

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

**Cr.A No. 292-M/2020**

**(Saqib Khan *Versus* The State and another)**

**Present:** Qazi Faqihuddin Siddiqi, Advocate for the  
appellant/convict.

Mr. Inayat Ullah Khatir, Advocate for State.

Complainant Salma alongwith her husband  
Hussan Maab in person.

Date of hearing: **27.05.2021**

**JUDGMENT**

**ISHTIAQ IBRAHIM, J.-** This appeal has been preferred by appellant Saqib Khan against his conviction and sentence vide judgment dated 17.10.2020 handed down by learned Sessions Judge/ Special Judge Juvenile Court, Dir Lower in case FIR No. 43 dated 29.03.2019 u/s 376, 377 PPC read with sections 44 & 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 registered at Police Station Khall, District Dir Lower, whereby he was convicted and sentenced as under:

i) **u/s 376 (3) PPC read with section 54(2) of CP&W Act, 2010:**

Life imprisonment (simple) with fine of Rs.100,000/-.

ii) **u/s 377 PPC read with section 53 of CP&W Act:**

Simple imprisonment for 14 years with fine of Rs.10,00,000/-.

He was also directed to perform community service for one year under Probation Officer

and to furnish bail bond to the tune of Rs.1,100,000/- to satisfaction of Probation Officer. The sentences were directed to run concurrently with benefit of section 382-B, Cr.P.C.

2. Brief facts of the case as emerging from the first information report are that on 30.03.2019 at 00:20 hours complainant Mst. Salma Bibi (PW-1) in the company of her brother-in-law Ibrahim (PW-2) and her minor daughter/ victim Hina Bibi aged 5/6 years came to P.S *Khall* and made a report to the effect that on the previous day her minor daughter named above came back home late at 14:00 hours from school. She asked her daughter for late coming in response whereof she started crying and told her that on her way back to home from school, Saqib (appellant), who was standing on the way, called her and took her to his *baitak* on the pretext of giving her cash amount purportedly sent by her father from Saudi Arabia. After taking her to the *baitak*, the appellant undressed her as well as himself and thereafter forcibly raped her. He retained her in the *baitak* with a view to console her not to disclose the event before any one and thereafter let her go home.

Abdus Sattar Khan (PW-13), the then SHO, recorded report of complainant in shape of formal FIR (Ex.PA). He also prepared injury sheet

of the minor victim and sent her to hospital for medical examination. After conducting medical examination of the minor victim, lady Dr. Muneeza Hussain (PW-11) gave her opinion Ex.PW-11/1 which is as under:

She was lied compatibly on bed examined from head to toe fully exposed no signs of force were found although there was generalized scattered rashes and all scratches marks were seen on thigh and legs. The victim was febrile.

Yes sexual intercourse with force has been done (vaginal plus anal)

No hymen membrane was found on examination.

Signs of inflammation was observed in perianal areas and right sided vaginal areas and small tear was observed in anal area. Three swabs were taken one dry from anus and one dry from vagina and wet from vagina and provided to the police officers and referred to the TMG Hospital Gynaecologist for expert opinion.


The lady doctor also gave her report (Ex.PW-11/2) on the injury sheet, which is as follows.

According to our examination, her hymen membrane was seen to be ruptured. Moreover, right side vagina swelling and bruises were seen in the anal area. She was sent to Timergara for bone age that was done by TMG Radiologist i.e "bone age approximately 6/7 years".

According to the Timergara District Gynecologist and that opinion was "Hymen membrane seems to be torn, positively side are intact, no active bleeding, tear or bruises on vagina".

Conclusion: on examination basis the hymen membrane does not look to be intact. So it looks to be forceful rape has been done (i.e anal + vaginal).


3. The appellant was arrested on 30.03.2019. He was produced before Dr. Anwar Khalid (PW-12) for medical examination. According to his report, by that time the appellant had developed secondary sexual characteristics, hence, he was declared to have attained the age of puberty, however, for further confirmation he was referred to radiologist for determination of his bone age who reported the same as 13/14 years. Since he had already taken a bath, therefore, no stains could be found on his pubic area.



4. After completion of usual investigation, the appellant was challaned to Juvenile Court for his trial. Formal charge was framed against him to which he did not plead guilty by opting to face the trial. In order to prove its case against the appellant, prosecution produced thirteen witnesses and closed the evidence. He was thereafter examined u/s 342, Cr.P.C but he once again denied the allegations of prosecution, however, he neither examined himself on oath nor opted to produce any evidence in his defence. On conclusion of trial, the learned trial Court convicted him u/s 376/377 PPC read with sections 44 & 53 CPA and sentenced him vide

judgment dated 04.12.2019 to undergo seven years imprisonment.

