

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Manzoor Ahmad Malik
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Syed Mansoor Ali Shah

Criminal Appeal No.251/2020 & Criminal Petition No.667/2020

(Against the judgment of Lahore High Court, Rawalpindi Bench, dated 09.06.2016, passed in Crl. A. No.393/2013, and Capital Sentence Reference No.14-T/2013 and against the Order dated 09.06.2020 of that Court declining suspension of sentence in Crl. Misc 822/M of 2020.)

Atif Zareef, etc (in both cases)

...Appellants/Petitioners

versus

The State (in both cases)

...Respondent

For the appellants:
/petitioners

Sardar Abdul Raziq Khan, ASC.
(in both cases)

For the State:

Mirza Abid Majeed, DPG.

Date of hearing and short order:

04.01.2021

JUDGMENT

Syed Mansoor Ali Shah, J.- According to the crime report,¹20 year old Saadia Rani ("complainant") while travelling to *Rawalpindi* from *Kotli Sattian* with one Hameed Abbasi (PW-2) on 28.08.2012, was intercepted on the roadway by the appellants and others, taken off-road and raped. After the gruesome act, the complainant, straight from the place of alleged occurrence, went to the police station and reported the matter. She nominated (i) Sajjad Hussain alias Jajji, (ii) Sher Baz Khan alias Sheru, (iii) Atif Zareef and two unknown persons as perpetrators who, all five, allegedly committed rape on her, one after the other. Later (iv) Nafees Ahmed and (v) Waqas Hameed were nominated by her as having committed rape on her in supplementary statement recorded the next day. Her statement under Section 164 of the Code of Criminal Procedure, 1898 ("Cr.P.C") was also recorded by a learned Magistrate on 29.08.2012, wherein she reiterated her version of having been raped by the aforesaid five persons.

¹ FIR No.126/2012, P.S. Kotli Sattian, district Rawalpindi, offence u/s 376(2), PPC.

2. Sajjad Hussain alias Jajji and Waqas Hameed became proclaimed offenders, while Sher Baz Khan alias Sheru, Atif Zareef and Nafees Ahmed ("appellants") were sent up for trial and found guilty of having committed rape on the complainant (PW-1). They were convicted under Section 376(2) of the Pakistan Penal Code, 1860 ("PPC") and sentenced to death with the direction to pay Rs.500,000/- as compensation to the complainant or in default thereof to undergo simple imprisonment for six months by the trial court. The appellants challenged their conviction and sentence in appeal before the High Court, and the trial court also sent the Capital Sentence Reference (CSR) to the High Court for confirmation of the death sentence or otherwise. The appeal and the CSR were heard together by the High Court. Vide the impugned judgment, the High Court maintained the conviction of the appellants, however, reduced their sentence to that of imprisonment for life and extended them benefit of Section 382-B, Cr.P.C. also.

3. We have heard the learned counsel for the parties at length and examined the record of the case minutely with their able assistance. The prosecution evidence produced in the case to prove the charge against the appellants consists of: (i) the testimony of the complainant (PW-1) as to commission of rape on her by the appellants and others; (ii) the testimony of Hameed Abbasi (PW-2) as to taking away the complainant by the appellants and others; (iii) the medical evidence including the medico-legal report (Ex-PA) and the statement of Dr. Shehla Waqar (PW-5), confirming commission of sexual assault on the complainant; (iv) the Chemical Examiner's report (Ex-PR) that reported detection of semen in the vaginal swabs of the complainant; and (v) the DNA test report (Ex-PS) that reported matching of the DNA found in the vaginal swabs of the complainant with that of the appellant Sher Baz Khan alias Sheru and matching of the DNA found in the stained section of the *Shalwar* of the complainant with that of the appellant Atif Zareef.

4. We observe that the complainant while appearing as PW-1 deposed each and every detail of the gruesome act committed on her, and her testimony could not be shaken as to any material part of the occurrence stated by her. The suggestions in cross-examination relating to her alleged immoral character and her alleged illicit relation with Hameed Abbasi (PW-2) were strongly denied by her. In any case, the questions targeting her character had no relevance to the matter on trial, i.e., the commission of rape on her. The complainant being an educated lady, studying in B. Ed. after completing her B.A degree at the

time of this agonizing incident had no reason to falsely implicate the appellants, and that too with a such self-deprecating allegation that would tarnish her honour and dignity. The bald assertion of the appellants, without any supporting evidence, that they had seen her in a compromising position with Hameed Abbasi (PW-2) was even otherwise of little value to discredit the testimony of the complainant, which is found to be trustworthy and confidence inspiring.

