JUDGMENT SHEET

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

Cr.A No. 226-M/2021

Faridullah .....(Appellant)
vs
The State& another.....(Respondents)

Present: Mr. Abdul Halim Khan, Advocate for the appellant.

Mr. Haq Nawaz, Assistant A.G for the the State.

Date of hearing: 18.10.2022

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. This Criminal Appeal is directed against the judgment of the learned Sessions Judge/Zilla Qazi/ Judge Special Court, Dir Lower, dated 16.09.2021, whereby he convicted Farid Ullah ("appellant") u/s. 376 (3), PPC, and sentenced him to suffer life imprisonment alongwith imposition of fine Rs. 1,000/-, or in default thereof, shall suffer one day S.I and he has further ordered to pay Rs.100,000/- to the complainant as compensation u/s. 544-A, Cr.P.C read with Section 15(6) of the Juvenile Justice System Act, 2018 recoverable as arrears of land revenue; or in default thereof, shall undergo six months S.I. The appellant was extended the benefit of section 382-B, Cr. PC.

2. Facts shortly of the instant case are that the complainant/victim, Mst. Marwa, (PW/APW-6), aged about 11 years, alongwith her mother and uncle, Muhammad Badshah, reported the matter to the local police on 01.07.2018 at 14:30 hours, to the effect that she had gone to water spring situated in *Khwar Undesa* on 27.06.2018 for brining water. While she was busy in filling the pitcher with water, the present appellant/ convict Farid Ullah came over there at about 09:30 hours, caught her with her hand and took to the nearby bushes. He subjected her to rape, whereafter, he left the victim and went away. She charged the appellant/ convict for the commission of offences in hand. Murasila was drafted, which culminated into registration of the case against the appellant/convict at the Police Station concerned.

3. After completion of investigation, challan was submitted against the appellant/convict before the learned trial Court. Copies were supplied to him u/s. 265-C, Cr. PC. Charge was farmed against him u/s. 53of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 and section 376, PPC. He pleaded not guilty and claimed trial.

4. The prosecution examined as many as eight (08) PWs. Statement of the appellant/convict was also recorded u/s. 342, Cr.P.C, in which he was afforded an opportunity of evidence in defence and/or statements on oath, so he denied the allegations of prosecution by recording his statement on oath in terms of Section 340(2), Cr.P.C, but he did not examine any witness in defence.

5. On conclusion of trial, the learned trial Court vide judgment dated 03.01.2019, convicted the appellant as under: -

i. **Under section 376 (3) PPC to undergo life imprisonment alongwith fine of Rs. 100,000/-, or in default thereof, he was ordered to suffer six months S.I;**

ii. **Under section 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010, to undergo ten years imprisonment alongwith fine of Rs. 100,000/-, or in default thereof, he was ordered to undergo six months S.I.**

Both the sentences were ordered to be run concurrently. The benefit of section 382-B, Cr. P.C., was extended to the appellant.

6. The appellant/convict, preferred an appeal **(Cr.A No.48-M/2019)** before this Court. His counsel raised an objection that at the time of the incident, his age as per his Form "ب" was recorded 14 years 11

months and 17 days, which means he was a child under section 2(b) of the Juvenile Justice System Act, 2018 **(the "Act")**. His counsel further objected that his trial was to be conducted by a special Court under the Act. Accepting the objection, this Court vide judgment dated 26.11.2020 allowed the appeal and remanded the case to the learned trial Court with the following directions: -

> **"To conduct a proper inquiry according to law qua the age of the appellant either by itself or through a competent police officer. The learned trial Court shall thereafter record the statement of police officer, if so, appointed for conducting inquiry, as well as the statement of any other witness deemed necessary in this regard. If it is found that the appellant was juvenile at the time of occurrence, then on his application the trial Court shall summon any witness for his examination or re-examination of witnesses already examined. If, after conducting inquiry, the appellant is proved to be above the age of 18 years at the time of occurrence, the trial Court in that eventuality shall announce the judgment after hearing the parties. The parties shall appear before the Court on 22.12.2020. Needless to mention that the learned trial Court shall positively compete the process within four months. During the said period, the appellant shall be treated as under trial prisoner."**

7. Complying with the above order, the learned Trial Court, conducted an inquiry about the age of appellant and in the light of inquiry report (Ex CW1/1), the date of birth of the appellant/convict was determined as 10.07.2003. Charge was re-framed

against the appellant on 07.01.2021 by the special Court under the Act and Khyber Pakhtunkhwa Child Protection & Welfare Act, 2010.