The appellant challenged his conviction and sentence through Cr.A No. 581-M/2019 which was accepted by this Court vide judgment dated 27.07.2020 by remanding the case to trial Court with directions to reframe the charge against the appellant and proceed with the case further.



During post-remand proceedings, prosecution relied upon the evidence already produced during the first round, however, I.O Abdul Hamid SI (PW-6) was re-examined for placing on file opinion of expert (Ex.APW-6/2) regarding trousers of the victim and appellant and swab which had been sent by I.O for analysis vide application Ex.PW-6/1 to KMC, Peshawar. After examination of the appellant u/s 342, Cr.P.C and hearing the arguments, the learned trial Court convicted and sentenced him vide judgment dated 17.10.2020, the detail has already been given in the earlier part of this judgment. Legality of the said judgment has been challenged through this appeal.

5. We have heard the arguments and perused the record.

6. Keeping in view the nature of offences, prosecution could not be expected to produce any eye witness of the occurrence, thus, the case against the present appellant is mainly based on circumstantial evidence especially medical reports furnished by lady doctor after medical examination of the minor victim. The lady doctor (PW-11), after medically examining the victim, has given her detailed reports Ex.PW-11/1 and Ex.PW-11/2 which are explicit in terms and clearly verify that hymen of the victim was absent and tear was found on her anal region, hence, there remains no doubt to conclude that the victim was subjected to forceful vaginal as well as anal intercourse. The lady doctor was thoroughly cross-examined on each and every aspect of the case but nothing was brought on record to create a doubt with regard to her observations regarding the victim she had recorded in her reports. Thus, medical evidence in the present case is of pivotal importance and can rightly be considered against the appellant. Reliance is placed on the judgment of the august Supreme Court of Pakistan in the case titled Muhammad Asif and another Vs. The State (2006 SCMR 338), wherein it was observed that:

8. We are not persuaded to agree with the contentions of learned counsel for the petitioner mainly for the reasons that petitioners have failed to bring on record any animosity with the complainant for their false implication. On the contrary, the prosecution has brought on record truthful and believable evidence produced by Abdul Ghafar victim who categorically implicated the petitioners with commission of sodomy forcibly. His statement is corroborated by the statement of P.W. Muhammad Siddique to whom he narrated the facts immediately. His version is also supported by medical evidence produced by Dr. Muhammad Saeed Sabri, P.W.2 according to which there were slight abrasions present between anus and the tip of coccyx.


7. Although prosecution has not examined the victim apparently because of her tender age, however, complainant Mst. Salma Bibi (PW-1), her mother, has lodged the report in her presence on the basis of information she had received from her immediately after the occurrence. Complainant and her brother-in-law Ibrahim (PW-2) have stated that they had found blood stains on *shalwar* of the victim and she was crying because of pain. Both the said PWs have been significantly cross-examined but they have remained firm in their narrations with regard to all the events followed by the occurrence, hence, the natural mode of their narrations excludes all the possibilities of concoction or pre-planning for

enrobing an innocent person in a false case. Similarly, the appellant was arrested on the same night from his house and was medically examined by Dr. Anwar Khalid (PW-12) who has confirmed in his report Ex.PW-12/1 that the appellant by that time had developed secondary sexual characteristics and had attained puberty. The I.O has taken into possession the cot on pointation of the appellant from his *baitak* on which he had subjected the minor to rape. Thus, the happenings which had occurred after the occurrence substantiate statement of the victim before her mother. Moreso, possibility of false implication of the present appellant in the case on the basis of ill-will is ruled out for the reason that there is no evidence of previous enmity between the parties nor the defence has confronted complainant or her brother-in-law Ibrahim (PW-2), who had verified the report, with any suggestion in this regard. Even otherwise false implication of accused in such like cases could not be expected from parents of the victim because of shame and humiliation in society as obviously as result of such disclosure the victim would carry the stigma with her for the whole of her life, therefore, after thrashing out the entire evidence



on record, we are satisfied that there is no possibility of false implication of the appellant in the present case. Therefore, testimony of PW-1 and PW-2 comes under the principle of *res gestae* and the same is admissible in evidence under Article 19 of the Qanun-e-Shahadat Order, 1984. Reliance is placed on the case of 'Riasat Ali and another Vs. The State' (PLD 1991 SC 397), wherein it has been held by the apex Court that:

“---- Art. 19 --- Admissibility of evidence as *res gestae* --- Witness, reported what he had seen of the occurrence to his father --- Timing and locale of the occurrence was such that his narration must have made various links in the same chain of *res gestae* --- Such evidence, held was admissible.”



