

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 271-M/2020

Maqbool Hussain s/o Dilaram Khan R/O Kojahangol Ashriat Tehsil &
District Lower Chitral presently at Central Jail Chitral.

(Appellant)

Versus

The State and another

(Respondents)

Present:

Mr. Rahimullah Chitrali, Advocate for the
Appellant.

Mr. Sohail Sultan, A.A.G for the State.

Mr. Aziz Ahmad Hashmi, Advocate for
Respondent No.2.

Date of hearing: **08.03.2021**

JUDGMENT

ISHTIAQ IBRAHIM, J.- This criminal appeal
filed u/s 410 Cr.P.C, appellant namely Maqbool
Hussain has challenged judgment dated 21.09.2020
rendered by the learned Additional Sessions
Judge/Judge Juvenile Court, Camp Court at *Drosh*,
Chitral in case F.I.R No.56 dated 21.4.2018
registered under sections 376/364A/511 PPC &
section 53 of the Khyber Pakhtunkhwa Child
Protection & Welfare Act, 2010 (**the Act**), whereby
the appellant was convicted & sentenced u/s;

1. 376/511 PPC to undergo ten (10) years R.I
with directions to pay Rs.50,000/- as
compensation to the victim;

2. 364A/511 PPC to undergo ten (10) years R.I with directions to pay Rs.50,000/- as compensation to the victim; and
3. 53 of the Act to undergo seven (07) years R.I with directions to pay Rs.1,000,000/- as compensation to the victim.

All the sentences were ordered to run consecutively with benefit of section 382-B Cr.P.C.

2. On 21.4.2018 at 14:00 hours, the complainant namely Saqib Ahmad (PW-4) at the Police Station *Ashriat*, District *Chitral* in the company of his minor daughter namely Kulsoom Hussain aged about 11/12 years (PW-5) reported the matter that his daughter namely Kulsoom Hussain is the student of 5th Class and on the eventful day, she was coming back from School, when reached the spot, the appellant by putting *dupatta* in her mouth, took her to nearby jungle and committed rape on her. Other companions of the minor victim ran and informed the complainant about the incident, who immediately rushed to the spot where the appellant while seeing the complainant fled away by leaving his clothes. The occurrence was also witnessed by Rehmat Azam and Mehnaz Begum (PW-6).

3. The report of the complainant (PW-4) was reduced into formal FIR (Ex.PW4/1). The victim was medically examined by Lady Doctor Saeed Rabbani (PW-16) and her opinion as per medico-

legal report is Ex.PW14/3. On 22.4.2018, the appellant was arrested vide his card of Ex.PW8/3 by Abdul Muzaffar SHO (PW-8). The case was investigated by Mubarak Ahmad Inspector (PW-14). On 23.4.2018, the appellant was also medically examined by Dr. Samad Khan (PW-12) vide his report Ex.PW12/2. During the course of investigation, site plan Ex.PW14/5 was drafted at the instance of complainant/victim. Statements of the witnesses were also recorded u/s 164 Cr.P.C. On 28.4.2018, the appellant recorded his judicial confession before the learned Judicial Magistrate (PW-17).

4. After completion of investigation, *challan* was put before the Special Court established under the Juvenile Justice System Act against the appellant being juvenile. He was formally charge-sheeted for the offence, however, he did not plead guilty to the charge and opted to face the trial. In support of its allegation against the appellant, the prosecution produced as many as seventeen witnesses and closed the evidence. After examination of the appellant u/s 342, Cr.P.C, the learned trial Court vide judgment dated 21.09.2020 convicted and sentenced the

appellant in the manner already detailed in the earlier part of this judgment, hence, this appeal.

5. Arguments heard and record of the case was perused with the valuable assistance of learned counsel for the parties and learned A.A.G representing the State.

6. It is the case of prosecution against the present appellant that he took minor victim Mst. Kulsoom Hussain to a nearby jungle while she was coming back from school and raped her. The victim, who was a minor girl of about 11/12 years of age, appeared before the Court as PW-5 and narrated the entire episode in a straightforward manner in her examination-in-chief. She also remained consistent during her cross examination despite putting intense questions to her. Similarly, minor Mehnaz Begum (PW-6) who was aged about 10/11 years and accompanying the victim at the time when she was forcibly taken by the appellant to the nearby jungle was also examined as PW-6. Her testimony too strengthens the prosecution case. The complainant was also examined as PW-4, who narrated the same story as in the F.I.R. Khairul Azam who at the relevant time accompanied the complainant to the

spot and witnessed all the events like the complainant on the spot was also examined as PW-

7. His statement is fully in line with the statement of the complainant (PW-4) as well as the prosecution version. All the above prosecution witnesses were subjected to a lengthy cross examination but nothing was extracted from their mouth in favour of the appellant. Moreso, no clue of *malafide* or grudge for false implication of the appellant in the instant case could be noticed in the entire prosecution evidence. In the peculiar circumstances, no question of misidentification of the appellant would arise. There is no material contradiction in testimonies of all the above PWs, therefore, the presence of all the PWs on the spot at the relevant time can confidently be termed as natural.

