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Judgment Sheet

IN THE LAHORE HIGH COURT,

BAHAWALPUR BENCH, BAHAWALPUR

JUDICIAL DEPARTMENT

Criminal Appeal No. 124-J of 2023.

(Sajjad Ahmad Vs. The State)

JUDGMENT

Date of hearing:	27.06.2024**.**
Appellant by:	Mr. Javed Iqbal Bhatti, Advocate.
State by:	Mr. Najeeb Ullah Jatoi, Deputy Prosecutor General.

SADIQ MAHMUD KHURRAM, J. Sajjad Ahmad son of Kareem Bakhsh (convict) was tried alongwith Kareem Bakhsh son of Allah Dewaya and Muhammad Imran son of Wazir Ahmed (both since acquitted) by the learned Additional Sessions Judge, Liaquatpur in case FIR No.228 of 2021, dated 26.06.2021, registered at Police Station Pacca Laran, District Rahim Yar Khan in respect of offences under sections 376 and 365-B of Pakistan Penal Code, 1860. The learned trial court vide judgment dated 07.03.2023 convicted **Sajjad Ahmad son of Kareem Bakhsh (**convict) and sentenced him as infra:-

Sajjad Ahmad son of Kareem Bakhsh:-

Imprisonment for life under section 376(3) of the Pakistan Penal Code,1860 and directed to pay fine of Rs.50,000/-, and in case of default of payment of fine, the convict was directed to undergo simple Imprisonment of six months further. The convict was also directed to pay compensation of Rs.100,000/- under section 544-A Cr.P.C. to the

> victim. In case of default of payment of compensation, the convict was directed to further undergo simple Imprisonment of six months.
>
> The convict was extended benefit available under Section 382-B of the Code of Criminal Procedure, 1898 by the learned trial court.

Kareem Bakhsh son of Allah Dewaya and Muhammad Imran son of Wazir Ahmed, the co-accused of the convict, were, however, acquitted by the learned trial court.

2. Feeling aggrieved, Sajjad Ahmad son of Kareem Bakhsh (convict) lodged the instant Criminal Appeal No.124-J of 2023 assailing his conviction and sentence.

3. The brief facts of the prosecution case, as stated by Mst. Shakeela Bibi (PW-3), the victim of the case, in her statement before the learned trial court, are as under:-

> "Stated that on 24.06.2021 at about 10.00 p.m. accused persons Imran, Sajjad present before this court, facing trial and Bashir Ahmed (since P.O) came over there on a white coloured car when I was outside of my house on the call of nature. Accused Sajjad & Bashir put me forcibly in car while accused Imran was driver of said car. Today took me towards Liaquatpur side on said car and kept me at some unknown place for about 12/13 days. On third day, accused Karim Bakhsh present before this court, facing trial came over there and put off my gold ornaments. Accused Sajjad committed Ziati with me while accused persons Bashir & Imran guarded the situation. Thereafter, accused persons left me at night time near to my house. Then I went inside my house, wherefrom we went to police station and narrated the occurrence. Police also produced me in the court. My medical examination was conducted at Pacca Laran under the guard of lady constable. Police also took me to Lahore for further examination."

4. After the formal investigation of the case report under section 173 of the Code of Criminal Procedure, 1898 was submitted before the learned trial court and the accused were sent to face trial. The learned trial court framed the charge against the accused on 10.02.2023 to which the

accused pleaded not guilty and the learned trial court proceeded to examine the prosecution witnesses.

