IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MALIK SHAHZAD AHMAD KHAN
MR. JUSTICE AQEEL AHMED ABBASI
MR. JUSTICE SALAHUDDIN PANHWAR

CRIMINAL PETITION NO. 90-L OF 2019
(On appeal against the judgment dated 18.12.2018 of the Lahore High Court, Lahore in Cr. Appeal No. 71971/2017)

Hassan Khan
... Petitioner

Versus

The State
...Respondent

For the Petitioner: Syed Muhammad Tayyab Shah, ASC

For the State: Mr. Sajjad Hussain Bhatti, DPG Punjab

Date of Hearing: 02.12.2025

ORDER

MALIK SHAHZAD AHMAD KHAN, J.- The petitioner was tried by the learned Additional Sessions Judge, Kallur Kot pursuant to a case registered vide FIR No. 293 dated 06.10.2015 under Section 376 PPC at Police Station Jandan Wala, District Bhakkar. The learned Trial Court vide its judgment dated 20.07.2017 convicted the petitioner under Section 376 PPC and sentenced him to suffer rigorous imprisonment for a period of 20 years. He was also directed to pay an amount of Rs.500,000/- as compensation to the victim Mst. Farhat Bibi or in default thereof to further undergo simple imprisonment for six months. Benefit of Section 382-B Cr.P.C. was also extended in favour of the petitioner. The learned High Court dismissed the appeal filed by the petitioner and upheld the judgment of the Trial Court.

2. Arguments heard. Record perused.

3. As per contents of the FIR, Mst. Farhat Bibi, complainant, alleged that about 07 months prior to the registration of FIR at 05:30

AM (morning), she went out of her house towards a nearby forest to answer the call of nature. The petitioner was already hiding in the afore-mentioned forest, who forcibly captured the complainant and committed rape with her at pistol point, hence, the FIR of this case.

4. After hearing the learned counsel for the petitioner and the learned Law Officer at some length, we have noted that according to the DNA test, the petitioner cannot be excluded being the biological father of the child, who was born due to the act of the petitioner 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 is a case of zina with consent (fornication) punishable under Section 496-B PPC.

5. It is noteworthy that the occurrence in this case took place 07 months prior to the registration of FIR. The complainant alleged that on the day of occurrence, at about 05:30 AM (morning), she went to the forest situated near her house to answer the call of nature where the petitioner was already hiding, who forcibly committed rape with her at pistol point. It is not understandable that as to how the petitioner knew that the complainant would come in the afore-mentioned forest on the day of occurrence at 05:30 AM. The prosecution case in this respect is completely silent. Moreover, no resistance was offered by the complainant at the time of occurrence. The medical officer did not note any healed mark of violence on the entire body of the alleged victim. Even the clothes of the alleged victim were not produced before the Police or before the learned Trial Court to show that the same were torn at the time of occurrence. It shows that the alleged victim did not offer any resistance. The prosecution evidence shows that the occurrence took place near the house of the complainant i.e. near a residential area but no hue and cry was raised by the complainant at the time of occurrence to attract the people of

the area to save her. It is also noteworthy that after the occurrence, the alleged victim came back to her house where her brother and other family members were admittedly living but she remained mum for almost 07 months. The long silence of the complainant for a period of 07 months speaks volumes against her conduct, therefore, the story narrated by the complainant with the delay of 07 months regarding forcible rape cannot be relied upon blindly. It is true that a pistol was allegedly recovered on the pointing out of the petitioner but the said pistol was not used during the occurrence. The pistol was recovered from a residential house and no witness of the locality was associated during the recovery proceedings, which is violative of the provisions of Section 103 Cr.P.C., hence, the said recovery cannot be relied upon.

