

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.57371 of 2023
(Nazar Muhammad vs. DPO, etc.)

JUDGMENT

Date of hearing:	19.10.2023
Petitioner by:	Mian Ali Raza Sarwar, Advocate.
State by:	Mr. Shahid Nawab Cheema, Assistant Advocate General.
Respondents No.5 & 6 by:	Rai Atif Sher Kharal, Advocate.

ALI ZIA BAJWA, J.:- Through this petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter '*the Constitution*'), the petitioner seeks recovery of the alleged detenue namely Mst. Yasmin (daughter of the petitioner) from the illegal and improper custody of respondents No.5 and 6.

2. Arguments heard and the record available on the file perused.
3. There are two important moot points raised by the learned counsel for the petitioner. The first one is that respondent No.5 Muhammad Zahid is guilty of the offence of rape as he has contracted and consummated the marriage with a minor girl/detenue and the second that being a minor, Mst. Yasmeen, the alleged detenue, was not competent to get her statement recorded under Section 164 of the Code of Criminal Procedure, 1898 ('Cr.P.C.')
4. As far as the first moot point is concerned, perusal of the record reflects that respondent No.5 contracted marriage with the daughter of the petitioner. According to the petitioner's own version at the time of her

marriage, his daughter was 13/14 years old and she was not legally competent to enter into a bond of marriage. I have perused the statement of Mst. Yasmeen Bibi, got recorded before the Magistrate under Section 164 Cr.P.C. in which she categorically stated that her age is 19 years. If for the sake of arguments, the statement of the petitioner is considered correct, that Mst. Yasmeen was of 13/14 years of age at the time of her Nikah with respondent No.5, even then respondent No.5 cannot be held guilty of the offence of rape. It has been settled since long that when a girl marries after attaining puberty, said marriage cannot be considered a ‘void marriage’, even if she has not attained the minimum legal age provided under any law for the time being in force. The age of puberty, under different ‘Schools of Thought’, varies, however, as per the ‘Hanafi’ school of thought, the minimum age for a girl to attain puberty is 9 years. In this regard, reference can be made to the decision of the Supreme Court in **Yousuf Masih alias Bagga Masih**¹. In the said case, it was categorically held by the Supreme Court as under:-

“...All the original texts of Hanafi jurisprudence are unanimous on the point that 9 years is the minimum age on which the declaration of a girl about her puberty can be accepted. For example Allama Shami, the well known Hanafi jursit, writes in his Radd-ul-Muhtar, volume 5,---page 107 And the minimum age of puberty for a boy is 12 years and for a girl is 9 years.

In the case in hand, even as per the version of the petitioner, the age of her daughter Mst. Yasmeen was about 13/14 years at the time of her marriage. Keeping in view the principles of Islamic Law as reiterated in the **Yousaf Masih alias Bagga supra**, Mst. Yasmeen has already reached an age where she can attain puberty. Now the question arises as to how it will be determined whether a girl has attained puberty or not. This query was also answered in **Yousaf Masih alias Bagga supra** that when a girl after reaching the minimum age of puberty declares that she has attained puberty, her declaration would be accepted as correct unless and until rebutted by cogent and convincing legal evidence. The relevant extract of the judgment has been reproduced *infra*:-

“...And the minimum age of puberty for a boy is 12 years and for a girl is 9 years. Therefore, if they reach this age and declare that they

¹ Yousuf Masih alias Bagga Masih and another vs. The State – 1994 SCMR 2102

have attained puberty, their statement can be relied upon if there is nothing apparent to falsify them... ”

I have minutely perused the case file but could not find anything contrary to the stance of Mst. Yasmeen to falsify her declaration. Thus, her declaration in this regard would be deemed true.