5. The prosecution in order to prove its case got recorded statements of as many as **twelve** witnesses. Mst. Shakeela Bibi (PW-3), the *prosecutrix*, narrated the facts of the occurrence. Muhammad Zafar (PW-1) and Zahoor Ahmed (PW-2) stated that they saw the accused kidnapping Mst. Shakeela Bibi (PW-3) and were told by Mst. Shakeela Bibi (PW-3) that she was raped by the appellant. Wazeer Ahmed 1352/C (PW-11) stated that on 12.01.2022, he executed the warrant of arrest of the appellant and also published the proclamation under section 87 of the Code of Criminal Procedure, 1898 regarding the appellant. Abdul Qadir, ASI (PW-6) investigated the case from 25.03.2022 till 07.04.2022 and detailed the facts discovered during the investigation of the case in his statement before the learned trial court. Sumera Rafiq ASI, (PW-4) investigated the case from 30.07.2021 till 22.11.2021 and detailed the facts discovered during the investigation of the case in her statement before the learned trial court. Waseem Kousar, S.I (PW-10) investigated the case on 06.01.2022 and detailed the facts discovered during the investigation of the case in his statement before the learned trial court. Muhammad Jamil, ASI (PW-5) stated that on 26.06.2021, he recorded the formal F.I.R (Exh.PA/2) and also investigated the case from 26.06.2021 till 14.07.2021 and detailed the facts discovered during the investigation of the case in his statement before the learned trial court. Muhammad Tariq, ASI (PW-7) investigated the case from 10.05.2022 till 07.10.2022, arrested the appellant on 06.10.2022 and

detailed the facts discovered during the investigation of the case in his statement before the learned trial court.

6. The prosecution also got Dr. Hina Siddiqui, (PW-9) examined, who on 07.07.2021 was posted as a Woman Medical Officer at RHC Pacca Laran, District Rahim Yar Khan and on the same day, conducted the medical examination of the victim namely Mst. Shakeela Bibi (PW-3). Dr. Hina Siddiqui, (PW-9), after examining Mst. Shakeela Bibi (PW-3), observed as under:-

> "Tears, lacerations, bruises, abrasions, swelling, hyperemia at the private parts with specific site from in reference to lithotomy position on and around the private parts
>
> *Swelling at introitus .A bruise extending from 4-7'0 clock position at vaginal orifice (sic*)
>
> 2. Rupture of hymen, if present fresh or old.
> *Ruptured*
> ……
>
> Keeping on analysis of report of PFSA & clinical examination, I am of the opinion that no seminal material was found on the samples sent to PFSA for analysis. **However, hymen was ruptured and genital injuries were present.**
>
> Ex.P.H is the carbon copy of MLC report of victim issued by myself. My final opinion is Ex.P.H/1.The same is signed by me and is in my hand-writing, bearing seal of the hospital also. Pictorial diagrams Ex.P.H/2 & Ex.P.H/3 are also drawn by me. I prove my hand-writing and signatures on these documents ." (emphasis supplied).

The prosecution also got Dr. Junaid Nadeem (PW-8) examined who stated that he had examined the appellant on 14.07.2021 and found him capable of having sexual intercourse.

7. On 14.02.2023, the learned Assistant District Public Prosecutor gave up prosecution witness namely Mushtaq Ahmad as being collusive

with the appellant. On 27.02.2023, the learned Assistant District Public Prosecutor closed the prosecution evidence.

8. After the closure of prosecution evidence, the learned trial court examined the appellant Sajjad Ahmad son of Kareem Bakhsh, under section 342 Cr.P.C. and in answer to the question *why this case against you and why the PWs have deposed against you*, he stated that he had been falsely involved in the case. Neither the appellant opted to get himself examined under section 340(2) Cr. P.C nor he adduced any evidence in his defence.

9. On the conclusion of the trial, the learned Additional Sessions Judge, Liaquatpur, convicted and sentenced the appellant as referred to above.

10. The contention of the learned counsel for the appellant precisely was that the whole case was invented and untrue and that the prosecution remained unable to prove the facts in issue and did not produce any unimpeachable, admissible and relevant evidence. Learned counsel for the appellant further submitted that the appellant was quite innocent and had nothing to do with the alleged occurrence. The learned counsel for the appellant submitted that the learned trial court, while disbelieving the same evidence, had acquitted Kareem Bakhsh son of Allah Dewaya and Muhammad Imran son of Wazir Ahmed, the co-accused of the appellant and the conviction awarded to the appellant on the basis of same evidence was not justified. He further submitted that the prosecution has miserably failed to prove the charge against the appellant beyond the shadow of reasonable

doubt and the learned trial court while passing the impugned judgment of the appellant's conviction, had erred in law and facts of the case, which warranted interference by this Court.

