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**JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Capital Sentence Reference No.23 of 2019
(The State versus Asad Ali)

Crl. Appeal No.17007 of 2019
(Asad Ali versus The State)

JUDGMENT

Date of hearing: **25.09.2023.**

Appellants by: **M/s. Khalid Nawaz Ghumman and Kamil Hameed, Advocates.**

State by: **Mr. Muhammad Wagas Anwar, Deputy Prosecutor General.**

Complainant by: **Mr. Safdar Hussain Tarrar, Advocate.**

AALIA NEELUM, J:- The appellant-Asad Ali, son of Muhammad Yaqoob, Caste Mughal, resident of Mohallah Tajpura Tehsil and District, Hafizabad, has assailed his conviction and sentence recorded by the learned Addl. Sessions Judge, Hafizabad vide judgment dated 13.03.2019 in a State case F.I.R No.402/2018, dated 18.06.2018, the offence under Section 376 (3) PPC, registered at the police station, City, Hafizabad titled **“The State Vs. Asad Ali”**, whereby the learned trial court convicted the appellant-Asad Ali under Section 376 (3) PPC and sentenced to death, with the direction to pay Rs.1,00,000/- as fine and in case of default in payment thereof, he would further undergo 06-months S.I.

2. Feeling aggrieved by the judgment of the learned trial court, the appellant-Asad Ali, has assailed his conviction by filing the instant appeal bearing **Crl. Appeal No.17007 of 2019**. The

learned trial court also referred **Capital Sentence Reference No.23 of 2019 (The State. Vs. Asad Ali)** to confirm the death sentence awarded to the appellant-Asad Ali. The matters arising from the same judgment of the learned trial court are being disposed of through this consolidated judgment.

3. Briefly, the prosecution story as alleged in the F.I.R (Ex. PC/3) lodged on the application (Ex. PC) of Mazhar Iqbal (PW-4)-the complainant is that on 18.06.2018 at about 3:30 p.m, wife of the complainant sent her daughter, namely, Madhia Rani (the alleged victim) aged about 8/8 ½ years to a shop to purchase articles and when Madhia Rani (the alleged victim) did not return to home, the complainant along with Riaz Ahmad and Nasar Hussain, prosecution witnesses went in search of Madhia Rani (the alleged victim). When they reached near the house of Yaqoob Tarkhan, they heard crying of Madhia Rani (the alleged victim). They entered the house and saw the accused-Asad Ali, was committing zina with Madhia Rani (the alleged victim). The complainant and prosecution witnesses apprehended the accused at the spot and handed it over to the police. Hence, this case.

4. After the case registration, Talat Yasmeen, Inspector (PW-10)-the investigating officer, found the accused guilty of the offense charged against him. The report under Section 173 of Cr.P.C was prepared and sent to court, and the learned trial court formally charge-sheeted the appellant on 01.08.2018, to which he pleaded not guilty and claimed trial. In support of its version, the prosecution produced as many as ten (10) witnesses. The appellant was also examined in terms of Section 342 Cr.P.C., wherein he neither opted to appear as his own witness in terms of Section 340(2) Cr.P.C. nor produced any defence evidence.

5. After recording evidence and evaluating the evidence available on record in light of arguments advanced from both

sides, the learned trial court found the prosecution version proved beyond any shadow of reasonable doubt, which resulted in the appellant's conviction in the afore-stated terms.

6. We have heard the arguments advanced by the learned counsel for the parties and have minutely perused the record on the file.

7. The learned counsel for the appellant submitted that there is an apparent conflict between the medical and the ocular evidence, which creates serious doubt in the prosecution's case. To bolster this contention, reference has been made to the statement of Madhia Rani (PW-5), the victim, where she states that she was subjected to rape, but according to the Forensic DNA and Serologist report (Exh.PF/1-2), she was not subjected to rape. Madhia Rani (PW-5), the victim, submitted that when she was taken to the hospital, she was examined by Dr. Sadaf Aslam (PW-9), who stated that on 18.06.2018, she had examined Madhia, the victim, brought by lady constable Sobia Majeed 916/LC (PW-2) for medical examination. Dr. Sadaf Aslam (PW-9), after a medical examination of the victim, made the following remarks: -

“---on her general examination, victim was weak by physique, well oriented, confused. An overage height and weight. No external injury on her body---On her internal examination, swelling of Vulva, vaginal tear, hyperemia, ruptured of hymen present--”