8. The learned trial Court provided full opportunity to the parties for recording further evidence, if, they so wished. The prosecution relied upon its evidence already recorded on file while the defence requested for calling the complainant Mst. Marwa, Lady Dr. Hina Zia, ASI Muhammad Araq Khan and ASI Juma Rahman ASI, for re-cross-examinations and relied on the cross-examination of other PWs already recorded. The learned trial Court called the above witnesses for re-cross examinations and thereafter recorded the statement of appellant a fresh u/s. 342, Cr.P.C, in which he was afforded an opportunity of statement on oath as per evidence in defence, which he did not avail.

9. We have heard arguments of Mr. Abdul Halim Khan, learned counsel for the appellant and Mr. Haq Nawaz, learned Assistant Advocate General, for the State and perused the record.

10. Admittedly Mst. Marwa, the victim, is a child. Article 3 of the Qanun-e-Shahadat Order, 1984

("QSO") provides as to who may testify. For the sake of ready reference, it is reproduced below:

> **"3. Who may testify: AH persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind:**
>
> **Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:**
>
> **Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways:**
>
> **Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Holy Qur'an and Sunnah for a witness, and. where such witness is not forthcoming the Court may take the evidence of a witness who may be available.**
>
> **Explanation: A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."**

Article 17 of QSO speaks about the competence and number of witnesses as under:

> **"17. Competence and number of witnesses: (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah:**
>
> **(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law: —**

a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly ; and

b) in all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant."

11. In the case of **Raja Khurran Ali Khan and others v. Tayyaba Bibi and others (Cr.A Nos. 120, 121, and 122 of 2019)**, august the apex Court held that it is imperative to ensure that a child or the person who testifies shall have the capacity and intelligence of understanding the questions put to him, and who shall also be able to rationally respond to the questions. This is known as rationality test. The Court referred to the case of **The State through Advocate General, Sindh, Karachi v. Farman Hussain and others (PLD 1995 Supreme Court 1)**. In this case, it was held that the issue of evidence of a child is a delicate one, which requires great care to ensure that no element of coaching is involved. The Court further held that the evidence of child witness should not be relied upon unless it is corroborated by some evidence on the record as a rule of precedence. The issue is of universal importance. Reference may be made to the cases from other jurisdiction. A leading case is that of

R. v. Marquard of the Supreme Court of Canada. In this case, the Court observed:

> **"... (1) the capacity to observe (including interpretation); (2) the capacity to recollect; and (3) the capacity to communicate.**
>
> **[...]**
>
> **The judge must satisfy him or herself that the witness possesses these capacities. Is the witness capable of observing what was happening? Is her or she capable of remembering what he or she observes? Can he or she communicate what he or she remembers? The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable.**
>
> **[...]**
>
> **Generally speaking, the best gauge of capacity is the witness's performance at the time of trial.**
>
> **[...]**
>
> **(T)The test outlines the basic abilities that individuals need to possess if they are to testify. The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate. [once[This established, deficiencies of perception, recollection of the events at issue may be dealt with as matters going to the weight of the evidence." [R. v. Marquard [1993] 4 S.C.R. 223]**

Further dilating upon the significance of the testimony of a child victim, the Canadian Supreme Court further observed that even a Court may allow an out of Court statement of a child witness as an exception to the hearsay rule. The reason cited for this

was need and search of truth. **[R. v. Khan [1990] 2 S.C.R. 531]**.

12. Reverting to the case in hand, we would now scrutinize the testimony of the victim. At the beginning, it is worth mentioning that no rationality test of the victim was carried out by the learned trial Judge. It appears that the learned trial Judge did not consider it necessary. Article 3 of the QSO, as reproduced above, shows that it is the duty of the Court to see if the witness is prevented from understanding the questions put to him or from giving rational answers for the reasons recorded therein. There is no hard and fast rule for determination of competency of a child witness. **[Muhammad Ilyas v. Kabir Hussain (2003 YLR 806)]**. As a matter of legal requirement, it is the intelligence of a child witness to testify in the circumstances of a given case and not the factor of his or her age. **[Zatoon Bibi v. State (1998 P Cr. LJ 1680)]**. As we shall see shortly even otherwise, the victim demonstrated the capacity to understand the questions and to give rational answers.