11. On the other hand, the learned Deputy Prosecutor General contended that the prosecution had proved its case beyond a shadow of doubt by producing independent witnesses. The learned Deputy Prosecutor General further submitted that there was no untoward delay in lodging the FIR. The learned Deputy Prosecutor General further submitted that it was a heinous offence and exploited the victim's future by the appellant at the expense of his lust; that the victim was a child and it could not be expected from her to put her future at stake for any reason to falsely implicate the appellant in this case for nothing; that delay in reporting the matter to the police had no adverse effect on the fate of the prosecution case because in the cases where family honour was involved, immediate rushing to the police station for lodging the crime report and putting the honour at stake, was always difficult for anybody; that the medical evidence provided further corroboration to the ocular account; that the impugned judgment entailing the conviction and sentence of the appellant did not warrant interference by this Court. Lastly, the learned Deputy Prosecutor General prayed for the rejection of the appeal.

12. We have heard the learned counsel for the appellant, the learned Deputy Prosecutor General and with their assistance perused the record and evidence recorded during the trial carefully.

13. The learned counsel for the appellant has laid great stress on the reliability of the victim's testimony, the prosecution witness namely Mst. Shakeela Bibi (PW-3), because, as argued by him, she was a child witness and could have been tutored or influenced by elders. The learned counsel for the appellant has strenuously argued that it would not be safe to rely on the child witness's testimony. By now, the law relating to the competence of the child witness to depose in a criminal case and its evidentiary value is well settled. It would, therefore, be relevant to discuss the precedent law in this regard. Article 3 of the Qanun-e-Shahadat Order, 1984 contemplates that all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender or extreme old age, disease, whether of body or mind or any other cause of the same nature. For a child witness, normally the courts conduct "*vior dire test*" under which the court before examination puts certain preliminary questions to the child, which bear no connection with the case so as to judge the child's competency and understanding. If the child is capable of answering those questions properly and deposes in a smart manner, then the child is considered as a competent witness. A child is fully competent to depose before a court of law subject to his/her capacity and intellect to understand what he/she deposes about. Whether a child is a competent witness or not and whether he/she passes the 'rationality test' is something which is to be decided by the court in accordance with Article 3 read with Article 17 of Qanun-e-Shahadat, 1984 after carrying out the *voir dire* test. The term *Voir Dire* has been defined in various lexicons as under:

According to Black's Law dictionary, voir dire connotes:

"*A preliminary examination to test the competence of a witness or evidence"*

According to Webster's Unabridged Dictionary:

"*An oath administered to a proposed witness or juror by which he or she is sworn to speak the truth in an examination to ascertain his or her competence*."

According to Advance Law Lexicon

A rule requiring that a party must call the best evidence that the nature of case will allow.

According to Advance Law Lexicon

A special form of oath administered to a witness whose competency to give evidence in the particular matter before the Court is in question, or who is to be examined as to some other collateral matter.

Voir dire is an inquiry within a trial to decide relevant ancillary issues which are material for the just decision of that trial. In the case titled "*Muhammad Jamal and others v. The State*" (**1997 SCMR 1595)**, the august Supreme Court of Pakistan found the child witness's testimony as inspiring and credible and upheld the conviction because it was supported by medical evidence. In the case titled "*Mst. Razia alias Jia v. The State*" (**2009 SCMR 1428)**, the august Supreme Court of Pakistan upheld the conviction handed down, inter alia, on the basis of ocular testimony of two child witnesses. The apex Court had observed that the trial Court had taken all possible and due steps to judge the level of intelligence and maturity of the child witnesses before recording their statements because they had given consistent accounts of the occurrence and the participation of their mother, i.e. the convicted accused. It was further observed that this ocular evidence had derived strength and corroboration from other evidence. The august Supreme Court of Pakistan, exercising its Shariat appellate jurisdiction, has observed and

held in the case titled "*Fayyaz alias Fayyazi and another v. The State*" (**2006 SCMR 1042**) as follows:-

> "It has also been rightly observed by the learned Federal Shariat Court that conviction could be based on the solitary statement of the victim provided the same is capable of implicit reliance and is corroborated by any other."

