since he was busy with other matters, he could not record the statement of the victim on that very day and passed the following order-

> "দেখিলাম। আদালত ব্যস্ত থাকায় আগামী ০১/৪/০৯ ইং তারিখে উপস্হাপন করা হোক। ভিকটিমকে নিরাপদ হেফাজত বাগবাড়ি, সিলেট প্রেরন করা হোক।"

He stated that since no prayer was made by the parents or nearest relatives of the victim seeking her custody, he had no alternative but to send her to the approved home managed and controlled by the Ministry of Social Welfare under section 58(a) of the Children Act, 1974.

Discussion and findings

The hon'ble Court referred to the provision of law dealing with custody of victim children, in section 58 of the Children Act, 1974.

> *"58. Order for committal of victimised children.-The Court before which a child is produced in accordance with section 57 may order the child-*
>
> *(a) to be committed to a certified institute or an approved home until such child attains the age of eighteen years or, in exceptional cases, for a shorter period, the reasons for such shorter period to be recorded in writing, or*
>
> *(b) to be committed to the care of a relative or other fit person on such bond, with or without surety, as the Court may require, such relative or fit person being willing and capable of exercising proper care, control and protection of the child and of observing such other conditions including, where necessary, supervision for any period not exceeding three years, as the Court may impose in the interest of the child.*
>
> *Provided that, if the child has a parent or guardian fit and capable, in the opinion of the Court, of exercising proper care, control and protection, the Court may allow the child to remain in his custody or may commit the child to his care on bond, with or without surety, in the prescribed form and for the observance of such conditions as the Court may impose in the interest of the child."*

... the proviso has an over-riding effect, so that if the child has a parent or guardian fit and capable in the opinion of the Court of exercising proper care, control and protection, then the custody of the victim girl is to be given to her parents and there would be no need for the Court even to consider the other two alternatives, namely committing her to a certified institute or approved home or committing her to care of a relative or other fit person.

The hon'ble Court gave the opinion that the proviso has an over-riding effect, so that if the child has a parent or guardian fit and capable in the opinion of the Court of exercising proper care, control and protection, then the custody of the victim girl is to be given to her parents and there would be no need for the Court even to consider the other two alternatives, namely committing her to a certified institute or approved home or committing her to care of a relative or other fit person. The hon'ble Court further stated that there was nothing in the

above mentioned section of the Children Act regarding any requirement for an application to be made by the parents. The Court was of the opinion that in view of the age of the victim girl, who was seven years old at the relevant time, and had been brutally raped, the learned Judge should have realised that it would be inhuman to separate such a tender-aged girl from her parents and send her to a safe home. It was apparent from the records that the girl was crying to go to her mother and the mother was crying to have her back home, and the Court opined that this must be sufficient notice to anyone that the girl is required to be given to the custody of her parent. In addition to this, the Court noted from the order sheet of the learned Magistrate that on 07.04.2009 there was a written application made by the Officer-in-Charge of the police station to allow the mother of the victim to stay with her in the safe home. The Court was of the view that at that stage it should have been clear to the learned Magistrate that the parents of the girl were eager to have her custody, and as such, should have released the girl to the custody of her parents.

The Court was of the view that the learned Senior Judicial Magistrate, 2nd Court, Sylhet was also under a misconception of the law when he seemingly passed an order for keeping the girl in safe custody when the law required that the safe custody should be only the last resort and the parents, if they are fit and capable, should get precedence so far as custody of the victim girl is concerned. It was the finding of the Court that the learned Magistrate, who believed that an application from the parents was necessary, and under that misconception ordered the girl to be held in safe custody, acted illegally and inhumanely under the facts and circumstances of the case. The Court opined that the best interests of a seven year old child can only be served when she is allowed to remain in the custody of her parents.

The hon'ble Court discussed at length the relevant provisions of the law and international instruments to which Bangladesh is a signatory. In this regard the Court referred to the decision in the case of ***Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69***, where his Lordship B.B. Roy Chowdhury, J. pointed out that although the provisions of international instruments are not binding unless they are incorporated in the domestic law, they should not be ignored. His Lordship went further to say that beneficial provisions of the international instruments should be implemented as is the obligation of a signatory State. The Court further noted the case of State Vs. Metropolitan Police Commissioner, 60 DLR 660 in which it had stated that as signatory Bangladesh is obliged to implement the provisions of the CRC, and that if the beneficial provisions of the international instruments do not exist in our law and are not in conflict with our law, then they ought to be implemented for the benefit and in the greater interests of our children.

... although the provisions of international instruments are not binding unless they are incorporated in the domestic law, they should not be ignored.

.. beneficial provisions of the international instruments should be implemented as is the obligation of a signatory State.

The hon'ble Court was of the opinion that the neglect of the Bangladesh Government to implement the provisions of the CRC has led to numerous anomalies in our judicial system when dealing with cases where an offender and/or the victim are children. The Court cited the example of the Railways Act, 1890 where in section 130 (1) the provisions of sections 82 and 83 of the Penal Code have been overridden, thus making children below the age of 9 years liable to be prosecuted and punished for offences under the Railways Act. The Court was of the view that such glaring discrepancies were a result of the lack of proper assimilation of our laws. The Court also referred to another glaring anomaly, in the Children Rules, 1976 where the punishment that can be awarded to a child who attempts to run away in violation of the Code of Conduct of the Detention Centre, is caning, which is in contradiction with the UN Instrument relating to punishment for children and the prohibition of corporal punishment.

The hon'ble Court recommended that immediate steps must be taken by the Government to enact laws or amend the existing law in order to ensure implementation of all the provisions of the CRC, which are beneficial to children and also to minimise the anomalous situations which arise when dealing with children.

The Court recommended that in order to avoid further complications in the proper application of the existing laws, certain Articles of the CRC must be assimilated into our national law: to ensure that the definition of 'child' is uniformly fixed in all statutes as anyone below the age of 18 years [Art.1 CRC]; the date relevant for considering the age of the accused is the date of commission of the offence, which is fundamental to the concept of protection of children who are not fully mature and do not appreciate the consequence of their actions [explained in detail in the Roushan Mondal case]; in all matters where a child is an accused, victim or witness, the best interests of the child shall be a primary consideration [Art.3 CRC]; that a child's views shall be considered by the Court [Art.12 CRC]; in ALL cases where a child is accused of commission of any offence under the Penal Code or under any special law he is to be tried by a Juvenile Court or any other appropriate Court or Tribunal in accordance with the provisions of the Children Act and Children Rules [discussed in Roushan Mondal]; the use of children for the purpose of carrying drugs or arms or in any other activity which exposes them to physical and moral danger or any harm must be made a criminal offence to be tried under the Children Act [Art.33 CRC].

... there must be a Court designated as being dedicated to hear cases involving children [Art.37(d)CRC]...

... Legal Aid must be made available in all matters involving children so that no child remains unrepresented [Art.40(2)(b)(ii)CRC].

... Probation Officers should be available on call round the clock in all parts of the country to enable proper and effective implementation of section 50 of the Children Act. Similarly, places of safety must be set up.

The hon'ble Court opined that until such time as Juvenile Courts are set up in each district, there must be a Court designated as being dedicated to hear cases involving children [Art.37(d) CRC], otherwise the requirement of the law to have expeditious hearings will be frustrated. The Court further stated that Legal Aid must be made available in all matters involving children so that no child remains unrepresented [Art.40(2)(b)(ii)CRC]. Also,

Probation Officers should be available on call round the clock in all parts of the country to enable proper and effective implementation of section 50 of the Children Act. Similarly, places of safety must be set up, at least one in every district and local health clinics must be empowered for the purpose of medical examination of victims so that the need to detain victims in custody will be considerably reduced.

The Court noted that when it comes to children committing more serious crimes, they are tried effectively as adults and the best interests of child are not taken into consideration in practice. This goes against Article 3 of the CRC for State Parties to ensure that in all actions concerning children taken by institutions, including Courts of law, the best interests of the child shall be a primary consideration. The Court stated that Courts should at all times consider the reasons behind the deviant behaviour of the child and after taking into account all the attending facts and circumstances decide what treatment would be in the best interests of the child.

Courts should at all times consider the reasons behind the deviant behaviour of the child and after taking into account all the attending facts and circumstances decide what treatment would be in the best interests of the child.

The Court was of the opinion that the learned Judge should have taken into account the child's view with regard to custody, in compliance with international provisions, which are meant to be for the welfare and wellbeing of children. Further, the Court felt that the tearing away of a seven year old female child from the bosom of her mother can be nothing other than cruel and inhuman treatment which is contrary to Article 27 of the CRC as well as Article 35(5) of our Constitution. The Court found that the learned Magistrate had acted in contravention of the provisions of law, the Constitution and the CRC, to which Bangladesh is a signatory, and as such had caused immeasurable human suffering to the victim girl and her parents. The Court concluded that the lower judiciary is not sensitised enough nor sufficiently aware of relevant provisions of law to cope with a situation of this nature.

Directions

The hon'ble Court made the following general and specific recommendations:

"1. First and foremost, we feel that for proper appreciation of the provisions relating to justice for children, it is essential that all persons concerned with children, including the concerned Government officials of the relevant Ministries and officials of the concerned Government Departments, law enforcing agencies, the judiciary, personnel in the detention and penitentiary system as well as community leaders and local government officials must be aware and sensitised to the needs of children in contact with the law.

2. Initial training and all subsequent refreshers training/courses for Judges, Judicial Magistrates and Executive Magistrates should include the concept and practice of Justice for children as a separate topic giving it proper importance.

3. Establishment of child-specific Courts in every district which will be dedicated to cases relating to children and will deal with cases involving children on a priority basis and other cases only if there is no outstanding case of a child.

4. There is a patent need for a child-sensitive specifically trained Police force. Each Police Station shall have at least two officers, of whom one shall be a female, to deal with cases involving children in contact with the law. That officer shall be designated as a focal point for children in conflict/contact with the law who shall deal with all cases relating to children as far as practicable. The training courses of the members of the law enforcing agencies must include justice for children as a separate subject focusing on their duties and obligations under the law.

5. Detailed separate Rules under the Children Act, 1974 should be formulated and incorporated therein, which will deal with victim children and will specifically determine the duties and responsibilities of police officers, probation officers, the Court and others concerned in dealing with them.

6. It is time for Bangladesh to live up to its promises to set up a Children's Commission/Children's Ombudsman. Alternatively, a National Juvenile Justice Forum, which are in vogue in certain countries, may be set up under the Chairmanship of a senior sitting Supreme Court Judge. The practical benefit would be that the Forum may be empowered to issue directions and guidelines to the subordinate judiciary and other bodies regarding any issues relevant to justice for children. Such an institution shall be set up under the Constitution giving it specific powers to issue in guidelines/handbook relation to matters concerning justice for children. Such guideline shall be adopted by the Ministries concerned with justice for children and shall be translated into Bangla and disseminated to all the relevant bodies and institutions, including the police and other law enforcing agencies, probation service, prison service, Social Welfare Department, Courts and tribunals.

7. A summary of the said guideline (to be followed by the members of the police and other law enforcing agencies with respect to the treatment of children in contact/conflict with the law) should be displayed in prominent places of police stations.

8. Each police station shall display in a prominent place the names and contact numbers of Probation Officers, Doctors on duty, places of safety, approved homes, certified institutions and NGOs working in the area.

9. In the police station, children shall be kept separately from adult accused persons.

10. Police officers should work in close cooperation with Probation Officers, the safe homes and NGOs working in the field in the local area so that protection, safety and well-being of a victim child can be provided without any delay.

11. As soon as a victim child is brought before the police station, or the police are informed about the whereabouts of a victim child, the Probation Officer should be informed.

12. The Probation Officer shall visit the victim child without any delay. He shall assist the police officer in determining whether the child needs medical treatment or examination and whether the child is safe with its parent or guardian. Where necessary the child shall immediately be taken to the nearest clinic or hospital. If medical examination cannot be done on the same day, the police officer concerned shall record reasons for the same.

13. When a child is brought before the Police Station or the Court, it shall be the duty of the police officer or the Court to determine whether it is safe for the child to return with the parent or guardian. If required, the child shall be asked about these matters confidentially and without presence of its parent or guardian.

14. A child shall not be separated from its parent or guardian save in exceptional cases. These will include cases where the parent or guardian is unavailable or where the threat of safety comes from the parent or guardian or where the parent or guardian is unable to provide safety to the child from any impending threat.

15. In the absence of a parent or guardian, a relative or other fit person may be entrusted to keep the child in safety.

16. Where appropriate, the child may be taken to a place of safety by the Probation Officer himself under section 55 of the Children Act.

17. The Government must provide sufficient number of places of safety, at least one in every district, so that such a place of safety is easily accessible from any part of the country.

18. While separating the child from its parent or guardian, the police officer, the probation officer or the Court must record the reasons thereof.

19. When it is necessary to separate a child from its parent or guardian, in exceptional cases and where the situation demands, the guidelines under sections 55 and 58 of the Children Act, should be strictly followed. Accordingly-

    a) A probation officer or a police officer can take a child to a place of safety and detain the child for a period of not more than 24 hours before producing the child before the Court. (Section 55 of the Children Act).

    b) Once produced before the Court in connection with any offence under the Children Act, before institution of proceedings, the Court may make such order as the circumstances may admit and require for the care and detention of the child (section 56 of the Children Act).

c) After institution of proceedings, the child shall be produced before the Court and the Court may commit the child to the care of any relative or fit person, or to a certified institute or approved home. The conditions as provided in section 58 of the Children Act shall be strictly followed.

d) Where the parent/guardian is fit, capable and willing to take custody of the child then the Court shall hand over custody to the parent/guardian. The reasons for not doing so must be clearly stated by the Judge.