Learned counsel for the petitioner has vehemently argued that the DNA test report of this case is not reliable. He submits that the occurrence in this case allegedly took place about 07 months prior to the registration of FIR and buccal swabs of the petitioner and the minor child were taken on 30.11.2015 and 22.12.2015, respectively, but according to the DNA test report, the said swabs were analyzed and examined in the Forensic Science Laboratory on 19.05.2017 i.e. after about 1 & ½ years from the date of taking of the swabs of the petitioner and the minor child. He has referred to a research paper published by the International Journal of Pharmaceutical Sciences. The perusal of the said research paper shows that the buccal swabs disintegrates within a period of two weeks, therefore, a serious question has arisen regarding the authenticity of the afore-mentioned DNA test report. However, we would not like to comment upon the merits and demerits of the afore-mentioned arguments and authenticity of the DNA test report as the above-referred issue shall be decided in some other case. We are of the view that even otherwise, the

allegation of sexual intercourse with the complainant has been proved through the evidence of the complainant, duly supported by the medical evidence of Dr. Ruqia Asim (PW-6). However, all the above-mentioned facts show that it was not a case of forcible rape. As mentioned earlier, the evidence of the complainant to the extent of commission of illicit intercourse with her by the petitioner is established in this case. The evidence of the complainant to the said extent remained unshaken during cross-examination and the same is confidence inspiring. The prosecution case to the extent of allegation of sexual intercourse with the complainant has also been supported by the medical evidence brought on the record through Dr. Ruqia Asim (PW-6), who stated that vagina of the complainant admitted two fingers easily. We are, therefore, of the view that the prosecution has proved its case to the extent of offence of zina with consent (fornication) punishable under Section 496 PPC against the petitioner beyond the shadow of any doubt. After examining the entire prosecution case, we have come to this irresistible conclusion that it is not a case of rape as envisaged under Section 376 PPC, rather it is a case of fornication i.e. *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. Farhat 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 at this stage without providing her opportunity of defence.

It is true that the petitioner was not charged under Section 496-B PPC but it is by now well settled that if the charge for major offence is framed against an accused but from the evidence it is established that a minor offence has been made out then the accused can be convicted and sentenced for the minor offence as envisaged under Section 238(2) Cr.P.C. We may refer here the case of Muhammad Sharif Vs. The State (2006 SCMR 1170) where the charge under Section 10(3) of the Zina (Enforcement of Hudood) Ordinance, 1979 was framed against the accused but from the evidence of said case it was established that it was a case of zina with consent punishable under Section 10(2) of the Ordinance ibid, therefore, the accused was accordingly convicted and sentenced under Section 10(2) of the Zina (Enforcement of Hudood) Ordinance, 1979 i.e. zina with consent. It is pertinent to mention here that the offence of zina with consent Section 10(2) of Zina (Enforcement of Hudood) Ordinance, 1979 has been substituted with the offence of fornication punishable under Section 496-B PPC, pursuant to amendment brought under the Protection of Women (Criminal Laws Amendment) Act, 2006. Similarly, in the cases of Ijaz Ahmed Vs. The State (2010 SCMR 141), Amir Muhammad Vs. The State (2007 SCMR 452) and Muhammad Shabbir Vs. The State (1992 SCMR 2063), the accused of the said cases were convicted and sentenced for offence of zina with consent punishable under Section 10(2) of Zina (Enforcement of Hudood) Ordinance, 1979 instead of the offence of rape punishable under Section 10(3) of Zina (Enforcement of Hudood) Ordinance, 1979.

6. For what has been discussed above, by a majority of 2:1 *(Justice Salahuddin Panhwar, dissenting)*, this petition is converted into an appeal and the same is partly allowed. The impugned judgment is modified to the extent that conviction and sentence of the

petitioner/appellant under Section 376 PPC is set aside and he is acquitted from the said charge and instead the petitioner/appellant is convicted under Section 496-B PPC and is sentenced to 05 years rigorous imprisonment with a fine of Rs.10,000/- or in default whereof to further undergo 02 months simple imprisonment.

7. Per Justice Salahuddin Panhwar, for reasons to be recorded later, this petition is dismissed and leave is refused.

JUDGE

JUDGE

JUDGE

Islamabad, the
2nd of December, 2025
Not Approved For Reporting
Khurram