In the case titled "*Mushtaq Ahmed and another v. The State*" (**2007 SCMR 473)**, the august Supreme Court of Pakistan, exercising its Shariat appellate jurisdiction, has observed and held as follows:-

> "It is consistent view of this Court that in rape cases mere statement, of the victim is sufficient to connect the petitioners with the commission of offence in case the statement of the victim inspires confidence."

In the case titled "*Ulfat Hussain v. The State*" (**2010 SCMR 247),** the august Supreme Court of Pakistan held that although in principle a conviction could be based on the testimony of an intelligent and understanding child witness. In the case of *"Raja Khurram Ali Khan And 2 Others versus Tayyaba Bibi and another"* **(P L D 2020 Supreme Court 146***)*, the august Supreme Court of Pakistan has laid down a complete code relating to the recording of the statement of a child who himself is a victim and has directed as under:

> "Competence and Evidential Value of a Child Witness
>
> 44. A child, irrespective of his age, is competent to be a witness, subject to his fulfilling the conditions precedent provided under Articles 3 and 17 of the Qanun-e-Shahadat Order, 1984 (Order). The said provisions read:
>
> "3. Who may testify
>
> All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other use of the same kind:
>
> Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:
>
> Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented

thereafter and mended his ways:

Provided further that the Court shall determine the competence of a witness in accordance with the qualification prescribed by the Injunctions of Islam as laid down in the Holy Quran and Sunnah for a witness, and, where such witness is not forthcoming the Court may take the evidence of a witness who may be available.

Explanation. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

"17. Competence and number of witnesses

(1) The competence of a person to testify and the number of witness required in any case shall be determined in accordance with the Injunctions of Islam as laid down in the Holy Quran and Sunnah.

(2) Unless otherwise provided in any law relating to the Enforcement of Hudood or any other special law:

(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

(b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant." (emphasis provided)

45. A close reading of the above provisions reveals that the essential conditions for a child, or for that matter any person, to appear and testify as a witness, is that the child or the person must have the capacity and intelligence of understanding the questions put to him, and also be able to rationally respond thereto. This threshold has been referred to as passing the "rationality test", and the practice that has developed with time in our jurisdiction is for the same to be carried out by the presiding Judge prior to recording the evidence of the child witness. Moreover, we have noted that in our jurisdiction, the judicial acceptance of a child witness, as a safe piece of evidence, has been rather hesitant and cautious. This Court in the case of The State through Advocate General, Sindh, Karachi v. Farman Hussain and others (PLD 1995 SC 1), by a majority decision, while dilating upon the competence and evidential value of a child witness, opined that:

"Evidence of child witness is a delicate matter and normally it is not safe to rely upon it unless corroborated as rule of prudence. Great care is to be taken that in the evidence of child element of coaching is not involved ... In any case the rule of prudence requires that the testimony of child witness should not be relied upon unless it is corroborated by some evidence on the record."

46. In other common law jurisdictions, the Courts are more inter-active with the child witnesses during the recording of their entire evidence. Justice McLachlin, speaking for the Canadian Supreme Court in the case of R. v. Marquard [1993] 4 S.C.R. 223, has explained with precision the competency of the child witness, by stipulating the following criteria for testing the same in terms:

"... (1) the capacity to observe (including interpretation); (2) the capacity to recollect; and (3) the capacity to communicate.... The judge must satisfy him or herself that the witness possesses these capacities. Is the witness capable of observing what was happening? Is he or she capable of remembering what he or she observes? Can he or she

communicate what he or she remembers? The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable ……. Generally speaking, the best gauge of capacity is the witness's performance at the time of trial….. [T]he test outlines the basic abilities that individuals need to possess if they are to testify. The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate. [once] This established, deficiencies of perception, recollection of the events at issue may be dealt with as matters going to the weight of the evidence."