20. Under the Children Act, 1974 and under the system of Justice for children there is no requirement for anyone, including the parent or guardian, to apply before the Court for any relief. It is the duty of the Court to ensure compliance of the law in the best interests of the child.

21. Children shall be given special preference in getting legal aid under the ওঔঅলঠভীঊভঔ শক্সযঔল ওঔঅল, ২০০০ and for this purpose appropriate instructions shall be given by the government to the District Legal Aid Committee.

22. Bangladesh Bar Council should develop a training manual for newly enrolled lawyers to include Justice for Children as a separate subject for better understanding of child protection and development of child rights and its different mechanisms where it should explain their role and responsibility, concept of child rights and United Nations Child Rights Convention and other international instruments.

23. The Judicial Administration Training Institute (JATI) should undertake training programmes for Judges and Magistrates, including follow-up training for senior Judges regarding Justice for Children and, in particular training regarding the provisions of the Children Act, 1974, the Children Rules, 1976 and relevant UN and other international instruments.

24. The Ministry of Women and Children Affairs and Ministry of Social Welfare should provide training for their own officers as well as for Probation Officers, Managers and concerned staff employed in the safe homes and other places used for detention of children.

25. The Government should ensure training in good parenting and for awareness development in the community to establish child protection and rehabilitation of deviant children in the community.

26. The Government must take positive steps for dissemination of materials regarding child rights in order to ensure awareness of all concerned with children in contact with the law through the print media as well as the electronic media, including television and radio.

27. Laws are required to be formulated for victim and witness protection in order to avoid

harassment of the victim children and to ensure effective prosecution of offenders, keeping in mind the need to maintain confidentiality, privacy and dignity.

28. Informal atmosphere should be ensured in Juvenile Courts in order to protect child/youthful offenders, child victims and witnesses. Presence of police should be avoided, unless it is felt necessary for the protection of the child offender, victim or witness. Judges/lawyers should not wear uniform during trial.

29. The concerned Ministries should consider the need to formulate community based committees to develop child protection mechanisms, skill development training, and training in child rights.

30. The State through its relevant Ministries shall take necessary steps to identify children at risk of committing offences and at risk of being exploited by adult criminals for criminal activity, i.e. young children engaged in theft, robbery, picketing, vandalism, as carriers of drugs and arms, explosives, member/informer of criminal gangs and suicide squad and should identify the reasons behind the criminal activities of children and address the root cause of such deviant behaviour.

31. The concerned Ministries shall take appropriate measures to form, strengthen and activate Upazila/Union/Ward level child protection motivational committees and community based committees set up for ensuring and monitoring child protection in their locality.

32. The Government should take steps for setting up a system and mechanism for the rehabilitation of victims of crimes.

33. It is therefore imperative that the Government take immediate steps to amend the existing laws or formulate new laws in order to overcome the anomalies and procedural knots as highlighted above as well as to enable implementation of the provisions of the international instruments which will undoubtedly be beneficial to the children of this nation, thus fulfilling our obligations under international treaties and covenants."

Bangladesh National Woman Lawyers Association (BNWLA) V Govt. of Bangladesh (Writ Petition No.8769), 31 BLD 324

This was an application by way of Public Interest Litigation (PIL), filed by the Bangladesh National Woman Lawyers Association (BNWLA), concerning the phenomenon of stalking/eve teasing which is being faced by the girls and women of our society.

It was submitted by the learned advocate that the scenario has now gone out of proportion in that the matter is not simply restricted to eve teasing, which has been long recognized, but has taken a turn whereby the persons who are related to the victim girls and women are also being targeted by the perpetrators and are being physically assaulted. She pointed out that in the past the victims escaped their humiliation by taking their own lives, but now not only the victims are suffering and sometimes committing suicide, but their relatives are under constant threat from the perpetrators and have on occasions in the recent past been hounded and murdered because they protested against the menace of eve teasing. She pointed out recent articles in the newspapers regarding a girl who was forcibly taken away by stalker and locked inside his room, having put vermillion on forehead thereby indicating his conjugality with her. The girl out of shame committed suicide by hanging herself.

Findings and directions

The hon'ble Court issued a Rule Nisi calling upon the respondents to show cause as to why they should not be directed to enact guidelines, or issue policy statement or specific legislation to address the issue of sexual abuse, sexual harassment, eve-teasing, stalking in order to protect and safeguard the rights of the women and girls in our society in their homes and on their way to and from education institutions/schools/colleges and other public places wherever necessary, and/or such other or further order or orders passed as to this Court may seem fit and proper.

In the interim the hon'ble Court gave the following directions:

"i) the Inspector General of Police (IGP) is hereby directed to take immediate steps to apprehend all stalkers/eve-teasers who physically, psychologically, emotionally or sexually abuse or harass women and children, in particular those against whom any allegation is made of harassing/stalking girls and women in any place including at their homes, in the streets, work places and other public places.

ii) the respondent No.1 is directed to issue immediate instructions to all the Deputy Commissioners throughout the country and all Upazilla Nirbahi Officers to be on high alert and to deal with this particular menace of stalking/eve-teasing and sexual harassment separately and independently of any other crime and to take appropriate and immediate action against the alleged offenders.

iii) the Secretary, Ministry of Home Affairs and the Inspector General of Police are hereby directed to take immediate steps to direct the Superintendent of Police of every

District as well as the Officer-in-Charge of the Police Stations to take appropriate and immediate steps for providing protection to the family members as well as the civil society who come forward to assist in the event of any eve teasing, to ensure that no harm may come to them through any reaction by the stalkers/eve teasers.

iv) the respondents No.3 and 4 are hereby directed to take steps to ensure that the media, including the electronic media, namely radio and television to broadcast the seriousness of the menace of eve-teasing and stalking and also to notify the severe consequence that may be brought upon the perpetrators. The respondents No.3 and 4 may also engage the NGOs and civil society in order to make the general public aware of the menace which now besieges us. The community must also be told how best to protect themselves."

In view of the peculiar nature of the offence, the hon'ble Court was of the view that the existing laws in the Penal Code and DMP Act and the Nari-o-Shishu Nirjatan Ain are not sufficient to deal with the situation which has in the recent months blown out of proportion. The Court stated that this is a peculiar situation which must be catered for by appropriate and specific laws, rules and regulations. The Court therefore directed the respondent No.2 in consultation with the respondents No.3-7 to take immediate steps for formulating specific laws to counter the menace of eve teasing/stalking, and sexual abuse and harassment, keeping in mind that in the prevailing situation deterrence should be the aim of the new law.

The State - Versus- The Secretary, Ministry of Home Affairs, and others (Suo-Motu Rule No.01 of 2010), 30 BLD 265

This was a Suo Motu Rule issued in response to a newspaper report appearing in the Daily Prothom Alo of 25.01.2010, which was brought to the notice of the Court by Ms. Fahima Nasrin, learned advocate of the Supreme Court and Vice President of the Bangladesh National Woman Lawyers Association (BNWLA).

Facts

The report showed a picture of three very young children, two boys and one girl, alleged to be aged 14, 9, and 7 years respectively. They were apprehended by the Bhairab Railway Police for having in their possession a total of 3kg of hemp (ganja) and were being held in jail custody.

In the affidavit in opposition the Secretary, Ministry of Home Affairs confirmed that the three children were arrested on 22.01.2010 by on-duty police party comprising one Habilder and three Constables of GRP, and two Ansar personnel. The children had in total 3 kg ganja taped with a bandage to their bodies. He further reported that the children were enlarged on bail on 25.01.2010 by the learned Judicial Magistrate, Court No.2, Kishoregonj. He also narrated that the Superintendent of District Jail, Kishoregonj reported that the two boys were kept in the juvenile ward where there is capacity to keep five children in the jail and the seven year old girl was kept in the female ward inside the jail (Kishoreganj District Jail).

Findings and directions

The hon'ble Court noted that fact that the law enforcing agencies are unaware of the fundamental laws of the country, namely the Penal Code (section 82) which provides as follows:

> *"82. Nothing is an offence which is done by a child under nine years of age."*

Pursuant to this provision, a child below the age of nine years could not be arrested under any circumstances, since that child would be immune from prosecution.

The hon'ble Court then looked at section 13(2) of the Children Act, which provides that:

> *"13(2) Where the child is arrested, the officer in charge of the police-station to which he is brought shall forthwith inform the parent or guardian, if he can be found, of such arrest,....."*

The Court noted that from the records there was no evidence that the police personnel involved in the apprehension and arrest of the children or the Officer in Charge of the police station (OC) were at all aware of the provisions of the Penal Code or the Children Act. The Court emphasised that these were mandatory provisions which the authorities are bound to follow, and which the police had failed to follow in this instance.

The hon'ble Court further considered section 2(j) of the Act which provides as follows:

> *"(j) "place of safety" includes a remand home, or any other suitable place or institution, the occupier or manager of which is willing temporarily to receive a child or where such remand home or other suitable place or institution is not available, in the case of a male child only, a police station in which*

arrangements are available or can be made for keeping children in custody separately from the other offenders;"

The Court stressed that there is no provision in the Act for keeping a female child in the police station overnight, and as such, the girl was kept in unlawful custody overnight. The Court further went on to state that even in the case of a male child, the section provides that such child may be kept in the police station overnight, if there is room to keep him separate from other offenders.

The Court expressed the view that the police personnel must be more alert with regard to the provisions of law.

The Court further noted the lack of appreciation on the part of officials that matters concerning children should get priority, from the fact that the children, who were arrested on 22.01.2010, were produced before the learned Magistrate on 23.01.2010 at 5 p.m., and not earlier.

The Court looked at the order sheet dated 23.01.2010 in which the learned Senior Judicial Magistrate (in charge) had recorded as follows:

"আসামীদেরকে জিজ্ঞাসাবাদে আদালতের নিকট প্রতীয়মান হয় যে, শামীম (৯) ও তাসলিমা তাদের কৃত কর্মের ফলাফল সম্বন্ধে বোধ সম্পন্ন নয়। এমতাবস্হায় তাদের জবানবন্দি রেকর্ড করা হলো না।"

Magistrate should have reprimanded the police officer for arresting children who are incapable of committing an offence and should have directed the children to be taken back to their parents forthwith.

The hon'ble Court stressed that when the learned Magistrate becomes aware that a child is below the age of nine years or a child between the age of nine and twelve years is not able to fully understand the consequence of his act, then he should have immediately realised that no offence could have been committed and he should have immediately released the two children, who were obviously not capable of committing an offence under the law. The Court continued that the learned Magistrate should have reprimanded the police officer for arresting children who are incapable of committing an offence and should have directed the children to be taken back to their parents forthwith.

The Court reiterated that when a child is exempt from prosecution either under section 82 of the Penal Code or upon inquiry under section 83 of the said Code, no question of arrest, custody or handing over on bond at all arises. As such, it was wrong for the Magistrate to expect that anyone would apply for the bail or custody of those two children, and the Court opined that they should have been sent to their parents immediately.

... when a child is exempt from prosecution either under section 82 of the Penal Code or upon inquiry under section 83 of the said Code, no question of arrest, custody or handing over on bond at all arises. As such, it was wrong for the Magistrate to expect that anyone would apply for the bail or custody of those two children.

The Court further opined that the learned Magistrate was ignorant of the provisions of section 2(j) of the Act, given that he had considered a prison should to be a

place of safety. The Court pointed out that from the year 2003 the High Court has laid down that no children, even after conviction, should be found in the jails. It also indicated that the learned Magistrate could have found another suitable place, for example the Kishore Unnayan Kendra in Gazipur, which was a mere one and half hour's distance by road.

The Court then looked at the bail application which was moved on behalf of the three children on 24.01.2010. The Court stated that an application for bail is only warranted when a person, against whom an allegation of criminal offence is brought, is at all liable to be apprehended, prosecuted and kept in custody. No question of bail otherwise arises. In such view of the matter the Court stated that the granting of bail to a seven year old and nine year old, who has no understanding about the offence, is unwarranted.

...an application for bail is only warranted when a person, against whom an allegation of criminal offence is brought, is at all liable to be apprehended, prosecuted and kept in custody. No question of bail otherwise arises. In such view of the matter the Court stated that the granting of bail to a seven year old and nine year old, who has no understanding about the offence, is unwarranted.

The Court further noted from the order of the learned Magistrate dated 24.01.2010 that instead of assisting the Court in releasing the two non-prosecutable children, the learned advocate appearing on behalf of the State, rather drew the Court's attention to the fact that it was a case under Narcotics Control Act, thereby hinting at the gravity of the offence. The Court stressed that the learned Public Prosecutor (PP) or anyone appearing on his behalf is equally liable to have a thorough knowledge of the provisions of law and to act in accordance with the law and, above all, to ensure that all others, including the investigating agencies and the judiciary, are made aware of the relevant provisions of law. It is his duty to assist the Court to come to a just and fair decision in accordance with the law. The Court expressed the view that the learned advocate appearing for the State was ignorant of the law. The Court further expressed its astonishment at the fact that when the matter was transferred to the Senior Judicial Magistrate, and the learned advocate appearing on behalf of the three children produced their Birth Registration Cards, from which it was apparent that the eldest child was aged 13½ years and two younger ones were 8 years and 6½ years respectively, the learned Senior Judicial Magistrate still refrained from releasing the two children aged 8 and 6½ years from the binds of a criminal proceeding.

...there are in existence a National Task Force (NTF) and District Task Force (DTF) whose duty it is to meet regularly in order to see that no children are languishing in the prisons.

The hon'ble Court was informed by learned advocate Ms. Fahima Nasrin that as a result of the Suo Motu Rule issued by the High Court Division in 2003, there are in existence a National Task Force (NTF) and District Task Force (DTF) whose duty it is to meet regularly in order to see that no children are languishing in the prisons. The Court expressed the view that such task force should also take upon themselves the duty to ensure that whenever any child is apprehended, an alternative place of custody is available for her/him in the immediate vicinity, so that even at the weekend or any odd hour of the night children may be placed in a place of safety in

accordance with law, rather than in the police station or in the prison in breach of law. Keeping children in a prison in so-called 'safe custody' is not contemplated by the law and must at all times be avoided.

