Stereo HCJDA-38

Judgment Sheet

IN THE LAHORE HIGH COURT,

BAHAWALPUR BENCH, BAHAWALPUR

JUDICIAL DEPARTMENT

Criminal Appeal No. 395 of 2021

(Muhammad Saleem versus The State and another)

JUDGMENT

Date of hearing: -	25-10-2023
Appellant by: -	M/s Tariq Mehmood Khan and Syed Zeeshan Haider, Advocate.
State by: -	Mr. Javed Iqbal Bahaya, ADPP.
Complainant by: -	M/s Mian M. Haroon Shakil and Muhammad Gulzar Khaliq, Advocates.

Muhammad Tariq Nadeem. J:- Muhammad Saleem (appellant) was tried in case FIR No.251/2018 dated 15.08.2018 in respect of an offence under section 376 PPC, registered at Police Station Shedani Sharif, District Rahim Yar Khan After the conclusion of trial, learned trial court, *vide* judgment dated 11.09.2021, convicted and sentenced the appellant as infra: -

> ***Under section 376(1) PPC****: 14-years rigorous imprisonment with fine of Rs.1,00,000/- and in default thereof to further undergo simple imprisonment for six months.*
>
> *Benefit of section 382-B, Cr.P.C. was, however, extended to him.*

Feeling aggrieved, the appellant has filed the titled appeal against his conviction and sentence.

2. Tersely, the facts of the case as narrated in FIR (Exh.PC) got registered by Mst. Ishrat Bibi complainant are that she was resident of Khanbela and married with Allah Bakhsh eleven years ago. Out of that wedlock, two daughters were born who are alive but due to strained relations, Allah Bakhsh divorced the complainant about four years ago, thereafter, she came to the house of her parents. Muhammad Saleem appellant had visiting terms with the family of complainant. Five months

ago, he (appellant) said to the complainant that he would marry her and at the promise of marriage, he used to commit rape with her. When the complainant told him that it is a sin, he extended threats that if she would not fulfill his desire, he would not marry her. Due to this reason, the complainant was compelled to join the appellant, who used to commit rape with her. As a result of rape, she conceived pregnancy and when she told this fact to the appellant, he asked her for abortion with the plea that her pregnancy was not the outcome of his cohabitation with her. The complainant narrated the whole occurrence to PWs namely Saeed Ahmad son of Ghulam Nabi caste Jundela resident of Shedani Sharif and Malik Manzoor Ahmad son of Ghulam Fareed caste Machhi resident of Bait Dewan, before whom the appellant also confessed his guilt. The appellant did not contract *Nikah* with the complainant and due to rape with her, she conceived pregnancy. Hence, this case.

3. After completion of investigation, the result of investigation was encapsulated in report under Section 173, Code of Criminal Procedure, 1898, which was submitted before the learned trial court. The appellant was summoned by the learned Additional Sessions Judge, Liaquatpur, to face the trial. Copies of relevant documents were provided to him as required under Section 265-C, Code of Criminal Procedure, 1898 and formal charge was framed against him on 09.10.2018, to which he pleaded not guilty and claimed trial.

Thereafter the complainant filed an application before the learned trial for DNA test regarding blood grouping of appellant with blood grouping of minors Duaa Fatima aged about one and a half years and Aqsa Bibi aged about two months with the contention that the appellant under the pretext of contracting marriage with the complainant had been committing *zina* with her, which resulted into the birth of above said minors. The learned trial court dismissed the application *vide* order dated 20.04.2019. The complainant assailed the above mentioned order through Criminal Revision No.81 of 2019 in this Court which was partly allowed vide order dated

26.01.2021 with the concurrence of learned counsel for the parties to the extent of conducting “DNA test of Aqsa Bibi minor”. In the light of above mentioned order, DNA test was conducted and according to the report of PFSA (Exh.PH), it was opined by analyst that Muhammad Saleem (appellant) could not be excluded as being the biological father of Aqsa Bibi.

In order to prove its case, the prosecution produced as many as nine witnesses during the trial. Ocular account has been furnished by Mst. Ishrat Bibi complainant/victim (PW4), whereas Saeed Ahmad (PW5), who only got recorded his examination-in-chief and cross-examination was reserved, was given up by the prosecution being won over by the appellant, therefore, only the solitary statement of Mst. Ishrat Bibi complainant/victim (PW4) remained in the field.

Faisal Abbas, ASI (PW3), being investigating officer, stated about various steps taken by him during the investigation of this case.

Medical evidence was furnished by Lady Doctor Mehnaz Abbasi (PW8), who conducted medical examination of Mst.Ishrat Bibi complainant/ victim (PW4).