47. Reverting back to our jurisdiction, we note that, unfortunately, the standard of appreciating the testimony of a child witness, who is the victim of a crime, and the mode and manner of recording his evidence, warrants much needed change and innovation, which has been witnessed in other jurisdictions. And more particularly, the Courts are to appreciate the crucial distinction between a child witness, who is a witness to the crime, and one who is himself a victim thereof.

48. In this regard, we note that the "rationality test", which is applied by the presiding Judge at the commencement of the examination-in-chief of a child witness, should be made applicable throughout the testimony of the child witness. If at any stage, the presiding Judge observes any hindrance or reluctance in the narration of events, the evidence should be stopped, and remedial measures should be taken to ease the stress and anxiety the child witness might be under, and if required, the case be adjourned to another date. And further, in case the child witness is still unable to narrate his testimony with ease, then the presiding Judge ought to record his findings on the demeanour of the child witness, conclude his evidence, and relieve him as a witness.

49. In other jurisdictions, we note that great care is taken to ensure that such child witnesses are able to depose their testimony at ease, by taking measures in the court room to lessen their stress and anxiety of court-room appearances in such a tender age. Such measures include child witness aid in testifying, screens in court rooms, closed courtrooms and counsellor aid before and after recording of evidence, which needs to be adopted and practiced in our jurisdiction in cases wherein a child victim is to appear as a witness. In this regard, we expect the respective governments to take appropriate legislative and administrative measures for ensuring the much needed protection and facilitation of child witnesses.

50. As for the presiding trial court judges, they should take appropriate steps during the court proceedings to ensure that the child witnesses depose their testimony with ease, and that too, in a stress-free environment. In cases where the child witness is unable to depose in the court room, and his evidence is "necessary" to find the truth, and it has a ring of "circumstantial trustworthiness", then courts, as practiced in other common law jurisdictions, may consider in appropriate cases, allowing out-of-court evidence, as an exception to the "hearsay rule". Wigmore, a notable American scholar on the law of evidence, in his book Wigmore on Evidence, Volume 5 (Chadbourn rev. 1974), identified two considerations, which may serve as an exception to the "hearsay rule": "a circumstantial probability of trustworthiness, and a necessity for the evidence".

51. In the Canadian jurisdiction, the Supreme Court in the case of R. v. Khan [1990] 2 S.C.R. 531, where the appellant, who was a medical doctor, was charged with sexually assaulting a three and a half year-old

girl, allowed an out-of-court statement of a child witness, as an exception to the "hearsay rule", endorsing with approval, the need for "truth", as expressed by Wigmore. The extracts of the deliberations on the issue are recorded as under:

"The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.

"Because of the frequent difficulty of obtaining other evidence and because of the lack of reason to doubt many statements children make on sexual abuse to others, courts in the United States have moved toward relaxing the requirements of admissibility for such statements. This has been done in the context of the doctrine of spontaneous declarations. In McCormick on Evidence (3rd ed. 1984), at p. 859, n. 49, the authors refer to this development as the "tender years" exception to the general rule, and describe it as follows:

A tendency is apparent in cases of sex offences against children of tender years to be less strict with regard to permissible time lapse and to the fact that the statement was in response to inquiry."

"Similarly, Wharton's Criminal Evidence (13th ed. 1972), at p.84, states that while "[t]he res gestae rule in sex crimes is the same as in other criminal actions", the rule "should be applied more liberally in the case of children".

"These developments underline the need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse. In so far as they are tied to the exception to the hearsay rule of spontaneous declarations, however, they suffer from certain defects. There is no requirement that resort to the hearsay evidence be necessary. Even where the evidence of the child might easily be obtained without undue trauma, the Crown would be able to use hearsay evidence...