Keeping children in a prison in so-called 'safe custody' is not contemplated by the law and must at all times be avoided.

The Court stated that the children wing of the prison is meant for children who have been convicted and who cannot be placed in detention in any certified institute in accordance with the law. It is not meant to be used for children who are kept on remand or simply kept overnight as a place of safety. The prison cannot in any event be classified as a place of safety. The Court further stressed that the keeping of a seven year old girl in the female ward of the prison is not sanctioned by the law and must be avoided at all costs. The Court reminded us that the law requires that children kept in any confinement, must be kept separate from adults and convicted prisoners should not be allowed to mix with those under trial.

The Court stated that the children wing of the prison is meant for children who have been convicted and who cannot be placed in detention in any certified institute in accordance with the law. It is not meant to be used for children who are kept on remand or simply kept overnight as a place of safety. The prison cannot in any event be classified as a place of safety.

As a final point, the hon'ble Court pointed out that section 17 of the Act prohibits the publicity in relation to any child who is involved in any case or proceeding in any Court under the Children Act, which leads directly or indirectly to the identification of such child, nor shall any picture of such child be published. While the Court appreciated the fact that the newspaper had brought to the notice of the public at large the illegality committed by the law enforcing agencies and the judiciary, it directed them to refrain from identifying children who are alleged to have committed criminal offences and were again reminded of provision 17 of the Children Act and the sanction for breach of that section as provided under section 46 of the Children Act.

The State -Versus- The Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others (Suo-Motu Rule No.15 of 2010), 19 BLT 376

This was a Suo Motu Rule issued in response to a report in the Daily Star published on 29.09.2010 under the caption "Keep child prisoners in correction centres instead of jails".

Facts

The Rule was issued on that date directing the Secretary, Ministry of Home Affairs and the Inspector General of Prisons to report to the Court within two weeks specifying where the 145 children were being held and by order of what authority they were being so held. The Secretary, Ministry of Social Welfare was also directed to furnish a list of all remand homes and places of safety within the country under the control and supervision of the said Ministry. According to the newspaper report 145 children were being held in 67 prisons within the country.

Findings and directions

The hon'ble Court stated that it is a fundamental aspect of the Children Act that children are not to be kept in custody within the prisons, during the pendency of any trial of the child. The Court highlighted the proviso to section 497 of the Code of Criminal Procedure, which permits the Court to enlarge any child alleged to have committed a non-bailable offence on bail. The Court further looked at section 49(2) of the Children Act, which provides that if the Court does not grant bail, then the child shall be ordered to be detained in a remand home or place of safety, defined under section 2(j) of the Children Act as follows:

> *"2(j) "place of safety" includes a remand home, or any other suitable place or institution, the occupier or manager of which is willing temporarily to receive a child or where such remand home or other suitable place or institution is not available, in the case of a male child only, a police-station in which arrangements are available or can be made for keeping children in custody separately from the other offenders."*

Court has no authority whatsoever to send any child during the pendency of a trial to be held in custody within any prison. The Definition of a place of safety in the Act makes no mention to the effect that any prison will be a place of safety for any child.

The hon'ble Court noted that a Court has no authority whatsoever to send any child during the pendency of a trial to be held in custody within any prison. The definition of a place of safety in the Act makes no mention to the effect that any prison will be a place of safety for any child. The Court further stressed that there is no provision within the Children Act or any other law which permits any judge to send a child during the pendency of a trial to be held in custody within any prison.

Looking at the issue of safe homes, the Court pointed out that while there are a number of safe homes provided for the purpose of housing women and female children in some parts of the country, there are no "safe home" or places of safety provided for male children throughout the country. The Court highlighted its judgement in the case of ***State v. Secretary, Ministry of Law, Justice & Parliamentary Affairs and others, 29 BLD 656***, where it had recommended that the government must provide sufficient numbers of safe homes within an accessible distance of every District. The Court reiterated its recommendation that unless sufficient numbers of safe homes are provided for housing children, who are not granted bail, particularly male children, then injustice will be done.

[The Court] recommended that the government must provide sufficient numbers of safe homes within an accessible distance of every District.

The hon'ble Court stressed that the learned Judges must be aware that children cannot under any circumstances be kept in prison pending trial. Further, they opined that it is the responsibility of the Department of Social Welfare to provide either a safe home, remand home or any other suitable place where children who have come into contact with the law may be kept during the pendency of their trial, if they are at all to be kept in custody.

In conclusion the Court held that these children held in the prisons, whose age is below 16 years, are being held there illegally and without lawful authority and are to be removed from prison forthwith.

The State Versus- The Metropolitan Police Commissioner, Khulna and others (Suo-Motu Rule No.04 of 2008), 60 DLR 660

This was a Suo Motu Rule issued in response to a newspaper report published in the Daily Star dated 22.04.2008, under the caption "8-yr-old sued, sent to jail for drug trade". The alleged offender was reported to be aged only eight years and, therefore, not liable for criminal prosecution, and as such, the hon'ble Court issued Rule Nisi calling upon 1. The Metropolitan Police Commissioner, Khulna, 2. Chief Metropolitan Magistrate, Khulna and 3. Sub-Inspector Ashim Kumar Das, of the Detective Branch, Khulna Metropolitan Police to show cause as to why they would not be directed to explain under what authority a criminal case had been started against a minor girl of 8 years of age and under what provision of law she was arrested and detained in custody in the District Jail, Khulna and why the minor girl should not be paid compensation for her illegal arrest and detention, and why the compensation would not be directed to be paid from the personal funds of those found to have acted in violation of the laws of the land.

Facts

On 20.04.2008 a young girl by the name of Arifa, daughter of Rajab Uddin of village Bhomra, District-Shatkhira, along with one Ripon, was caught red-handed having in her possession 29 bottles of phensedyl, which were strapped to various parts of Arifa's body. Police seized the incriminating articles in the presence of witnesses and produced Arifa and Ripon before the Magistrate on 21.04.2008. The informant stated in the F.I.R. that Arifa was 10 years old. The learned Magistrate, upon perusing the F.I.R. and the forwarding of the Investigating Officer, sent Arifa and Ripon to jail custody. Subsequently a prayer was made for their bail, which was opposed by the prosecution and rejected by the learned Magistrate. However, Arifa was directed to be sent to safe custody.

Findings and discussions

The hon'ble Court discussed the lack of knowledge of the law on the part of the law enforcement officers. The Court expressed the opinion that although the police officer who arrested Arifa was not at fault in doing so, given the fact that he deemed her to be 10 years of age, once he had arrested her, he could and should have tried to locate the girl's parents which he did not do. The Court pointed out that there is a clear mandate in section 13(2) of the Act, 1974 to do so.

...given the fact that [the police officer] deemed her to be 10 years of age, once he had arrested her, he could and should have tried to locate the girl's parents which he did not do. The Court pointed out that there is a clear mandate in section 13(2) of the Act, 1974 to do so.

The Court observed that the police officer, who forwarded Arifa to the Court of learned Metropolitan Magistrate, had observed that Arifa was a 10 year old child and accordingly she must be dealt with under the provisions of the Act, 1974. However he then went on to pray that the accused be kept in jail custody till the conclusion of the investigation and he strongly opposed her release on bail. The Court opined that this demonstrated a deplorable lack of knowledge of the Children Act, and noted that the officer in question required more training and better knowledge about the provisions of the Children Act.

The hon'ble Court also considered the issue of bail, and stated that at the very first instance, the police officer dealing with the child has a responsibility to consider bail. If the offence alleged is bailable, then bail is to be granted as of right. The Court referred to section 48 of the Act, 1974, under which the officer has to consider bail even if the child is arrested of a non-bailable offence. Section 48 of the Act provides as follows:

... at the very first instance, the police officer dealing with the child has a responsibility to consider bail. If the offence alleged is bailable, then bail is to be granted as of right.

... the officer has to consider bail even, if the child is arrested of a non-bailable offence.

> *"48.* ***Bail of child arrested.****- Where a person apparently under the age of sixteen years is arrested on a charge of a non bailable offence and cannot be brought forthwith before a Court, the officer in charge of the police station to which such person is brought may release him on bail, if sufficient security is forthcoming, but shall not do so where the release of the person shall bring him into association with any reputed criminal or expose him to moral danger or where his release would defeat the ends of justice."*

The Court also looked at section 49 (1) of the Act, 1974, dealing with the custody of a child not released on bail, which provides as follows:

> *"49.* ***Custody of child not enlarged on bail.****- (1)Where a person apparently under the age of sixteen years having been arrested is not released under section 48, the officer-in-charge of the police-station shall cause him to be detained in a remand home or a place of safety until he can be brought before a Court."*

The Court noted that there was nothing on record to suggest that Arifa was sent to any remand home or place of safety either on 20.04.2008 or after she was produced before the Magistrate on 21.04.2008. The Court further noted that both the police officers appeared to have been totally oblivious of the provisions of section 50 of the Act, 1974, which provides as follows:

> *"50.* ***Submission of information to Probation Officer by police after arrest.****- Immediately after the arrest of a child, it shall be the duty of the police officer, or any other person affecting the arrest to inform the Probation Officer of such arrest in order to enable the said Probation Officer to proceed forthwith in obtaining information regarding his antecedents and family history and other material circumstances likely to assist the Court in making its order."*

It also appeared to the Court that the police officers had ignored the provisions of section 13(2) of the Act, which provides as follows:

> *"13(2) Where the child is arrested, the officer in charge of the police station to which he is brought shall forthwith inform the parent or guardian, if he can be found, of such arrest, and shall also cause him to be directed to attend the Court before which the child will appear and shall specify the date of such appearance."*

The Court observed that in addition to their failure to comply with the above provisions of law the police made no attempt to inform a probation officer, which is the requirement of section 50, as quoted above.

It also appeared to the hon'ble Court that the learned Additional Chief Metropolitan Magistrate also failed to consider the provisions of the Act, 1974. The learned CMM points out that the accused was not brought before the Court, which is not borne out by the order sheet. He also states that in Khulna Jail there is a separate ward for the safe custody of accused women and children. There is nothing on record to indicate that Arifa was ordered to be kept in safe custody separately from other adults. On 22.04.08 an application for bail was filed, which was kept for hearing on 23.04.08. In such situation section 49(2) of the Act, 1974 is applicable, which provides as follows:

> *"49(2) A Court, on remanding for trial a child who is not released on bail, shall order him to be detained in a remand home or a place of safety."*

The Court emphasized that as soon as a child is brought before the Court the Judge should automatically realize that provisions of the Children Act are applicable and he should immediately consider all possible means of releasing the child, unless there is good reason to keep her/him in detention. The Court further observed the failure of the learned Additional Chief Metropolitan Magistrate to consider **the proviso to section 497 of the Code of Criminal Procedure**, which allows granting of bail to a child even in cases involving non-bailable offences. The order sheet of the learned Additional Chief Metropolitan Magistrate shows that on 21.04.08 Arifa was sent to jail custody with a custody warrant. On 23.04.08 Arifa was ordered to be taken to safe custody. No mention was made that she must be kept separated from adult detainees. Also there is nothing on record to indicate that any other steps were taken to ascertain alternative measures regarding her custody.

While the Court appreciated the fact that the CMM appeared to have appointed a probation officer, this was not done by the police at the time of arrest as required under section 50 of the Act, but was only done a month later when Arifa appeared before the CMM.

The hon'ble Court observed that in view of the fact that she was found by the learned CMM to be above nine years of age, the Court is then bound to consider application of section 83 of the Penal Code to the facts of the case. Section 83 provides as follows:

...in view of the fact that she was found by the learned CMM to be above nine years of age, the Court is then bound to consider application of section 83 of the Penal Code to the facts of the case.

> *"83. Nothing is an offence which is done by a child above nine years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion."*

The Court expressed the view that where the accused is barely above the age of full exemption from criminal prosecution, it would be incumbent upon the Court to ascertain that the accused understood that the item she was carrying was contraband, that what she was doing was illegal, that she appreciated the consequence of supplying the item to others, and whether she was at all aware of the effect of drugs and whether or not she was simply obeying the orders of her elders out of deference or fear. The Court must consider whether the accused child is capable of having the *mens rea* to commit the offence alleged. However, the hon'ble Court emphasized that these were general comments and stated that it is for the Court dealing with any particular case to consider all the relevant legal provisions and all the prevailing circumstances before reaching any decision on the issues raised in the case.

... where the accused is barely above the age of full exemption from criminal prosecution, it would be incumbent upon the Court to ascertain that the accused understood that the item she was carrying was contraband, that what she was doing was illegal, that she appreciated the consequence of supplying the item to others, and whether she was at all aware of the effect of drugs and whether or not she was simply obeying the orders of her elders.

The Court went on to consider the issue of bail in greater depth, and observed that the underlying theme of international covenants and instruments relating to children is that they are to be enlarged on bail and to be detained only as a last resort. This is in addition to section 49 of the Act, 1974 which provides that if a child, who is accused of an offence, is not released on bail then the Court shall order him/her to be detained in a remand home or a place of safety. The Court stated that if the learned Judge, before whom the matter appears for trial, feels inclined, he may consider the bail matter, particularly bearing in mind the probable unsuitability of safe home atmosphere for a child of such tender age. However, the bail may be subject to custody of the girl being given to any person considered suitable by the learned Judge. The Court, in all circumstances, must ensure the best interests of the child.