Rest of the prosecution witnesses, more or less, are formal in nature. After completion of prosecution evidence, statement of the appellant under Section 342, Code of Criminal Procedure, 1898 was recorded, wherein he refuted the allegation levelled against him and professed his innocence. The appellant opted not to appear as his own witness in disproof of the allegation as provided under Section 340(2), Code of Criminal Procedure, 1898, however, he opted to produce certain documents in his defence evidence. Upon conclusion of trial, the appellant was convicted and sentenced by the learned trial court as mentioned and detailed above. Hence, this appeal.

4. Learned counsel for the appellant, in support of this appeal, contends that from bare reading of crime report (Exh.PC) and statement of Mst.Ishrat Bibi complainant/victim (PW4), it is crystal clear that the offence under

section 376 PPC is not made out and at the most, offence under section 496-B, PPC could be attracted according to the facts and circumstances of the case; that no complaint in terms of section 203-C, Cr.P.C. has been filed about the offence of fornication; that although medical evidence has fully proved the case of prosecution and it is also proved through the report of PFSA (Exh.PH) that the appellant cannot be excluded as being the biological father of Aqsa Bibi but the prosecution has miserably failed to prove the factum of rape with Mst. Ishrat Bibi complainant/victim (PW4) without her consent; lastly submitted that this appeal may be accepted and the appellant may be acquitted of the charge.

5. On the other hand, learned counsel for the complainant has vociferously argued that the offence for which the appellant has been convicted and sentenced is an offence against society; that the prosecution has proved its case up to the hilt through cogent and confidence inspiring evidence of Mst. Ishrat Bibi complainant/victim (PW4), which is duly supported by medical evidence and PFSA report; that there is no material contradiction in the prosecution evidence; that the report of PFSA (Exh.PH), alone, is sufficient to hold that the appellant has committed rape with the complainant; that the learned trial court while already taking a lenient view has sentenced the appellant only for fourteen years R.I.; that this appeal has no force, therefore, the same may be dismissed.

6. Learned Law Officer has frankly conceded that from the evidence on the file, the offence under section 376 PPC is not made out, however, it is a case of fornication as a result of which a girl has born, so her rights be protected appropriately.

7. I have heard the learned counsel for the appellant as well as learned counsel for the complainant and learned ADPP meticulously and perused the record minutely with their able assistance.

8. In order to prove its case, besides Mst. Ishrat Bibi complainant/victim (PW4), the prosecution produced Saeed Ahmad (PW5), however, he got recorded his examination-in-chief on 03.10.2020 and was not produced for

cross-examination rather he was given up by the prosecution on 08.05.2021 being won over by the appellant. In this way, only the solitary statement of Mst. Ishrat Bibi complainant/victim (PW4) remained in field.

I have observed that Mst. Ishrat Bibi complainant/victim (PW4) has narrated almost similar story as she had described in her written application (Exh.PB), on the basis of which formal FIR (Exh.PC) was chalked out. Although medical evidence duly confirms the fact that Muhammad Saleem appellant cannot be excluded as being the biological father of Aqsa Bibi (offspring of rape) but it is to be seen that from the contents of FIR and the evidence recorded by Mst. Ishrat Bibi complainant/victim (PW4) before the learned trial court, whether offence under section 376 PPC is made out or it is a case of fornication?

To better resolve this controversy, I deem it appropriate to have a glance over the relevant provisions of law. This case pertains to year 2018, for the reason, the definition of rape given in section 375, PPC before substitution (*vide* Act XLVI 2021) reads as under: -

> ***375. Rape.*** *A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,*
> *(i) against her will;*
> *(ii) without her consent;*
> *(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;*
> *(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or*
> *(v) with or without her consent when she is under sixteen years of age.*
>
> *Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.*

The term ‘consent’ has been defined in section 90 of Pakistan Penal Code which is hereby described as under: -

> ***90. Consent known to be given under fear or misconception,*** *Consent is not such a consent as is intended by any action of this Code, if the consent is given by a person under fear of*

> *injury or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception: or*
>
> ***Consent of insane person.*** *—If the consent is given by a person Who from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or*
>
> ***Consent of child.*** *Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.*

Consent by a victim in a rape case was discussed by the Supreme Court of India in case titled as *"Uday v. State of Karnataka"* **(AIR 2003 Supreme Court 1639)** as infra:-

> *"it therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.*
>
> *……*
>
> *Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting*

to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.