7. In addition to the above, the appellant/accused has also confessed his guilt before the learned Judicial Magistrate. The prosecution has also produced and examined Mr. Hassan Ali Khan, the learned Judicial Magistrate as PW-17 who has recorded confessional statement of the accused/appellant. The confessional statement of the accused is Ex.PW-17/2. The learned Judicial Magistrate was

subjected to taxing cross examination but there would be nothing in his statement to suggest that the confessional statement recorded by the appellant was either involuntary or same was the result of any pressure or undue influence rather in light of the evidence, the confession of the accused appears to be voluntary and therefore can certainly be used against him as an important piece of evidence. Needless to say that the appellant in his confessional statement has confirmed all the events relating to commission of offence as narrated by the above PWs in their respective statements.

8. The testimonies of the above prime prosecution witnesses particularly of the victim (PW-5), are also fully corroborated by medical evidence brought by the prosecution through Lady Dr. Saeed Rabbani (PW-16) and Dr. Samad Khan (PW-12). PW-12 has medically examined the appellant and according to his report Ex.PW12/2, he with expertise reasons has opined that the appellant was capable of committing sexual intercourse, whereas the lady doctor (PW-16) has conducted medical examination of the minor victim Mst. Kulsoom Bibi. In her report Ex.PW14/3, the lady

doctor (PW-16), has opined that hymen of the victim was intact, however, she has noted certain signs of violence on different parts of her body, which establishes the attempt of rape on the victim as alleged by the victim in her statement and confirmed by the appellant in his judicial confession. Both the above doctors were sufficiently cross-examined but nothing could be brought on the record during their cross-examination to doubt the genuineness of the medico-legal reports they had prepared after examining the victim and the appellant. In short, the prosecution has brought sufficient trustworthy, reliable and confidence inspiring evidence on the record, which connects the appellant with the commission of offence.

9. Keeping in view the evidence on record, the learned trial Court has committed no illegality by recording conviction of the appellant u/s 376 read with section 511 P.P.C. However, the quantum of sentence awarded to the appellant by learned trial Court under the said sections of law needs extenuation keeping in view the fact that the appellant was a juvenile offender and was chased for rape upon the victim. Record is also mute regarding

his involvement in such like offence in the past. Thus, all the above reasons would be considered for mitigation of the sentence of the appellant.

10. As regards conviction of the appellant u/s 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 as well as u/s 364 (A) PPC in the circumstances of the case, legal questions cropped up before this Court, hence, to answer these questions, learned counsel for the parties and learned A.A.G were heard in detail.

11. First, this Court would take up the question with regard to conviction of the appellant u/s section 53 of the Act. Section 53 of the Act caters punishment for sexual abuse which reads:

53. Sexual abuse. Whoever commits an offence of sexual abuse shall be punished with imprisonment for a term which may extend to fourteen years and shall not be less than seven years and shall also be liable to fine which shall not be less than ten hundred thousand rupees.

The above referred penal provision prescribes the punishment for the offence of sexual abuse which has been defined in clause (y) of sub-section (1) of Section 2 of the Act, which is as follows.

(y) "Sexual abuse" means employing, using, forcing, persuading, inducing, enticing, or coercing any child to engage in, or assisting any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism

or any obscene or sexually explicit conduct or stimulation of such conduct either independently or in conjunction with other acts, with or without his consent.

The offence of rape is punishable u/s 376 of the Pakistan Penal Code, 1860. For ready reference, section 376 PPC is reproduced as under;

376. Punishment for rape. Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine.

(1A) Whoever commits an offence punishable under sub-section (1) of sub-section (2) of this section 377 or 377-B and in the course of such commission causes any hurt punishable an offence under section 333, section 335, clauses (iv), (v) and (vi) of subsection (3) of section 337, section 337, section 337C clauses (v) and (vi) of section 337-F, shall be punished with death or imprisonment for life and fine.


(2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.

(3) Whoever being a public servant including a police officer, medical officer or jailor, taking advantage of his official position, commits rape shall be punished with death or imprisonment for life and fine.

