

Star LAW analysis

Bail, rule and stay orders: People's perception and reality

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THE jurisdiction of the High Court Division may be invoked by way of some petitions or applications and the most available of these are writs, criminal miscellaneous petitions under section 561A of CrPC, revision applications etc.

Usually when these motion applications are heard for the first time, the petitioner's lawyer basically prays that the government order, lower court proceeding, judgment, order or sentence challenged in the petition be

violation in the procedure of investigation or trial or proceeding in the lower court, the High Court usually issues a rule against the respondents and also grants a stay order and if the matter is a criminal one and the accused person is in jail, in that case granting bail to the accused person is also within the jurisdiction of the court. Issuing rule, stay order and granting bail, of course, do not mean the end of the matter; this is just the primary stage of the judicial proceeding in the Supreme Court.

The respondents will have to

obtained in the trial court but overturned or stayed in the High Court on its first move be it by way of writ, quashing application, revision or appeal. It is to be borne in mind that the general public might perceive the apex court as a forum of justice but the term 'justice' is not something as ordinary people might often perceive. Justice is to be done and served within the four corners of law and the judges themselves cannot act going beyond the law. Very technically we call "law is blind"; we both judges and lawyers also do wear black gowns and coats. This also

give verdict or decision in accordance with the relative strengths and weaknesses of those evidence irrespective of the fact that it may engender public concern.

Second, alongside the evidences there is another yardstick to be followed by the superior courts in upholding or rejecting a lower court proceeding or judgment; and this is the strict compliance with every steps or procedure of law while conducting investigation or trial of the matter in question. If it is a criminal matter and there is slightest violation in compliance with the law and its procedure during trial or investigation, the superior court will have no other option but to stay the proceeding or judgment and finally dismiss or quash the matter at the end of the final hearing.

One eleven, mass arrest and now bail and stay by the high court

In the wake of one-eleven incident with the takeover of power by the present caretaker government the mass arrest of political bigwigs who have hitherto been infamous for their corruption and misdeed as public servants and their subsequent prosecution by special courts in corruption charges have eased public anger in the sense that no one is above the law. However, this easing concern has suddenly turned out to be a matter of lull and gush among general public in the wake of mass granting of bail and order of stay of proceeding or judgment of the trial court by the apex court.

As I've already mentioned, the reasons lie in the two fundamental principles enunciated just above. It was at the very beginning of this process that whispers were in the air that this was not the proper net to catch these bigwigs. The laws under the Emergency Ordinance and Emergency Power Rules and subsequent amendments to the anti-corruption laws under which these bigwigs were arrested and tried have been attacked in the



court as illegal and unconstitutional and hence all trials and prosecution under these laws would be illegal. It is fundamental norm of constitutional as well as criminal law that all persons will have right to get protection against ex post facto law and this is guaranteed under Article 35(1) of our constitution.

This means that a person cannot be convicted of an offence except for violation of a law in force at the time of the commission of the act charged as offence. Clause 1 of Article 35 also provides that no person shall be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence. Even if we assume that all procedure in the laws was duly followed, still the apex court has jurisdiction to stay proceeding and conviction under these provisions of the constitution.

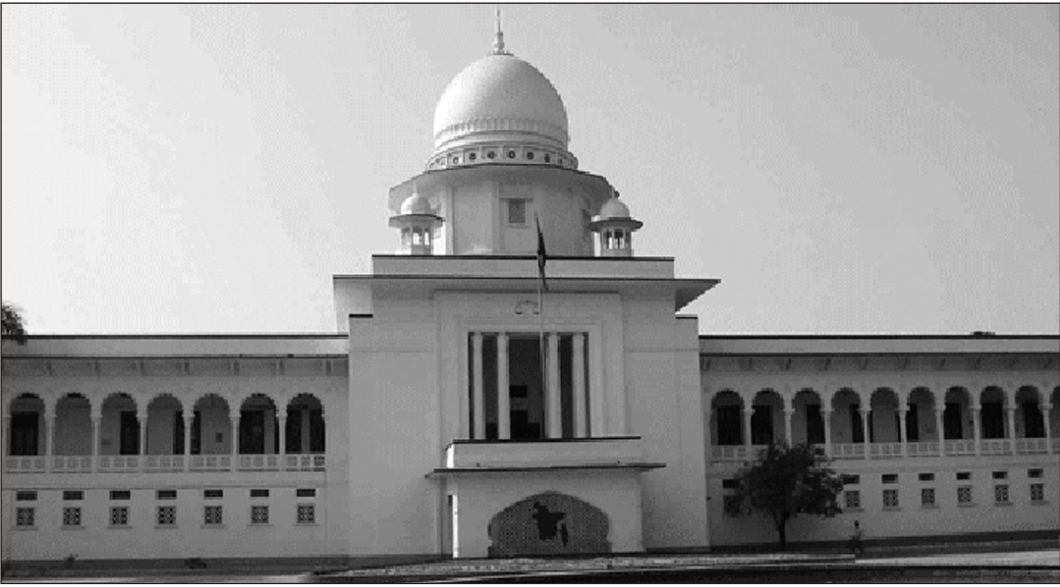
Why did the trial court do the trials then? Well, all these laws are still valid laws as they have not yet been declared by the apex court illegal or unconstitutional and the trial court judges cannot ignore the

laws made by the government of the day. When a criminal case is brought before the trial court after investigation and charge-sheet, it is incumbent upon the trial court to start trial as per law and there is little scope to see whether all procedure in the investigation and filing the case was followed.