5. Now I come to the next point regarding the consequences of marrying a girl who has not yet attained the minimum age provided by the law to enter into a matrimonial contract. In this regard, suffice it to say that it is a consistent view of Constitutional Courts of our Country that if a person marries an underage girl, the relevant law providing punishment for such an act is the Child Marriage Restraint Act, 1929 (hereinafter ‘*the Act of 1929*’). In **Mst. Bakhshi**², an appeal was filed in the Supreme Court of Pakistan against the decision of West Pakistan High Court, Lahore Bench, by which the High Court got recovered the daughter of the appellant from her custody and allowed the girl to go with her husband. It was contended by the said appellant that her daughter was minor and had not attained the minimum age provided by the Act of 1929, hence she was not competent to enter into a nuptial bond and the High Court had erred in letting her go with her husband. The Supreme Court strongly repelled the contention of the said appellant by holding that punishment for marrying an underage girl has been provided by the Act of 1929 but such marriage cannot be termed as invalid merely because the girl had not attained the minimum age provided under that Act. The relevant portion of the judgment has been provided below:-

“...It is true that the said Act does not permit the marriage of a girl below the age of 16 years, but if a girl below the age of 16 years marries in violation of that law, the marriage itself does not become invalid on that score, although a adult husband contracting the marriage or the persons who have solemnized the marriage maybe held criminally liable.”

This principle has been expounded and reiterated in a chain of judgments³ of the Constitutional Courts of our Country ruling thereby that such marriage cannot be invalidated on this ground and the only consequence provided

² Mst. Bakhshi vs. Bashir Ahmad and Another – PLD 1970 Supreme Court 323

³ Mauj Ali v. Syed Safdar Hussain Shah and another – 1970 SCMR 437, Ghulam Hussain. vs. Nawaz Ali and Another – 1975 P Cr. L J 1049, Mushtaq vs. Muhammad Amin - P L D 1962 Kar. 442, Ghulam Qadir vs. The Judge Family Court, Murree and another – 1988 C L C 113, Allah Bakhsh vs. Safdar and others – 2006 Y L R 2936, Allah Nawaz vs. Station House Officer, Police Station Mahmood Kot District, Muzaffargarh – PLD 2013 Lahore 243, Muhammad Azam vs. The State and another – 2018 PCr.LJ Note 175 and Muhammad Khalid vs. Magistrate 1st Class and 2 others – PLD 2021 Lahore 21

under the Act of 1929 is punishment of imprisonment to a person who marries such underage girl. The contention of the learned counsel for the petitioner that respondent No.5 has committed an offence of rape punishable under Section 376 of the Pakistan Penal Code, 1860 (hereinafter ‘PPC’) is based on a wrong assumption that being minor, consent of Mst. Yasmeen to marry respondent No.5 and consummation of marriage would not matter because Section 375 PPC provides that a sexual act with a girl under sixteen years of age will amount to rape irrespective of her consent. In this regard, suffice it to say that the sexual offence mentioned in Section 375 PPC cannot be equated with the consensual consummation of marriage with a legally wedded girl, who has attained puberty, though she has not attained the minimum age provided under the Act of 1929. To do so would amount to declaring such marriage null and void. Regarding the validity of such marriage, it is worth noting that marriage is a significant institution in Islam and its validity or illegality can only be adjudged in the light of injunctions of Islam. The Act of 1929 only provides punishment for marrying a girl under 16 years of age but does not declare such marriage void. When confronted with this proposition, learned counsel for the petitioner has controvorted the validity of this enactment. I am not in agreement with his stance because to declare a law or provision of law against the injunctions of Islam is the sole domain of the Federal Shariat Court established under Article 203-C of the Constitution. Recently, in Farooq Omar Bhoja⁴ a challenge was thrown to the vires and legality of Sections 4, 5 & 6 of the Act of 1929 being repugnant to the injunctions of Islam for setting a minimum legal age for male and female to contract marriage. Although said enactment was held by the Federal Shariat Court to be within four corners of injunctions of Islam but Federal Shariat Court neither declared such marriage void nor made any kind of suggestions in this regard to amend the law. The intent of lawmakers is obvious from the bare reading of the Act of 1929 that they wanted to punish a person solemnizing marriage with a girl less than sixteen years of age. If the legislature intended to declare such marriage as void and to punish the offender under the general law, then there was no need to provide a punishment for such an act in the said enactment and there would have been a

⁴ Farooq Omar Bhoja vs. Federation of Pakistan through Ministry of Law and Justice of Pakistan through Secretary, Islamabad – PLD 2022 FSC 1

simple mentioning that such an act would be punished under the general penal law of the land. Penal provisions cannot be attracted on the basis of analogy or presumptions in cases where there is a clear enactment available dealing with a specific situation. A similar enactment was promulgated by the Province of Sindh i.e. Sindh Child Marriage Restraint Act, 2013 and its Section 2(a), fixed the age of 18 years as the minimum legal age for both, male and female, to enter into marital ties. Said Act has also not declared such marriage as void although punishment for such offence has been enhanced.

