

A critical analysis on bypassing the direction of Supreme Court and human rights on remand by police and lower courts in Bangladesh

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Abstract: This article speculates and explores current laws and practices regarding remand and detention in Bangladesh. It tries to understand the history of passing the directions of High Court Division relating remand and its consequences. Then this paper presents some relevant judicial sentence in Bangladesh. Finally, it draws some recommendations to enforce the direction and law for the police and lower courts in Bangladesh so that right to life and fundamental freedoms of all persons can be secured in the situation of remand as per the Constitution of Bangladesh.

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I. INTRODUCTION

If we want to save our human rights, legal rights then the name of judiciary will come first. Even in the matter of protection of law, the duty of savior will go to judiciary. In protecting human rights and uphold the law, the function of judiciary is to supervise the different factor of government which works against the spirit of constitution and violate the human rights provision. The word 'remand' and it's nature really a concern to the society because in remand there violates just not only civil rights but also human rights. But the judiciary can pick up and save human rights and other rights in several ways:

- i) By practicing the spirit of constitutional supremacy which is encouraged in the Constitution of Bangladesh.
- ii) By enforcing fundamental rights through the judicial review of Bangladesh Constitution.
- iii) By saving the people who are being deprived by the statutorily procedural laws in criminal justice system of Bangladesh.
- iv) By applying different international conventions, which are strictly related with human rights and also discuss the joint enforcement of national laws.
- v) By approving the PIL (Public Interest Litigation) for the betterment of poor people, though higher court in Bangladesh has already approved the PIL in limited cases.

II. DEFINITION OF REMAND

The word 'remand' has not directly used in the code of criminal procedure of Bangladesh. Generally remand means send back. According to sections 60 and 61 of the code of criminal procedure a police is empowered to detain the accused only for 24 hours and if there is reasonable reason to detain him in custody then within 24hours the police needs to send the detainee to the nearest judicial magistrate. And if the investigation cannot be completed within 24 hours then police can apply for further investigation with detention.

*In the legal sense the remand is treated as an adjournment of a case. However, the criminal justice system knows the remand as having a particular meaning. When a case is adjourned, the court may have the power or duty to remand the accused in the police custody or in jail, rather than simply adjourn the case to another day. It would be accurate to say that while all remands are adjournment, not all adjournments are remands.*²

III. CASE ANALYSIS FOR DELIVERING THE DIRECTION ON REMAND BY SUPREME COURT

Despite the legal and constitutional provisions against arbitrary arrest and detention, the practice of arbitrary arrest, detention and torture is rampant in Bangladesh. Fortunately, the higher judiciary in Bangladesh has taken a proactive stand in prevention of arbitrary arrest and detention and protection of people from torture. The most important judicial decision in this regard in recent years is **BLAST vs. Bangladesh**.³

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² Md. Abdul Halim, Text Book on Code of Criminal Procedure (5th edition, Dhaka, 2011,p-73)

³ 55 DLR (HCD) (2003) 363

In BLAST(Bangladesh legal Aid and Services Trust) vs. Bangladesh, Shamim Reza Rubel, a university student was picked up by the Detective Branch (DB) of the police on 23 July 1998 from in front of his house on Siddeswari Road in Dhaka at 4.30 p.m. and he was severely beaten. Shamim was pronounced dead at the emergency section of DMCH by doctors at 9-45 p. m. on the same day. He was brought by a group of plain clothes men who identified themselves as members of the DB. A hospital official said the dead body was not registered. The witnesses also said police were asking Shamim to say that he had illegal arms in his possession. The killing of Shamim by the DB of the police caused a public outcry and got huge media coverage. As a result of wide publicity of the death of Shamim, there was an investigation. There was a post-mortem and after investigation, charges were brought against the accused persons under section 302 of the Penal Code. It was found that AC Akram, an officer of the Detective Branch, in association with some other officers, brutally tortured the victim, which caused his death. After the trial, the accused was convicted and sentenced to imprisonment for life. The High Court Division also provided interpretation of several provisions of the Cr. P. C. relating to arrest and detention and issued some guidelines. The court held that the word 'concerned' is a vague word, which gives unhindered power to a police officer to arrest any person. The Court observed that in order to safeguard the life and liberty and to limit the power of the police, the word 'concerned' is to be substituted by any other appropriate word. The Court developed a list of guidelines on the use of arrest and detention that are discussed later.