This is mainly because the judges in our country have to follow adversarial system as opposed to inquisitorial system followed in civil legal system. Under adversarial or common law system judges are to play an impartial role and have little jurisdiction to interfere with the process of investigation by the state.

The ground works for a successful conviction under a criminal law mainly depend upon the police and investigation authorities and if they either accidentally or intentionally or being persuaded by any party manipulate or violate rules with regard to investigation or prosecution, it is obvious that in the long run the conviction might not be upheld in the apex court.

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stayed and/or rule be issued. 'Stay' means suspension of operation of the proceeding/order/action/judgment/sentence challenged in the petition till a specified period or till hearing as specified by the court.

On the other hand, 'issuing rule' means asking the respondents to show cause or explain the reasons why their proceeding/order/action/judgment/sentence will not be declared illegal. If the petitioner's lawyer can substantiate a prima facie case in his favour that there was violation of law in the government order, or

answer the rule by way of affidavit; they may also appear in the court to vacate the stay order if there are convincing reasons for that. After answers are given, the matter will be heard on merit by the apex court, although it usually takes 3/4 years as there are huge backlog of pending cases in the apex court.

Ordinary people's perception and reality

From ordinary people's point of view, it is sometimes awkward in many cases to see that verdict in favour of the prosecution is

signifies that "law is blind". Why?

There are two fundamental principles behind it: First, law is blind in the sense that the court and the judges cannot go beyond the evidences produced in the court to prove or disprove the matter in question. Once evidences are produced, be it either by way of testimony of witnesses or material evidences during the trial process, the judge has to come up with the verdict strictly in accordance with the value and warrants of those evidences; and the superior courts are also bound by those evidence and they have to

LAW FOR everyday life

Issues relating to family maintenance

Children in easy circumstances are bound to maintain their poor parents, although the latter maybe able to earn something for themselves. A son though in straitened circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm. A son, who is poor and is earning something, is bound to support his poor father who earns nothing.

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'MAINTENANCE' includes food, clothing and lodging. But this definition of maintenance is not exhaustive. In relation to a minor, the word includes other necessary expenses for mental and physical well-being of a minor, according to his/her status in society. For example minor's educational expenses etc.

Wife's right

Wife gets precedence over all other relations when it comes to the right of maintenance. The wife is entitled to maintenance from her husband although she may have the means to maintain herself. This applies even if the husband is without means.

The husband's duty to maintain commences when the wife attains puberty and not before. We should also know when this right terminates. The right ceases right on the death of her husband. But if the marriage is broken by way of divorce the wife remains entitled to maintenance up to iddat period, which extends to three months. With the expiry of iddat period this right comes to an end.

That means during the whole period of marriage and iddat the husband is bound to maintain his wife. But the condition is she is obedient and allows him free access at all lawful times. So if the wife deserts her husband or disobeys

his reasonable instructions, she loses her right to maintenance.

It is also held in a judgment that where a wife refuses to live with the husband

in the marriage contract which may render the husband liable to make a special allowance to the wife. For exam-

and perform marital obligations without valid reason, husband is not bound to maintain her.

In addition to the legal obligation to maintain there may be stipulations in the marriage contract which may render the husband liable to make a special allowance to the wife. For exam-

ple, a husband may have a lawful agreement with the first wife that, on his marrying second wife, the first wife may reside with her parents and obtain a regular allowance.

Similarly, an agreement with a second wife to allow her to reside in her parents' house and to pay her maintenance is good in law.

Right to sue

If a husband refuses to pay maintenance, the wife is entitled to sue for its realization under the Family Courts Ordinance 1985. In fixing the sum of maintenance, the court should consider the rank and the circumstances of both the spouses.

Failure to maintain

Under the Dissolution of Muslim Marriages Act, 1939, section 2 (ii), a wife is entitled to dissolution if the husband has failed or neglected to provide maintenance for a period of two years.

Children and descendants' right

A father is bound to maintain his sons until they attain puberty and his daughters until they are married. But a father is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The father is not bound to provide separate maintenance for a minor son who refuses to live with him without reasonable cause.

Similarly the father is not bound to provide separate maintenance for an unmarried daughter, unless the circumstances are such as to justify her staying away. But the fact that the children are in the custody of their mother during their infancy does not relieve the father from the obligation of maintaining them while marriage is dissolved or the spouses are living separately.

