

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE JAMAL KHAN MANDOKHAIL
 MRS. JUSTICE AYESHA A. MALIK
 MR. JUSTICE MALIK SHAHZAD AHMAD KHAN

CRIMINAL MISCELLANEOUS APPLICATION NO. 374/2024
 (Compromise)

IN / AND CRIMINAL PETITION NO. 725/2023

(Against the judgment dated 17.05.2023 of the Lahore High Court, Bahawalpur Bench in Criminal Appeal No.452/2019)

Muhammad Imran

...Applicant/Petitioner

Versus

The State and another

...Respondent(s)

For the Applicant/
Petitioner: Agha Nayyar Latif Awan, ASC

For the State: Mr. Irfan Zia, Addl. P.G. Punjab

Date of Hearing: 26.06.2024

JUDGMENT

Malik Shahzad Ahmad Khan, J.- As per brief allegations leveled by Mst. Mumtaz Bibi, complainant (PW-1), 04 years earlier to the registration of FIR, she was married to one Gohar Aman. However, due to matrimonial disputes she was divorced one month earlier by the said Gohar Aman. The complainant thereafter started living in the house of her brother namely Muhammad Zaman (PW-3). Muhammad Imran, petitioner, was a friend of Muhammad Zaman who used to come to the house of the complainant party. On 11-7-2016 at 08:00 PM (night), Mst. Mumtaz Bibi, complainant, was alone in her house. In the meanwhile, Muhammad Imran, petitioner, came to the house of

5. Although during the pendency of this case before this Court, the petitioner moved Criminal Miscellaneous Application No. 374/2024 for grant of permission to compound the offence whereupon a report was requisitioned, which has been received from the learned District & Sessions Judge, Bahawalnagar, and according to the said report, the sole eye-witness of the case namely Mst. Mumtaz Bibi, complainant (PW-1) has exonerated the petitioner from the charge and she stated that due to some misunderstanding she named the petitioner in this case and now she is satisfied that the petitioner is innocent, hence, she has no objection on the acquittal of the petitioner but it is noteworthy that the complainant/victim did not exonerate the petitioner at the time of recording of her statement by the learned trial Court and at that time she supported the prosecution case. Furthermore, the offence under Section 376 PPC is a non-compoundable offence, therefore, the petitioner cannot be acquitted on the basis of the above-mentioned ground. We, therefore, while dismissing Criminal Miscellaneous Application No. 374/2024 for grant of permission to compound the offence, proceed to decide the main Criminal Petition No. 725/2023, on merits.

6. The main contention of learned counsel for the petitioner is that it was not a case of rape punishable under Section 376 PPC and at the most it was a case of fornication (*zina with consent*) punishable under Section 496-B PPC. As mentioned above, the complainant has already exonerated the petitioner from the charge, therefore, no one appeared on behalf of the complainant to oppose the above-referred contention of learned counsel for the petitioner. However, learned Additional Prosecutor

General has controverted the above-mentioned argument of learned counsel for the petitioner while arguing that according to the facts of the case and evidence produced by the prosecution, it is a case of rape punishable under Section 376 PPC.

It is true that as per report of Punjab Forensic Science Agency, the DNA profile of Muhammad Imran, petitioner matched with the DNA profile of semens detected on the vaginal swabs of Mst.Mumtaz Bibi, complainant, which shows that illicit intercourse took place between the petitioner and the complainant and the complainant (PW-1) also alleged that the petitioner committed rape with her but the moot point for determination before this Court is that as to whether it is a case of rape punishable under Section 376 PPC or it a case of fornication (*zina with consent*) punishable under Section 496-B PPC. In order to resolve the above-mentioned controversy, we have noted that occurrence in this case took place on 11-7-2016 at 08:00 PM (night) whereas the FIR was lodged on 13-7-2016 at 05:45 PM and, as such, there is a delay of about two days in reporting the matter to the Police. It was so mentioned in the FIR that brother of the complainant namely Muhammad Zaman (PW-3) and another witness namely Muhammad Waseem Akram (PW-2) attracted to the spot when the complainant raised hue and cry after the occurrence but even then the FIR was not promptly lodged and the complainant party kept on consulting with each other for about two days. No plausible explanation has been given by the prosecution for the above-mentioned delay in reporting the matter to the Police. Under the circumstances, the sanctity of truth cannot be attached to the FIR, as there was every possibility that the FIR was lodged after deliberations while

narrating an exaggerated story to make the offence graver.