Dr. Sadaf Aslam (PW-9) also deposed during cross-examination that: -

“---The MLR No.32SA/18 consisted upon four pages is, Ex. P.E/1-5 which bears my signature and report of the chemical examiner comprising upon two pages Ex.PF/1-2. According to my opinion on the basis of examination, the victim Madhia was raped--”

The prosecution declared Dr. Sadaf Aslam (PW-9) hostile, as she was suppressing who accompanied the victim and the medical examination history. Law is well settled regarding the credibility of the deposition of a witness declared hostile during examination-in-chief in the trial. The evidence of such a prosecution witness cannot be rejected merely because such witness has been declared hostile by the prosecution. Still, the same can be accepted to the extent his statement is dependable on scrutiny thereof. Learned DDPP cross-examined her. She (PW-9) deposed during cross-examination that: -

“---It is correct that victim Madhia Rani was already admitted in the hospital when I examined her. No treatment was given to the victim before her examination by me. After examination the victim, the stitching of victim at her vagina was made by Consultant Doctor Saima Nasir. The victim was admitted on slip No.15711-E/18. At the time of her examination, victim was confused but not fainted. I have asked the details from the victim but she never told, however, mother of victim told the details. According to my history given, I have not written about the incapacity of victim regarding the narration of occurrence. However, the victim was in confused condition---”

The facts that come on the record through cross-examination conducted by the DDPP were not denied by the defence. From the above evidence, it is not feasible to state with certainty that there is any conflict between the medical and the ocular proof. The deposition of Dr. Sadaf Aslam (PW-9) reveals that the victim was raped. As far as the contention of the learned counsel for the appellant that the Forensic DNA and Serologist report (Exh.PF/1-2) about the appellant has come negative is concerned, Dr. Sadaf Aslam (PW-9) had mentioned in column No.5, related to “evidence collected,” in MLC (Exh. PE), of the victim that the one green and white shirt and one yellow and light green trouser were handed

over to Sobia Majeed 916/LC (PW-2). Dr. Sadaf Aslam (PW-9) had not mentioned in MLC (Exh. PE) that she prepared the sealed parcels of the clothes of the victim and three vaginal, pri-vagina, and cervical swabs. When preparing the Medico Legal Certificate, the doctor had not mentioned that sealed parcels were handed over to the lady constable. It could be the reason for the negative DNA report. Even otherwise, Dr. Sadaf Aslam (PW-9), who had examined the victim, has deposed that on her internal examination, swelling of the vulva, vaginal tear, hyperemia, and rupture of the Hyman were observed by her (PW-9). Clothes were blood-stained. This testimony of Dr. Sadaf Aslam (PW-9) shows that bleeding had occurred because of the rape.

8. It is a settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material, and only then can the same be pleaded. Even where it is so, the Court has to examine which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the prosecution's case. Madhia Rani (PW-5), the victim, was eight years old at the time of occurrence, while she was 8-1/2 years old when her statement was recorded in the Court. After the Court was convinced that she was competent to make the statement, the same was recorded. During the examination-in-chief, the victim, Madhia Rani (PW-5), deposed that: -

“---Stated that on 18.6.2018 at about 3:30 p.m, my mother sent me to a shop in order to purchase articles. Where the accused Asad Suhail present before the court met me in the street and asked me that his mother was calling me. Then accused took me to his house where his mother and sister were not present. He took me into a room where he forcible put off my “shalwar” and committed Zina-Bil-

Jabar with me. Responding to my hue and cry, my father Mazhar Iqbal, Nasar Hussain and Riaz Ahmad PWs passing through the street came there and saw the occurrence. They all apprehended the accused. I was medically examined. I.O also recorded my statement.”

We must notice that despite a lengthy cross-examination, she stood to her statement and did not cast any doubt on the statement made by her examination-in-chief. Madhia Rani (PW-5), the victim, during cross-examination, reaffirmed that: -

“---on the day of occurrence, my mother sent me to purchase eatable for my brother Ibrahim and thread rolls. My mother gave me Rs.50/-to purchase above mentioned from the shop of Hafiz which is on the eastern side from our house---There is no shop near the house of Asad. All accused present in the court. The house of Asad accused is situated on the back side of our house. I did not purchase any item from the shop of Hafiz. Nobody met me on the way towards shop. The Rs.50/- slipped away (lost) somewhere---My mother along took me to the hospital after the occurrence at about 7:00 p.m. The house of place of occurrence was not bolted or locked from the inside---At about 5:00 p.m., from the day of occurrence, my family took me to my house. Police recorded my statement at hospital. Nasar PW is my real paternal uncle---”