Rape is an offence under the Pakistan Penal Code, a Federal statute whereas the Khyber Pakhtunkhwa Child Protection Act, 2010 is a Provincial law, which was promulgated in the Khyber Pakhtunkhwa with the aim and object to provide for the care, protection, maintenance,

welfare, training, education, rehabilitation and reintegration of children at risk in the Province.

Actually, rape and sexual abuse are two distinct offences because of their different constituent ingredients. The offence of sexual abuse, which is punishable u/s 53 of the Act, was also introduced in the Pakistan Penal Code u/s 377A through Criminal Law (Second Amendment) Act, 2016, which is replicated below for ready reference.



377A. Sexual abuse.—Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or stimulation of such conduct either independently or in conjunction with other acts, with or without consent where age of person is less than eighteen years, is said to commit the offence of sexual abuse.

The offence of sexual abuse has been defined almost in the same words u/s 377A, PPC as well as in clause (y) of sub-section (1) of Section 2 of the Act with slight variation of the word 'child' used in the definition in the Act whereas the word 'person' occurs instead of the word 'child' in S.377A PPC which has been clarified by adding the words 'where age of person is less than eighteen years'. Thus, sexual abuse is an offence under the Federal as well as Provincial statutes, however, the punishments

provided under both the laws for the said offence are different. Section 377B provides the punishment for the said offence upto seven years imprisonment with fine of not less than five hundred thousand whereas u/s 53 of the Act, the said offence is punishable upto fourteen years but shall not be less than seven years with fine which shall also be not less than ten hundred thousand. Thus, there is conflict between the federal and provincial laws with regard to the quantum of sentence for commission of the same offence i.e. sexual abuse and as such the matter attracts the principle of '**Occupied Field**'. The doctrine of '**Occupied Field**' or '**Doctrine of Eclipse**' as visualized in Article 143 of the Constitution of the Islamic Republic of Pakistan, 1973, which reads as under:

143. *Inconsistency between Federal and Provincial laws.* If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void.

Bare reading of the afore-referred Article shows that Federal law shall prevail over the Provincial law on the same subject matter when the

Provincial law is repugnant to Federal statute notwithstanding the fact that the Federal law was enacted before or after the Provincial law. The doctrine of '**Occupied Field**', as observed by Karachi High Court in the case of Messrs Quetta Textile Mills Limited through Chief Executive Vs. Province Of Sindh through Secretary Excise and Taxation, Karachi and another (P L D 2005 Karachi 55), may be defined as under:

"If a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field".

In this regard, I would refer the judgment of Supreme Court of India in the case of Zaverbhai Amaldas Vs. The State of Bombay (AIR 1954 S.C. 752), wherein it was held that:

"if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute".

With reference to the case of Michell v. Brown it was further observed in the same judgment that:

"It is true, as already pointed out, that on a question under article 254(1) whether an Act of Parliament prevails against a law of the

State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law”.

There is conflict between the Federal and Provincial Laws on the same subject-matter i.e the offence of sexual abuse with regard to the quantum of sentence and in such situation the settled principle is that the Provincial statute shall give way to the Federal law. Wisdom is also sought from the judgment of the august Supreme Court of Pakistan in the case of Pakistan Telecommunication Company Ltd. Vs. Member NIRC and others (2014 SCMR 535) wherein it was observed that:

13. Even otherwise under the provision of Article 143 of the Constitution of Pakistan, 1973, laws enacted by the Parliament have been given overriding and superimposing effects over the laws enacted by a Provincial Assembly of any of the Provinces and in case of any clash or repugnancy between the two, the laws enacted by the Parliament shall prevail. Thus, on the touchstone of the provision of Article 143 of the Constitution, the Act of Parliament has been placed on the high pedestal and any Provincial Law enacted by the Provincial Assembly shall give way to the Federal Law, enacted by the Parliament, if the former is inconsistent or repugnant to the latter.

Upshot of the above discussion is that since alternate of section 53 of the Act is available in

shape of section 377A PPC which has overriding effect being a Federal statute and the Act *ibid* is in conflict therewith qua the quantum of sentence, therefore, the appellant cannot be prosecuted u/s 53 of the Act when there is section 377A PPC in the field having the prevailing effect under the doctrine of '**Occupied Field**' or '**Doctrine of Eclipse**' as well as on the ground of lack of evidence qua the charge of appellant for sexual abuse. Thus, conviction and sentence of the appellant under Section 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 needs conversion to section 377-B PPC.