In ASK (Ain O Salish Kendra) vs. Bangladesh and others⁴, the unlawful detention of the prisoners languishing in Dhaka Central Jail, despite having served out their terms of conviction, was challenged. According to law, after pronouncing conviction, the court will send the conviction warrant to the jail authority. But due to negligence of court staff and jail authorities, the said conviction warrants did not reach the jail and many prisoners could not be released from jail, even after serving out their terms of conviction. The Court issued a rule nisi upon the respondents on April 16, 2005 to show cause as to why the continued detention of the persons in Dhaka Central Jail, in violation of their fundamental rights as guaranteed under Articles 31, 32, 35(1) and 36 of the Constitution, and in spite of serving out the terms of their respective sentences, should not be declared to be without lawful authority and why an independent commission should not be appointed to conduct an inquiry into the matter. The Court also directed the respondents to submit a list of such prisoners. The Jail authority submitted the report and the case is still pending for final hearing. There are numerous reports of cases of extra-judicial killings allegedly committed by law enforcement agencies. Persistent abuse of power and authority by the law enforcing agencies resulting in extra-judicial killing of the citizens, in the name of cross-fire/encounter, constitutes a gross violation of fundamental rights guaranteed by the constitution of the People's Republic of Bangladesh.

In the case of **ASK, BLAST and Karmojibi Nari Vs. Bangladesh** and others, the court issued a Rule Nisi returnable within four weeks on 29.06.2009 calling upon the respondents to show cause as to why the extra-judicial killing, in the name of cross-fire/encounter by the law enforcing agencies, should not be declared to be illegal and without lawful authority and why the respondents should not be directed to take departmental and criminal action against persons responsible for such killing. Abuse and custodial torture and killing by the special forces like the RAB also remains virtually unchallenged, precisely because victims or relatives of victims are intimidated, or because of the reluctance of the police to accept a case against members of such special forces.⁵

IV. EXISTING LAWS RELATED REMAND IN BANGLADESH

Section 54 and 167 of Code of Criminal Procedure, 1898 gives an ample opportunity to police arrest any person without any warrant on the base of suspicion but the phrase of reasonable suspicion has not defined clearly. If any police wants then he can easily misuse the power. In Bangladesh, custodial confessions are outlawed unless made to a magistrate, so before sending to the magistrate police can try to take a confession which is a tool to make accused to confess voluntarily before magistrate.⁶

Section 54. of CRPC has stated (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest- *firstly*, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;

⁴ 57 DLR (HCD)

⁵ See, Mehedi Murder- 'Case against RAB in Barisal refused', The Daily Star, November 07, 2004 available at: www.thedailystar.net/2004/11/07/d41107012319.htm, 'Khilgaon Police refuse to take against RAB: Sumon's family', UNB, 4th June, 2005.

⁶ Lutz Oette, 'Torture in Bangladesh 1971-2004, Making International Commitments A Reality and Providing Justice and Reparations to Victims, August 2004', A Study prepared for Redress.

secondly , any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking;

thirdly , any person who has been proclaimed as an offender either under this Code or by order of the Government;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

sixthly, any person reasonably suspected of being a deserter from the armed forces of Bangladesh

seventhly , any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;

eighthly , any released convict committing a breach of any rule made under section 565, sub-section (3);

ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.⁷

Section 167 of CRPC has expressly stated the procedure when investigation cannot be completed within 24hours.

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Judicial Magistrate] a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or send it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Government shall authorize detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, he shall forward a copy of his order, with his reasons for making it to the Chief Metropolitan Magistrate or to the Chief Judicial Magistrate to whom he is subordinate.

(4A) If such order is given by a Chief Metropolitan Magistrate or a Chief Judicial Magistrate, he shall forward a copy of his order, with reasons for making it to the Chief Metropolitan Sessions Judge or to the Sessions Judge to whom he is subordinate.

(5) If the investigation is not concluded within one hundred and twenty days from the date of receipt of the

⁷ See, Section 54, the Code of Criminal Procedure (Act No. V of 1898)

information relating to the commission of the offence or the order of the Magistrate for such investigation-

- (a) the Magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence to which the investigation relates is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Magistrate; and
- (b) the Court of Session may, if the offence to which the investigation relates is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Court:

Provided that if an accused is not released on bail under this sub-section, the Magistrate or, as the case may be, the Court of Session shall record the reasons for it:

Provided further that in cases in which sanction of appropriate authority is required to be obtained under the provisions of the relevant law for prosecution of the accused, the time taken for obtaining such sanction shall be excluded from the period specified in this sub-section.