An 8-1/2-year-old girl could hardly be aware of the technicalities of the law about an offense of sexual assault. The victim, Madhia Rani (PW-5), stood firm in her statements. The defence reaffirmed the incident. The incident was confirmed from the cross-examination of Mazhar Iqbal (PW-4) and Riaz Ahmad (PW-6) by the defence. Mazhar Iqbal (PW-4), complainant and father of the victim, during cross-examination, reaffirmed that: -

“---I was present at my house when Madhia Rani victim left the house for shop in order to purchase eatable for her brother Ibrahim and thread rolls from the Hafiz shop. Her mother gave her Rs.50/-. The shop of Hafiz is situated towards western side from our house---The house of the accused is on the backside of our house which is towards eastern side from our house. There is no shop near the house of Asad Ali accused present in the court---We started search of Madhia Rani victim/PW at about 4:00 p.m. My brother Nasar PW is Rickshaw driver. He normally uses his rickshaw from morning to evening. However, on the day of occurrence, due to Eid holidays, he was present at house. The occurrence, took place on the third day of Eid---Riaz PW was at our house when we took him with us to search the Madhia Rani victim. Rias PW came to our house at about 3:00 p.m. on the day of occurrence. Riaz PW visited our house in connection with Eid celebration---My brother Nasar was also present at our house at the day of occurrence---We started in search of Madhia Rani victim firstly at Hafiz shop, then street of Rai Mukhtar, then main street and after then the street of accused. Main doors of the house of accused and doors of rooms were not locked/bolted from the inside---Mother of the victim Madhia Rani also reached at the place of occurrence. Police reached at the place of occurrence at about 4:00 p.m. Madhia Rani victim was shifted to the hospital in the company of her mother and Talat Yasmeen Inspector/I.O after 15/20 minutes---I alone went to police station at about 5:00 p.m, after sending the victim to the hospital. I got drafted complaint Ex.PC from a private person in the police station. After submitting complaint Ex.PC I went to my house---The accused Asad Suhail was arrested at the time of occurrence and place of occurrence. Nasar and Riaz PWs caught hold the accused till the arrival of the police. I also remained present there outside the house. Main gate of the house of occurrence remained open”

Similarly, Riaz Ahmad (PW-6), during cross-examination, reaffirmed that: -

“---There is grocery shop situated near the house of complainant owned by Hafiz. House of accused is not situated in between shop of Hafiz and house of complainant---At time of occurrence, I was present in the house of complainant wherefrom we started the search of victim Madhia Rani. I along with Nasar, Mazhar complainant and other house mates of the house were present in the house of complainant. I visited the house of complainant in connection with Eid celebrations ten minutes prior to the occurrence. Firstly, we proceeded towards the grocery shop of Hafiz in search of victim, then we searched the victim in the adjacent streets and after that we proceeded in the street of house of occurrence. Victim Madhia Rani left her house in my presence. We search the victim for about 30 minutes. The outer door and the door of room of place of occurrence were neither locked nor bolted. However, doors were shut at that time,. Many persons gathered there on our hue and cry. First of all, Rai Fida Hussain, then nephew of Mazhar complainant whose names are not known to me then Sarwar, Rai Javed, Zubair and others whose names are not known to me came there. I along with the help of Mazhar and Nasar Pws caught hold the accused. Till the arrival of police I and Nasar PW caught hold the accused. The police party firstly responding arrived at the place of occurrence, comprised upon male police personnel. Lady police came at the place of occurrence after about two hours later on. Before the arrival of lady police, the accused was shifted to the police station by the first police party. During this time, Mazhar complainant alone went to the police station for registration of FIR. The victim was shifted to the hospital in the company of her mother by the first police party from the place of occurrence---I along with my wife visited the house of complainant about one year prior to the occurrence. I had been

oftenly visiting the house of complainant in the evening. Two/three days after the occurrence, I again visited the house of complainant, I alongwith my wife never visited the house of complainant after the occurrence. Five/seven days prior to the occurrence, Mazhar Hussain complainant visited my house---