So far as the quantum of sentence of the appellant u/s 377-B PPC is concerned, it is pertinent to mention here at the relevant time section 377-B PPC was entailing punishment of '*either description for a terms which may extend to seven years and liable to fine which shall not be less than five hundred thousand rupees or with both*'. Though on 24th May, 2018 through Criminal Laws (Amendment) Act, 2018, punishment of section 377B PPC was substituted that '*imprisonment of either description for a terms which shall not be less than fourteen years and may extend upto twenty*

years and with fine which shall not be less than one million rupees.’, however, the instant occurrence has taken place on 21.4.2018 before the *ibid* amendment in the Pakistan Penal Code and it is settled law that the penal provision touching a right in exercise at the time of passing legislation would not operate retrospectively, therefore, in the circumstances, the law which was prevailing at the relevant time shall be applied. In this regard, reliance is placed on the case of ‘Adnan Afzal Vs. Capt. Sher Afzal’ (PLD 1969 Supreme Court 187), wherein the apex Court has held that;

“Interpretation of statutes-Retrospectively of legislation-----Matter retrospective if it is merely procedural in nature.---Such matter; however, would not operate retrospectively if it touches a right in existence at time of passing of legislation- Matter of procedure, what are.”

It would not be out of place to clarify here that in the case of ‘Usama Vs. The State and another’ (Cr.A 162-M/2020) decided by this Court on 25.1.2021, wherein the date of occurrence was 13.4.2019 i.e. after the above amendment in P.P.C, however, at that time neither the aforesaid amendment in the P.P.C was brought into the notice of the Court nor the Court was properly assisted on the legal point.

12. Adverting to 2nd question with regard to conviction of the appellant for the offence u/s 364-A P.P.C. To resolve this question, it is to be seen that whether the facts & circumstances of the present case also constitute offence u/s section 364A P.P.C or otherwise?. The prosecution allegation regarding abduction of the minor victim against the appellant is that the minor victim while coming back from School was abducted by the appellant to a nearby jungle, where he raped her. According to the site plan Ex.PW14/5, the point/place wherefrom the victim was taken/dragged by the appellant to the spot (jungle) is about 104 feet for the purpose of satisfaction of his lust and there is nothing in the evidence that the appellant was having any other intention, thus, the peculiar circumstances of the case would not constitute offence of abduction of the victim and as such the matter would not attract section 364A P.P.C. In this regard, reliance is placed on an authoritative judgment of the august Supreme Court of Pakistan (Shariat Bench) rendered in the case of 'Shams Saeed Ahmad Khan Vs. Shafaullah and another' (1985 SCMR 1822), wherein it has been observed that;



"Existence of intention or reasonable knowledge of accused. Accused charged with offence under S.377 PPC and kidnapping. Abduction neither intended nor object of crime but to commit sodomy alone. Merely because victim was moved a few paces in terrorem or shoved along to a suitable place, not to make additional offence under S.12 of Ordinance (VII of 1979).

Similar view was taken by the august Supreme Court of Pakistan in another case of 'Muhammad Akhtar Vs. Muhammad Shafique and another' (1986 SCMR 533), by holding that;

"Kidnapping for unnatural lust—Removal of child only a few paces with object and purpose to commit sodomy and not at all to remove or take away child from lawful guardianship, will not make an additional offence under S.12 of Ordinance. Acquittal on charge under S.12 upheld by Supreme Court.

In the present case, the appellant was also a minor of about 17 years at the relevant time and except the intention of commission of rape with victim, there would be hardly noticed anything in the prosecution evidence which could suggest that he was also having the intention to take away the victim from her lawful guardianship with *mens rea* of her abduction. Thus, the conviction and sentence of the appellant u/s 364A PPC by the appellant through the impugned judgment is not sustainable in the circumstances.

13. In view of the above, this appeal is partially allowed, the impugned judgment of the learned trial Court is modified by maintaining conviction of the appellant u/s 376/511 P.P.C but his sentence is reduced from ten (10) years R.I to five (05) years S.I keeping in view his tender age i.e. 17 years at the time of occurrence whereas his sentence u/s 53 of the Act is converted into section 377B PPC and same is also reduced from seven years R.I to five (05) years S.I. The amount of compensation under section 376 PPC is reduced from Rs.50,000/- to Rs.25,000/- or in default he shall undergo one month S.I. Similarly, the amount of fine u/s 377B PPC is also reduced from Rs.1,000,000/- to Rs.500,000/- or in default he shall undergo further 03 months S.I. All the sentences shall run concurrently with benefit of 382-B, Cr.P.C. However, the appellant is acquitted of the charge u/s 364A PPC.

Announced.
Dt: 08.03.2021

Office
25/3/2021
WR

JUDGE