

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

JAIL PETITION NO. 712 OF 2018

(On appeal against the judgment dated 12.09.2018 passed by Sindh High Court, Circuit Court, Hyderabad in Crl. A. No. S-47 of 2018)

Zahid & Riaz Ali	...	Petitioners
	Versus	
The state	...	Respondent

For the petitioners	:	Ms. Ayesha Tasneem, ASC
For the respondents	:	Mrs. Rahat Ahsan, Addl.P.G. Sindh
Date of hearing	:	03-03-2020

JUDGMENT

QAZI FAEZ ISA, J. FIR No. 311/2017 was registered at police station Taluka Tando Muhammad Khan on 28th October 2017 at 5.10 pm in respect of the rape of a married lady. Zahid and Riaz Ali, the petitioners herein and Muhammad Nadeem were nominated in the FIR. The learned Judge of the Trial Court convicted all three nominated accused under section 376 read with section 34 of the Pakistan Penal Code ("**PPC**") and sentenced them to ten years rigorous imprisonment each and on each of them imposed a fine of fifty thousand rupees and in default of payment of fine to undergo six months simple imprisonment; they were however extended the benefit of section 382-B of the Code of Criminal Procedure ("**the Code**"). The appeal preferred by the petitioners against their conviction was dismissed by the learned Judge of the High Court who maintained the conviction and sentences awarded to them. However, the appeal of Muhammad Nadeem was allowed and he was acquitted because the lady testified that he had not violated her.

2. In this jail petition the petitioners were unrepresented, therefore, on the last date of hearing, we had appointed Ms. Ayesha Tasneem, learned ASC, to represent the petitioners at State expense. The learned counsel for the petitioners states that the crime is stated to have taken place on 27th October 2017 at 12 noon but was reported to the police the following day at 5.10 pm. She further states that no DNA report was prepared and that the person who took the specimens, including the vaginal swabs taken from the victim, was not produced as a witness.

3. The learned Additional Prosecutor General ("**APG**") opposes the petition and states that delay in rape cases is not of much significance as victims are reluctant to come forward to report the crime to the police and in this regard places reliance upon the cases of *Yasmin Butt v Majid Baig*¹ and *The State v Abdul Khaliq*². The learned APG states that there was sufficient evidence against the petitioners and after careful examination of the evidence the Trial Court had convicted the petitioners and the High Court had maintained the conviction. The learned APG refers to the report of the chemical examiner (Exhibit 10/C) which confirms the presence of human sperm on the articles that were sent for chemical examination. The learned APG further contends that the medico legal certificate (Exhibit 10/D) provided by Dr. Shahida Qayyum, Women Medical Officer, supports the allegation of rape. She has also referred to the testimony of the victim (PW-3) which, according to her, fully implicated the petitioners, however, with regard to the third co-accused (Muhammad Nadeem) the victim stated that he had not violated her. The learned APG further states that during cross-examination no question with regard to the rape was put to the victim and in the statements of the petitioners recorded by the Court under section 342 of the Code, they had simply denied the allegation without alleging any animosity of the victim or the complainant of the FIR, who is the victim's husband, namely Muhammad Ali (PW-2), against them. She further states that the

¹ 2008 SCMR 1602

² PLD 2011 Supreme Court 554

petitioners also elected not to testify on oath under section 340 (2) of the Code.

4. We have heard the learned counsel for the parties and with their assistance examined the record.

5. Undoubtedly, the FIR was registered after a day of the crime having been committed, however, the fact that the modesty of a married woman was violated by sexual assault makes understandable the apprehension of the victim and her family in approaching the police immediately. 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. In the case of *Hamid Khan v State*³ a delay of three days in reporting the crime to the police was considered immaterial. In the present case the delay could also be explained because the victim and her family had elected for her medical treatment. The victim was examined on the day of the crime by Dr. Shahida Parveen (PW-4). The lady doctor (PW-4) also testified that there were some marks of violence on the victim: nail marks on her right and left cheeks and swelling on her right forearm, suggesting that the victim was forced and restrained; and that, "*the presence of human sperm in internal vaginal swabs constitutes the likelihood of sexual intercourse.*" The victim (PW-3) herself testified about the sexual assault on her by the petitioners, but was not cross-examined on this part of her testimony. The chemical examiner's report produced by the lady doctor states that the seals of specimens sent for chemical examination were received intact and it was the chemical examiner who had broken open the seals, therefore, the contention of the petitioners' learned counsel regarding the safe transmission of the specimens is discounted both by this fact as well as by the fact that no question was put regarding tampering of the said seals. As regards the absence of DNA report, this is not sufficient to secure an acquittal because

³ 1981 SCMR 448

there was substantial corroboratory evidence to secure the conviction of the petitioners beyond reasonable doubt.

6. The learned Judge of the Trial Court after a careful examination of the evidence convicted the petitioners and also convicted co-accused, Muhammad Nadeem, however the learned Judge of the High Court acquitted him because the victim herself had stated that he did not rape her. However, the acquittal of co-accused Muhammad Nadeem does not bring the case of the present petitioners at par with his because they had sexually assaulted the victim but the co-accused Muhammad Nadeem had not done so. The learned Judge of the High Court was therefore correct to maintain the conviction of the petitioners. We also do not see any reason why the victim and her husband would falsely nominate the petitioners and bring upon themselves societal odium; in any event no suggestion was put forth to the effect that the complainant or the victim had any animosity or ill will against the petitioners. We are therefore satisfied that the petitioners were properly convicted. In our opinion the petitioners were dealt with leniently with regard to their sentences, but since neither the victim nor the State has sought enhancement of sentence, we are not considering this aspect of the case. Consequently, leave to appeal is declined and this petition is dismissed.

Judge

Judge

Islamabad,
03-03-2020
Atif/*

APPROVED FOR REPORTING