13. The prosecution case is based on the statements of the victim Mst. Marwa (PW-6) and a Woman Medical Officer, Dr. Hina Zia, from District

Headquarter Hospital Timergara (PW-2). In her examination-in-chief, the victim reiterated the story of the incident recorded in the FIR. She re-stated that on 27.06.2018, while she was filling her earthen pot (مٹکہ) at *Khwar Ondesa Chashma/* spring, at about 09:30 a.m., the appellant Farid Ullah son of Alif Said of Village *Ondesa Lajbok*, district Lower Dir, came there, took hold of her and took her down the spring towards bushes, where he raped her. On that day, she did not disclose the incident to anyone in her house. On 01.07.2018, four days after the first incident, while she was again on the way to the aforesaid spring, she found the appellant near around the spring. Due to fear, she went back to her house and told her mother and her uncle about the incident of rape on 27.06.2018. Her mother and uncle took her to the Police Station, situated in *Balambat* town, where she made the report. She acknowledged the report as correct and took her signature thereon. Her uncle verified her report. She saw her report in the Court and accepted its contents in her examination-in-chief. After the report, she produced to the police her clothes she was wearing on the day of the occurrence. The police took her to the hospital in Timergara, where she was medically examined. She pointed out the place of the occurrence

to the Investigating Officer in the presence of her uncle. She was cross examined on 25.10.2018 before the remand of the case.

14. After the remand of the case, she was subjected to further cross-examination on 20.01.2021, as APW-6. In the first round, she was subjected to lengthy cross-examination. She was challenged on certain aspects. First, when asked up to which class she has attended the school, she replied that she has dropped out from her school some 3/4 years ago. Second, she was asked if any relative of her visited to her house in the night. She replied in the negative. Third, she was asked that 2/3 years ago some persons used to throw stones in the house of her uncle. In this context, it was suggested to her that there was a dispute/enmity between her uncle and the appellant and a quarrel had taken place. She denied that suggestion as well. Fourth, she was asked that there is a water connection to her house from two water supply schemes. She said yes but she replied that her family gets cold water from the spring. There were no further suggestions to the effect that she had no pretext to go to the spring while there is a water connection to her house from the village water scheme. Fifth, it was told

to her that near the spring, a village path runs towards village *Ghwargay Lajbok.* She stated that no road passes over the spring rather there is a road at a certain distance. Coming to the specific detail of the incident, she deposed that on 27.06.2018, while she was going to the spring, no one had seen her. She replied affirmatively that she did not provide the earthen pot to the police. She also affirmatively replied that when the appellant touched her hand (meaning the appellant took hold of her) she made hue and cry. She added of her own that the appellant had a pistol and threatened her to kill her. She admitted that she did not disclose the factum of pistol and her threat of life to her family members and to the police. Sixth, regarding her resistance, she stated that she did not bite the appellant with her teeth or injured him with her nails.

15. The victim further deposed that her clothes were not torn but got blood stained. She did not disclose the factum of blood-stained clothes to her mother. She explained on her own that she had washed those clothes. She had gone to the spring at 09:00/ 09:30 a.m., and returned around 10:00 a.m. Regarding the spot position, she told to the Court during her cross-examination that there was some mud, bushes

and a little bit leaves there and that a bit of blood was dropped on the leaves. While pinpointing the place of the occurrence to the police, she had indicated the earth and the leaves. She did not disclose to the police that the next time she went to the spring at 07:00/08:00, a.m. The next time Younas, her younger brother, aged about five years accompanied her which fact was also she did not disclose to the police. She expressed her lack of knowledge that her maternal uncle had suspected illicit relationship between his wife and her father, due to which her father has gone to Saudi Arabia. She denied a suggestion that there is enmity between the family of appellant and her uncle due to which she had implicated the appellant in the instant case. No suggestion was put to her that the incident did not take place at all. There was also no suggestion as to identification and recognition of the appellant.

16. Lady Dr. Hina Zia was examined as PW-2 on 10.10.2018 before the remand and cross examined as APW-2 on 03.02.2021, after remand. In her pre-remand statement, she reproduced her replies to the questions the I.O asked from her while examining the victim on 01.07.2018 at 05:15 p.m. For

the sake of quick reference, those are reproduced hereunder.

> 1. **The victim is about 11/12 years old.**
> 2. **Yes. Sexual-assault has been done.**
> 3. **There is no sign of violence around her private parts.**
> 4. **Yes. Hymen is ruptured.**
> 5. **No. There was no bleeding, no sign of inflammation. Hymen was perforated but it was an old case (chronic).**
> 6. **Not.**
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> **Urine pregnancy test, abdomen pelvic**
>
> **Specimen of vaginal swabs is handed over to Juma Rahman S.I/O.I.I P.S Balambat along with urine pregnancy test and ultra sound report.**
>
> **Urine pregnancy test negative. Normal Abd: and pelvic.**