The Court stated that under normal circumstances any child ordered by the Court to be enlarged on bail would go to the parents. The Court looked at the United Nations Convention on the Rights of the Child (UNCRC), to which Bangladesh was one of the first signatories and is bound to take steps for implementing the provisions thereof. The Court recommended that we should take all necessary steps to implement the aims and goals of the UNCRC. The hon'ble Court illustrated the matter of international covenants/conventions and their incorporation into national laws by giving the example of a decision of the Indian Supreme Court in ***People's Union for Civil Liberties v. Union of India, 1997 SCC (Cri) 434***. In this case, their Lordships had made extensive reference to an Australian decision in ***Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 69 Aus LJ 423***. In the latter case the applicability of the UNCRC was in issue. Mason C.J. stated the position that the fact that a Convention has not been incorporated into their national law does not mean that its ratification holds no significance to national law. Rather, the provisions of an

international convention should be used as guidance while developing common law. This view was reiterated by the judges in the Indian case, and a similar view was taken by our Appellate Division in ***Hussain Muhammad Ershad Vs. Bangladesh and others, 21 BLD (AD) 69***. B.B. Roy Chowdhury J. stated as follows:

> *"True it is that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts."*

His Lordship went on to say that they would be enforceable if the provisions are incorporated into the domestic law and that Courts should not ignore the international obligations, which a country undertakes. If domestic laws are not clear enough or there is nothing therein, the national Courts should draw upon the principles incorporated in the international instruments. If domestic law is inconsistent with international instrument, then the Court must respect national law, but shall draw attention of the law makers to such inconsistencies.

The hon'ble Court observed that while Bangladesh has not yet incorporated all the provisions of the UNCRC into its national laws, our domestic laws do not contain the beneficial provisions of the UNCRC, and they also are not in conflict with our domestic laws, save and except Article 21 regarding adoption. The Court recommended that the provisions may, therefore, be considered if it would be in the best interests of the child.

The hon'ble Court suggested that in upholding the best interest of the child, the Court may consider the third alternative, i.e. placement with any close relatives who might be willing to take the girl into their custody. Failing that, the Court would look to other distant relatives/any other benevolent person, who might agree to take the girl into their custody at their risk and responsibility. In this respect fostering might be a realistic alternative.

The Court then went into a discussion of the duties of the Probation Officer, which are detailed in Section 16 and 31 of the Act, 1974 and Rule 21 of the Children Rules 1976 (the Rules, 1976). The Court stated that since the trial Court or appellate Court is not in a position to ascertain the physical aspects with regard to the family background, character of the accused and the circumstances in which he or she was brought up, it is necessary that the Court should rely on a report from the probation officer, who will go to the locality, if necessary, to ascertain all the factual aspects necessary for the Court to come to a decision with regard to the child. He would also speak to the accused as provided by the UNCRC. Article 12 provides as follows:

> *"12.1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

... since the trial Court or appellate Court is not in a position to ascertain the physical aspects with regard to the family background, character of the accused and the circumstances in which he or she was brought up, it is necessary that the Court should rely on a report from the probation officer, who will go to the locality, if necessary.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

The Court stressed the importance of seeking and respecting Arifa's views on the issue of her custody, so far as practicable and reasonable, keeping in mind her age and mental development. This is in consonance with the international covenants and treaties dealing with children and juveniles. At the end of the day it will be up to the learned Judge/Magistrate conducting the trial to decide what will be in the best interests of the child, bearing in mind all the circumstances reported to him and brought before him by way of evidence and report, particularly of the probation officer.

Observations of the Court

The hon'ble Court summarized its observations as follows:

"1. It is the duty of this Court and all other Courts as well as the other state departments, functionaries and agencies dealing with children, to keep in mind that the best interests of the child (accused or otherwise) must be considered first and foremost in dealing with all aspects concerning that child.

2. The parents of the children who are brought before the police under arrest or otherwise, must be informed without delay.

3. A probation officer must be appointed immediately to report to the Court with regard to matters concerning the child.

4. Bail should be considered as a matter of course and detention/confinement should ensue only as the exception in unavoidable scenarios.

5. In dealing with the child, its custody, care, protection and wellbeing, the views of the child, its parents, guardians, extended family members as well as social welfare agencies must be considered.

6. Where the best interests of the child demands its separation from its parents, special protection and assistance must be provided and there must be alternative care for the child.

7. Steps must be taken to assist the parents to mend their ways and to provide a congenial atmosphere for the proper development of the child.

8. If a child is detained or placed in the care of someone other than the natural parents, its detention or placement must be reviewed at short intervals with a view to handing back custody to its parents or guardians, subject to their attainment of suitability to get custody of the child.

9. When dealing with children, detention and imprisonment shall be used only as a measure of last resort and for the shortest period of time, particularly keeping in view the age and gender of the child.

10. If detention is inevitable, then the child shall be kept in the appropriate Homes/Institutions, separated from adults and preferably with others of his/her same age group.
11. Every effort must be made at all stages for reintegration of the child within the family and so as to enable him/her to assume a constructive role in society.
12. Due consideration must be given to the fact that children come into conflict with the law due to failure of their parents/guardians or the State to provide adequate facilities for their proper upbringing. If the parents or guardians lead the child astray, then it is they who are liable and not the child.
13. The Legislature should consider amending the Children Act, 1974 or formulating new laws giving effect to the provisions of the UNCRC, as is the mandate of that Convention upon the signatories.
14. The use of children as 'drug mules' should be made an offence and incorporated in the Children Act, making the parents/guardians of any child used for carrying drugs criminally liable.
15. The State must make provision for diversion of child offenders from the formal placement in government safe homes/prisons to be placed in an atmosphere where the child may be guided in more congenial surroundings within a family unit, either with relatives or unrelated foster families, if necessary on payment of costs for the child's maintenance.

Ain o Salish Kendra (ASK), and another VERSUS Bangladesh, represented by the Secretary, Ministry of Labour and Manpower, and others (Writ Petition No.1234 of 2004), 63 DLR 95

This was a Writ Petition filed by the Petitioners in response to a number of news articles that brought to light the huge numbers of child workers in the country, **especially those toiling in the 'bidi' factories**.

Facts

There are 25,000 child workers aged between 4 to 14 years in the 'bidi' factories situated in Haragacha, Rangpur and they work under unhealthy and unhygienic environment risking their lives. This was stated in a report published in the Daily Ittefaq on 05.10.2003. A similar report was published in the Daily Jugantar on 15.01.2004 reporting that 15,000 child workers are carrying on work within the 'bidi' factories of Haragacha in Rangpur under inhuman conditions. The children are between the ages of 8-16 years. An editorial in the Daily Prothom Alo dated 04.10.2003 also speaks of 10,000 children working in the 'bidi' factories in Haragacha who have lost their childhood. In view of such stories regarding children toiling in the 'bidi' factories in Rangpur the petitioners, Ain O Salish Kendra (ASK) and Aparajeyo Bangladesh filed the instant writ petition seeking an order from the High Court Division declaring the continuous failure of the respondents to ensure healthy, hygienic and safe work place, for the workers within the 'bidi' factories of respondents No.3 to 5 in accordance with the provisions of the Factories Act, 1965 and why such activity should not be declared as illegal and unconstitutional, being in violation of the fundamental rights guaranteed under Articles 27 and 31 of the Constitution and why they should not be directed to discharge their legal duties to ensure compliance with the aforesaid provisions of law. It was further prayed that the respondents No.3, 4 and 5 be directed to provide cost of medical treatment to the workers within those 'bidi' factories including the children, who are suffering from diseases due to their work in those establishments.

The petitioners, by filing a supplementary affidavit dated 11.07.2010, furnished a report of an inquiry undertaken by ASK which tends to show that the modus operandi of the 'bidi' factory has now changed to a certain extent, inasmuch as the work is now handed by the factory owners to middlemen, who supply the necessary paper and tobacco for rolling the 'bidi' sticks to the 'bidi' rollers, who do the work within their homes. It is reported that once the raw materials are taken to the homes the whole family, including adults and young children are engaged in rolling 'bidi' throughout the day. It is pointed out that the 'bidi' rollers should receive 63 taka per thousand, but in fact they receive about half of that, leaving the remainder in the hands of the middleman. At the same time the report also confirms that the 'bidi' factories are still engaging children within their factories where the working condition is unhygienic and inhuman. Children interviewed alleged that they suffered from headaches and cough and that some even faint within the factories. On the other hand the Managers of the 'bidi' factories deny engaging any children within their factories and their registers do not disclose any children being engaged by them for work within the factories.

Discussion and findings

Factories Act, 1965 was abolished by the Labour Act, 2006, but all the relevant provisions have been re-enacted in sections 51 to 60 of the current law. With regard to the age of workers, section 2(Ka) of the Factories Act described as "adolescent" someone between the age of 16 to 18 years and an "adult" as someone who has completed the age of 18 years and a "child" as anyone who has not completed the age of 16 years. A "young person" is one who is a child or an adolescent. Section 66 of the Factories Act, 1965 prohibited the employment of any child who had not completed 14 years of age and section 67(Ka) provided that non-adult workers between the age of 14 to 18 years would not be allowed to work unless a certificate of fitness was granted for the purpose under section 68 of the Act.

The hon'ble Court looked at the available statistics, and observed that according to data published by UNDP Human Development Report, 2007-2008 there are 5.05 million working children between the age of 5 to 14 years, the total number of children being 35.06 million in that age group. The Court further noted that under the provisions of International Labour Organisation (ILO) Convention No.182, which Bangladesh ratified on 12.03.2001, Article 3(d) includes in the definition of hazardous child labour as "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." The Court noted that an ILO study on hazardous child labour in Bangladesh found that more than 40 types of economic activities carried out by children were hazardous to them. The survey also reveals that except for light work, child labour usually had harmful consequences on the mental and physical development of children.

Laws regulating child labour:

The Court noted that since the time of British rule there have been many laws protecting children from hazardous labour. The Employment of Children Act, 1938 (repealed by the Labour Act 2006) provided as follows:

> *"3(3) No child who has not completed his twelfth year shall be employed, or permitted to work, in any workshop wherein any of the processes set forth in the Schedule is carried on :*
>
> .....
>
> *THE SCHEDULE*
>
> *List of Process:*
> *1. Bidi-making*
> *2. Carpet-weaving*
> *3. Cement manufacture, including bagging of cement*
> *4. Cloth-printing, dyeing and weaving*
> *5. Manufacture of matches, explosives and fireworks*
> *6. Mica-cutting and splitting*
> *7. Shellac manufacture*
> *8. Soap manufacture*
> *9. Tanning*
> *10. Wool cleaning."*

The Court observed that the above processes, which were recognised as hazardous preoccupations for children of tender years, are now carried out by thousands of children of this country, in spite of laws providing sanction for violation of the laws. The Court pointed out that the sanctions for violation of these laws were negligible, for example, section 4 of the above mentioned Act imposed a fine which could extend to five hundred taka. With the introduction of new law, namely the Labour Act 2006 the penalty has been increased to a fine of five thousand taka as provided by section 284. The hon'ble Court noted that the Employment of Children Act, 1938 was replaced in India by the Child Labour (Prohibition and Regulation) Act, 1986. Section 14 of the Act has provided for punishment up to 1 year imprisonment (minimum being 3 months) or with fine up to Rs.20,000 (minimum being ten thousand) or with both to one who employs or permits any child to work in contravention of provisions in section 3. With the lack of similar strict sanctions in our country, the Court noted that the employers of child labour in this country choose to pay the fine in the rare event of being prosecuted.

The Court went on to discuss the applicability of international instruments, of which Bangladesh is a signatory, and stated that these are to be implemented in our domestic laws. There is an obligation, which we should not ignore, as was held in ***Hussain Mohammad Ershad vs Bangladesh & others, 21 BLD (AD) 69 and State v. Metropolitan Police Commissioner, 60 DLR 660***.

The Court discussed ways to allow families the choice to send their children to school rather than work. It stated that the education system has to be made more attractive for the poorest citizens, at least by providing a level of income for the family which will not require the children to go to work. The Court appreciated the current initiative to make school compulsory up to Class VIII as laudable, but observed that for compulsory education to be a reality and effective for those to whom it matters most, there must be other financial benefits, sufficient to entice the student population to attend school and also to continue attending school. Good quality teaching in the schools must also be ensured. Absenteeism on the part of the teachers is rampant. Rather than being committed to teaching the students during school hours, it is more lucrative for them to teach the same students privately for a fee. The want of the teachers must also be satiated to prevent their engaging in other activities in order apparently to supplement their income. So, effective measures must be put in place to ensure that children, who do attend school, are given adequate stipend provided by the State, which will be sufficient incentive for their parents to send them to school and for the children also to attend regularly and have a meaningful education which will be a benefit to them in their future lives.

... the education system has to be made more attractive for the poorest citizens, at least by providing a level of income for the family which will not require the children to go to work.

The Court, recognizing that there may still be situations where families had no choice but to send children to work, urged that steps be taken to ensure that children engaged in harmful work must be registered as such and their movements must be monitored, making sure that all

facilities such as education, rest and leisure are ensured. The Court suggested that a system of registration and monitoring of domestic child workers, for example would deter the employers from physically and sexually abusing them. Newspaper reports indicate the extent of the problems faced by the domestic child workers, including instances where they have committed suicide or were murdered.

...a system of registration and monitoring of domestic child workers, for example would deter the employers from physically and sexually abusing them.

...ensure that children engaged in harmful work must be registered as such and their movements must be monitored, making sure that all facilities such as education, rest and leisure are ensured.

Directions

The Court made a number of observations, recommendations and directions, which are as follows:

"1. We are appalled by the revelation that in this day and age there is bonded labour (যণ্ডীভষ্ঠ) or servitude practised in the coastal fishing areas of the country and young children are the victims. We have no hesitation in directing the Ministry of Labour to take all necessary steps to put an end to such practice immediately and with the help of the law enforcing agencies to bring the perpetrators of such practice to justice. At the same time there must be a concerted effort on the part of the relevant Ministries and government departments to ensure full time education and necessary financial assistance to the parents/guardians of these children to enable them to desist from such illegal and harmful practices and to encourage them to educate their children.