Explanation-The time taken for obtaining sanction shall commence from the day the case, with all necessary documents, is submitted for consideration of the appropriate authority and be deemed to end on the day of the receipt of the sanction order of the authority.⁸

Section 27 of the Evidence Act also helps to extract the confession because it states the idea of recovery of incriminating information. This provision motivates law enforcement officers to collect evidence, information, and confession through torture. There is a widespread rumor is that the confessions which are extracted during remand are not voluntary.⁹

Section 2(f) of Special Power Act, 1974 also gives the power to arrest any person on doing pre-judicial act. “prejudicial act” means any act which is intended or likely-

- (i) to prejudice the sovereignty or defence of Bangladesh;
- (ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign states;
- (iii) to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;
- (iv) to create or excite feelings of enmity or hatred between different communities, classes or sections of people;
- (v) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;
- (vi) to prejudice the maintenance of supplies and services essential to the community;
- (vii) to cause fear or alarm to the public or to any section of the public;
- (viii) to prejudice the economic or financial interests of the State;
- (h) “prescribed” means prescribed by rules made under this Act.¹⁰

V. EXAMPLES OF VIOLATING THE PROVISION RELATED HUMAN RIGHTS

Bangladesh has ratified or acceded to a number of international human rights instruments that prohibit arbitrary arrest, detention and torture. Bangladesh acceded to the International Covenant on Civil and Political Rights (ICCPR, 1966) in 2000.

According to Article 7 of ICCPR, No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

According to Article 9 of ICCPR

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

⁸ See, Section 167, the Code of Criminal Procedure (Act No. V of 1898)

⁹ See, Section 27, the Evidence Act (Act No. I of 1872)

¹⁰ See, Section 2(f), the Special Power Act (Act No. XIV of 1974)

It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

According to Article 14 of ICCPR

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The Prohibition of torture and ill-treatment is one of the core norms of international human rights law. Torture is prohibited in the Universal Declaration of Human Rights, (UDHR) 1948, the Convention against Torture, (CAT) 1984, and the International Covenant on Civil and Political Rights, (ICCPR) 1966. Moreover, the Geneva Convention, 1949, on humanitarian law, contains a common Article 3 which prohibits torture and other degrading treatment during an armed conflict “not of an international character.” Bangladesh ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, in 1996.

Article 1 of the Convention defines torture as:

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person

information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person,

or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

Article 2 of the Convention against Torture contains the fundamental state obligation in the following way:
“1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.”

Article 4 of the Convention against torture states:

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 13 of the Convention against torture states:

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14 of the Convention against torture states:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Although Bangladesh ratified the Convention against torture, it has failed to adopt the legislation necessary to implement the same.

VI. CONSEQUENCES OF NOT FOLLOWING THE CONCERN LAWS AND RULES

If the concern laws, rules, conventions related remand are not properly followed in Bangladesh then the following situation might happen in a regular basis-

- i) Anyone can be disappeared in any time by the law executing authorities
- ii) No one will be bound to give the answer accordingly
- iii) There will be a tradition to disobey the laws in society
- iv) People will take laws in their hand by thinking lack of laws
- v) Financially capable people will try to leave the country to avoid harassment by the law protecting authorities.

VII. RECOMMENDATION

- a) Definition of remand should be defined in the Code of Criminal Procedure, 1898.
- b) When the definition of remand will be clear then the proper procedure in remand also need to be inserted.
- c) Directions from Supreme Court in *BLAST vs. Bangladesh* and *Saifuzzaman vs. State* cases should be implemented as soon as possible in order to transparency.
- d) Various obligations from the different convention regarding remand and torture need to be implemented and for this an active cell need to be introduced in Bangladesh.
- e) All provisions on impunities of law enforcement agencies and securities agencies for committing torture should be abolished by the parliament.
- f) Take urgent steps to ensure access to detainees, especially during periods of custodial interrogation. Relatives, doctors and lawyers should have access to detainees without delay and regularly thereafter.
- g) Witnesses including family members and human rights defenders should be protected against possible reprisal by the perpetrators of torture or other human rights violations.

h) Interrogation should take place only at official centers and any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court against the detainee;

i) The detainee should have the right to have a lawyer present during any interrogation;

j) The police officer responsible for arbitrary arrest, detention, and torture should be accountable to the law for his/her criminal wrongdoing in 'like manner' as the citizen.

k) Up to date methods of investigation should be introduced and more forensic facilities should be put in place to detect crime and gather evidence of crime.

l) Right training should be given to the police about modern scientific methods of investigation.

VIII. CONCLUSION

Unlawful torture in remand still exists in Bangladesh. To avoid this kind of tradition we have no other option other than follow the direction of the Supreme Court on remand. And the lower courts in Bangladesh need to follow the rules from High Court Division and give initiative order to police to follow the rules. If the authority duly insert the word 'remand' in statute and make the provision which need to be followed in remand time then if anyone violate that provision can be questioned according to law. And not only the following of statutory laws but also the following of International conventions like Human Rights need to binding for concern authority is necessary.

REFERENCES

- [1]. Code of Criminal Procedure, 1898
- [2]. Evidence Act, 1872
- [3]. Special Power Act, 1974
- [4]. International Covenant on Civil and Political Rights, 1976
- [5]. United Nations Convention against torture, 1987

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