5. Hameed Abbasi (PW-2) also deposed how he and the complainant, who were travelling to *Rawalpindi* from *Kotli Sattian*, were interrupted by the appellants and how the complainant was taken away by them on the day of occurrence. His statement, thus, fully corroborates the version of the complainant as to her forcible taking away by the appellants and some other persons. It is true that he admitted in cross-examination that he did not see the appellants committing rape with the complainant. Rape is a crime that is usually committed in private, and there is hardly any witness to provide direct evidence of having seen the commission of crime by the accused person. The courts, therefore, do not insist upon producing direct evidence to corroborate the testimony of the victim if the same is found to be confidence inspiring in the overall particular facts and circumstances of a case, and considers such a testimony of the victim sufficient for conviction of the accused person. A rape victim stands on a higher pedestal than an injured witness, for an injured witness gets the injury on the physical form while the rape victim suffers psychologically and emotionally.² In the present case, the testimony of the complainant as to commission of rape on her on the day of occurrence is supported by the medical evidence, i.e., the medico-legal report (Ex-PA) and the statement of Dr. Shehla Waqar (PW-5). The potency test of the said appellants was also positive. The involvement of Sher Baz Khan alias Sheru and Atif Zareef in commission of this offence is corroborated by the DNA test report (Ex-PS), which is considered, due to its scientific accuracy and conclusiveness, as a gold standard to establish the identity of an accused and a very strong corroborative piece of evidence. The prosecution has thus proved its case against the appellants, Sher Baz Khan alias Sheru and Atif Zareef beyond reasonable doubt. We, therefore, uphold their conviction recorded by the trial court and confirmed by the High Court, and also maintain the sentence passed on them by the High Court. The appeal to their extent is dismissed.

² See *State of U.P. v. Munshi*, AIR 2009 SC 370.

6. So far as the case of the appellant Nafees Ahmad is concerned, we find it to be distinguishable from that of the other appellants. He was not nominated by the complainant in the FIR, nor was there any explanation given in the supplementary statement (Ex-DA), wherein he was nominated, as to how the complainant came to know that he was that unknown person who had committed rape on her with other persons. This gap in the prosecution evidence casts a reasonable doubt about his involvement in the occurrence especially when it is appreciated in view of his negative DNA test report. The possibility of mistaken identification of the unknown person, as being Nafees Ahmad, cannot be ruled out. The prosecution thus could not prove its case against the appellant, Nafees Ahmad, beyond reasonable doubt. The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. Releasing a guilty by mistake is better than punishing an innocent by mistake. We, therefore, accept this appeal to the extent of appellant Nafees Ahmad, set aside his conviction and sentence, and acquit him of the charge by extending him the benefit of doubt. He shall be released forthwith if not required to be detained in any other case.

7. It is important to observe that, while examining and reappraising the evidence available on record, we have noted that during the cross-examination of prosecution witnesses, particularly the complainant/victim (PW-1), Gul Hameed Abbasi (PW-2) and Muhammad Latif, Investigating Officer (PW-10), the defence tried to build a case that Mst. Sadia Rani, the complainant/victim (PW-1), was a woman of immoral character for having illicit relations with Gul Hameed Abbasi (PW-2), and therefore her testimony was unreliable and untrustworthy. The lady Doctor Shehla Waqar, WMO (PW-5), who medically examined Mst. Sadia Rani (PW-1), the complainant/victim, and issued the MLR (Ex-PA) was also cross examined on these lines. A portion of her cross examination is relevant and being reproduced:

“It is correct that there is nowhere mentioned in Ex-PA that hymen was freshly ruptured or old ruptured. It is correct that in Ex-PA there is nowhere mentioned whether the vagina was admitting one finger or two fingers. It is correct that by doing this it can be assessed that whether the victim was virgin or habitual.”