2. In the light of our observations in the body of this judgement, we are of the view that the Ministry of Education must take the initiative to ensure that compulsory education provided by statute enacted under the mandate of Article 17 of the Constitution for all the children of Bangladesh becomes a realistic concept and not just lip-service. To that end steps must be taken to ensure that children can attend school without jeopardising the family's food security. In other words, there must be financial provision for the family such that the child's attendance at school should not result in the reduction of the family's income earning capacity. To put it more plainly, the head of the family must be given the equivalent amount of benefit (cash or kind), which the child would have earned if he was not compelled to attend school. Moreover, to ensure continuity of attendance, provisions must be made for necessary uniform and stationary for the child's use as well as any other costs that she or he may incur in the course of attending a school. In addition, a hot and nutritious meal provided for the child would be an added attraction for him or her as well as for the family and would ensure attendance throughout the day. Of course, such financial

and other benefits would have to be closely monitored to ensure that attendance in the school is not a mere paper transaction, giving benefit only to the unscrupulous teachers and other officials.

3. The Ministry of Education must also ensure quality education for the children by providing good quality teachers who are dedicated and committed to providing curricular and extracurricular activities within the school premises for all-round development of the children, gearing them up for a meaningful and productive future. The teachers' wants must also be properly catered for to ensure their unfaltering and missionary-like dedication and commitment.

4. It appears to us that children share all their facilities with others and end up deprived of due benefits. We would suggest that a separate Ministry or Department be set up to cater for the needs of the children of this country. In addition, we strongly recommend setting up of an independent constitutional body to oversee the workings of all the agencies and government machinery engaged in serving the needs of the children community.

5. In the light of the matters raised by the instant writ petition, Respondent No.1 is hereby directed to ensure that all employers, particularly those engaging children as labourers, abide by the law and do not engage those under the legal age stipulated by statute, and provide all necessary facilities and equipment to ensure a healthy working atmosphere in their establishments for those who may be lawfully engaged in remunerated work. Needless to say prompt action must be taken against those who violate the provisions of law thereby creating unhygienic, cramped and unhealthy workplaces.

6. Respondent No.1 is directed to take appropriate measures against respondents No.3 to 5 to ensure that the working conditions within those establishments conform in every respect to the requirements of the law.

7. Bearing in mind the inherent health hazards of the tobacco industry, the manufacturers must be compelled to provide adequate medical facilities and medical insurance for all employees.

8. In view of the inherent dangers to the health of children within the home, including the unborn and newborn and those who may be forced by their parents to join in the family 'avocation' of 'bidi' rolling, respondent No.1 is hereby directed to take immediate steps to phase out within a period of one year further 'home bidi rolling' by directing the 'bidi' factory owners not to allow working from home.

9. Respondent No.[2] is directed to ensure that all factories and manufacturing establishments abide by the law in respect of maintaining a safe, healthy and hazard free working condition in accordance with the provisions of the Labour Act.

10. The existing sanctions provided by the law against the manufacturers are patently inadequate. We, therefore, direct respondent No.1 to take steps to ensure amendment of the law to include adequately deterrent punishment so that the perpetrators will heed the need to conform to the legal requirements. Steps must also be taken to make the prosecution effective.
11. The law must also be amended to set a reasonable remuneration to the workers engaged in the 'bidi' factories.
12. The government must take all necessary steps to gear up capacity building of the families by providing necessary financial assistance with a view to poverty eradication.

Fahima Nasrin –VERSUS- Government of Bangladesh and others (Writ Petition No.3646 of 2008.) 61 DLR 232

Facts

Md. Zahidul Hasan, alias Rony, henceforth referred to as Rony, was accused of taking gold jewellery from a young girl and thereafter killing her. He was charged under section 302 of the Penal Code and tried in the Sessions Court. It having been established that Rony was below the age of 16 years at the time of trial, the trial took place in the Court of Sessions Judge and Juvenile Court, Kushtia. At the conclusion of the trial, the learned Judge came to a finding that an offence under section 302 of the Penal Code was proved beyond doubt and, in view of his youth, by Judgement and order dated 14.08.2006, Rony was sentenced in accordance with the provisions of sections 51 and 52 of the Children Act, 1974 (the Act) to imprisonment for 10 years. He was ordered to be detained in an institute for youthful offenders until he reached the age of 18 years. On 17.08.2006 Rony was sent from Kushtia District Jail to the Kishore Unnayan Kendra (KUK) (Youth Development Centre) at Jessore. His date of birth was recorded as 09.05.89 and, therefore, he would be 18 years of age on 09.05.2007. On 03.05.2007 the Assistant Director of the KUK, Social Welfare Department, Pulerhat, Jessore expressed his findings in his memo dated 03.05.07 to the Secretary, Ministry of Social Welfare (MoSW), that Rony was sufficiently rehabilitated and his behaviour was satisfactory. The Secretary was requested to order his final release under the provisions of section 67 of the Act. On 30.05.2007 Save the Children UK made representation to the Secretary, MoSW echoing the request of the KUK. However by a memo dated 22.10.2007, it was decided by MoSW that, as Rony was sentenced to 10 years' imprisonment and there was no direction from the Court that he was to be released upon attaining the age of 18 years, he would be returned to the District Jail.

Discussion

The Court first discussed its own jurisdiction to hear the petition. It stated that as the detenu had no competent guardian and was being detained without lawful authority, the Court had no hesitation to assume jurisdiction to adjudicate the legality or otherwise of the detention. In this regard the Court took support from the decision in case of ***State Vs. Deputy Commissioner, Satkhira and others reported in 45 DLR 643***, where on the basis of a newspaper report about the unlawful detention in jail of a juvenile this Court issued a suo motu Rule in order to examine the facts and circumstances of the incarceration of a child for a lengthy period of 12 years. The Court further pointed out that in this case, until the MoSW expressed their interpretation in respect of the order of sentence passed by the learned trial Judge, no cause of action arose. Therefore, the Court stated that the failure to lodge an appeal against the sentence was not a bar to the writ petition challenging the interpretation of the order of sentence in the context of the applicable law.

... as the detenu had no competent guardian and was being detained without lawful authority, the Court had no hesitation to assume jurisdiction to adjudicate the legality or otherwise of the detention.

The Court looked at the provisions of the Children Act which provide for sentencing a child offender upon conviction of an offence punishable with death, transportation (which is now imprisonment for life, viz. Ordinance No.XLI of 1985) or imprisonment, namely, sections 52 and 53 of the Act. Section 52 provides as follows:

> *"52.* ***Commitment of child to certified institute:-*** *Where a child is convicted of an offence punishable with death, transportation or imprisonment, the Court may, if it considers expedient so to deal with the child, order him to be committed to a certified institute for detention for a period which shall be not less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years."*

The Court pointed out that section 52 is the substantive provision of law which provides for punishment of a child upon conviction of an offence and section 53 provides an even more lenient alternative at the discretion of the Court in a fit case. The Court also considered section 51, which provides the modes of punishment which are not permissible to be inflicted upon children and exceptions thereto. Section 51(1) provides as follows:

... section 52 is the substantive provision of law which provides for punishment of a child upon conviction of an offence and section 53 provides an even more lenient alternative at the discretion of the Court in a fit case.

> *51.* ***Restrictions on punishment of child:-****(1) Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment:*
>
> *Provided that when a child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient or when the Court is satisfied that the child is of so unruly or of so depraved character that he cannot be committed to a certified institute and that none of the other methods in which the case may legally be dealt with is suitable, the Court may sentence the child to imprisonment or order him to be detained in such place and on such conditions as it thinks fit:*
>
> *Provided further that no period of detention so ordered shall exceed the maximum period of punishment to which the child could have been sentenced for the offence committed: (emphasis added)*
>
> *Provided further that at any time during the period of such detention the Court may, if it thinks fit, direct that in lieu of such detention the youthful offender be kept in a certified institute until he has attained the age of eighteen years."*

The Court gave the opinion that the importance of section 51(I) is that the punishments which cannot be imposed on a child upon conviction are placed first and foremost in order to give the provision primacy and more emphasis. It stated that the purport of the section is that no child shall be sentenced to "death or imprisonment for life or imprisonment"

The Court gave the opinion that the importance of section 51(1) is that the punishments which cannot be imposed on a child upon conviction are placed first and foremost in order to give the provision primacy and more emphasis. It stated that the purport of the section is that no child shall be sentenced to "death or imprisonment for life or imprisonment" (emphasis added by the Court). The Court was of the view that this clearly indicates the intention of the legislature to keep children, as far as possible, outside the system of incarceration in prisons. Then the first proviso to section 51(1) provides exceptions to the substantive provision giving instances when a sentence of imprisonment may be imposed. The Court opined that the law intends to protect youthful offenders (defined in section 2(n) as any child who has been found to have committed an offence). This is further highlighted by section 51(2), which provides that a youthful offender sentenced to imprisonment shall not be allowed to associate with adult prisoners. The Court was of the view that the substantive provision of section 51(1) is an exception to the general law.

... the law intends to protect youthful offenders (defined in section 2(n) as any child who has been found to have committed an offence). This is further highlighted by section 51(2), which provides that a youthful offender sentenced to imprisonment shall not be allowed to associate with adult prisoners. The Court was of the view that the substantive provision of section 51(1) is an exception to the general law.

The hon'ble Court observed that in the case of an offence punishable under section 302 of the Penal Code, the prescribed punishment is a sentence of death or imprisonment for life. However, the Court pointed out that in case of children such punishment cannot be imposed, although there is an exception to the exception (in respect of awarding sentence of imprisonment). The Court stated that a sentence of imprisonment may be imposed on a child upon conviction, if the Judge conducting the trial forms the opinion that the offence is of so serious in nature that no punishment under the provisions of this Act which he is authorised to inflict (i.e. under sections 52 and 53 of the Act) is sufficient or if the Court is satisfied that the child is of so unruly or so depraved character that he cannot be committed to a certified institute. In the view of the Court, the crux of the proviso is that there must be an opinion and/or satisfaction of the Judge.

... a sentence of imprisonment may be imposed on a child upon conviction, if the Judge conducting the trial forms the opinion that the offence is of so serious in nature that no punishment under the provisions of this Act which he is authorised to inflict (i.e. under sections 52 and 53 of the Act) is sufficient or if the Court is satisfied that the child is of so unruly or so depraved character that he cannot be committed to a certified institute.

The Court in this case heard submissions from *amici curiae*, and expressed its agreement with their submissions that in the absence of any clear opinion expressed by the Judge that the offence was so serious and the punishment authorised by the Act was not sufficient, or that he was satisfied that the child was of so unruly or so depraved character that he could not be committed to a certified institute, the sentence of imprisonment is untenable.

The Court further agreed with the submissions that the inclusion of the word "ঞ্জঃৎঃয়" in the sentencing portion of the judgement is improper or perhaps the learned Judge misconceived the provisions laid down in section 52 of the Act in awarding the sentence.

The Court stressed that section 52 of the Act provides for detention of any child in a certified institute for a period which shall not be less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of 18 years. The Court stressed that the last part of the section clearly indicates that the maximum sentence that a child may be awarded under section 52 will end on his attaining the age of 18 years and, therefore, he may not be kept in detention after his 18th birthday.

On the other hand, the Court stated that it is always possible at any time to revert a child from prison, if imprisonment or detention in some other place was ordered under the first proviso to section 51(1), to a certified institute, as provided by the third proviso. In the view of the hon'ble Court, this fortifies the view that children should not ordinarily be sentenced to imprisonment, unless absolutely necessary where exceptional circumstances exist, and then only as a matter of last resort and for the shortest appropriate period of time.

... it is always possible at any time to revert a child from prison, if imprisonment or detention in some other place was ordered under the first proviso to section 51(1), to a certified institute, as provided by the third proviso.

The Court also considered in depth the second proviso to section 51(1). The Court was of the view that 'detention' in the second and third provisos refers to 'detained' (in such place) in the first proviso. The hon'ble Court stated that this means that when the Court is satisfied that the child is of so unruly or so depraved character that he cannot be committed to a certified institute, then he may be sent to prison or be 'detained' in such place and on such conditions as it thinks fit. As mentioned above, the third proviso contemplates sending the youthful offender back to a certified institute after a period of detention in the place where he was sent under the first proviso, to be detained there until he attains the age of eighteen years.

The second proviso to section 51(1) mandates that the detention as mentioned in the first proviso shall not exceed the maximum period of punishment to which the child could have been sentenced for the offence committed. The Court opined that for proper appreciation of this provision one must keep in view the fact that the offender is a child to whom the provisions of the Children Act, 1974 apply and that the substantive sentencing provision is contained in sections 52 and 53. Section 52 permits a child to be sentenced to detention in a certified institute, even in cases where the offence is punishable with death or imprisonment for life or imprisonment. All penal offences are, therefore, covered. But at the same time all other penal sanctions are excluded. The Court stressed that upon

The second proviso to section 51(1) mandates that the detention as mentioned in the first proviso shall not exceed the maximum period of punishment to which the child could have been sentenced for the offence committed.

conviction of any offence under any law the sentence must be awarded in accordance with the sentencing provisions of the Childre Act, 1974 and the maximum sentence that could have been imposed on a child upon conviction of any offence would have been detention in a certified institute for 10 years or up to the date of his attaining the age of 18 years, whichever is earlier. In exceptional circumstances a sentence of imprisonment may be imposed under the first proviso to section 51(1) of the Act.