The complainant (PW-1) and uncle of the victim namely Ibrahim (PW-2) have explained all aspects of the occurrence and their statements are also corroborated by medical and other circumstantial evidence, as such, their testimony being straightforward, trustworthy and confidence inspiring duly connects the appellant with occurrence.

8. So far objection of learned counsel for the appellant regarding delay in lodging the report is concerned, admittedly father of the victim is abroad

for his livelihood and complainant was totally dependent upon her in-laws. Keeping in view nature of the offence as well as social and domestic issues connected therewith, reluctance of the complainant, being a rustic villager, to disclose the matter could not be ignored. Hence, in the mentioned circumstances the delay in lodging the report has no adverse bearing on the case of prosecution.

2. As regards conviction of the appellant under the Child Protection and Welfare Act, 2010 (the Act), perusal of the impugned judgment would reveal that besides convicting the appellant under sections 376 and 377 PPC, the learned trial Court has also convicted him under sections 53 read with section 54(2) of the Act which are reproduced below for ready reference.


**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 mainly speaks about sexual abuse of a child by another person which has been defined in clause (y)

of sub-section (1) of Section 2 of the Act, which reads.-

- (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.

In order to understand the difference between section 377 PPC and section 53 of the Act, we deem it appropriate to reproduce section 377 PPC.



**377. Unnatural offences.** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.

*Explanation.* Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.

Perusal of the above penal provisions under the two laws in light of definition of sexual abuse clearly shows that sodomy and sexual abuse are two different offences independent of each other. In other words, the offence of sodomy does not contain the ingredients of sexual abuse and vice versa. The evidence on record though duly proves

that the appellant has subjected the victim to rape and sodomy at the same time which are punishable under sections 376 and 377 of the Pakistan Penal Code but there is no evidence on record to prove the offence of sexual abuse of the victim by the present appellant which is punishable under section 53 of the Act as well as under section 377-A of the Pakistan Penal Code. Hence, in absence of any evidence, the learned trial Court has reached at a wrong conclusion by convicting the appellant under section 53 read with section 54(2) of the Act. In this regard we would refer judgement of this Court dated **25.01.2021** in **Cr.A No. 162-M/2020** titled Usama Vs. The State and another.

10. Moving on to quantum of sentence awarded to appellant by learned trial Court, it is an admitted fact that the appellant is a juvenile offender of 13/14 years of age and is legally entitled to get the concessions available to him under the Juvenile Justice System Act, 2018. Record further shows that he is first offender and bears no history of his involvement in such like offences. Moreso, the parties have patched up the matter through

intervention of the local elders and parents of the victim have pardoned him in the name of Almighty Allah. They are present in person before the Court today and stated that they are no more interested in prosecution of the appellant in the present case. To this effect they produced compromise deed dated 26.05.2021, which is placed on file as Ex.PA. Though the offences are non-compoundable, however, compromise is in the best interests of both the parties because by this way the enmity between them, which has sprouted because of the present occurrence, could be eliminated, hence, we deem it just and proper to consider the compromise coupled with juvenility of the appellant and circumstances of the case for the purpose of mitigation of the sentence awarded to him by learned trial Court. Wisdom is drawn from judgment of the august Supreme Court of Pakistan in the case titled Moinuddin and others Vs. The State and others (PLD 2019 S.C 749).

11. In light of what has been discussed above, this appeal is partially allowed, the impugned judgment is modified by acquitting the appellant of the charges u/s 53 read with section 54(2) of the Act.

His conviction under sections 376 and 377 PPC is maintained, however, the sentences of imprisonment awarded to him by trial Court under the said heads are reduced to ten years, the minimum punishment prescribed under section 376 PPC. The appellant was in custody during trial proceedings since the date of his arrest and has also remained in jail for about ten months after his first conviction by trial Court. Being a juvenile, there is apprehension that his character will get worsened during his long stay in jail with hardened criminals, therefore, the appropriate course in the circumstances would be to release him on probation under section 15(c) read with clause (a) of the Juvenile Justice System Act, 2018 for the remaining period of sentences of imprisonment with benefit of section 382-B, Cr.P.C subject to his furnishing bail bond through his father/guardian to the tune of Rs.500,000/- to the satisfaction of trial court concerned. He shall not commit any offence and shall keep good conduct during the said period. Violation of conditions of the bond may result into cancellation of the probation order on report of the Probation Officer. The appellant shall report/visit the concerned Probation

Officer once in six months and the Probation Officer shall submit reports before the trial Court. In case of violation of the conditions by the appellant, the trial Court shall intimate Additional Registrar of this Court in writing by transmitting report of the Probation Officer whereafter the office shall place the matter before the Court for further order. Office is directed to send copy of this judgment to concerned Probation Officer.

Announced.  
Dt: 27.05.2021

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Office  
7/6/2021  
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