In this background of the case, we find it important to examine whether recording sexual history of the victim by carrying out “two-finger test” (TFT) or the “virginity test” has any scientific justification or evidentiary relevance to determine the commission of the sexual assault of rape,

and whether the myth that “unchaste”, “impure” or “immoral” women are more likely to consent to sexual intercourse and are not worthy of reliance have any legal basis. This further begs the questions whether “sexual history”, “sexual character” or the very “sexuality” of a rape survivor can be used to paint her as sexually active and unchaste and use this to discredit her credibility; and whether her promiscuous background can be made basis to assume that she must have consented to the act. These important questions require to be examined in the light of our Constitution, the law and modern forensic science as it stands today.

Modern forensic science - sexual history and virginity testing

8. Lynn Enright in her book “Vagina - a Re-education”³ writes that we are taught from an early age that the hymen is associated with female purity. It is imagined as a sheath protecting the opening of the vagina. But this is false. The hymen has no biological function, it has been made into a symbol of virginity around the world. These inaccuracies are largely rooted in misogyny. Medical jurisprudence textbooks had previously prescribed certain tests of medical evaluation to determine prior virginity of an alleged rape victim, viz, assessment of the elasticity of her vaginal orifice by insertion of two fingers in her vagina and examination of the state of her genitals particularly the hymen. These textbooks had a significant impact on the adjudication of rape cases in the British India, as well as, in Pakistan and India post-independence.⁴Our National Commission on the Status of Women (NCSW) has reported⁵ that crime of rape is viewed in the patriarchal context of sexual conduct of the survivor. Rape is also seen as a crime of lust and passion rather than a crime of control. Since then, much water has flown under the bridge, and today modern forensic science shuns the virginity test as being totally irrelevant to the sexual assault. The latest edition of the *Modi's Textbook of Medical Jurisprudence and Toxicology*⁶states: “The pre-occupation of the medical community was to examine the hymenal status of the victim and determination of vaginal laxity to give opinion on past sexual history. It is time to get past the assessment of virginity and focus attention on appropriate medical care and psychological counseling. It will be illegal, irrelevant and wholly inappropriate to record a finding whether the

³ Allen & Unwin, 2019

⁴ See Kolsky, Elizabeth, “The Body Evidencing the Crime: Rape on Trial in Colonial India 1860- 1947” (2010); DurbaMitra and Mrinal Satish, “Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India” (2014).

⁵Sohail Akbar Warraich, “Access to Justice for Survivors of Sexual Assault” – A pilot study by National Commission on the Status of Women (NCSW), Government of Pakistan. 2017

⁶ 26th Edition. Lexis Nexis publications.

victim was sexually active or not prior to and after the incident." The latest scientific research studies dispute accuracy of such virginity tests and opinions.⁷The World Health Organization (WHO), the Office of the High Commissioner of the United Nations and the United Nations Entity for Gender Equality and the Empowerment of Women have stated in "*Eliminating Virginity Testing: An Interagency Statement*"⁸ that "virginity testing, also referred to as hymen, two-finger or pre vaginal examination...has no scientific merit or clinical indication" and "the appearance of a hymen is [also] not a reliable indication of intercourse and there is no known examination that can prove a history of vaginal intercourse." They have clarified that "like all human tissues, vaginal and hymenal tissue can be injured during trauma...[T]he purpose of the examination for sexual assault is to evaluate for and treat injuries...not to assess virginity status."

9. Modern forensic science thus shows that the two finger test must not be conducted for establishing rape-sexual violence, and the size of the vaginal introitus⁹ has no bearing on a case of sexual violence. The status of hymen is also irrelevant because hymen can be torn due to several reasons such as cycling, riding among other things. An intact hymen does not rule out sexual violence and a torn hymen does not prove previous sexual intercourse. Hymen must therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those findings that are relevant to the episode of sexual assault, i.e., findings such as fresh tears, bleeding, oedema, etc., are to be documented. "Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim...[T]he only statement that can be made by the medical officer is whether there is evidence of recent sexual activity and about injuries noticed in and around the private parts. The duty of the medical officer extends principally to provide adequate healthcare and comfort to the victim and secondarily to assist the prosecution with appropriate medical evidence."¹⁰The medical officers instead of burdening themselves with reporting about the sexual history of the

⁷ See *Eliminating virginity testing: an interagency statement*, World Health Organization (2018); *Strengthening the medico-legal response to sexual violence*, WHO and UNODC (2015); *Statement on Virginity Testing*, Independent Forensic Expert Group (2015); Jim Anderst and N. Kellogg, I. Jung: "Reports of Repetitive Penile-Genital Penetration Often Have No Definitive Evidence of Penetration" (2009).