Although mere delay in such like cases is not always fatal to the prosecution's case but while keeping in view the other particular facts of a case, the same may be relevant.

7. We have further noted that in the contents of the FIR (Ex.PA/1), the complainant has herself stated that 04 years prior to the occurrence, her marriage was solemnized with one Gohar Aman but one month prior to the occurrence she (complainant) was divorced by her husband and thereafter she was living in the house of her brother namely Muhammad Zaman (PW-3). We have also noted that Mst. Mumtaz Bibi, complainant, who is the sole eye-witness of the occurrence, has admitted during her cross-examination that prior to the registration of the instant FIR, earlier another FIR bearing No. 145/16 under Section 294 PPC was lodged by the Police of Police Station City A-Division (Bahawalnagar) and she (complainant) as well as the present petitioner Muhammad Imran, both were arrested by the Police in the said case. The relevant parts of the statement of Mst.Mumtaz Bibi, complainant, in this respect are reproduced hereunder for ready reference:-

"It is correct that prior to registration of this case on 23.05.2016 a case FIR No. 145/16 was registered with P/S City A-Division U/S 294 PPC in which I was arrested by Muhammad Afzal ASI complainant of said FIR from Railway Colony, at that time I was arrested by police official.

.....
It is correct that Imran accused present in court was also an accused of said FIR and he was also released on bail/surety before police. It is correct that

my brother Muhammad Zaman PW got me released on bail/surety on 23.05.2016 in case FIR No. 145/16."

8. It is, therefore, evident from the perusal of the above-mentioned parts of the statement of Mst. Mumtaz Bibi, complainant (PW-1) that she was earlier arrested by the Police along with the petitioner in a case of obscene acts. It is further noteworthy that although the complainant claimed that she was forcibly dragged by the petitioner towards a room of her house where the petitioner committed rape with her after forcibly removing her *shalwar* but no signs of dragging have been mentioned in the site plan of the place of occurrence (Ex.PB). Similarly, no mark of dragging or mark of any laceration, bruise or contusion was noted on the entire body of Mst. Mumtaz Bibi, complainant by the Medical Officer Dr. Nayab Arshad (PW-9). It was not alleged in the contents of the FIR or in the statement of Mst. Mumtaz Bibi, complainant (PW-1) recorded by the learned trial Court that the petitioner was armed with any firearm, *churri*, *danda* or any other weapon at the time of occurrence due to which the complainant became frightened and could not offer any resistance. The petitioner was admittedly empty handed at the time of occurrence. A female who is not a consenting party would offer very strong resistance in a case of attempt to commit rape with her by a male but as mentioned earlier in the instant case no mark of violence whatsoever was noted on the entire body of Mst. Mumtaz Bibi, complainant by the Medical Officer at the time of her medical examination. Likewise, the allegation of forcibly removing the clothes (*shalwar*) of Mst. Mumtaz Bibi, complainant (PW-1) was not corroborated with the recovery of any torn clothes of the L

complainant. All the above-mentioned facts show that Mst. Mumtaz Bibi, complainant was a consenting party. Under the circumstances, we are of the view that ingredients of offence of rape punishable under Section 376 PPC are not attracted in this case rather it is a case of fornication (*zina with consent*) punishable under Section 496-B PPC.

We are aware of the fact that once we hold that it is a case of fornication punishable under Section 496-B PPC then Mst. Mumtaz Bibi, complainant is also liable to be proceeded against and punished as an accused of the offence of illicit intercourse with consent but as she was not challaned by the Police and no charge of fornication under Section 496-B PPC was framed against her by the learned trial Court, thus, she had no opportunity to defend herself, therefore, it will not be appropriate to punish her without providing her opportunity of defence.