"The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary"... The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability.

"I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence. This does not make out-of-court statements by children generally admissible; in particular the requirement of necessity will probably mean that in most cases children will still be called to give viva voce evidence."

52. Now, reverting back to the facts of the present case, it is noted with concern that Tayyaba Bibi, the victim of the crime, was not treated with due care and caution during the investigation, and the trial proceeding. Tayyaba Bibi, who at the time of being taken into custody

> by Khalid Mehmood Awan, SHO (PW-16) from the house of convict Raja Khurram Ali Khan, was admittedly injured and required medical attention, but she was instead subjected to the process of questioning by the SHO, which he even video recorded (Ex PW). We further note that after her medical treatment at PIMS, Tayyaba Bibi, instead of being taken to a child care centre, was subjected to another bout of questioning, and this time by Ms. Nisha Ishtiaq, Assistant Commissioner, Islamabad (PW7). In these circumstances, it would be fair to note that Tayyaba Bibi, during the period in which she rendered her statements, was not completely free from pressure and influence of the police, local administration and the accused. In this regard, we have noted with appreciation that the trial Court applied the "rationality test", prior to commencing her examination-in-chief, by recording its finding that Tayyaba Bibi was intelligent to understand questions put to her, and had the capacity to correctly respond thereto. Thus, her testimony during the examination-in-chief can be considered relatively free from adverse negative influences. No doubt, during her lengthy cross-examination, she wavered from the initial stance she had taken during her examination-in-chief, when she was confronted with her previous video recorded statement obtained by Khalid Mehmood (PW-16). However, in view of the findings recorded by the trial Judge, regarding her stressed un-natural demeanour during her cross-examination, the said wavering stance cannot be given the same credence, as one may give to any adult witness of a crime. In fact, her cross-examination should have been stopped the moment the trial Judge noticed her reception of questions and responses thereto lacked intelligent rationality, which in fact is an essential attribute of a competent witness under Article 3 of the Order. The trial judge then surely erred by allowing her cross-examination to continue in her said disposition. It appears that the trial Judge wrongly treated Tayyaba Bibi to be a child witness of a crime, rather than as a child witness who was herself the victim of the crime. This lack of distinction on the part of the trial Judge led to his faulty conclusion of completely discarding the evidentiary value of her testimony."

It is, therefore, obvious from the above discussion, that a child witness is not barred from entering the witness box. It is the satisfaction of the trial Court, which is of crucial importance. A child who also happens to be a victim of an offence is competent to testify as a witness, and the deposition would be worthy of reliance provided the Court is satisfied that he or she, as the case may be, is intelligent and understands the significance of entering the witness box. A conviction can also be handed down placing reliance on the sole testimony of a child witness. We have gone through the evidence recorded by the learned trial court and find that the prosecution witnesses, in a consistent and forthright manner gave evidence proving that the appellant

had raped the prosecution witness namely Mst. Shakeela Bibi (PW-3). All the prosecution witnesses namely Muhammad Zafar (PW-1), Zahoor Ahmed (PW-2) and Mst. Shakeela Bibi (PW-3) consistently corroborated the version adopted by each other and after careful scrutiny of the statements of above said prosecution witnesses, we find that their statements are in line with each other on each and every minor as well as material aspect of the case and smooth flow of facts is apparent from their depositions. They were subjected to cross-examination by the defence, but without extracting anything beneficial for the appellant.

14. The statement of the prosecution witness namely Mst. Shakeela Bibi was further supported by Dr. Hina Siddiqui, (PW-9), who on 07.07.2021 was posted as a Woman Medical Officer at RHC Pacca Laran, District Rahim Yar Khan and on the same day, conducted the medical examination of the victim namely Mst. Shakeela Bibi (PW-3). Dr. Hina Siddiqui, (PW-9), after examining Mst. Shakeela Bibi (PW-3), observed *Swelling at introitus. A bruise extending from 4-7'0 clock position at the vaginal orifice* and a *ruptured hymen.* Dr. Hina Siddiqui, (PW-9) also observed the trouser worn by the victim namely Mst. Shakeela Bibi (PW-3) at the time of her examination was also stained with blood.