⁸ A joint interagency statement released in 2018 for eliminating virginity tests in rape cases titled "Eliminating Virginity Testing: An Interagency Statement"

⁹The Latin word "introitus" comes from "intro", into, within + "ire", to go = to go into. In anatomy, an introitus is thus an entrance, one that goes into a canal or hollow organ such as the vagina. The vagina is a muscular canal extending from the cervix to the outside of the body.

¹⁰Modi's Textbook of Medical Jurisprudence and Toxicology, 26th Edition. LexisNexis publications. P.766.

victim must ensure, according to *Modi's Textbook of Medical Jurisprudence and Toxicology*,¹¹ in a case of sexual offence of rape to examine the external genital area for evidence of injury, seminal stains and stray pubic hair.

10. Due to a combination of lack of training, inexperience the medico-legal certificate's (MLC) casually report the two finger test, to show that the vagina can admit phallus-like fingers to conclude that the survivor was sexually active at the time of the assault or a 'virgin' as perceived by the society. Neither of these tests have any basis in medical science. Medical language of MLC is riddled with gender biases and immediately calls into question the character of the rape survivor. It is used to support the assumption that a sexually active woman would easily consent for sexual activity with anyone. The World Health Organization (WHO), the Office of the High Commissioner of the United Nations and the United Nations Entity for Gender Equality and the Empowerment of Women in "*Eliminating Virginity Testing: An Interagency Statement*" proclaim, "the practice is a violation of the victim's human rights and is associated with both immediate and long-term consequences that are detrimental to her physical, psychological and social well-being." In view of this firm and reliable Interagency Statement, examination of a rape victim by the medical practitioners and use of the medical evidence collected in such examination by the courts should be made only to determine the question whether or not the alleged victim was subjected to rape, and not to determine her virginity or chastity.

Constitutionality of "sexual history"

11. Dragging sexual history of the rape survivor into the case by making observations about her body including observations like "the vagina admits two fingers easily" or "old ruptured hymen" is an affront to the reputation and honour of the rape survivor and violates Article 4(2)(a) of the Constitution, which mandates that no action detrimental to the body and reputation of person shall be taken except in accordance with law. Similarly Article 14 of our Constitution mandates that dignity shall be inviolable, therefore, reporting sexual history of a rape survivor amounts to discrediting her independence, identity, autonomy and free choice thereby degrading her human worth and offending her right to dignity guaranteed under Article 14 of the Constitution which Right to dignity under Article 14 of the Constitution is an absolute right and not subject to law. Dignity means *human*

¹¹ 26th Edition. LexisNexis publications. P 797.

worth: simply put, every person matters. No life is dispensable, disposable or demeanable. Every person has the right to live, and the right to live means right to live with dignity. A person should live as "person" and no less.¹² Human dignity hovers over our laws like a guardian angel; it underlies every norm of a just legal system and provides an ultimate justification for every legal rule.¹³ Therefore, right to dignity is the crown of fundamental rights under our Constitution and stands at the top, drawing its strength from all the fundamental rights under our Constitution and yet standing alone and tall, making *human worth* and *humanness* of a person a far more fundamental a right than the others, a right that is absolutely non-negotiable.

12. A woman, whatever her sexual character or reputation may be, is entitled to equal protection of law. No one has the license to invade her person or violate her privacy on the ground of her alleged immoral character. Even if the victim of rape is accustomed to sexual intercourse, it is not determinative in a rape case; the real fact-in-issue is whether or not the accused committed rape on her. If the victim had lost her virginity earlier, it does not give to anyone the right to rape her.¹⁴ In a criminal trial relating to rape, it is the accused who is on trial and not the victim. The courts should also discontinue the use of painfully intrusive and inappropriate expressions, like "habituated to sex", "woman of easy virtue", "woman of loose moral character", and "non-virgin", for the alleged rape victims even if they find that the charge of rape is not proved against the accused. Such expressions are unconstitutional and illegal.