9. For what has been discussed above, by a majority of 2:1 (*Justice Ayesha A. Malik dissenting*), this petition is converted into appeal, partly allowed and the impugned judgment is modified to the extent that conviction and sentence of the petitioner/appellant under Section 376 PPC is set aside and instead the petitioner/appellant is convicted under Section 496-B PPC and is sentenced to 05 years rigorous imprisonment with the fine of Rs.5000/- or in default whereof to further undergo 02 months simple imprisonment. As we have converted the conviction and sentence of the petitioner/appellant from the charge under Section 376 PPC to the offence under Section 496-B PPC, therefore, conviction and sentence of the petitioner/appellant under the charge of Section 449 PPC is also set-aside and the

petitioner/appellant is convicted under Section 448 PPC and sentenced to 01 year rigorous imprisonment. Both the sentences awarded to the petitioner/appellant shall run concurrently and benefit of Section 382-B Cr.P.C. is also given to the petitioner/appellant.

I Disagree with the JUDGE
reasons and conclusion of
the majority opinion and
have added my dissent to
explain why. JUDGE

Islamabad, the
26th of June, 2024
Not Approved For Reporting

Khurram

8/7

Ayesha A. Malik, J.- I have read the opinion of the majority as contained in the judgment authored by Mr. Justice Malik Shahzad Ahmad Khan with the concurrence of Mr. Justice Jamal Khan Mandokhail. However, I cannot agree with the reasoning given nor the conclusion drawn therein. Hence, my dissent is based on the reasons given hereunder.

2. As per the prosecution's case, reflected in the First Information Report (**FIR**), Mumtaz Bibi (**Complainant**) was in the house of her brother Muhammad Zaman when on 11.07.2016, at 8:00 p.m., Muhammad Imran (**Petitioner**), who was a friend of her brother (Muhammad Zaman) and visited often, came to the house when her brother was not home and she was alone. He bolted the outer gate of the house, forcibly took her to the bedroom placing his hand over her mouth, where she was subjected to rape. On her hue and cry, Muhammad Waseem Akram (PW-2) and Muhammad Zaman, her brother (PW-3) came to the house where she narrated the incident. She approached the police station on the same night through her application dated 11.07.2016 (Ex.PA); she was brought by the police before Dr. Nayab Arshad, WMO DHQ Hospital, Bahawalnagar (PW-9) for her medical examination on the same night at 2:25 a.m. on 12.07.2016. The doctor examined her physically and also obtained, for the purposes of the Deoxyribonucleic Acid test (**DNA**), two external and two internal vaginal swabs and blood samples and sent the same to the Punjab Forensic Science Agency, Lahore (**PFSA**). Buccal swab standards of the Petitioner as well as the Complainant were taken on 22.07.2016 at the PFSA. The DNA test came positive as per the Report dated 28.09.2017 (**DNA Report**).

3. The Petitioner was arrested on 21.10.2017. The Petitioner was sent to face trial before the learned Additional Sessions Judge, Bahawalnagar. The trial court vide judgment dated 11.07.2019 convicted the Petitioner as under:

"Under Section 376 PPC: 10-Years rigorous imprisonment with fine of Rs.100,000/- or six months SI in the event of default.

Under Section 449 PPC: 02-Years rigorous imprisonment with fine of Rs.20,000/- or three months SI in the event of default.

The sentences were ordered to run concurrently with benefit of Section 382-B Cr.P.C."

4. The Lahore High Court, Bahawalpur Bench, Bahawalpur (**High Court**) vide the Impugned Judgment dated 17.05.2023 (**Impugned Judgment**) dismissed the appeal filed by the Petitioner while maintaining

his conviction and sentence mainly on the ground that the Complainant stood firm in her stance of rape and that the MLC (Ex.PE) and DNA Report (Ex.PF) corroborated her story. The High Court also concluded that there is no evidence on the record that the Complainant and the Petitioner willfully engaged in sexual intercourse. The High Court decided that the Petitioner failed to prove that the Complainant wanted to marry him and, on his refusal, she filed a fake case against him.