6. Furthermore, I could not lay my hand on any dictum laid down by the Federal Shariat Court where the marriage was declared void when a minor girl, without attaining the minimum age prescribed by the law, contracted marriage after attaining the age of puberty. Thus, in view of the above discussion, I have no hesitation to hold that the act of respondent No.5 to marry Mst. Yasmeen and consummation of such marriage would not amount to rape as pleaded by learned counsel for the petitioner.

7. Regarding the second moot point that Mst. Yasmeen was not competent to get her statement recorded under Section 164 Cr.P.C., I have no hesitation to hold that such argument has no substance and highly misapprehended. The age of a witness has nothing to do with her/his competence to depose as a witness. Relevant law dealing with the competence of a witness has been provided under Article 3 of the Qanun-e-Shahadat (hereinafter '*the Q.S.*'). Before proceeding further, it will be advantageous to have a glimpse of relevant law, which has been reproduced herein below:-

"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 cause 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 qualifications 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.”

This Article only provides a rule of circumspection. The law of evidence does not prescribe a specific age as a determinative factor to consider a witness to be competent to depose. Article 3 of Q.S. envisages that all the 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, because of tender age, extreme old age, disease whether of mind, or any other cause of same kind. A child of tender age is competent to testify if he has intellectual capacity to understand questions and give rational answers thereto.

8. Article 17 read with Article 3 of Q.S. vests in the court the discretion to determine whether a witness of tender age is or is not competent to be a witness by reason of understanding or lack of understanding. In **Raja Khurram Ali Khan**⁵, the Supreme Court elaborated that a court has to apply the ‘rationality test’ in such cases to ascertain whether a child is capable enough to understand the questions put to such child and to give rational answers. Relevant extract of the judgment has been provided below:-

“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...”

While applying rationally test, no specific set of questions is required to be put to a child witness and it is sole discretion of concerned court how it would satisfy itself regarding competence of a child witness. Presumption of correctness is attached to the judicial proceedings and declaration of Magistrate/court regarding its satisfaction would be enough to qualify such

⁵ Raja Khurram Ali Khan and 2 others vs. Tayyaba Bibi and another – PLD 2020 Supreme Court 146

witness as a competent witness. Guidance is sought from the decision of the Supreme Court in Ameer Umar⁶ wherein, while discussing the provisions of Section 118 of erstwhile Evidence Act 1872 (now Article 3 of the Q.S.), this principle was expounded in the following words:-

“Section 118 of the Evidence Act does not prescribe any set of questions to be put in this behalf. All that is required is that the Court must satisfy itself that the child witness is capable of giving rational answers to the questions being put to him. The learned Magistrate has recorded his satisfaction on this point, and we do not see how we can go behind his opinion.”

It is also pertinent to note that although in this case, learned Magistrate has recorded the questions and answers in writing, which were put to Mst. Yasmeen but even this was not the requirement of law. As discussed earlier, law only requires the satisfaction of the court before recording the statement of a child witness and no specific procedure has been provided by the law to be applied before reaching any conclusion regarding competence of a child witness. Jotting down the questions put to such child is not required as was held by this Court in Abdul Majeed⁷ in the following words:-

“16. ...It means that the observing intellect of a child in the shape of writing question and answer is not the requirement of law. The Court was quite competent to give its observation with regard to the intellect of the witness. It would mean that only requirement is the satisfaction of the Court.”

In this case, learned Magistrate put questions to Mst. Yasmeen to ascertain her competence to make statement and after his satisfaction, he recorded her statement. Thus, in the aforementioned facts and circumstances, I am of the considered view that Mst. Yasmeen was fully competent to make statement under Section 164 Cr.P.C., therefore, contention of learned counsel for the petitioner on this score is repelled.

