IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Justice Qazi Faez Isa
Justice Mazhar Alam Khan Miankhel

Jail Petition No.73/2016
(On appeal from the judgment dated 26.10.2015
passed by the Lahore High Court, Multan Bench,
Multan in Crl.A.No.732/2010 and M.R.No.139/2010)

Farooq Ahmad ...Petitioner

VERSUS

The State ...Respondent

For the petitioner: Mr. Muhammad Rizwan Ibrahim Satti, ASC

For the respondent: Mr. Ahmad Raza Gillani, Additional PG, Punjab

Date of Hearing: 12.5.2020

ORDER

Qazi Faez Isa, J. The complainant, Ghulam Shabbir (PW-4), reported that his daughter aged between 8 and 9 years old was raped by the petitioner on 29 March 2008 at 5 pm and FIR 80/2008 was registered at police station Saddar, District Muzaffargarh on 30 March 2008 at 4.15 pm in respect of the crime. The petitioner was tried by the learned Additional Sessions Judge, Muzaffargarh and was convicted for rape under section 376(1) of the Pakistan Penal Code ('**PPC**') and sentenced to death. He was also directed to pay compensation of an amount of one hundred thousand rupees to the victim and in default thereof to undergo three months simple imprisonment and a fine of two hundred thousand rupees was imposed on him and in default of payment thereof to undergo six months simple imprisonment. Murder reference was submitted to the High Court and the petitioner appealed his conviction. The learned Judges of the High Court maintained the conviction of the petitioner but reduced the sentence of death to one of imprisonment for life since the

petitioner had just attained eighteen years of age when he had committed the crime.

2. The petitioner had filed this petition through Jail and was unrepresented, therefore, on 21 April 2020, we had appointed Mr. Rizwan Muhammad Ibrahim Satti, a learned counsel of this Court to represent him. The learned counsel submits that the complainant had stated that there were two other eyewitnesses to the crime, namely, Ghulam Hussain and Manzoor Hussain, but they were not produced by the prosecution to testify; the FIR stated that the crime was committed under a *Jal* tree but when the complainant testified in court he stated that it was committed adjacent to some bushes; the statement of the victim was recorded on 18 June 2008 which was after a period of almost three months from the date the crime was stated to have been committed and a forensic comparison of the semen retrieved from the victim and from her clothes was not compared with the petitioner's DNA, that is DNA matching, to determine that it was that of the petitioner and in this regard the learned counsel relies on the cases of *Muhammad Javed v State* (2019 SCMR 1920) and *Muhammad Aslam v State* (2006 SCMR 348).

3. The learned counsel next addressed the question of the sentence and submits that the learned Judges of the High Court had for valid reasons set aside the sentence of death awarded to the petitioner but substituted it with one of '*imprisonment for life*' which the law did not envisage. To appreciate the contention of the learned counsel it would be appropriate to reproduce section 376(1) PPC as it stood on the date of the offence:

> 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.

Mr. Rizwan Satti states that the alternate punishment prescribed under 376(1) PPC was imprisonment, '*which shall not be less than ten years or more than twenty-five years*' and that it was not appreciated that the alternate sentence for the rape of a minor to '*imprisonment for life*'

was enhanced by the Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016 promulgated on 22 October 2016 whereas the crime was committed in the year 2008 and the amendment was not retrospectively applicable. Therefore, the learned counsel submits that the sentence of the petitioner may be reduced to bring it in terms with the sentence mentioned in section 376(1) PPC. He further submits that the petitioner had just attained the age of majority when the crime was committed and after being convicted and while serving out his sentence he showed remorse and demonstrated impeccable conduct as a convict and earned remissions of about nine and a half years and has suffered sufficient punishment by remaining incarcerated for over 12 years.