5. As per the opinion of the majority, the Complainant failed to make out a case of rape under Section 376 of the Pakistan Penal Code, 1860 (PPC) and instead, a case under Section 496-B of the PPC, being a case of 'fornication', has been made out. Consequently, the majority's opinion has modified the Impugned Judgment to the extent that the conviction and sentence of the Petitioner under Section 376 of the PPC has been set aside and instead, the Petitioner has been convicted under Section 496-B of the PPC and sentenced to 5-years rigorous imprisonment with a fine of Rs.5000/- or in default to undergo 2-months simple imprisonment. The majority's opinion has also set aside the conviction and sentence recorded under Section 449 of the PPC and convicted him under Section 448 of the PPC.¹ Consequently, as per the opinion of the majority, the offense of rape is not made out and in its place the offense of fornication has been made out for which the Petitioner has been convicted and sentenced. This finding has two important parts to it, one being with reference to proving the offense of rape and the second being that in view of a positive DNA Report, this Court has imputed consent on behalf of the Complainant and subjected the Petitioner to a conviction under Section 496-B of the PPC. I will take up both these issues separately.

6. With reference to the charge of rape, for the purposes of this case, in terms of Section 375 of the PPC,² rape is when a man has sexual intercourse with a woman against her will, without her consent, or with her consent which is obtained by putting the fear of death in her or by hurting her and finally where she gives consent believing that she is married to him or where the consent is given to a minor under the age of sixteen. In terms of the said section, what was required by way of evidence was proof that she was subjected to sexual intercourse against

¹ Section 448 of the PPC is the punishment for house-trespass, whereas Section 449 of the PPC is the house-trespass in order to commit offence punishable with death.

² Section 375 of the PPC was amended by the Criminal Laws (Amendment) Act, 2021 but the said amended provision is not relevant to this case because at the time of commission of the offence reported by the Complainant, the prior provision of Section 375 of the PPC was in-field.

her will and without her consent. As per the law settled by this Court, the most definitive and conclusive evidence in a case of rape is the DNA test. In the *Ali Haider* case, this Court has held that DNA evidence is considered to be the gold standard to establish the identity of an accused due to its accuracy and conclusiveness and is one of the strongest and most corroborative pieces of evidence in rape cases.³ This Court has explained that DNA test with scientific and clarity points towards the perpetrator and leaves very little room for doubt. In the *Salman Akram Raja* case, this Court has held that the DNA test provides a high degree of confidence for identifying perpetrators and is extremely useful for ascertaining the real culprits and excluding potential suspects.⁴ DNA tests are considered to be as accurate as fingerprints especially in a rape case as it clearly establishes the fact that a perpetrator has had sexual intercourse with the victim. A recent study rendered the impact of DNA tests on the prosecution case is such that when the DNA evidence matches the suspect in a rape case, the odds of conviction are substantially greater than in cases with ordinary evidence.⁵ As per the study, DNA evidence establishes that the suspect had sexual contact with the victim and highlights the importance of quality forensic medical examinations. Accordingly, the veracity and significance of the DNA test cannot be ruled out or ignored when the test becomes corroborative evidence in support of the allegation of rape.

7. With reference to the value of the statement of a complainant, this Court has also held that the solitary statement of the victim is sufficient to award a conviction in a rape case if that statement is trustworthy, consistent and reliable.⁶ The Supreme Court of India (**SCI**) in the *Gurmit Singh* case has ruled that the courts should find *no difficulty to act on the testimony of a victim of sexual assault alone* to convict an accused where her testimony inspires confidence and is found to be reliable.⁷ The SCI further held that *corroborative evidence is not an imperative component of judicial credence in every case of rape*.⁸ This Court has also repeatedly ruled that marks of violence in a case of sexual offence are not essential to establish rape and that in the absence of visible marks of violence, it cannot be inferred that the plea of rape is devoid of any merit, especially

³ *Ali Haider v. Jameel Hussain* (PLD 2021 SC 362) (**Ali Haider**).

⁴ *Salman Akram Raja v. Government of Punjab* (2013 SCMR 203) (**Salman Akram Raja**).