15. It was contented by the learned counsel for the appellant that there was a delay in lodging of the F.I.R which could cause serious doubt in the prudent mind about the implication of the accused for an ulterior motive. In this case, the occurrence of subjecting the minor girl Mst. Shakeela Bibi (PW-3) to rape had taken place at 10:00 p.m., on 24.06.2021 and the matter

was reported on 26.06.2021, despite the fact that the modesty of a minor girl was violated by rape. The apprehension of the victim and her family in approaching the police immediately is quite understandable in the circumstances. Delay in reporting the crime to the police in respect of an offence involving a person's honour and reputation and which society may view unsympathetically could play on the minds of a victim and her family and deter them from going to the police. Therefore, in such a situation it is very obvious that even if the report has been lodged with a delay, it will not bring complications and otherwise not beneficial for an accused who has been charged with the offence the punishment of which would entail to the death penalty or imprisonment for life. In the case titled "*Zahid and another v. The State"* (**2020 SCMR 590**), the august Supreme Court of Pakistan has observed and held as follows:-

> "Undoubtedly, the FIR was registered after a day of the crime having been committed, however, the fact that the modesty of a married woman was violated by sexual assault makes understandable the apprehension of the victim and her family in approaching the police immediately. Delay in reporting the crime to the police in respect of an offence involving a person's honour and reputation and which society may view unsympathetically could prey on the minds of a victim and her family and deter them to go to the police. In the case of Hamid Khan v. State a delay of three days in reporting the crime to the police was considered immaterial".

16. The learned counsel for the appellant has also laid much emphasis on the report of the Punjab Forensic Science Agency, Lahore, according to which no seminal material was detected on the items sent to it for analysis. It has already been mentioned that according to the statement of Dr. Hina

Siddiqui (PW-9), at the time of the examination of the victim namely Mst. Shakeela Bibi (PW-3), the Woman Medical Officer had observed a ruptured hymen and a bruise extending from the 4 o'clock position to the 7 o'clock position at the vaginal orifice and this fact itself proves the penetration. The penetration having been established, we do not think that such DNA testing was required under the circumstances. Moreover, DNA testing is not a requirement of the law. In this regard reliance is placed on the case titled "*Farooq Ahmed v. The State"* (**PLD 2020 SC 313**), wherein the august Supreme Court of Pakistan has observed and held as under:-

> "7. The rape having being established, was it then necessary to conduct a DNA test to determine that the semen retrieved from the victim's body and shalwar was of the petitioner. We do not think that such DNA testing was required under the circumstances. Moreover, DNA testing is not a requirement of law. In Shakeel's case (above) it was held (in paragraph 9), that:
>
> It is well-established by now that "omission of scientific test of semen status and grouping of sperms is neglect on the part of prosecution which cannot materially affect the other evidence." In this regard we are fortified by the dictum as laid down in case titled Haji Ahmad v. State (1975 SCMR 69)...
>
> In the above cited case of Haji Ahmad v. State (1975 SCMR 69) the father had raped his step-daughter and his conviction was sustained by this Court in the absence of a DNA test; the Trial Court had relied on the girl's testimony, chemical examiner's report confirming existence of semen on vaginal swabs taken from her and the medico-legal report showing her to have been sexually molested. Similarly, this Court in the case of Irfan Ali Sher v. State (Jail Petition No. 324/2019, decided on 17 April 2020) upheld a conviction under section 376 PPC in the absence of a DNA test. Rejecting the petitioner's argument that 'DNA report was not sought' this Court held (in paragraph 3), that:
>
> As regards the semen not being sent for DNA forensic determination with a view to link it with the perpetrator is not a requirement of law.
>
> It is also not desirable that we should impose additional conditions to prove a charge of rape, or of attempted rape, and to do so would be a disservice to victims, which may also have the effect of enabling predators and perpetrators. However, there may be cases where an accused's DNA is retrieved for forensic determination to establish his guilt."