Illegitimate child's right

In orthodox Muslim law a father is not bound to maintain an illegitimate child but the mother is obligated to support her natural son or daughter. A change is introduced in this respect by way of statutory law. Under the suppression of torture against Women and Children Act a person who fathers an illegitimate child is under legal obligation to maintain that child.

Maintenance of parents

Children in easy circumstances are bound to maintain their poor parents, although the latter maybe able to earn something for themselves. A son though in straitened circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm. A son, who is poor and is earning something, is bound to support his poor father who earns nothing.

Maintenance of grandparents

A person is bound to maintain his paternal and maternal grandfathers and grandmothers if they are poor.

Maintenance of other relations

Persons who are not themselves poor, are bound to maintain their poor relations within the prohibited degrees in proportion to the share which they would inherit from them on their death.

It must be borne in mind that a man is bound to maintain his wife and children, no matter he is poor or not. But distant relatives are only to be maintained if they are poor and he himself is in easy circumstances.

The writer is advocate, member of Dhaka Bar Association.



GOOD NEWS



Investigations of sexual slavery in Paraguay make progress

INVESTIGATIONS into girls subjected to sexual slavery in Paraguay during the Stroessner dictatorship have taken a major step forward thanks to one woman's testimony.

This in turn has encouraged other women to come forward and testify about their experiences of sexual slavery, giving greater weight to the Truth and Justice Commission's investigation.

Julia Ozorio Gamecho was the first woman to come forward and talk to the Commission about how she was subjected to sexual slavery by the military during the dictatorship.

The Commission is investigating thousands of human rights violations which happened while Stroessner was in office, from 1954 to 1989.

These violations include sexual violence against women. Girls as young as seven are believed to have been snatched from their homes and "groomed" to serve high ranking military officials.

Ozorio's testimony helped the Commission to confirm details about a location where girls were taken after they had been snatched from their families. There they were forcibly prepared for their sexual enslavement to high ranking members of the military.

Yudith Rolón of the Commission said: "We value and admire her courage in telling us what happened to her, events which have left her with irreparable trauma, from both the physical and psychological torture she suffered".

"She corroborated events that the Truth and Justice Commission had already been investigating. We had heard of many cases but no-one had wanted to give testimony, as she has done".

These testimonies had previously been almost impossible to collect due to fear of reprisals. Some of the officials to whom the women were enslaved are believed to still be linked to the military.

A former military official who helped Ozorio to survive while detained, also came forward to present his account of the case to the Truth and Justice Commission on Tuesday 12 August.

Ozorio's case will be included in the Commission's final report which will be presented to the government and civil society on 28 August. Her testimony will be one of over 2,000 detailing human rights violations committed during the Stroessner dictatorship.

The report will also cover the period from Paraguay's transition to democracy, to the enactment of the law that created the Commission on 6 October 2003.

Ozorio was 13 when she was snatched from her home in the town of



Nueva Italia in Paraguay's central department.

She was taken by a colonel (vice-commander of the Presidential Escort Regiment) and two other soldiers. For the next two years she was held in captivity and subjected to sexual slavery by the colonel.

According to Ozorio, girls who cried a lot or who were no longer of use for example when they reached 15 or 16 years of age and were no longer considered desirable - were sometimes killed.

Ozorio was freed by her captor because she had reached the age of 15 and he was no longer interested in her. Ozorio said her life was spared because she reminded her captor of his dead daughter. She went to Argentina to seek safety and has lived in Buenos Aires ever since.

Thirty-seven years later she returned to Paraguay to present her book, A Rose and a Thousand Soldiers (Una rosa y mil soldados), her story of what happened to her during the two years she was subjected to sexual slavery.

In the book, Ozorio writes about the night she was abducted: "He said these words to me: 'many girls have passed through here. Some left alive, others weren't so lucky'...he looked at me for a long time and said: 'you are a very pretty girl - please don't make me kill you'..."

"The first night was horrible. No human words exist that can express the pain of that night...my body was covered with bruises and bite marks. A deep wound bled from my breast."

After her testimony to the Commission, Ozorio reported receiving two anonymous threatening telephone calls. The Commission has offered her protection as a result of these threats.

As well as telling her painful story and raising awareness of what she and many other young girls experienced, Ozorio now also hopes to set up a foundation to protect girls who have been victims of sexual violence.

General Stroessner came to power by overthrowing civilian president Dr Federico Chávez in 1954.

During his rule, thousands were victims of grave human rights abuses including arbitrary detentions, torture, "disappearances" and forced exile.

Some of these abuses were committed as part of Operation Condor, a plan coordinated by the military governments of the Southern Cone - Argentina, Bolivia, Brazil, Chile, Uruguay and Paraguay - to eliminate their "opponents" during the 1970s and 1980s.

Stroessner died on 16 August 2006 in Brasilia, where he had been living in exile since 1989. He was 93.

Source: Amnesty International.