⁵ Megan Alderden et al., *Prosecutor's Perspectives on Biological Evidence and Injury Evidence in Sexual Assault Cases*, 31 JOURNAL OF INTERPERSONAL VIOLENCE 7-8 (2021). <<https://doi.org/10.1177/0886260518778259>>.

⁶ *Habibullah v. the State* (2011 SCMR 1665) (**Habibullah**). Similarly, it was held in *Shakeel v. the State* (PLD 2010 SC 47) (**Shakeel**) and *Muhammad Aslam v. the State* (2023 SCMR 397).

⁷ *The State of Punjab v. Gurmit Singh* (AIR 1996 SC 1393) (**Gurmit Singh**).

⁸ *Id.*

where the medical evidence confirms sexual intercourse.⁹ In this context, it is important to note that the victim's character or reputation is also immaterial by way of evidence, there being no nexus between her reputation, character and the offense of rape. Similarly, questions targeting her character have no relevance to the matter on trial, that is, the commission of rape.¹⁰ Similarly, physical resistance need not be established in a rape case as different people react differently when confronted with trauma and to subject all women to a stereotypical presumption that she must resist in a particular form in order to establish rape is totally without basis. These cases show the shift in the jurisprudence which relies on the statement of the victim and corroborative scientific evidence to establish rape and essentially denounce myths, presumptions and stereotypical arguments.

8. The offense of rape is made on the body of the victim and her response to this offensive act cannot be standardized as per *expected responses*. As per expert psychiatrists, the reflexive reaction of fear or threat in a victim may automatically lead to fight, flight or *freeze* responses.¹¹ Especially, in sexual violence, the victim may not be able to make decisions to protect themselves as they might freeze or get stuck in response to the traumatic experience.¹² The use of force or intimidation, the act itself, its trauma and the response will vary from victim to victim and is, therefore, totally subjective. Hence, I totally disagree with the findings given in the opinion of the majority that, since the Petitioner was unarmed, having no weapon at the time of occurrence, a female who is not a consenting party would offer very strong resistance in a case of rape and consequently, there would be marks of resistance on her body. There is no uniform or predictable response of a victim in a case of rape, and at the same time, there is no standardized response of behavior after the rape that would culminate into evidence against the victim. A United Nations Committee on the Elimination of Discrimination Against Women, while considering the stereotypical standards imposed on women to establish rape concluded that such stereotypical standards deny women fair trial because it reinforces a typical myth that women must resist sexual assault. In this regard, the said Committee stressed that there can be no assumption of law or practice that a woman gave her consent

⁹ Shakeel, *supra* note 5 and Habib Ullah, *supra* note 5.

¹⁰ Atif Zareef v. the State (PLD 2021 SC 550) (Atif Zareef).

¹¹ Dr. Lori Haskell & Dr. Melanie Randall, *Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know*, SSRN ELECTRONIC JOURNAL (2019). <<https://ssrn.com/abstract=3417763>>.

¹² *Id.*

simply because there are no marks of resistance.¹³ As per Jan Jordan, the requirement that the victim display evidence of resistance or ‘she must fight back’ is one of the influential myths in rape trials.¹⁴ She highlighted that the masculinist and restrictive approach in rape cases denies and invalidates the realities of women’s experiences. By reducing to a physical act of insertion, “the act of rape is stripped from the fear that surrounds women’s existence within patriarchal structures of gender inequality.”¹⁵ A recent study concluded that most people do not believe that a high ratio of rape or sexual assault cases exists in Pakistan and they further believed that these cases are completely false and fabricated.¹⁶ Sometimes, to silence the victims of rape or sexual abuse and to bar them to seek justice, criminal defamation proceedings are initiated against them by the perpetrators.¹⁷ In my opinion, relying on marks of injury or visible signs of resistance as evidence of rape is a fallacy and a denial of a fair trial to the complainant, who is the victim of a serious and heinous crime. Catharine MacKinnon highlights that the deeper problem is the rape law’s assumption that a single, objective state of affairs existed and when the reality is split, “the law tends to conclude that a rape *did not happen.*”¹⁸