17. While under cross-examination on 10.10.2020, she admitted that in case of rape, the victim feels severe pain in her private parts. She also admitted that hymen could be broken due to severe blood but she explained that it never breaks due to bleeding during menstruation period. She further admitted that in her report there is no mention that since what time her hymen was not intact. She explained on her own that usually there is a recovery of hurt injury from 4 to 10 days. While under cross-examination after remand, she was asked several questions most particularly regarding her observation in her report that there was no bleeding, no sign of

violence and that hymen was perforated but it was an old case (chronic). In reply to a question regarding violence marks, she deposed that there was no abrasion, scars bruises, lacerations, scratches and no complaint of pain by the victim, including no symptoms of violence, on her clothes. She explained of her own that there were such signs but the same were older and it was an older sexual assault case. Her explanation clearly establishes that the victim was subjected to sexual intercourse three days before the report. It was after three days and that, too, when she saw the appellant again at the place of the occurrence that she apprehended another sexual assault on her that she rushed back to her house and disclosed the incident. As we have seen above, the defence remained unsuccessful to shatter the testimony of the victim, inasmuch as she was subjected to rape much before the incident in question.

18. The lady Dr. Hina Zia was specifically asked about the word "chronic" she used in her medical report. She explained that the words chronic and acute are used when there is a long disease, for example, chronic diabetic and chronic asthmatic, etc. She then explained that if

hymen has ruptured as a result of a sexual violence, it heals from seven to ten days and even from 4 to 10 days. She further explained that a ruptured hymen as a result of sexual violence causes severe pain to the victim including bleeding. She, however, denied that if the hymen is ruptured for the first time, severe pain and bleeding, is a must.

19. We shall now advert to the forensic report. The four parcels containing suspected multiple colour shirt and suspected green colour shalwar of the victim, one suspected Swab of the victim, one suspected white shirt and shalwar of the appellant and one bottle containing semen were subjected to chemical examination in the FSL. The parcel No.3 containing the white shirt and one shalwar from the appellant were found positive for semen. No semen was detected on the articles contained in other parcels. Forensic evidence has lost its value. The reason obviously is that the report was made after three days. So, we will not believe the FSL report.

20. Regarding site plan Ex PB, the victim and the I.O were cross-examined. The evidence demonstrates that there are no houses or road near around the spring where the incident took place; thick

bushes near the water spring; a path at an elevate position passing above the spring; a path leading to the water spring; and road at a certain distance. Evidence also shows that at the time of spot inspection, blood-stained leaves and/or earth were not found.

21. The contention of the defence that there is a delay of three days in lodging the report is correct. However, there could be no escaping from the fact that in such like cases, people avoid to make report as the honor of the family and the larger-than-life stigma on the victim, always come in the way of the complainant party. In case of a woman particularly, unmarried girl, disclosure of such unfortunate incident is not merely due to shame and modesty but also due to fear. Such cases are not ordinarily prompted by false implication. So far as availability of water supply connection in the house of the complainant is concerned, it is very usual and also customary that in such mountainous areas, like district Dir, people go to the water springs to fetch clean and cold water for their daily use. As regards the village road/path, even if it is assumed that there is one such road/path, it is categorically established that the appellant took the victim to the nearby thick bushes and achieved his fiendish goal there. There is no

possibility, not even a cross question to the effect, that the place of the occurrence inside the thick bushes was visible from the alleged path/road. Then, the victim has categorically denied enmity between her uncle and the appellant.

22. So far the juvenility of the victim is concerned, if it is assumed that she was admitted into school at 7, and she left her school at 5, her age would come out as 12 years. If her age is considered 12 years on 25.10.2018, the date on which her statement was recorded before the trial Court prior to remand and her contention that she brought out from school three years ago, her age approximately would be 14-1/2 years. As against this the lady doctor on the basis of her observation determined her age as 11/12 years. Even if it is admitted that she was 17, as the trial Court has opined, she was still under 18. As to the compromise, when she was asked about it, she replied in affirmative but as, the learned trial Judge has observed, her reply came after a long pause and silence. We have already discussed about the word "old chronic" used in the medical report suggests to the actual incident and no inference of bad character of the victim could be drawn from it. Needless to say, the appellant was also

medically examined, he was found having attained puberty and capable of performance sexual intercourse. The non-recovery of blood-stained earth and leaves is also of no help to the appellant for the simple reason that the occurrence took place three days before the report and there was no possibility that suchlike evidence would remain intact.

23. As sequel to above we have reached to the conclusion that the prosecution has successfully proved the charge leveled against the appellant. Thus, we uphold the conviction and sentence passed against the appellant vide the impugned judgment dated 16.09.2021. Resultantly, the instant appeal, being devoid of any merit, is hereby dismissed.

Announced
Dt: 18.10.2022

JUDGE

JUDGE