4. The learned Additional Prosecutor General, Punjab ('**APG'**) opposes the petition and states that the case against the petitioner was established beyond reasonable doubt. With regard to the said two eyewitnesses who the prosecution had given up, the learned APG states it is the discretion of the prosecution to produce whichever witnesses it wants to establish any particular point and that it was open to the petitioner to seek their production if he wanted to. He submits that the petitioner's guilt stood established by the testimony of the victim (PW-3), the medical evidence and the testimony of the complainant, Ghulam Shabbir (PW-4). Therefore, there was no need to unnecessarily consume the time of the Court by producing witnesses to restate what had been established. As regards the purported discrepancy of the place where the crime was committed, the complainant reporting in the FIR that it was under a *Jal* tree and stating in his testimony that it was adjacent to some bushes is not of any significance and does not undermine the prosecution case in establishing the crime committed by the petitioner. The fact that the victim's statement was not immediately recorded is also of no consequence considering that a minor had been raped and was traumatised and once she was composed her statement was recorded. With regard to not getting the recovered semen and the petitioner's DNA subjected to comparative-testing, the learned counsel submits that the same is not a requirement of law and in this regard relies on the case of *Shakeel v State* (PLD 2010 Supreme Court 47).

5. However, with regard to matter of sentence the learned APG states that it is correct that section 376(1) PPC was amended on 22 October 2016 when the alternate sentence for the rape of a minor was enhanced to one of imprisonment for life and fine, however, since in this case the crime was committed before this amendment came into effect and as it does not provide for its retrospective application therefore section 376(1) before its amendment, which provided for a sentence ranging from ten to twenty-five years imprisonment, would be applicable to this case and leave may be granted on this point alone.

6. We have heard the learned counsel and with their assistance have also examined the paper-book. In this case a minor girl was raped by a boy who had just attained the majority age of eighteen years. After the trial commenced the victim testified on 16 November 2009; by then she was a year older, that is between the age of 9 and 10 years. However, before recording her testimony the learned Judge of the Trial Court had asked the victim a number of questions to establish whether she was competent to testify and had recorded that, she was '*quite mature and has answered the questions above satisfactorily, hence she is declared a competent witness*'. Thereafter, the victim (PW-3) testified on oath that she had been raped and she was cross-examined at length by the petitioner's counsel yet no material contradiction emerged nor did she resile from the accusation she had made against the petitioner. The victim proved a reliable witness and was physically examined by two lady doctors. Firstly, by Dr. Shabanna Tabbasum (PW-1) on 30 March 2008 who had amongst other things noted that the victim's '*Perineum, vulva stained with blood*', '*deep penetration had been tried'*, '*Patient was still bleeding*", '*Hymen shows fresh tear at 6'clock*' and, on the basis of the examination of the victim had rendered her opinion that the probable duration of injuries was within twelve hours. She also took a vaginal swab for chemical examination to ascertain the presence of semen. In view of the precarious condition of the victim she was again examined on 31 March 2008 by Dr. Raissa (PW-2) who confirmed the earlier findings recorded by Dr. Shabanna Tabbasum. The specimen removed from the victim's body and from her shalwar was sent for chemical examination and the chemical examiner's report (Exhibit PH) confirmed that the same

was semen. A potency test was also performed on the petitioner and the report (Exhibit PF) confirmed that he was potent and capable of sexual intercourse. Ghulam Shabbir (PW-4) also testified against the petitioner and he too stood by his account during his cross-examination.

7. The rape having being established, was it then necessary to conduct a DNA test to determine that the semen retrieved from the victim's body and shalwar was of the petitioner. We do not think that such DNA testing was required under the circumstances. Moreover, DNA testing is not a requirement of law. In *Shakeel's* case (above) it was held (in paragraph 9), that:

> It is well-established by now that "omission of scientific test of semen status and grouping of sperms is neglect on the part of prosecution which cannot materially affect the other evidence." In this regard we are fortified by the dictum as laid down in case titled Haji Ahmad v. State (1975 SCMR 69)...