The Court noted from Rule 9 of the Children Rules, 1976 that the inmates of the certified institute or approved home are constantly and continuously monitored with regard to their background, character, performance, etc:

> *"9. **Management of certified institutes**.-(1) The Superintendent shall maintain case file for each inmate separately containing detailed information about the family background, character, aptitude, performance in education, training and such other matters as he may consider necessary.*
>
> *(2) The governing body of a certified institute shall exercise such powers and shall conduct its, business in such manner as the Director may determine, and the decisions of the governing body shall require approval of the Director."*

The Court was therefore of the view that the intention of the legislature is to ensure assessment of the children who are sentenced to detention in order to gauge the improvement in their character and behaviour with the view to setting them at liberty either conditionally or without condition. The Court felt that any offender who shows sufficient improvement in his character and behaviour in the assessment of those who are given the duty to assess his development may be discharged before the completion of his sentence of detention. That is the purpose of the law. The hon'ble Court was of the view that the interpretation given by the Ministry to the sentence that Rony was to be sent back to prison is misconceived and not tenable in the facts and circumstances of the case.

The Court discussed the implementation of various beneficial provisions of international conventions, covenants and treaties, such as the UN Convention on the Rights of the Child (UNCRC) and International Covenant on Civil and Political Rights (ICCPR), of which Bangladesh is a signatory.

The Court further stressed the importance of proportionality between the offence committed and the sentence imposed. This is where the learned Judge must weigh in the balance all facts relating to the antecedents and background of the child, which he should glean from the use of the services of the Probation Officer. The Court felt that the intention of the legislature in enacting the Children Act is to treat young offenders differently and to give them the opportunity to be reformed and rehabilitated since our entire sentencing policy is reformative, not retributive. The Court reiterated that the aim of the law is to treat the deviant child to make him a better citizen as the punishment prescribed is purposely lenient and meant to reform and rehabilitate him. The Court felt that to even consider any form of retributive or

The Court further stressed the importance of proportionality between the offence committed and the sentence imposed.

deterrent punishment in the guise of protection of society would be a regressive step shutting our eyes to our obligation to provide a congenial environment in which our children may grow and flourish into worthy citizens. The Court stressed that at all times the welfare and the best interest of the child must be kept in the mind.

Finally, the Court pointed out that in view of the fact that the matter involves a child, section 17 of the Children Act, 1974 will apply, which provides that the picture, name and identity of a child offender shall not be published in the media and any such publication would be an offence under the said Act. Hence, the publication of any photograph or the real name, address and identity of the detenu is strictly prohibited in any form or manner whatsoever in any electronic, print or other media.

... the publication of any photograph or the real name, address and identity of the detenu is strictly prohibited in any form or manner whatsoever in any electronic, print or other media.

Bangladesh Legal Aid and Services Trust (BLAST), and another Versus Secretary, Ministry of Education, and others (Writ Petition No.5684 of 2010), 31 BLD 201

An application under article 102 of the Constitution was filed by Bangladesh Legal Aid and Services Trust (BLAST) and Ain o Salish Kendro (ASK), as a public interest litigation, impugning actions such as caning, beating and chaining of children, both boys and girls, studying in governmental and non-governmental primary and secondary educational institutions, including madrashas, in particular those reported in a series of reports published in national newspapers during 2010. It is stated that young children have been subjected to 'corporal punishment' by educational institutions, which in some cases appear to be quite horrendous acts of violence administered in the name of discipline. Towards the beginning of 2010 there was a spate of newspaper publicity reporting numerous cases of corporal punishment being meted out to children in various educational institutions, including Madrasas, Primary Schools and High Schools, and the children upon whom the corporal punishment had been inflicted were both boys and girls of various ages, as young as six years up to 13/14 year olds.

Discussion and findings

The hon'ble Court in its judgment considered the issue of corporal punishment and what is happening in the name of instilling discipline into children.

What is corporal punishment?

The Court recognized that corporal punishment, i.e. punishment inflicted on the body, is a form of discipline, which has been exercised across the world for many years. The Court described the various forms of punishment that could be considered as corporal punishment. In addition, to the physical forms of punishment, the Court also outlined other non-physical forms of punishment, including, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child. The Court stated that children bear the brunt of so-called disciplinary action from everyone older in age or bigger in size. The Court observed that the attitude of acceptance of corporal punishment as a norm has been handed down from generation to generation, to the extent that some adults/parents acquiesce to corporal punishment imposed upon their children as the only way to teach them and it is normal since they themselves were subjected to the same treatment. Some go so far as to say that had it not been for the chastisement and punishment, we would not be what we are today.

The Court noted that the severity of the punishment ranges from verbal abuse/rebuke to physical violence by the use of the limbs or other implements varying in size, shape and degree of lethalness. At the same time the Court observed that the effect of the corporal punishment manifests in various forms and varies with the mental and physical state and stature of the child and can range from the not so visible psychological effect to the patent physical injury requiring hospitalisation and occasional death. Constant and prolonged rebuke can also lead to suicide of the child.

The Court looked at Article 19 of the Convention on the Rights of the Child (CRC) 1989, which provides as follows:

> *19.1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
>
> *2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

The Court also looked at Article 28.2 of the CRC, which provides as follows:

> *28.2. "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."*

In addition to this, the Court looked at Article 37 of the CRC, which requires States to ensure that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment" General Comment No.8 dated 02.03.2007 issued by the Committee of the CRC focuses on corporal punishment and other cruel or degrading forms of punishment with a view to highlight the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take.

The Court noted that the Committee recognises that the practice of corporal punishment directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity.

... the practice of corporal punishment directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity.

In addition to international instruments, the Court pointed out that Article 35 of our Constitution deals broadly with protection of citizens in respect of trial and punishment. Clause (5) of article 35 provides that "no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment." Taken one step further, it should be obvious that if any person is protected from "torture or cruel, inhuman or degrading punishment or treatment" after conviction of a criminal offence, then it stands to reason that a child shall not be subjected to such punishment for behaviour in school which cannot be termed criminal offence.

Article 35 of our Constitution deals broadly with protection of citizens in respect of trial and punishment. Clause (5) of article 35 provides that "no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."

Harmful effects of corporal punishment

The Court then moved on to look in depth at the effects of corporal punishment. It was of the view that corporal punishment is detrimental to children's well-being and has serious physical, psychological and emotional effects, as well as causing truancy and dropping out of school. This in turn exacerbates the cycle of illiteracy and poverty.

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The Court commended the steps taken by the Ministry of Education in issuing the circular prohibiting corporal punishment in all educational institutions. At the same time, the Court strongly recommended that the awareness drive must continue. In addition it stated that the authority concerned must take steps to incorporate imposition of corporal punishment as 'misconduct' within the service rules for teachers so that any teacher imposing corporal punishment on a pupil will be subjected to departmental proceedings for misconduct. The Court felt that the law must be amended accordingly.

... the authority concerned must take steps to incorporate imposition of corporal punishment as 'misconduct' within the service rules for teachers.

The Court felt that the authorities concerned must ensure that everyone coming into contact with children must realise that corporal punishment is harmful for the well-being of the children and, therefore, anyone contravening the prohibition is not only in breach of the terms and conditions of his service, but also may be liable to punishment under the existing criminal law.

The Court further noted the emotional harm and psychological damage caused by corporal punishment, which is less easy to detect. It stated that emotional and psychological damage manifest in the behaviour of children subsequent to being subjected to corporal punishment. When a child plays truant, it is obvious that going to school is distasteful to the child. He or she fears more punishment. Children become inattentive in their studies and in some cases they end up dropping out of school altogether. The Court stressed that this has far reaching effects on the child's development and future prospects in life.

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In addition, the Court gave examples of a number of cases where children have resorted to taking their own life, which is certainly an unwanted and avoidable loss of human life.

Legal framework with regard to corporal punishment

The Court considered a case of the Indian Courts where an existing law permitting corporal punishment was struck down by the High Court. Looking at the laws of Bangladesh, the Court observed that the existing laws of Bangladesh do not provide specifically for corporal punishment either in the home or in the educational institutions. However, a number of cases were brought to the notice of the Court which indicate that corporal punishment is pervasive in the homes, schools and work places. It is also pointed out that the Penal Code and the Code of Criminal Procedure, the Prisoners Act, 1894, Whipping Act, 1909, Cantonment Pure Foods Act, 1966, Suppression of Immoral Traffic Act, 1933, Railways Act, 1890 and the Children Rules, 1976 provide for the imposition of corporal punishment for certain offences. But these do not relate to the school or home setting.

...the existing laws of Bangladesh do not provide specifically for corporal punishment either in the home or in the educational institutions.

The Court referred to a report compiled by Global Initiative where it has been suggested that section 89 of the Penal Code provides a defence for the imposition of corporal punishment, thereby suggesting that corporal punishment such as those imposed by the parents or teachers are allowed by law. The Court expressed the view that this is an erroneous argument since section 89 does not at all relate to corporal punishment, as would be apparent from the other provisions of law contained in that chapter of the Penal Code. Chapter IV of the Penal Code is titled "General Exceptions" and gives details of acts which would not constitute a criminal offence. The Court felt that reading section 89 together with section 91 would expose the error in the interpretation relied upon by Global Initiative. Section 89 and 91 provide as follows:

> *"89. Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:*
>
> *Provided-*
>
> *First.-That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;*
>
> *Secondly.- That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt; or the curing of any grievous disease or infirmity;*
>
> *Thirdly.- That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;*
>
> *Fourthly.- That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.*

Illustration

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

91. The exceptions in section 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act."

The Court observed that the third proviso to section 89 provides that the exception of section 89 shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity. This, therefore, clearly excludes any situation where a teacher causes grievous hurt to a student. Section 91 makes it clear that any hurt which itself would amount to a criminal offence is not covered by the exception. Thus beating a child with a cane causing a bleeding injury would be an offence under section 323 of the Penal Code and would, therefore, not be covered by the exception in section 89. The Court was of the opinion that this section, as well as some of the other sections in this chapter, relate to acts done by persons giving medical care and as such corporal punishment is not contemplated by these provisions in Chapter IV of the Penal Code.

... the argument that the parent or a child consents to corporal punishment in the school is a fallacious argument. When a child is admitted in any school the parents and the child consent to be given educational instruction. Unless any particular school has within its written prospectus a stipulation that the child may be subjected to corporal punishment in the event of any breach of school regulation or for lack of academic attainment or for indiscipline generally, it cannot be said that either the parents or the student has consented to the child being subjected to corporal punishment.

The Court went through the legislation relating to schools and madrashas, and found that section 39(2) of the East Pakistan Intermediate and Secondary Education Ordinance, 1961 provides for framing regulations and in such regulations published in the Dacca gazette, part-I dated 15th September 1966, there is provision for disciplinary action against students of secondary school, intermediate colleges and intermediate section of degree colleges. In the said regulations certain actions and behaviour of students are deemed to constitute the offence of indiscipline and misconduct. The regulations then provide for infliction of suitable

penalties when, if any pupil is found guilty of indiscipline or misconduct, it would be for the head of the institution to take disciplinary action and award punishment unless mass punishment was considered necessary, when the matter would be reported to the Chairman of the Board and his orders would be awaited. However, on perusal of the available punishments, the Court did not find any reference to imposition of corporal punishment. The Court further noted that this regulation relates to older children attending secondary schools and as such there could not be any regulations allowing corporal punishment to younger children. The Court also noted from the above mentioned regulations that before a teacher turns to punishment he will naturally commence with remonstrance and reasoning and will show his disapproval, which may in itself suffice to meet the case. A warning in many cases will be found to be sufficient, especially if it is accompanied by entry of the boy's name in the conduct register. The Court felt that this demonstrated that the aim of the regulations relating to discipline is to punish only as a last resort and still then there is no provision for subjecting any student to corporal punishment.

The hon'ble Court also perused the Madrasha Education Ordinance, 1978 and the Registration of Private Schools Ordinance, 1962 and did not find any provision for imposition of corporal punishment on students.

The Court observed that corporal punishment has almost become a fact of life in Bangladesh and appears to be accepted as the norm by the children and adults alike. The Court cited several examples of this phenomenon where parents had accepted corporal punishment inflicted by teachers on their children. In each of these cases the teachers in question have evaded any effective form of redress even in cases where the students have suffered serious injuries.

The Court expressed its appreciation of the action taken by the Ministry of Education in the past. On 21.04.2008 the Primary Education Directorate of the Ministry of Primary and Mass Education issued a circular relating to appropriate behaviour towards students. This circular concerned students between the ages of 5-10 years, so far as it is relates to punishment both physical and mental both in the home setting as well as in the educational institution. It was observed that such mental and physical abuse hampers healthy and natural development of the child and steps were directed to be taken for the prevention of such abuse and for creating awareness regarding the development of negative behaviour. Consequently the concerned authorities were asked to direct all concerned to refrain from all physical and psychological torture, cruelty, scolding and other untoward behaviour towards all students of primary schools.

On 18.03.2010 the Primary Education Directorate issued another circular regarding behaviour towards child students. It was observed that in spite of written directives not to behave badly towards the students various types of physical and mental torture were being inflicted within the schools. Reference was made to a report by UNICEF highlighting incidents of scolding/insulting, caning on the rump, striking with the stick etc., which was not acceptable

to the students and which resulted in the student becoming frightened and reluctant to go to the school and also some of them stopped going to school altogether. Consequently, a direction was issued upon the teachers not to indulge in such behaviour, including physical and mental torture, cruelty and scolding etc. In this regard the Training Division of the Directorate was directed to take up these issues during the training programme.