9. At this point, it is relevant to note that victims of rape are subjected to a higher burden of proof than victims of other crimes based on certain misconceptions or presumptions against the victim and the rape. For example, the presumption that women usually lie that they are raped or that women who are widowed or divorced are more likely to consent to intercourse or even that every woman will resist her perpetrator in a particular manner which resistance must be evident and obvious for her to establish rape. Furthermore, gender-based violence is often viewed in the framework of morality, public decency and honor, rather than viewed as violence against women’s integrity. This is so notwithstanding the fact that the law on the subject of rape has evolved over the years where this Court has held that the best evidence in a rape case is a DNA test and that her previous character or reputation is irrelevant. In the same way

¹³ Views of the Committee on the Elimination of Discrimination against Women under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Forty-Sixth Session) Communication No. 18/2008. CEDAW/C/46/D/18/2008.

¹⁴ JAN JORDAN, WOMEN, RAPE AND JUSTICE: UNRAVELLING THE RAPE CONUNDRUM (Routledge) 54 (2022). The other myths that she mentions are stipulations that reporting be done immediately and without delay, beliefs in women’s disposition for making false rape complaints, beliefs in women’s rape fantasies and notions of uncontrollable male urges.

¹⁵ *Id.* at 58.

¹⁶ Noor Zafar, *The Plight of a Rape Survivor: An Analysis of Different Anthropological and Legal Aspects on the Prevalence of Rape, Particularly in South Punjab - Pakistan*, 9 PAKISTAN LAW REVIEW (2018).

¹⁷ Muhammad Anas Khan, *Criminal Defamation Laws in Pakistan and Their Use to Silence Victims of Sexual, Harassment, Abuse, or Rape*, 9 LUMS LAW JOURNAL (2023).

¹⁸ Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence*, 8 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 4 (1983). <<http://www.jstor.org/stable/3173687>>.

her sexual history has become irrelevant and most importantly, in cases of rape, this Court has repeatedly recognized that the statement of the victim is sufficient if it is confidence inspiring.

10. In the facts of the instant case, to establish rape, the prosecution has shown a positive DNA test by PFSA where both the Petitioner and the Complainant were tested and as per the DNA Report, the DNA profile of the Petitioner matched that taken from the Complainant. Counsel for the Petitioner argued that the statement of Dr. Nayab Arshad, WMO DHQ Hospital, Bahawalnagar (PW-9) is not conclusive proof as she has not stated that the Complainant was subjected to rape. This is again an irrelevant contention given that the doctor has confirmed sexual intercourse with the Petitioner and clearly stated that it is not in her domain to declare that the Complainant was raped or otherwise as she has confined herself to the medico-legal examination and the condition of the victim. Furthermore, the ocular evidence of the Complainant and Muhammad Zaman (PW-3) places the Petitioner at the house of Muhammad Zaman at the time of the occurrence as PW-3 states that he saw the Petitioner fleeing from the house. Muhammad Waseem Akram (PW-2) also states that he saw the Petitioner fleeing from the house on the date of the occurrence at the given time. The Complainant's statement is without any discrepancy and she has dispelled the allegations raised by the Investigating Officer that she wanted to marry the Petitioner and on his refusal she filed a false case against him. In terms of the medical examination and filing of FIR, the record does not show any delay as the record shows that she promptly approached the police on the same night through her application dated 11.07.2016 (Ex.PA); she was brought by the police before Dr. Nayab Arshad, WMO DHQ Hospital, Bahawalnagar (PW-9) for her medical examination on the same night at 2:25 a.m.; the Medico-Legal Examination Certificate for Female Survivors of Sexual Violence (Ex.PE) dated 12.07.2016 was issued by the said WMO. So there is no delay on the part of the Complainant in reporting the incident to the police and having herself examined which included the DNA test. Notwithstanding the clear set of facts in this case, with reference to delay, this Court has held that delay is of no consequence as such cases involve the victim and her family's reputation and honor, hence, some delay in reporting a crime of sexual offense is immaterial.¹⁹ In the *Hamid Khan* case, a three-day delay in reporting the crime to the police was deemed

¹⁹ Zahid v. the State (2020 SCMR 590) and Hamid Khan v. the State (1981 SCMR 448) (*Hamid Khan*). 

as insignificant.²⁰ Hence, there is no rule of thumb that a delay in reporting the crime suggests that victim has lied or registered a fake case.