9. It would not be out of place to discuss that during investigation resort is being made to Section 164 of the Cr.P.C. by the Investigating Officer, generally when statement of a witness or confession of an accused is to be recorded before the Magistrate. The statement of the witness must be recorded like a statement recorded from a witness in court. Before recording the statement, an oath is administered. The procedure of recording the

⁶ Ameer Umar vs. The State – 1976 SCMR 338

⁷ Abdul Majeed vs. The State – 2002 P Cr.LJ 41

statement of a witness is entirely different from the procedure of recording the statement/confession of an accused. Only before and after recording a confession of an accused, various precautionary measures⁸ including giving of reflection time to the accused have been prescribed. This rigorous exercise needs not to be followed for recording the statement of a witness under Section 164 of the Cr.P.C. Section 364 of the Cr.P.C. is of general application as it only applies to the statement of an accused recorded during any proceeding. The confession of an accused is recorded under Section 164 read with Section 364 of the Cr.P.C. Every court is bound to comply with all the precautionary measures provided under Section 364 Cr.P.C. whenever statement of an accused is recorded. But in the case of recording the statement of a witness, Section 364 Cr.P.C. has no relevance.

10. I have strangely noticed that learned Magistrate allowed the counsel for the petitioner to cross examine Mst. Yasmeen after her statement was recorded under Section 164 Cr.P.C. and also provided a memorandum at the end, which is required to be given after recording the confessional statement of an accused to the effect that he was warned that he was not bound to make the confessional statement, etc. As far as allowing the petitioner to cross examine Mst. Yasmeen is concerned, law does not warrant any such concession because petitioner was not an accused in the case. Under sub-section (1-A) of Section 164 Cr.P.C., the opportunity of cross examination is provided to the accused only. Initially this opportunity was also not available to the accused but later sub-section (1-A) was added to Section 164 Cr.P.C. through Section 62 of the Law Reforms Ordinance, 1972. As a ready reference, relevant sub-section of Section 164 Cr.P.C. has been provided below:-

"Section 164. Power to record statements and confessions: (1) Any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Provincial Government may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(1-A) Any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement. (emphasis supplied)

(2)....

(3).... "

⁸ As provided under SS. 164 & 364 of the Cr.P.C.

Above provision of law is self-explanatory and only provides an opportunity of cross examining a witness, who is getting her/his statement recorded under Section 164 Cr.P.C., to the accused against whom such statement was made. Right to cross examine a witness during trial proceedings is provided under Article 132(2) of the Q.S. but sub-section (1-A) of Section 164 Cr.P.C. is a special provision enacted to provide an opportunity to the accused only to confront the witness who makes the statement against such accused before a Magistrate prior to the commencement of trial. Allowing the petitioner to cross examine Mst. Yasmeen would mean that Magistrate had considered and declared Mst. Yasmeen as ‘a hostile witness’ and allowed the petitioner to put questions to her under Article 150 of the Q.S. which was based upon wrong assumption of law because these were not the trial proceedings during the course of which a witness could be declared hostile and party producing such witness could be allowed to put questions to such a witness. Thus, act of learned Magistrate to allow petitioner to cross examine the alleged victim Mst. Yasmeen was not warranted by the law.

11. As far as question of providing the memorandum by the Magistrate at the end of statement of Mst. Yasmeen to the effect that she was not bound by law to record the statement is concerned, I am afraid that it is not the requirement of law. Section 164(3) Cr.P.C. only requires such memorandum to be provided at the end of the confessional statement of an accused. Sub-section (3) requires that before recording confessional statement of an accused, a Magistrate should convey to the accused that she/he is not bound to make a confession and if she/he does so it may be used as evidence against her/him. It further requires that Magistrate shall put a memorandum to that effect at the foot of such confessional statement. Sub-section (3) of Section 164 Cr.P.C. has been provided herein below for ready reference:-

“Section 164. Power to record statements and confessions: (1)---

(2) ---

(3) A Magistrate shall, before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he

records any confession, he shall make a memorandum at the foot of such record to the following effect:--

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him."

(Signed) A.B. Magistrate.

Above referred provision of law makes it profusely clear that such memorandum is to be recorded only at the end of a confessional statement of an accused and there is no legal requirement to provide such memorandum at the end of the statement of a witness recorded under Section 164 Cr.P.C.

12. In the view of above discussion, I have no hesitation to hold that the practice of allowing the persons other than the accused, to cross examine a witness after her/his statement under Section 164 Cr.P.C. is recorded, and providing a memorandum as envisaged under Section 164(3) of the Cr.P.C. at the end of statement of a witness, is not in accordance with the law.

13. The upshot of the above discussion is that this petition is **dismissed** being devoid of any merits.

(ALI ZIA BAJWA)
JUDGE

The order was pronounced on 19.10.2023 and after completion it was signed on 22.11.2023.

JUDGE

Approved for Reporting.

JUDGE

Athar*