There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without

> *significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."*

Likewise the Supreme Court of India, in its recent pronouncement on 30.01.2023, while dealing with the point of consent in almost an identical case titled as ***Naim Ahmad vs. State (Nct of Delhi)*** wherein a married woman was allegedly raped by the accused with the assurance that he would solemnize marriage with her, has held as under: -

> *"21. In the instant case, the prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise given by the appellant or under the misconception of fact while giving the consent to have sexual relationship with the appellant. Undisputedly, she continued to have such relationship with him at least for about five years till she gave complaint in the year 2015. Even if the allegations made by her in her deposition before the court, are taken on their face value, then also to construe such allegations as 'rape' by the appellant, would be stretching the case too far The prosecutrix being a married woman and the mother of three children was matured and intelligent enough to understand the significance and the consequences of the moral or immoral quality of act she was consenting to. Even otherwise, if her entire conduct during the course of such relationship with the accused, is closely seen, it appears that she had betrayed her husband and three children by having relationship with the accused, for whom she had developed liking for him. She had gone to stay with him during the*

> *subsistence of her marriage with her husband, to live a better life with the accused. Till the time she was impregnated by the accused in the year 2011, and she gave birth to a male child through the loin of the accused, she did not have any complaint against the accused of he having given false promise to marry her or having cheated her. She also visited the native place of the accused in the year 2012 and came to know that he was a married man having children also, still she continued to live with the accused at another premises without any grievance. She even obtained divorce from her husband by mutual consent in 2014, leaving her three children with her husband. It was only in the year 2015 when some disputes must have taken place between them, that she filed the present complaint. The accused in his further statement recorded under Section 313 of Cr.P.C. had stated that she had filed the complaint as he refused to fulfill her demand to pay her huge amount. Thus, having regard to the facts and circumstances of the case, it could not be said by any stretch of imagination that the prosecutrix had given her consent for the sexual relationship with the appellant under the misconception of fact, so as to hold the appellant guilty of having committed rape within the meaning of Section 375 of IPC.*
>
> *22. In that view of the matter, the accused deserves to be acquitted from the charges levelled against him. Of course, the direction for payment of compensation given by the courts below shall remain unchanged as the appellant had accepted the responsibility of the child, and has also paid the amount of compensation to the prosecutrix.*

9. Coming to the case in hand, I have observed that Mst. Ishrat Bibi complainant/victim (PW4) was previously married with one Allah Bakhsh and two daughters were born out of that wedlock, but about four years prior to the registration of FIR, she was divorced by Allah Bakhsh due to their strained relations and thereafter she came to her parental house. Muhammad Saleem appellant had visiting terms with her family and he had been committing rape with her at the promise of marriage. It may not be out of place to mention here that the complainant was not a minor girl; she had sufficient maturity and well aware of the consequences of sexual intercourse by the appellant with her. Even otherwise, her character is dubious because she herself admitted in her cross-examination as under:-

> *"It is correct that in the year 2015 I had filed a petition under section 22-A & B, Cr.P.C. against Muhammad Aamir son of*

> *Muhammad Majid which has been dismissed. It is correct that I had levelled same allegation against said Muhammad Aamir as has been levelled against present accused Muhammad Saleem".*

10. The moot-point in this case is that whether the appellant committed rape with the complainant without her consent and if she offered herself for sexual intercourse on the false promise of marriage, then the offence under section 376 PPC will be applicable in this case or not? It is noteworthy that neither in the crime report (Exh.PC) nor in the statement of complainant (PW4), it has been mentioned that any force was used by the appellant for the said act. More so, prosecution evidence is also silent on the point that the complainant had allowed the appellant for commission of rape due to putting her in fear of death or hurt. Similarly, there is no evidence that the appellant committed rape with Mst. Ishrat Bibi complainant/victim (PW4) while showing himself as her husband. After scanning the entire prosecution evidence, I am quite confident to hold that it is not a case of rape in terms of section 375, PPC punishable under section 376, PPC rather it is abundantly clear that it is a case of 'fornication'.

11. Offence of fornication has been described in section 496-B, PPC which reads as under:-

> ***496B. Fornication.***__*(1) A man, and woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.*

Furthermore, meaning of 'fornication' has been given in Black's Law Dictionary, 11th Edition, as infra:-

> ***Fornication*** **1.** *Voluntary sexual intercourse between two unmarried persons,* **2**. Voluntary sexual intercourse with an unmarried woman. At common law, the status of the woman determined whether the offence was adultery or fornication--- adultery was sexual intercourse between a man, single or married, and a married woman not his wife, fornication was sexual intercourse between a man, single or married, and a single woman.