11. The Petitioner has also relied upon the registration of FIR No.145/2016 and stated that there has been a previous case filed against them under Section 294 of the PPC in which she obtained bail.²¹ The Petitioner contends that this previous case under Section 294 of the PPC suggests that the Complainant has a relationship with the Petitioner, however, the said provision is totally irrelevant as it pertains to obscene acts and songs wherein any obscene act in a public place or recitation of obscene song constitutes to an offense under Section 294 of the PPC. In no manner does an offence under Section 294 of the PPC suggest that the Petitioner and the Complainant were involved sexually based on their willingness and consent.

12. So, for the purposes of establishing rape, I am of the opinion that the Complainant has made out a case of rape against the Petitioner and, therefore, I am in agreement with the concurrent findings of the trial court as well as the High Court in this case.

13. It is crucial to observe that the Constitution specifically deals with preserving, protecting and promoting the rights of women, which are clearly violated in gender-based violence cases. Article 9 of the Constitution protects the right to life. Article 14 grants the inviolable right to dignity as well as the right to privacy. In cases of rape, there is a gross violation of the right to life, dignity and privacy. In this context, the State is responsible for ensuring that essential and required steps are taken to protect women from such crimes, and also to protect them from gender stereotyping which undermines a woman's ability to enjoy her basic fundamental rights. It goes without saying that gender stereotyping should not undermine the rule of law. The act of rape has serious consequences as it deprives a woman of her right to life and her right to dignity and privacy which includes the right to mental and physical integrity. Every woman is entitled to respect for her life, her integrity and the security of her person. No woman should be stigmatized simply because she has availed her right to access to justice and reported a heinous crime against her person and body.

²⁰ *Id.*

²¹ Section 294 of the PPC deals with obscene acts and songs.

14. Pakistan is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**) which condemns discrimination against women in all its forms and requires that appropriate measures be taken to eliminate discrimination against women. It recognizes gender-based violence, constitutes a form of discrimination and requires States to take steps to eradicate this. It specifically requires that the law must respect the integrity and dignity of women. Article 5 of the CEDAW requires that the right to be free from violence means the right to be valued, educated and free from eliminating stereotypical patterns of behaviors including social and cultural practices, which also include prohibiting inferiority or superiority ideas on the basis of sexes.

15. Now, I come to the second part of the opinion of the majority wherein they have changed the charge of rape under Section 376 of the PPC to fornication under Section 496-B of the PPC. The underlying reason and basis for doing so is that sexual intercourse was established by the DNA test meaning it is not rape but rather consensual intercourse between the parties. Section 496-B of the PPC states that a man, and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another and further that whoever commits fornication shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine not exceeding ten thousand rupees. The essential ingredient of fornication is the establishment by way of evidence of the fact that it was a willful intercourse between the parties. Hence, it is essential that for the purposes of fornication consent be established. Consent means an unequivocal voluntary agreement with the woman by words, gestures or any form of verbal or non-verbal communication, which communicates her willingness to participate in the sexual act. Consent goes to the very root of the right to dignity under Article 9 of the Constitution because in a case of rape where she states that there is no consent then to impute consent, that too without evidence of the same, undermines the dignity and the right to privacy of a woman. Consequently, without any evidence on the fact of consent or willingness the offence of fornication cannot be made out because consent has to be established and it cannot be assumed. In the *Ashraf* case, the Federal Shariat Court described the word 'consent' to be of the same mind; to agree to give assent; to yield to comply. The said judgment further stated that consent necessarily