17. We have also noted that according to the statement of the prosecution witness namely Mst. Shakeela Bibi (PW-3), she was aged about

14/15 years at the time of the incident and according to Dr. Hina Siddiqui (PW-9), the age of the prosecution witness namely Mst. Shakeela Bibi (PW-3) was about 13/14 years old on the day of her examination on 07.07.2021. No challenge was thrown to the age of the victim namely Mst. Shakeela Bibi (PW-3), therefore, on proving the allegation of rape against the appellant, the learned trial court rightly convicted the appellant under section 376(3) P.P.C.

18. So far as the contention raised by the learned counsel for the appellant that the learned trial court while disbelieving the same evidence has acquitted Kareem Bakhsh son of Allah Dewaya and Muhammad Imran son of Wazir Ahmed and the conviction awarded to the appellant on the basis of same evidence is not justified, is concerned, we have observed that the learned trial court has rightly acquitted the said co-accused of the appellant. The prosecution witness namely Mst. Shakeela Bibi (PW-3) did not state that Kareem Bakhsh son of Allah Dewaya and Muhammad Imran son of Wazir Ahmed, the co-accused of the appellant, since acquitted, had also raped her. During the course of the trial the prosecution witness namely Mst. Shakeela Bibi (PW-3) was specifically questioned with regard to her statement that it was only the appellant namely Sajjad Ahmed who had raped her. Moreover, we, keeping in view the prevailing social trend that innocent people of the family or friends of the main culprit are implicated falsely to incapacitate them to pursue the case of the actual culprit, are of the opinion that Kareem Bakhsh son of Allah Dewaya and Muhammad Imran son of Wazir Ahmed (since acquitted), the co-accused of the appellant, indeed had a case distinguishable from the appellant namely Sajjad Ahmed .

19. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version when the entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited but not otherwise. In the instant case, we find that the prosecution witness namely Mst. Shakeela Bibi (PW-3) has successfully evidenced her credibility, therefore, the learned trial court was quite justified to rely on her while finding the appellant guilty.

20. As mentioned above, the prosecution witness namely Mst. Shakeela Bibi (PW-3) was cross-examined by the learned Counsel for the appellant, but her evidence relating to the fact of her being raped by the appellant has not been shaken at all. It is fully established by the statements of the prosecution witness namely Mst. Shakeela Bibi (PW-3) that the appellant raped her. The statements of Muhammad Zafar (PW-1) and Zahoor Ahmed (PW-2) against the appellant are a corroborative piece of evidence which lends assurance to the statement of the prosecution witness namely Mst. Shakeela Bibi (PW-3). There is material on the record to show that the appellant raped the prosecution witness namely Mst. Shakeela Bibi (PW-3). The intention of the accused is the basis and the gravamen of an offence under section 376 P.P.C. Consequently, we have no hesitation in holding that the learned trial court rightly convicted the appellant for the offence punishable under section 376 (3) P.P.C.

21. We have also examined the defence pleas taken by the appellant namely Sajjad Ahmad during the trial. The appellant namely Sajjad Ahmad claimed that he was involved in the case without any reason. The plea taken by the appellant namely Sajjad Ahmad is not appealable to the prudent mind as without suggesting any ill-will to the prosecution witnesses, it was not possible to allege rape against the appellant, without any rhyme or reason.

22. In the light of the above discussion, the conviction and sentence of the appellant namely Sajjad Ahmad son of Kareem Bakhsh, as awarded by the learned trial Court through the abovementioned judgment, are

maintained and upheld and the Criminal Appeal No.124-J of 2023 lodged by the appellant, is hereby **dismissed**.

(ASJAD JAVAID GHURAL) ***(SADIQ MAHMUD KHURRAM)***
JUDGE ***JUDGE***

Rashid

Approved for Reporting

Judge