

JUDGMENT SHEET

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

Cr.A. No.85-M/2016.

JUDGMENT

Date of hearing: **02.03.2017.**

**Appellant:- (Abdul Haq) by Mr. Abdul Halim Khan,
Advocate.**

**Respondents:- (the State & 1 another) by Barrister
Asad Hameed-ur-Rahman State counsel and
Muhammad Haleem Khan, Advocate.**

MOHAMMAD IBRAHIM KHAN, J.- Abdul Haq

the Appellant herein, is convicted and sentenced to ten
(10) years S.I. with imposition of fine of
Rs. 20,000/-, in default of payment of fine has been
further sentenced to three (3) months S.I in extending
benefit of Section 382-B Cr.P.C by the Court of
learned Additional Sessions Judge/Izafi Zila
Qazi/Judge Juvenile Court Matta Swat vide its
judgment dated 10.03.2016.

2. This is an appeal under section 410 of the
Criminal Procedure Code read with Para 10 (8) of the

Sharia Nazim-e-Adle Regulation 2009 with the following prayer:-

“It is humbly requested that the impugned judgment/order dated 10.3.2016 may please be set aside and the appellant may please be acquitted from the charges leveled against him”

This imploration is based on as many as grounds from (i) to (vii) under missive of the Appeal.

3. The charge speaks up that on 16.5.2015 at 7.30 A.M in the shop situated at *Sarbanda Dhero* which falls within the criminal jurisdiction of police station Matta, the accused/Appellant by the name of Abdul Haq is stated to have committed sexual intercourse with minor girl Mst. Nabia. This act is punishable under section 376 PPC.

4. In order to bring home charges prosecution examined Hayat Khan ASI as PW-1 who has received the report at 14.30 P.M on 18.5.2015 while he was on ‘*Ghast*’ of the *Illaq*a as usual. This report was recorded vide ‘*Murasila*’ Ex. PA/1 which was later on sent to PS concerned for registration of the

case. PW-2 is Dr. Liaqat Ali Khan Medical Officer Tehsil Headquarter Hospital Matta, who has examined Abdul Haq, accused/Appellant herein and found the following:-

***“ Date 19.5.2015 time: 11.45 A.M.
I examined Abdul Haq son of Speen
resident of Sarbanda Tehsil Matta:
He has fully developed axillary and pubic
hair. He has adult size penis and scrotum
he is able to perform sexual intercourse.
No.***

5. PW-3 is Hazrat Jamal IHC, who has taken Mst. Nabia a minor girl for examination before the female Medical Officer. PW-4 is Imtiaz Khan IHC, who has prepared the recovery memo Ex. PW-4/1. PW-5 is Nabia the complainant of this case, a minor girl of nine (9) years of age. She has narrated the occurrence in the mode and manner it had happened with her. This statement has been recorded after due satisfaction of the learned Presiding Officer of the Court. Whereby as many as eleven (11) questions were put to her so as to consider as to whether Mst. Nabia is fit to be examined in open Court. PW-6 is Mst. Fazilat who is mother of the complainant Nabia. She has

narrated as to how she had been disclosed the occurrence of 'Zina-bil-jabar' with her minor daughter and later on being examined by the female Medical Officer. PW-7 is Dr. Nadia WMO Civil Hospital Khwaza Khela, who has examined Mst. Nabia. In the statement of said Medical Officer there are some answers of very important questions. In response to question No. 1 she replied "that the victim is a pre-pubertal child with no signs of puberty visible as yet".

Likewise with regard to questions No. 2 & 3 the Medical Officer opined that "there have been vaginal and perianal tears that have already been stitched and the hymen has been perforated and injured". Whether there exist stains over the clothes of the victim. She reacted "that the clothes in which the incident happened have been changed so there is no stain over the clothes of the victim". In response to question No. 5 she replied "that the occurrence has taken place 72 hours earlier therefore no reply has been further given".

PW-8 Hazrat Hussain is the marginal witness of the

recovery memo Ex. PW-3/1, through which by means of syringe swabs were obtained for chemical analysis. PW-9 is Liaqat Ali ASI who has conducted the investigation when was entrusted to him on 18.5.2015. He has prepared the site plan Ex. PB, photographs of the shop of accused are taken into possession vide recovery memo Ex. PW-9/1, recovery memo of the search house is Ex. PW-9/2, card of arrest memo is Ex. PW-9/3. By an application Ex. PW-9/4 the accused Abdul Haq was referred for his medical checkup. In respect of analysis from the Khyber Medical College an application Ex. PW-9/5 was drafted and vide application Ex. PW-9/6 custody of the accused Abdul Haq was obtained. Vide an application Ex. PW-9/7 accused was produced before the Court for recording of his confessional statement under section 164/364 Cr.P.C. Opinion of the prosecution was obtained by an application Ex. PW-9/8. Similarly opinion of the FSL in the case was obtained through an application Ex. PW-9/9 which is placed on file as Ex.