The Court felt that effective steps were put in place for prohibiting corporal punishment in schools, but in spite of that, it found that several other incidents in schools in Dhaka and within the periphery of Dhaka had taken place subsequent to the issuance of the Rule. As a result of this the Court directed proper steps to be taken by the authority concerned. Subsequently, the Education Ministry and other concerned authorities took steps in order to formulate a policy called, "শিক্ষা প্রতিষ্ঠাচন ছাত্র-ছাত্রীচদর শারীরিক ও মানসিক শাস্তি প্রদান নিষিদ্ধকরণ নীতিমালা, ২০১০" (Guidelines for the Prohibition of Physical and Mental Punishment of the Students of Educational Institutions, 2010). These draft guidelines included directions that children in educational institutions shall not be subjected to physical and mental punishment, including all sorts of physical assault on the body or any part of the body of the student by use of hands, legs or any implement and also indirect physical assault by making the child hold his own ears while doing sit-ups or putting his head under the table or bench or directing him/her to do any work which is prohibited under the labour laws. Also to be prohibited is mental torture or humiliation which includes adverse comments about the child's parents, his/her ethnic identity etc. It is stated that if any teacher is found to have imposed any corporal punishment then it would be deemed as misconduct punishable under the Government Servants (Conduct) Rules 1979 and the Government Servants (Discipline and Appeal) Rules, 1985. The delinquent teacher may also be punishable under the criminal laws. However, the Court noted that there is no sanction against teachers of private schools other than under the criminal laws. The Court suggested that such a situation would be discriminatory since no departmental proceeding is envisaged for the teachers working in the private educational institutions. The Court was of the view that in such a situation there should be separate law to regulate the conduct/misconduct of teachers in the private educational institutions.

The Court observed that after the issuance of the present Rule, on 09.08.2010 the Ministry of Education had issued a circular as a result of which all physical and mental torture, cruelty and scolding as well as improper behaviour towards children in primary schools was to be prohibited and the matter was to be informed to all school teachers.

The Court then looked at Article 35(5) of the Constitution, which provides that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. The Court was of the view that while this clause relates to punishment upon conviction for a criminal offence, it is all the more applicable to persons who have not committed any offence and who cannot be subjected to such treatment for acts and behaviour which does not amount to a criminal offence.

The Court further noted that consequent upon the Rule issued by it, a meeting was held on 29.08.2010 presided over by the hon'ble Minister, Ministry of Education where discussion took place with regard to guidelines to be issued prohibiting corporal punishment on students. Among the resolutions was one to broadcast through the various public media including radio, television, private channels and national newspapers as well as leaflets and posters regarding prohibition of corporal punishment in the schools.

The Court once again looked at the issue of applicability of international instruments, in particular the Convention on the Rights of the Child (CRC) 1989. It discussed the decision in the case of ***Hussain Muhammad Ershad Vs Bangladesh and others, 21 BLD (AD) 69***. where B.B. Roy Chowdhury, J. had observed as follows:

> *"The national Courts should not, I feel, straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein, the national Courts should draw upon the principles incorporated in the international instruments."*

The Court also looked at the case of ***State vs Metropolitan Police Commissioner, 60 DLR 660*** where it was held that being a signatory to the Convention Bangladesh is obliged to implement the provisions thereof.

The Court stated that Article 28 of the Convention is relevant to the issue in this case, and held that in the light of the Convention corporal punishment upon the children must be prohibited in all settings including schools, homes and work places. Children who are subjected to corporal punishment or indeed psychological and emotional abuse cannot be expected to develop freely and properly and will not be able to give their best to this society. The Court stated that the effects of physical and mental torture on the proper development of children could not be ignored, and it would lead to inadequate achievement resulting in lack of education and poor prospects of better living standards which in turn will stoke the poverty cycle.

The Court gave examples of numerous countries of this world, both advanced and less developed, who have adopted prohibition of corporal punishment both at home and in the education institutions. The Court expressed the opinion that corporal punishment should be prohibited throughout the country in all settings. There should be a positive awareness drive aimed at all parents, teachers and others who take on the responsibility of caring for children that physical, psychological and emotional abuse of children can never be for their good.

The Court felt that in order to make the prohibition of corporal punishment in the educational establishments effective, the laws relating to disciplinary action against the teachers, who impose corporal punishment on students are required to be amended. The Court therefore directed the Ministry of Education to ensure inclusion of a provision within the Service Rules of all teachers of public and private educational institutions of the country, by incorporating the imposition of corporal punishment upon any students within the definition of 'misconduct'. Thus, any teacher accused of imposition of corporal punishment

any student will be liable to be proceeded against for misconduct and he or she shall face the consequence of such disciplinary proceeding as mentioned in the Service Rules. In addition he will be liable for any criminal offence committed in accordance with the existing laws of the land.

The Court expressed the view that laws which allow corporal punishment, including whipping under the Penal Code, Code of Criminal Procedure, Railways Act, Cantonment Pure Food Act, Whipping Act, Suppression of Immoral Traffic Act, Children Rules, 1976 and any other law which provides for whipping or caning of children and any other persons, should be repealed immediately by appropriate legislation as being cruel and degrading punishment contrary to the fundamental rights guaranteed by the Constitution.

Bangladesh National Woman Lawyers Association (BNWLA)-VERSUS The Cabinet Division (Writ Petition No.3598 of 2010), 31 BLD 265

This was an application under Article 102 of the Constitution brought by BNWLA regarding the plight of child domestic workers.

Facts

An incident of physical violence against a child domestic worker was highlighted as reported in the daily national newspaper Amar Desh on 03.05.2010.

A Rule Nisi was issued on 04.05.2010 calling upon the respondents No.1 to 6 in connection with their inaction to take appropriate steps against respondent No.7 (the employer of the domestic child worker) regarding the incident reported in the daily newspaper "Amar Desh" dated 03.05.2010 and to report to the Court within 24 hours with regard to their actions and measures taken in connection with the incident and as to why direction should not be given to respondents No.4 to 6 to send the victim Shuma (10) for immediate treatment in the nearest One Stop Crisis Centre at Dhaka Medical College Hospital and why the respondents shall not be directed to monitor the employment of children as domestic workers, and/or such other or further order or orders passed as to this Court may seem fit and proper.

Findings and discussions

The Court expressed the view that the work done in the domestic sector should be recognised as such and the rights of these workers should be ensured by incorporating the workers of the domestic sector within the Labour Act. So far as the work of children is concerned, the Court noted that the new Children Policy of 2011 defines a child as anyone up to the age of 18. The Labour Act, 2006 defines a child in section 2 sub-section (63) as anyone below the age of 14 and defines anyone between the ages of 14 to 18 as an adolescent. The Court pointed out that for the sake of uniformity a child should be defined in all laws as anyone below the age of 18, and, if necessary, the restriction or concession to allow children of a certain age to work may be defined in the Labour Act as has been done. Therefore, children up to the age of 14 may not be engaged in doing work as mentioned in section 34 of the Labour Act. The law is relaxed to some extent by section 44 which provides that a child who has reached the age of 12 years may be engaged in light work, if it will not harm his health or if his education will not be hampered. Section 34 also provides that an adolescent, i.e. a child between the age of 14 and 18, may be engaged to do work so long he has a certificate from a registered medical practitioner certifying his fitness. The Court expressed the view that the same provision could apply to children working in the domestic sector.

The Court expressed the view that the work done in the domestic sector should be recognised as such and the rights of these workers should be ensured by incorporating the workers of the domestic sector within the Labour Act.

The Court stressed that it must always be borne in mind that children are not in a position to consent to work and work is forced upon them by the poverty of their family and the inability of their parents to adequately provide for them and ensure their food security. It further stated that the lack of education of the children creates a vicious cycle of poverty since the children who are deprived of education can never hope to get out of the poverty cycle and can never hope to achieve anything in life other than menial work or becoming a burden upon the State joining the ranks of criminals. The Court stated that in order to break this vicious cycle of the poverty it is crucial that the government must have policies which will ensure that the children of school- going age attend school and should by strict government policy be restrained from being employed and protected from being employed forcibly by their parents.

The Court felt that at any cost children below the age of 12 should not be allowed to engage in any type of work, including domestic work. The Court emphasized that children below the age of 12 are required to go to school pursuant to the National Policy on education.

The Court stressed that it must always be borne in mind that children are not in a position to consent to work and work is forced upon them by the poverty of their family and the inability of their parents to adequately provide for them and ensure their food bsecurity.

The Court stressed that the government must ensure that any children taken away from their home are registered with the proper authorities so that their whereabouts can be traced. More importantly, there must be constant monitoring of the movement of these children perhaps from one household to another, particularly with the view to ascertaining and ensuring their physical security. In this regard, the Court found that the provisions highlighted in the জাতীয় শিশু শ্রম নিরসন নীতি, ২০১০ (National Child Labour Elimination Policy, 2010) were in some way beneficial for the children, if those provisions can be implemented. The Court therefore strongly urged the government to take immediate steps to implement the provisions of the National Child Labour Elimination Policy 2010.

The Court stressed that the government must ensure that any children taken away from their home are registered with the proper authorities so that their whereabouts can be traced.

With regard to children between the age of 14 and 18, the Court accepted that they would not be of compulsory school-going age, however it stressed that the government policy must be such that opportunity should be made available to these children to continue studies, if they so desire and accordingly, their work hours must be geared in such a way as to enable their further education. The provisions for registration of their movement and engagement in the domestic sector as workers must also be monitored strictly. Children between the ages of 14 to 18, who are engaged in the domestic sector, will be incorporated automatically within the provisions of the Labour Act, if and when those provisions are

... the beneficial provisions outlined in the three policy documents namely, Domestic Worker Protection and Welfare Policy 2010 (Draft), National Elimination of Child Labour Policy, 2010 and the Children Policy 2011 should be brought into effect at once so that the benefits of the provisions of those policies may be given to the domestic workers and, in particular, to the children in domestic work.

amended in order to include within the definition of workers those persons of any age working in the domestic sector.

Directions

The Court issued the following directions on the government:

1. To prohibit employment of children up to the age of 12 from any types of employment including employment in the domestic sector, particularly with the view to ensuring that children up to the age of 12 attend school and obtain the basic education which is necessary as a foundation for their future life.
2. We urge the government to implement the provisions mentioned in the National Elimination of Child Labour Policy 2010 published in the gazette dated 08.04.2010. In particular, we strongly recommend the establishment of a focal Ministry/focal point, Child Labour Unit and National Child Labour Welfare Council in order to ensure implementation of the polices as mentioned in the Policy, 2010.
3. We urge the government to implement all the beneficial provisions of the draft of Domestic Worker Protection and Welfare Policy 2010 as announced by the government.
4. The cases relating to the violence upon the domestic workers must be monitored and prosecution of the perpetrators must be ensured by the government. We note with dismay the disinterested and sometimes motivated way in which the prosecution conducts the investigation and trial procedure resulting in the perpetrators being acquitted or discharged or even remaining untouched due to the high position, which they hold in the society. The government has a duty to protect all citizens of this country, be they rich or poor. It must not be forgotten that the domestic workers come from a poverty-stricken background and deserve all the more protection from the government and the authorities setup by the government.

The State -Versus- Md. Roushan Mondal @ Hashem (Death Reference No.05 of 2004), 59 DLR 72

This was a Death Reference under Section 374 of the Code of Criminal Procedure submitted by the learned Additional Sessions Judge, 1st Court, Jhenaidah, for confirmation of the sentence of death imposed upon accused Md. Roushan Mondal @ Hashem upon finding him guilty under Section 6(2) of the Nari-o-Shishu Nirjatan Daman (Bishesh Bidhan) Ain, 1995, ("the Ain") by the judgment and order dated 13.1.2004 passed by him sitting as the Nari-o-Shishu Nirjatan Daman Bishesh Adalat and Additional Sessions Judge, 1st Court, Jhenaidah in Nari-o-Shishu Nirjatan Daman Special Case No.1 of 2000.

Facts

- On 15.10.1999 at about 8:30 p.m. Mst. Rikta Khatun, aged about 8 years, daughter of the informant Md. Ziarat Mondal, left her father's house in order to watch television at the house of their neighbour, Md. Bazlu. When she did not return by 10:00 p.m. the informant started to search for her and found out that she did not go to the aforementioned house in order to watch television.
- On 16.10.1999 at 5:00 a.m. one Md. Batu told the informant that his daughter's dead body was lying in the turmeric field to the west of the house of Prosanta Kumar Saha.
- The informant then went to that place and identified the dead body of his daughter. He saw marks of injury on his daughter's neck. It is the prosecution case that the victim was raped before being suffocated to death by the condemned prisoner.
- The informant lodged the First Information Report (F.I.R.) with Shailakupa Police Station at 9:35 a.m. on 16.10.1999 without naming anyone as accused.
- During investigation accused Roushan Mondal was arrested. He made a confessional statement recorded by a Magistrate. After investigation the police submitted charge sheet against the accused under Section 6(2) of the Ain. Cognizance was taken by the Judge of the Nari-o-Shishu Nirjatan Daman Bishesh Adalat and Sessions Judge, Jhenaidah.
- By his order dated 22.1.2001, upon taking evidence and after hearing submissions with regard to the age of the accused, the learned Sessions Judge came to a finding that the accused was at that time aged 15 years 21 days. Thereafter, he sent the case for trial to the Additional Sessions Judge, 1st Court, Jhenaidah,-cum-Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah.
- In view of the earlier order dated 22.1.2001 with regard to the age of the accused, the learned trial Judge, by his order dated 28.2.2001, assumed the role of a Juvenile Court under the Children Act, 1974 (henceforth referred to as "the Act") and framed charges against the accused under Section 6(2) of the Ain.

In the course of trial 11 prosecution witnesses were produced and examined in order to substantiate the case against the accused person, whereas the defence did not examine any witness. From the trend of the cross-examination of the prosecution witnesses and from the statement of the accused given when examined under Section 342 of the Code of Criminal

Procedure, 1898 ("the Code") the defence case appears to be one of innocence. The accused also alleged that he was tortured in police custody and compelled to make a confession.