Cross-examination of these witnesses thus established the appellant's involvement in the commission of the heinous crime of rape with a child of 8-1/2 years. The defence could not elicit any material from the cross-examination of these witnesses for doubting their version of the incident. Even the evidence regarding the role of rape is evident and precise and shows that Mazhar Iqbal (PW-4), the complainant, Madhia Rani (PW-5), the victim, and Riaz Ahmad (PW-6), are witnesses of truth. The prosecution version is entirely in tune with the medical evidence. We have no reason to disbelieve the clear and consistent version of the above eyewitness. Where the eyewitness account is credible and trustworthy, a negative DNA report (Exh. PF) pointing to alternative possibilities may not be accepted as conclusive. Rape is a crime not only against human dignity but also against society as a whole. In our culture, the family members of a minor girl, the victim of sexual assault, would rather suffer silently than falsely implicate somebody. Any statement of rape is an extremely humiliating experience for the family members of the girls and women. Until she/they is/are a victim of sex crime, she/they would not blame anyone but the real culprit. While appreciating the victim's evidence, the courts must never forget that no self-respecting Father would put her daughter's honor at stake by falsely alleging the commission of rape on her. Ordinarily, a look for corroboration of her testimony is unnecessary and uncalled for. No doubt, the DNA is negative, but it is evident from the testimony of the victim-Madhia Rani (PW-5), that she not only identified the

accused but also proved how the incident had occurred. The statement of a witness must be read in its entirety. Reading a line out of context is not an accepted canon of appreciation of evidence. During cross-examination, Muhammad Sohara S.I. (PW-8) reaffirmed that the accused-appellant was arrested from the place of occurrence. In the present case, the appellant had been provided ample opportunity to explain the incriminating evidence produced against him by the prosecution during cross-examination, but he reaffirmed the prosecution case. In light of the above, we have no hesitation in concluding that we find no merit in the contention raised on behalf of the appellant about discrepancies in the medical and ocular evidence.

9. Indeed, the statement of Madhia Rani (PW-5) was not recorded as per the provision of Section 164 of the Cr.P.C. Law does not require that a statement of a witness must be recorded under Section 164, Cr.P.C. However, a statement recorded Under Section 164 Cr.P.C. can never be used as substantive evidence of the truth of the facts. Still, it may be used for contradiction or corroboration of the witness who made it. As such, we hold that the absence of any statement under Section 164 Cr.P.C. has not caused any prejudice to the accused or caused any miscarriage of justice. Besides, we have seen that the evidence of the victim is free from any doubt, and she did not deviate from her statement before the investigating officer soon after the occurrence. Moreover, it is a settled principle that investigation flaws should not cause prejudice to the rights of the sexually harassed victims, and accordingly, hyper-technicalities are to be avoided.

10. Given the above circumstances, we have concluded that the prosecution has proved its case against the appellant beyond any shadow of a doubt. The appellant's guilt stands fully established from the evidence on the record. The learned trial

court rightly held the appellant guilty of the offence committed by him. The order of his conviction is, therefore, maintained. We have observed the factors which have persuaded us not to uphold the capital sentence of the appellant. The appellant, no doubt, has committed a heinous offense. Hence, the statement of the child witness is held to be mitigating circumstances.

11. Based on the grounds discussed hereinabove, we believe that mitigating circumstances exist about the quantum of the appellant's sentence. Therefore, we believe the death sentence awarded to the appellant is quite harsh. It is the well-recognized principle that the accused is entitled to the benefit of the doubt as an extenuating circumstance while deciding his question of sentence. The Hon'ble Supreme Court of Pakistan holds it in the case titled "**Dilawar Hussain v. The State**" (2013 SCMR 1582) in which the Hon'ble Supreme Court of Pakistan has observed on page 1590 as under: -

"---It has neither been the mandate of law nor the dictates of this court as to what quantum of mitigation is required for awarding imprisonment for life rather even an iota towards the mitigation is sufficient to justify the lesser sentence. According to our estimation even a single stance providing mitigation or extenuating circumstance would be sufficient to award lesser punishment as an abundant caution. In such circumstances, if the court is satisfied that there are certain reasons due to which death sentence is not warranted, the court has no other option but to improve second sentence of imprisonment for life while extending benefit of the extenuating circumstances to the convict in a just and fair manner---."

12. In these circumstances, the appeal bearing No.17007 of 2019, filed by the appellant, Asad Ali, son of Muhammad Yaqoob, is **dismissed**. However, his (the appellant) **death sentence is**

converted into rigorous imprisonment for life. The benefit of Section 382 (b) of Cr.P.C. is also extended to the appellant.

13. **Capital Sentence Reference No.23 of 2019** forwarded by the learned trial court for confirmation of the sentence of death inflicted upon the convict fails, which is answered in **Negative.**

(Asjad Javaid Ghural)
Judge

(Aalia Neelum)
Judge

Approved for reporting

Judge

Judge

This judgment
was dictated,
pronounced on
25.09.2023,
prepared, and
signed on
16.10.2023.

A.S.Khan