PW-9/10. PW-10 is Lady Dr. Naseem Begum, who has earlier examined Mst. Nabia. An expert opinion of the said Lady doctor in shape of her report is reproduced as under:

Operation: Stitching of vaginal tears

Dated 15.5.2015

Anesthetists: Hx of fall (as stated by attendant)

Procedure: Deep vaginal tear, stitched with catgut No.

1/5 2nd degree tear stitched with catgut No. 1/5.

Hymen was absent. Vagina was diapered.

Post-Operative orders: NBM

Till further order.

Inj. Ceftrizone 500 mg

IV state.

6. In her statement the operation notes have been reduced into Ex. PW-10/1. PW-11 is Ashraf Ali Khan, ASI, who on receipt of the 'Murasila' Ex.PA/1 got registered case FIR No. 557 dated 18.5.2015 copy of which is placed on file as Ex. PA. Who upon completion of the investigation submitted complete *challan* Ex. PW-11/1. PW-12 is Samar Khan Constable who has taken parcel to the Khyber Medical College Peshawar for chemical analysis. Upon handing over the same a receipt was obtained which was then given to the *Muharir* of PS concerned. Thereafter, learned counsel for the complainant and learned Public

Prosecutor jointly recorded their statement and the evidence of the prosecution was closed.

7. After closure of the prosecution evidence, accused/Appellant was examined under section 342, Cr.P.C, wherein he denied the charges, posed innocence and stated to have falsely been implicated in the case. However recorded his statement on oath within the meaning of section 340 (2) Cr.P.C.

8. Evidence of the prosecution entailed judicial prudent mind of the Presiding Officer of the Court of learned Additional Sessions Judge/Izafi Zila Qazi/Judge Juvenile Court Matta Swat, therefore sentences thought for were awarded through the impugned order, hence the present appeal.

9. Having heard arguments of learned counsel for the accused/Appellant, learned counsel for the complainant and learned State counsel, record with their assistance gone through.

10. Learned counsel for the accused/Appellant relied on **PLD 1960 Supreme Court 325** “

Muhammad Abdul Khaleque and others”, PLD 2002

SC 590 “Hayat vs Jahangir and other” , PLD 2002

Supreme Court 1048 “ Ayub Masih vs the State”,

2000 P Cr. L J 333 “ Rawato and another vs the

State”, 2007 SCMR 605 (Shariat Appellate

Jurisdiction) “ Ibrar Hussain and others vs the State

and another”, 2007 YLR 723 (Lahore) “ Mulazim

Hussain and 2 others vs the State”, 2016 YLR 616

(Lahore) “ Muhammad Shahid vs the State and

other” and PLJ 2016 P Cr. L J (Lahore) 406

(Multan Bench Multan) “ Pervaiz Maseeh vs the

State. In the light of these dictums of the Hon’ble

superior Courts prayed for acceptance of the appeal

and acquittal of the convict-appellant. Inversely the

learned counsel for the complainant and learned State

counsel vehemently opposed the arguments advanced

by learned counsel for the accused/Appellant and

prayed for dismissal of the appeal being shorn of

merits.

11. In order to deliver findings, it is extremely important to refer to the applicability of section 376 PPC under which the charge has been framed. The term '*Rape*' has been defined under section 375 PPC, which reads as under:

375. Rape.. A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

(i) against her will,

(ii) without her consent,

(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt,

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married.

(v) with or without her consent when she is under sixteen years of age.

12. This offence is punishable under section 376 PPC whereby if the contents of the rape are proved would entail punishment with death or imprisonment for either description for a term which shall not be less

than ten (10) years or more than twenty-five (25) years and shall also be liable to fine.

13. In order to constitute the offence of rape it is necessary that there shall be penetration to constitute sexual intercourse. In this case, Mst. Nabia, the victim who is of very tender age likely to touch 9 years has been examined by the female Medical Officer PW-7 Dr. Nadia WMO. Her statement would reveal that there have been vaginal and perennial tears that have already been stitched and the hymen has been perforated and injured. Although the said lady Medical Officer has been subjected to cross-examination at length by the defence but this fact has not been denied that even certain questions the answers of which are given in her cross-examination would lead to an inference that in-fact Mst. Nabia was subjected to sexual intercourse in a very harsh manner leaving behind stitched hymen being perforated and injured. In *juxta* position, when the statement of PW-10 Lady Dr. Naseem Begum who has earlier examined Mst. Nabia

the complainant, the operation was conducted in the form of operation notes, whereby stitching of vaginal tears and procedure has been adopted deep vaginal tear stitched with catgut No. 1/5 2nd degree tear stitched with catgut No. 1/5. Hymen was absent vagina was dilated.

14. It is now absolutely without any coloring being found that Mst. Nabia was subjected to sexual intercourse not only mere penetration to the hymen was even found coupled with this brutal incident has resulted into stitching that the procedure being adopted.