Findings and discussions

The hon'ble Court referred to a number of decisions where it had been held that a minor should always be tried by a Juvenile Court, and should be tried separately from adult offenders. The Court went on to discuss the aspects which determine whether a Court has jurisdiction to try the accused, such as the age and mental capacity of the accused. The Court stated that jurisdiction over the person is a precondition to the case proceeding to trial by any Court or Tribunal.

The Court stated that jurisdiction over the person is a precondition to the case proceeding to trial by any Court or Tribunal.

The Court then discussed the issue of definition of a child. The Court looked at the Children Act, where a child is defined in section 2(f) as a person under the age of 16 years. Section 2(n) of the Act defines "youthful offender" as a child who has been found to have committed an offence.

...the concept of juvenile justice has developed over the last 150 years or more and essentially follows the notion that a person of tender years does not have full control over his impetuous actions nor the mental maturity to realise the consequences of his conduct.

The Court looked at the development of the area of juvenile justice, stating that the concept of Juvenile justice has developed over the last 150 years or more and essentially follows the notion that a person of tender years does not have full control over his impetuous actions nor the mental maturity to realise the consequences of his conduct.

The Court in considering the necessity for a separate law for children supported the Indian decision of ***Hiralal Mallik v. the State of Bihar, 1977 (4) SCC 44***, where it was observed:

> *"Conceptually, the establishment of a welfare-oriented jurisdiction over juveniles is predicated and over-judicialisation and over-formalisation of Court proceedings is contra-indicated. Correctionally speaking the perception of delinquency as indicative of the person's underlying difficulties, inner tensions and explosive stresses similar to those of maladjusted children, the belief that Court atmosphere with forensic robes, gowns and uniforms and contentious disputes and frowning paraphernalia like docks and stand and crowds and other criminals marched in and out, are physically traumatic and socially stigmatic, argues in favour of more informal treatment by a free mix of professional and social workers and experts operating within the framework of the law. There is a case to move away from the traditional punitive strategies in favour of the nourishing needs of juveniles being supplied by means of treatment oriented perspective. This radicalisation and humanisation of juveniles has resulted in legislative projects which jettison procedural rigours and implant informal and flexible measure of freely negotiated non-judicial settlement of cases."*

The Court then went into a detailed discussion of the background history suffered by the children/youth community. The Court cited a number of articles and cases in describing the plight of children from the middle of the 19th century onwards, and the development of case law relating to children in the justice system.

... the dominant feature of the legislation regarding proceeding against the delinquent child is that it is meant for the protection of the child.

The Court subsequently looked at the reasons why children should be dealt with separately from adults. The Court highlighted the fact that the dominant feature of the legislation regarding proceeding against the delinquent child is that it is meant for the protection of the child. Another aspect of keeping children separately to adults put forward by the Court was the fact that the mind of the child is immature, impressionable and malleable. If kept in association with bad company, it is likely to learn the wrong things; in association with criminals, it is likely to pick up the trade of the criminals and improve upon the methodology with his young and fertile mind.

The Court also discussed the treatment of children in the international instruments. These provisions emphasise that the proceedings should result in the wellbeing of the juvenile and that the response/reaction to youthful offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions.

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The Court was of the view that the overall aim of the instruments is not to punish the offender, but to seek out the root of the problem, in other words, not treating the delinquents as criminals, but treating the cause of their criminality and directing them on a path which will be acceptable to mainstream society in order to ensure their rehabilitation.

The Court concluded that the thrust of the international declarations, rules, covenants and other instruments is towards reformation and rehabilitation of youthful offenders and for establishment of facilities for proper education and upbringing of youths so that they are prevented from coming into conflict with the law. In the event that a child or juvenile does come into conflict with the law, then the aim is to provide a system of justice which is 'child-friendly' and which does not leave any psychological scar or stigma on the child, and, on the contrary, prepares him for a fruitful future.

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The Court then moved on to consider the Children Act 1974. The Court first discussed the background to the Act, and talked about the legislation that was in place prior to the enactment of the 1974 law.

The Court expressed the view that the Children Act 1974 was promulgated as a direct manifestation of Article 28(4) of the Constitution, which has been placed in the Part III – under the title **"Fundamental Rights"**, and at the same time in response to, and with a view to fulfilling the mandate of, the relevant international instruments of the UN. The Court noted that the Act incorporates provisions of international covenants in order to safeguard the juvenile from exposure to the rigours of Court process and the stigma of trial and conviction.

The hon'ble Court commented that in the present case, the learned Sessions Judge had sent the case for trial by the learned Additional Sessions Judge, First Court and Nari-o-Shishu Nirjatan Daman Tribunal, Jhenaidah, which defeated the purpose of the trouble taken by him to ascertain the age of the accused under the provisions of section 66(1) of the Act. The Court further commented that there was nothing on record to show that all the formalities of a juvenile trial were followed. On the contrary, the offender was all along described as an 'accused' which is not a term found in the Act. The Court considered that the sentence passed clearly showed that the learned judge had lost sight of the provisions of the Act.

The Court looked at section 66(1) of the Act, which provides as follows:

> *"66. Presumption and determination of age.-(1) Whenever a person whether charged with an offence or not, is brought before any criminal Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child, the Court shall make an inquiry as to the age of that person and, for that purpose, shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be."*

In the opinion of the Court, this section is the first and foremost procedural consideration when any criminal Court is faced with a person brought before it, who appears to the Court to be a child. It comes even before the consideration of any offence, whether charged or not.

The Court looked at the issue of relevant date for application of the Children Act. The Court observed that while the definition section of the Act says a child is any person under the age of 16 years, it does not clarify whether he should be below 16 years of age at the time of commission of the offence or at the time of framing the charge or commencement of the trial. The Court, after examining relevant legislation from other jurisdictions and perusing the international conventions, came to the conclusion that the relevant date must be the date on which the offence is committed, otherwise the whole thrust of the law to protect those who are immature, impetuous, unwary, impressionable, young, fickle-minded and who do not know the consequences of their act, would be lost. The Court was of the opinion that it is the mental capacity of the offender at the time of committing the offence which is of crucial importance. The Court also took into account a number of case law decisions from various jurisdictions in support of this view.

Looking forward, the Court expressed the view that the time is ripe for our legislature to enact laws in conformity with the UNCRC. The Court felt that this would also give the opportunity to iron out some of the difficulties faced so far in relation to the date relevant for determining the age of the accused for the purpose of jurisdiction of the Juvenile Court and at the same time it may be spelt out that this legislation will take precedence over all other laws when matters relating to children are in issue. The Court looked at the laws enacted by other jurisdictions which had been drafted to reflect obligations under the international conventions.

Directions

In conclusion the Court gave a number of directions as to what the law ought to provide, which are as follows:

1. As soon as a child is apprehended for an alleged offence he must be taken before a Magistrate, and at all times kept separate and detached from any adult offender. Under no circumstances is the child to be kept in police lock-up.
2. The Magistrate must take immediate steps to ascertain the age of the child in accordance with section 66 of the Act, and procedures laid down in the Act are to be followed.
3. Parents/guardians of the child must be informed
4. The child should be considered for release to the custody of his parents/ guardians pending any inquiry regarding any allegation.
5. If his detention is felt absolutely necessary then he must be kept in a 'special home' or 'observation home' established for the purpose, pending decision on the allegation against him. The 'special homes' must be separate and distinct from the 'approved homes' where children in conflict with the law are placed after they are found to have been in breach of the law.
6. If it is established that she/he is a child then the matter must be adjudicated upon by a "Children's Justice Board/Panel" and the proceedings must be concluded expeditiously.
7. The child must be given opportunity to be legally represented and afforded legal aid for the purpose.
8. In deciding the case finally, the "Board/Panel" must take into account the child's background and other family/community circumstances, including any report of a Probation Officer or Social Worker.

9. If it is decided that confinement is necessary, then it must be in accordance with the Children Act and in an approved home and ***at any cost NOT IN PRISON*** (emphasis added)
10. The approved homes must be equipped to provide the necessary educational and vocational training facilities and always with the view to the rehabilitation of the child in the community.

The Court emphasized that the above is not a comprehensive list and provides only some of the Court's perceptions and suggestions. The Court with these directions wished to emphasise the importance of giving the deviant child an opportunity to do better and rejoin mainstream social structure.

Bangladesh Legal Aid and Services Trust (BLAST) and another -VERSUS- Bangladesh, represented by the Secretary, Ministry of Home Affairs, and others, 63 DLR 10

The issue before the Court in this case was whether a mandatory death penalty is permisible under the Constitution and wheather it could be imposed on a minor. This involved a Rule Nisi which was issued upon an application by the petitioners under Article 102(1)(2)(b)(i) read with Article 44 of the Constitution calling upon the respondents to show cause as to why section 6(2) of the Nari-o-Shishu Nirjatan (Bishes Bidhan) Ain, 1995 (Act No.XVIII of 1995) operative under section 34 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 (Act VIII of 2000) should not be declared to be void, unconstitutional and ultra vires and as to why petitioner No.2 the convicted detenu Md. Shukur Ali, son of late Hashem Mondal of Village-Shibrampur Tepra, Police Station- Shibalaya, District-Manikganj detained in the condemned cell of Dhaka Central Jail on conviction in Nari-o-Shishu Nirjatan Daman Bishesh Case No.75 of 1999 by Nari-o-Shishu Nirjatan Daman Bishesh Adalat, Manikganj purportedly under section 6(2) of the Nari-o- Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 (Act of XVIII of 1995) should not be brought before this Court so that it may satisfy itself that the petitioner is not being held in custody without lawful authority or in an unlawful manner.

Discussion and findings

The Court considered whether or not the death penalty could be included as a punishment after 1972 when the Constitution came into force. The Court concluded that since the provision of the special laws incorporating the punishment of death sentence are essentially for heinous crimes, including those leading to death of the victim, particularly, death caused either during or subsequent to rape; death caused by acid etc., they are a reaction to the perceived need of the day. It noted that the severest punishment is meted out only when the crime is perceived to be most heinous.

The Court stated that the crime of murder itself being a heinous offence, the death penalty had been prescribed under section 302. This penalty was provided in our laws prior to the coming into force of the Constitution and is protected by the Constitution itself. The newly enacted special laws prescribe the death penalty in cases where the crime is most heinous and death of the victim has resulted. Thus the death penalty is prescribed for offences causing death under various circumstances which was previously punishable under the Penal Code by sentence of death. If the death penalty were not included as a punishment for death in the newly enacted laws then there would be discrimination in treatment of offenders under the new laws as compared with those dealt with under the Penal Code. As a result, the Court expressed the view that the inclusion of the sanction of death penalty subsequent to the coming into force of Constitution cannot by itself be said to be unconstitutional.

The Court considered the case of ***Reyes***, in which their Lordships in the Privy Council had considered the submission of counsel that 'a sentencing regime which imposes a mandatory sentence of death on all murderers, or all murderers within specified categories, is inhuman and degrading because it requires the sentence of death, with all the consequences such a sentence must have for the individual defendant, to be passed without any opportunity for the defendant to show why such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the defendant's criminal culpability.' The hon'ble Court held the same view and observed that where the appellant is not a habitual criminal or a man of violence, then it would be the duty of the Court to take into account his character and antecedents in order to come to a just and proper decision. But where the law itself prescribes a mandatory punishment then the Court is precluded from taking into consideration any such mitigating or extenuating facts and circumstances.

The Court was of the opinion that when the legislature prescribes any punishment as a mandatory punishment the hands of the Court are thereby tied. The Court becomes a simple rubber-stamp of the legislature. Upon finding the accused guilty, the Court can do no more than impose the mandatory punish-

With regard to sentencing methods in Bangladesh, the Court observed that there is no provision or scope to argue in mitigation or to bring to the notice of the Court any extenuating facts and circumstances in any given criminal trial. There is no provision of sentence hearing. The Court stated that such a provision existed in 1982 as section 255K of the Code of Criminal Procedure, but the provision was abolished in 1983. The Court expressed the view that it is imperative that such provision should exist, particularly in view of the fact that in our country the adversarial system denies the accused any opportunity to put forward any mitigating circumstances before the Court. In our criminal justice system, the accused from the beginning to the end of the trial will maintain a plea of 'not guilty' and since no separate date is fixed for sentencing the accused, there is thereby no opportunity to put forward any mitigating or extenuating circumstances.

The Court stated with regard to mandatory provision for sentencing that these take away the discretion of the Court and precludes the Court from coming to a decision which is based on the assessment of all the facts and circumstances surrounding any given offence or the offender, and that is not permissible under the Constitution. The Court must always have the discretion to determine what punishment a transgressor deserves and to fix the appropriate sentence for the crime he is alleged to have committed. The Court stated with

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regard to mandatory provision for sentencing that these take away the discretion of the Court and precludes the Court from coming to a decision which is based on the assessment of all the facts and circumstances surrounding any given offence or the offender, and that is not permissible under the Constitution. The Court must always have the discretion to determine what punishment a transgressor deserves and to fix the appropriate sentence for the crime he is alleged to have committed. The Court may not be degraded to the position of simply rubberstamping the only punishment which the legislature prescribed. The Court expressed the view that if the discretion of the Court is taken away then the right of the citizen is denied.

... any provision of law which provides a mandatory death penalty cannot be in accordance with the Constitution as it curtails the Court's discretion to adjudicate on all issues brought before it, including imposition of an alternative sanction upon the accused found guilty of any offence under any law.

Expressing the view that the mandatory provision of death penalty given in any statute cannot be in conformity with the right accruing to the citizen under the Constitution, the Court found that section 6(2) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 is ultra vires the Constitution. The Court went further to say that, any provision of law which provides a mandatory death penalty cannot be in accordance with the Constitution as it curtails the Court's discretion to adjudicate on all issues brought before it, including imposition of an alternative sanction upon the accused found guilty of any offence under any law.

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