Salahuddin Panhwar, J. I have gone through the order authored by my learned brother, Mr. Justice Malik Shahzad Ahmad Khan, however, I humbly disagree with the views expressed by my brother in bench, therefore, I hereby choose to express my own views for dismissing this petition.

2. Briefly, the matter concerns a rape of a girl who is of approximately 24 years of age, resultantly a child was born as a result of such occurrence which is established through DNA report of Punjab Forensic Science Agency, that the accused and the complainant are biological parents of such new born child. The crime report of the said incident was lodged after a delay of approximately seven months. The view by my learned brother in **para 5 of the main order** is reproduced as under:

> *"It is 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."*

There is no cavil on the fact that cases of rape, as well as cases of sexual harassment go unreported in our society, the victims are fearful of the consequences of reporting, a victim of rape or sexual harassment often has to justify his own family members in regards to his own character at the time when he / she reports about the particular occurrence. In the case in hand, the victim is of young age, unmarried, her parents have passed away, she has an elder brother and record also shows evidence of threats forwarded to the victim, it clearly makes sense as to how reluctant a girl would be in these circumstances to share such an unfortunate occurrence with her own brother. It appeals to us as in common course of natural events[1] that her reluctance to report would have continued till she would have known about her pregnancy. It was observed by this court that the delay in reporting sexual assault to the Police is therefore not very material as held in Irfan Case[2] and that delay in such cases is not fatal to the case of prosecution keeping in mind the

[1] Article 129 of Qanun-e-Shahadat Order 1984
[2] Irfan Ali Sher vs. The State (PLD 2020 SC 295)

dilemma of our society, this court has held in Mehboob Ahmad Case[3] that:

> *"As to the apparent delay in lodging of the F.I.R., we cannot be unmindful of the prevailing taboos in our society. Even in modern day advanced societies, for and on account of the prevalent predilections, cases of rape go unreported. A victim of rape should not be penalized on account of ostensible delay in reporting what she has undergone. On the contrary, kindness, encouragement and understanding are the requirements to approbate a victim's difficult decision to purge the society of perpetrators of such heinous offences."*

Additionally it was observed by this court in Zahid Case[4] that:

> *"Delay in reporting the crime to the police in respect of an offence involving a person's honour and reputation and which society may view unsympathetically could prey on the minds of a victim and her family and deter them to go to the police"*

3. As far as the contention is concerned that there were no marks of violence on body of victim and such shall favor the accused, I am of a different view, as the accused was carrying a weapon, and any victim would be reluctant to resist such a perpetrator with a weapon in hand, as observed in the Mehboob Ahmad Case referred above that a deadly weapon in hands of a perpetrator is factor for lack of marks of violence on body of victim due to the fear of harm. Even otherwise, the medical examination could have not effectively capture the physical resistance by victim after a time span of approximately seven months.

4. In regards to the DNA report of Punjab Forensic Science Agency, record shows that buccal swab standards of Complainant Farhat Bibi were taken on November 05, 2015, buccal swab standards of Hassan Khan were taken on November 30, 2015 and buccal swab standards of new born baby were taken on December 22, 2015, whereas the analysis was conducted on 19 April, 2017. As far as the views of my learned brother in **para 5 of the main order** which reads as under:

> *"He has referred to a research paper published by International Journal of Pharmaceutical Sciences. The perusal of the said*

[3] Mehboob Ahmad vs. The State (1999 SCMR 1102)
[4] Zahid & another vs. The State (2020 S C M R 590)

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."

It has come to my notice that a common practice in PFSA in regards to DNA is that, when buccal swab standards are collected, the PFSA promptly extracts DNA from buccal swab standards and preserves it into its DNA library, such preserved DNA can be safely relied for purposes of testing for a very long period. Even otherwise, modern day science has evolved a lot and preservation methods such as drying the swabs are effective in preserving such evidence for a longer duration, as DNA is best preserved in an air-dried, water-free environment. Water can cause instability and breakage in strands that bind DNA, which would degrade the ability to properly test.[5] It will be a fallacy to only focus on the preservation period of the buccal swab standards alone, to examine its authenticity, rather it is the DNA extracted from the Buccal swab standards which can stay for years. Therefore, a period of approximately 1.5 years after the collection of swabs does not seem as a period which can discredit the evidentiary value of such DNA in given circumstances.

5. There is no cavil of proposition that, if an act carries two punishments listed under two or more offences under penalizing statute (s), the lesser can be awarded in view of mitigating circumstances. However, this applies to the situation where the act squarely falls within both of the said offences and the scenario would completely change if the required ingredients of the offence to which it will be altered are not fulfilled. The standard of proof in criminal cases is that the prosecution shall establish the guilt beyond reasonable doubt, unlike the preponderance of evidence in civil matters[6]. To alter the conviction under one provision to another will mandatorily require that the basic ingredients of the provision to which it will be altered must be fulfilled beyond reasonable doubt. The instant case in concerns two provisions of the Pakistan Penal Code (PPC); Section 376 and Section 496-B, both offenses are two distinct offenses carrying two different punishments. It is pertinent to mention that both have separate ingredients required for the conviction under this provision. Section 496-B which deals with fornication means that both parties involved were involved in the act with an equal consent; full and free consent as the concerned text of 496-B

[5] Guidelines for Evidence Collection, Preservation and Transportation- PFSA
[6] Sher Afzal vs The State (2025 SCMR 894)

PPC reads as: *"A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another.*" It is distinct from Section 376 PPC, which means that this concerns with the act which is not consensual and such is against the will of the person who is the victim of such offense. This modification is not justified, unless the element of consent is established through independent and cogent evidence, and not merely on the basis of assumptions or surmises.

6. The petitioner was not initially charged with section 496-B of the Pakistan Penal Code and was charged under Section 376 of the Pakistan Penal Code, it would not be appropriate merely for the purposes of reducing the sentence to modify a conviction under section 376 of the Pakistan Penal Code to a conviction under Section 496-B of the Pakistan Penal Code which would be against the basic principles of law which states that to convict a person under a particular offense all the ingredients of that offense must be proved beyond reasonable doubt.

Lastly another view which I humbly disagree is stated in **Para 5 of the main order** that:

> *"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"*

I am of the opinion that, it is not appropriate to modify the conviction under Section 376 PPC while questioning the authenticity of DNA report and at the same time rely on same report for a conviction under Section 496-B. If it appears to the court that such evidence furnished to prove a charge is not credible enough, such evidence cannot be relied to prove a different charge. The court cannot convict a person on the basis of preponderance of evidence or on mere assumptions that if one particular act is not proved, meaning thereby in cases where a victim fails to prove the offence of rape, it will not automatically establish the consent of the victim. It is for the very reason that this particular modification is sensitive matter, concerning dignity and honor, for which Quran has expressively stated that:

> *"Indeed, We have dignified the children of Adam, carried them on land and sea, granted them good and lawful provisions, and privileged them far above many of Our creatures."* (17:70) (Al-Isra)

7. Before departing with this dissenting note, I would appreciate the assistance rendered by Dr. Javed Iqbal, who is Professor of Biotechnology and Chair of Genomics & DNA Fingerprinting Research Group and Dean Faculty of Life Sciences, University of Central Punjab, on the DNA procedure.

8. Therefore, in the light of the above, the petition for leave to appeal is refused and the petition stands dismissed, the conviction of the petitioner is maintained.

JUDGE

Muhammad Subhan Malik (JLC)/-
02.12.2025
Islamabad
Approved for Reporting