15. Although, the Medical Officer PW-10 Dr Naseem Begum has been cross-examined to the extent that such like injury can be caused when a girl falls on the ground as has been stated by the said Mst. Nabia to her mother. The Medical Officer PW-10 Dr. Naseem Begum deposed during cross-examination that there are many things that can cause a girl hymen to tear other than intercourse, but in the case in hand, it is

out of question to determine that the procedure being adopted can be the result of a simple fall on the ground. Therefore absolutely under section 375 PPC an offence of rape has been committed with Mst. Nabia which is punishable under section 376 of the Pakistan Penal Code.

16. It is as next contended that that there is a delay in lodging of the first information report which would cast serious doubts in the prudent mind about implication of the accused for an ulterior motives. In this case the occurrence of subjecting minor girl Mst. Nabia to sexual intercourse is said to have been taken place at 7.30 A.M on 16.5.2015 and the matter was reported at 14.30 hours on 18.5.2015 while the FIR was chalked-out at 15.30 on the same day. Yes there is delay of almost 55 hours which is covered round about 2 days. Yet there are reasons to believe that by the time when Mst. Nabia was not examined by the Medical Officer on 16.5.2015, but at the relevant time it could not be said with certainty that Mst. Nabia was

subjected to any forceful sexual intercourse as because of fear she was unable to disclose this fact even to her mother. The statement of Mst. Fazilat, PW-6 would suggest that when her daughter came from *Madrassa* at an unusual time her clothes and feet were stained with blood. By that time she was then rushed to Medical Officer who then on examination found her to be subjected to sexual intercourse. Therefore in such a situation it is very obvious that even if report has been lodged with delay it will not bring complications and is otherwise be not beneficial for an accused who has been charged with offence the punishment of which would entail to death penalty or imprisonment for either description for a term which shall not be less than ten years or more than twenty-five years and shall be also liable to fine.

17. While developing his arguments learned counsel for the accused/Appellant referred to medical jurisprudence, whereby duration of retaining of semen in vagina. Motile spermatozoa in the vagina of a living

woman can be found over 100 hours after sexual intercourse and non-motile spermatozoa as far as long as 17 days. Spermatozoa may even survive longer in the vagina of a dead woman. Yet FSL report for the suspected liquid specimen of Mst. Nabia swab utilized during the examination, report in respect of which has been given in negative (*Liquid specimen negative for human semen in P1*). So mere on this score alone would not be a ground for acquittal as it is not necessary that the accused/Appellant Abdul Haq might have discharged inside the vagina, as there are reason to believe in perforating of the hymen by the time minor Nabia might have being unable to resist extreme pain which has left the accused/Appellant to have discharged outside. Thereby when the swabs were sent for chemical analysis result of which have been found in negative.

18. Apart from evidentiary value of the solitary statement of the victim, conviction can be awarded in rape/*Hudood* cases, on the sole testimony

of the victim subject to the condition that the statement of the victim must inspire confidence. In the case in hand a minor girl of very tender age was subjected to sexual intercourse as at the first instance she tried to hide this fact from her mother that is why she asserted to have fallen on the ground from a tree and then later on disclosed the name of the accused/Appellant to have subjected her to sexual intercourse. Thereafter she was taken to the hospital for medical checkup, thus how can a minor child of the age of 9 years can *mala fidely* charge the accused for such a heinous offence when she being tortured for the sexual intercourse and the accused/Appellant has been duly charged by the said minor Mst. Nabia during her cross-examination-in-chief, so with all probabilities she is believed to be a truthful witness.

19. Above all, learned counsel for the accused/Appellant is of the view that there are reasons to believe that the accused/Appellant is not

behind such a heinous offence of committing sexual intercourse with a minor girl Mst. Nabia. When he recorded his statement under section 342 Cr.P.C with regard to question No. 12 (کیا تم برحلف بیان دینا چاہتے) (جی ہاں۔ میں موجودہ الزام کی تردید کیلئے) he replied (ہو؟) but in (اپنے آپ کو بر حلف بیان دینے کیلئے پیش کرتا ہوں) respect of the question No. 13 (کیا تم اپنی صفائی میں شہادت 13 (جی نہیں) he responded (پیش کرنا چاہتے ہو؟). The statement on oath of the accused/Appellant would reveal that on the first instance he denied charges leveled against him and posed innocence by submitting the allegation against him is based on false footing and it has been manipulated by the complainant-party in order to grab money from him. Had accused/Appellant been charged for such offence on account of demand of money, the demand must have been specific for certain amount which has not been stated in the examination-in-chief. So, the statement of the accused/Appellant Abdul Haq on

oath is also not confidence inspiring thus leaving room for his substantiated implication in the case in hand.

20. Therefore, there is no persistence in this appeal which is hereby dismissed. The findings of the learned Court of Additional Sessions Judge/Izafi Zila Qazi/Judge Juvenile Court Matta Swat are absolutely decorously delivered for the sentence as awarded.

Announced.
Dt: 02.03.2017

JUDGE