Similarly, fornication has also been defined in Webster's New World Law Dictionary by Susan Ellis Wild, Legal Editor, as under:-

> ***Fornication.*** *Consensual sex between two individuals not married to one another.*

12. It is noteworthy that no FIR can be registered under the offence of fornication as envisaged under section 203(c), Cr.P.C. which is mentioned below:

> ***[203-C. Complaint in case of fornication.---*** *(1) No Court shall take cognizance of an offence under section 496-B of the Pakistan Penal Code, except on a complaint lodged in a Court of competent jurisdiction.*
> *(2) The Presiding Officer of a Court taking cognizance of an offence shall at once examine oath the complainant and at least two eye-witnesses to the act of fornication.*
> *(3) The substance of the examination of the complainant and the witnesses shall be reduced to writing and shall be signed by the complainant, and the witnesses, as the case may be, and also by the Presiding Officer of the Court.*
> *(4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding the Court shall issue summons for the personal attendance of the accused.*
> *Provided that the Presiding Officer of a Court shall not require the accused to furnish any security except a personal bond, without sureties, to ensure attendance before the Court in further proceedings.*
> *(5) The Presiding Officer of a Court before whom a complaint is made or to whom it has been transferred may dismiss the complaint, if, after considering the statements on oath of the complainant and the witnesses there is, in his judgment, no sufficient ground for proceeding and in such case he shall record his reasons for so doing.*
> *(6) Notwithstanding the foregoing provisions or anything contained in any other law for the time being in force no complaint under this section shall be entertained against any person who is accused of Zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979) and against whom a complaint under section 203-A of this Code is pending or has been dismissed or who has been acquitted or against any person who is a complainant or a victim in a case of rape, under any circumstances.*

Similarly, the term complaint has been defined in section 4(h), Cr.P.C. which is reproduced hereunder: -

> ***4(h) "Complaint".*** *"Complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the reports of a police-officer."*

Even otherwise, it is a well settled principle of law that complaint and police report have distinctive features. Report of police has been described in Section 173, Cr.P.C. which is also reproduced for ready reference:-

> ***173. Report of police officer.***
>
> *(1) Every investigation under this Chapter shall be completed without unnecessary delay, and as soon as it is completed, the officer in charge of the police station shall, through the Public Prosecutor,]*
>
> *(a) forward to a Magistrate empowered to take cognizance of the offence on a police report a report, in the form prescribed by the 3[Provincial Government], setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and*
>
> *(b) communicate, in such manner as may be prescribed by the 3[Provincial Government], the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given [:]*
>
> *Provided that, where investigation is not completed within a period of fourteen days from the date of recording of the first information report under section 154, the officer in charge of the police station shall, within three days of the expiration of such period, forward to the Magistrate through the Public Prosecutor, an interim report in the form prescribed by the Provincial Government stating therein the result of the investigation made until then and the Court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the Court decides that the trial should not so commence.]*
>
> *(2) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the 1[Provincial Government] by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.*

> *(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.*
>
> *(4) A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial:*
>
> *Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.]*
>
> *(5) where the officer in charge of a police station forwards a report under sub-section (1), he shall along with the report produce the witnesses in the case, except the public servants, and the Magistrate shall bind such witnesses for appearance before him or some other Court on the date fixed for trial.]*

A comparative study of above mentioned sections i.e. 4(h) and 173 Cr.P.C. it is palpable that complaint cannot be termed as police report. The learned trial court was not competent to take cognizance of this case because from bare reading of FIR (Exh.PC), it manifests that the case in hand is of fornication and no complaint was ever placed before the learned trial court in terms of section 203, Cr.P.C. In the light of above mentioned facts, cognizance taken by the learned trial court was unwarranted and proceedings conducted by it were *coram non judice.*

13. After completion of arguments of learned counsel for the parties and learned Law Officer, this Court made query to learned counsel for the appellant that when it is a stance of the defence that it is a case of fornication and not of rape and such a stance is also established from the documentary evidence in the shape of DNA report (Exh.PH) according to which Aqsa Bibi (minor), who is an offspring of fornication, is a biological daughter of the appellant, then who will be responsible for her upbringing and welfare, they replied that the appellant is ready to deposit Defense Saving Certificates to the tune of Rs.10,00,000/- in the name of Aqsa Bibi (minor).

14. For what has been discussed above, the prosecution has failed to prove the charge of rape under section 376 PPC against the appellant,

therefore, the titled appeal is **accepted**; consequently, conviction and sentence of Muhammad Saleem appellant recorded by learned trial court is set aside and he is acquitted of the charge. However, he shall be enfranchised trice from jail after the deposit of Defence Saving Certificate in the sum of Rs.10,00,000/- in the name of Aqsa Bibi minor, that too if he is not required to be detained therein in any other case. It is further directed that the Defence Saving Certificate shall be withdrawn by Aqsa Bibi minor after attaining the age of majority and only in case of severe need for the welfare of Aqsa Bibi minor, Mst. Ishrat Bibi complainant could draw the whole or partial amount after obtaining requisite permission from the learned Guardian Court in accordance with law.

(Muhammad Tariq Nadeem)
Judge

Approved for reporting

JUDGE

Announced and dictated on 25.10.2023
Prepared and signed on 15.11.2023

Khurram