implies agreement as a free agent with the presence of the free mind and free will.²² Recently, the Indian Criminal Law (Amendment) Act, 2013 introduced Section 114A in the Indian Evidence Act, 1872 which states where sexual intercourse is proved, and the woman did not consent to it then the law mandates that the court shall presume that she did not consent.²³ Section 53A of the Indian Evidence Act even requires that the evidence of character or previous sexual experience is not relevant in rape cases, and where the issue is of consent involved, Section 146 of the said law requires that no questions in cross-examination will be put to the victim as to her character or sexual for proving such consent. It is important to note that Pakistan has similarly expanded the definition of 'consent'²⁴ in Section 375 of the PPC by stating that consent means an *unequivocal voluntary agreement, gestures of any form of verbal or non-verbal communication, and communicates willingness to participate in the specific sexual act.* Furthermore, this Court by giving a finding of fornication against the Complainant, who has successfully established her case of rape before the trial court and the High Court on the basis of evidence, now at this stage, it means the denial of due process and fair trial as this Court by way of a declaration has stated that she indulged in an act of fornication with the Petitioner. This is significant given that it is not the Petitioner's case that he was involved with the Complainant nor is it the Petitioner's case that he went to the Complainant's house at that particular time nor did he by way of defense raise the plea of consent

²² Muhammad Ashraf v. the State (1997 P Cr. L J 1351) (Ashraf).

²³ Section 114A of the Indian Evidence Act, 1872 (Indian Evidence Act), which presume as to absence of consent in certain prosecution for rape.

²⁴ Criminal Laws (Amendment) Act, 2021 passed by the Parliament has amended the Section 375 of the PPC as follows:

375. Rape.- A person (A) is said to commit rape if A-

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of another person (B) or makes B to do so with A or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of B or makes B to do so with A or any other person; or
- (c) manipulates any part of the body of B so as to cause penetration into the vagina, urethra, anus or any part of body of B or makes B to do so with A or any other person; or
- (d) applies his mouth to the vagina, anus, urethra or penis of B or makes B to do so with A or any other person, under the circumstance falling under any of the following seven descriptions:

firstly, against B's will;
secondly, without B's consent; thirdly, with B's consent, which has been obtained by putting B or any person in whom B is interested, in fear of death or of hurt;

fourthly, with B's consent, when A knows that A is not B's husband and that B's consent is given because B believes that A is another man to whom B is or believes herself to be lawfully married;

fifthly, with B's consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by A personally or through another of any stupefying or unwholesome substance, B is unable to understand the nature and consequences of that to which B gives consent;

sixthly, with or without B's consent, when B is under sixteen years of age; seventhly, when B is unable to communicate consent.

Explanation 1.- For the purposes of this section, Vagina shall also include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when B by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that if B who does not physically resists to the act of penetration, it shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Explanation 3.- In this Chapter:-

person means a male, female or transgender;

rape includes gang rape.

Explanation. - A bona fide medical procedure or intervention shall not constitute rape.

or willingness. The Petitioner in his statement under Section 342 of the Code of Criminal Procedure, 1898 (**CrPC**) denied the Prosecution's case and specifically took the plea that the Complainant wanted to marry him and, on his refusal, she managed to register a fake case against him. He neither appeared as his own witness under Section 340(2) of the CrPC nor produced any evidence in his defense. Hence, it is not the Petitioner's case that there was consensual intercourse between him and the Complainant. The Petitioner did not specifically raise this defense that he was involved with her and had consensual intercourse. Therefore, I cannot subscribe to this view that an offense under Section 496-B of the PPC is made out. Accordingly, the judgments passed by the trial court as well as the High Court do not call for interference.

16. The opinion of the majority has referred to the report of the District and Sessions Judge, Bahawalnagar (Cr.MA No.374 of 2024) wherein it was reported that the Complainant has tendered her affidavit Mark-A that she has no objection if the Petitioner is acquitted from this case. This fact is irrelevant given that the offense of rape is non-compoundable, and the Cr.MA No.374 of 2024 has been rightly turned down.

17. In view of the foregoing, this Criminal Petition is dismissed, and leave is refused.

Bdy.
Bla
Bla

Islamabad
26th June 2024
'Approved for Reporting'
Azmat | Kehar Khan Hyder/-
5/2/24
8/2/CW