In the above cited case of *Haji Ahmad v State* (1975 SCMR 69) the father had raped his step-daughter and his conviction was sustained by this Court in the absence of a DNA test; the Trial Court had relied on the girl's testimony, chemical examiner's report confirming existence of semen on vaginal swabs taken from her and the medico-legal report showing her to have been sexually molested. Similarly, this Court in the case of *Irfan Ali Sher v. State* (Jail Petition No. 324/2019, decided on 17 April 2020) upheld a conviction under section 376 PPC in the absence of a DNA test. Rejecting the petitioner's argument that '*DNA report was not sought*' this Court held (in paragraph 3), that:

> As regards the semen not being sent for DNA forensic determination with a view to link it with the perpetrator is not a requirement of law.

It is also not desirable that we should impose additional conditions to prove a charge of rape, or of attempted rape, and to do so would be a disservice to victims, which may also have the effect of enabling predators and perpetrators. However, there may be cases where an accused's DNA is retrieved for forensic determination to establish his guilt.

8. The petitioner's counsel has contended that DNA testing is essential to sustain a conviction, and, to support his contention, has relied upon the cases of *Muhammad Aslam* and *Muhammad Javed* (above). Therefore, we proceed to examine these cases to see if these decisions support his contention. *Muhammad Aslam* was a decision of the Shariat Appellate Bench of this Court and was a case in which the accused had not been found guilty by the Trial Court and the judgment of acquittal was upheld by the Federal Shariat Court; leave to assail these concurrent judgments was sought; to overturn acquittals already recorded by two Courts is extremely rare and only in exceptional cases can leave be secured. However, leaving aside this aspect, let us examine the context of the observations made by the Shariat Appellate Bench of this Court with regard to DNA testing. In the case brought against the accused, it was not clear whether the alleged sexual act was consensual or had been committed against the will of the victim, who was not a minor. With regard to *Muhammad Javed's* case the alleged victim was found not to be of sound mind and incapable of testifying; the report of the chemical examiner had reported '*sexual activity*' however whether it '*was against the wishes of the victim had never been established*' and '*the medical evidence had shown no sign of rape having been committed with the alleged victim*'. In both these cases there wasn't sufficient evidence to establish the guilt of the accused and it was in this context that reference to DNA testing was made. In other words what was observed was that, in the absence of DNA testing the alleged crimes could not be established, which is altogether a different proposition from contending that DNA testing is mandatory in every case or that it is a requirement even in cases where the evidence is sufficient to establish the guilt of the accused. The decision in these two cases have no application to the facts of this case where the guilt of the accused-petitioner has been established beyond reasonable doubt.

9. We are satisfied that in the present case the prosecution had established its case against the petitioner beyond reasonable doubt. Therefore, the petitioner's conviction under section 376(1) of PPC is maintained, consequently, the petitioner's petition for leave to appeal to

such extent is dismissed. However, as regards the petitioner's sentence for the alternate punishment prescribed under section 376(1) PPC when the crime was committed the law prescribed that such sentence, '*shall not be less than ten years or more than twenty-five years*', but the learned Judges of the High Court had sentenced him to *imprisonment for life*, which alternate punishment was subsequently enhanced pursuant to the Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016. If the correct law was applied the learned Judges of the High Court may have been persuaded to pass a lesser sentence. Accordingly, leave to appeal is granted to determine the appropriate sentence to be imposed upon the petitioner under section 376(1) PPC, before the section was amended (the text of which has been reproduced above).

10. Whether the minimum or maximum prescribed sentence, or any sentence in between, is to be imposed is done after considering the facts of the case, including the age of the petitioner at the time when he committed the crime. The subsequent conduct of the petitioner may also be relevant for consideration of the Bench hearing the appeal. Therefore, the Superintendent of the Jail, where the petitioner is detained and serving out his sentence, is directed to submit a report within fifteen days with regard to the petitioner's conduct and the reasons for him having earned the stated remissions.

11. The impugned judgment is by two Hon'ble Judges of the High Court therefore the office is directed to fix the petitioner's appeal before a three-Member Bench of this Court. Since the petitioner has remained incarcerated for over twelve years the office is further directed to fix his appeal within three months with notice to the complainant and the victim.

Judge

Judge

Islamabad,
12 May 2020.
Sarfraz /-

Approved for reporting