13. It appears that the courts had been allowing opinion evidence of the medical experts as to the said tests to be brought on record in cases of rape in view of the provisions of Article 151(4) of the Qanun-e-Shahadat Order, 1984 ("QSO") [Section 155(4) of the erstwhile Evidence Act, 1872] which provided that "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the victim was of generally immoral character to impeach her credibility." This has now become inadmissible in evidence after the omission of Article 151(4) of the QSO by the Criminal Law Amendment (Offences Relating to Rape) Act, 2016. Earlier, a Full Bench of the Federal Shariat Court of Pakistan had also declared the provisions of Article 151(4) of the QSO to be

¹² Erin Daly and James R May. *Dignity Law: Global Recognition, Cases and Perspectives*. 2020

¹³ Denise G. Reaume, *Indignities: Making a Place for Human Dignity in Modern Legal Thought*, 28 *Queen's L.J.* 62 (2002)

¹⁴ See *Shakeel v. State*, PLD 2010 SC 47; *Shahzad v. State*, 2002 SCMR 1009; *State of U.P. v. Munshi*, AIR 2009 SC 370.

repugnant to the Injunctions of Islam, in *Mukhtar Ahmad v. Govt. of Pakistan*.¹⁵

14. While the omission of Article 151(4) of the QSO implies prohibition on putting questions to a rape victim in cross-examination, and leading any other evidence, about her alleged “general immoral character” for the purpose of impeaching her credibility. Section 12(3) of the Punjab Witness Protection Act, 2018 has specifically provided that “the court shall forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, unless such a question, in the opinion of the court, is a relevant fact in the case”. Therefore, evidence relating to sexual history should not be admitted in order to draw inferences supporting the ‘twin myths’, namely, that by reason of that sexual history, it is more likely that the complainant may have consented or become less worthy of belief.

15. Omission of Article 151(4) of the QSO by the Legislature leaves no doubt in discovering and ascertaining the intention of the Legislature that in a rape case the accused cannot be allowed to question the complainant about her alleged “general immoral character. Declaration of the Federal Shariat Court of Pakistan as to the provisions of Article 151(4) of the QSO, since omitted, also bars such questions. However, it may be important to underline that the omission of Article 151(4) of the QSO implies prohibition on questions put in cross-examination or the defence evidence led as to the reputation of the complainant to show her as of “generally immoral character”, and not on the questions put or defence evidence led to prove that some other person, and not the accused, is perpetrator and source of semen or injury found on the body of the complainant; nor does that omission completely shun the admissibility of questions in cross-examination or defence evidence, on the previous sexual relation of the complainant with the accused when the accused takes the defence, and intends to prove, that the complainant consented to the sexual activity that is an issue in the case. Section 12(3) of the Punjab Witness Protection Act, 2018 codifies this position when it obligates the court to forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, but also empowers the court to allow such a question if, in the court’s opinion, it is a relevant fact in the case. To the same effect are the provisions of Article 146 of the QSO, under which the court may

¹⁵ PLD 2009 FSC 65.

forbid such questions if it finds that they are 'indecent' or 'scandalous', but can allow them if they relate to facts-in-issue or to matters necessary to be known in order to determine whether or not the facts-in-issue existed. However, while allowing or disallowing such questions the court must be conscious of the possibility that the accused may have been falsely involved in the case, and should balance the right of the accused to make a full defence and the potential prejudice to the complainant's rights to dignity and privacy, to keep the scales of justice even for both.¹⁶

16. Foregoing are the reasons for our short order dated 04.1.2021, whereby Criminal Appeal No.251/2020 was partly allowed in the above terms. For ease of reference and completion of record, the said short order is reproduced hereunder:-

"For reasons to be recorded later, the instant criminal appeal is allowed to the extent of appellant No.3 Nafees Ahmad s/o Muhammad Ashraf and his conviction and sentence is set aside. He is acquitted of the charge framed against him. He is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case. The instant criminal appeal, however, is dismissed to the extent of appellant No.1 Atif Zareef and appellant No.2 Sher Baz Khan @ Sheru."

Criminal Petition No.667/2020:

17. Through this petition, the appellants have sought suspension of their sentences. Since the main appeal has been decided, this petition has become infructuous and is accordingly dismissed and leave refused.

Direction to I.G., Punjab Police

18. Before parting with the judgment, we consider it just and proper to highlight that two accused persons, Sajjad Hussain alias Jajji and Waqas Hameed (proclaimed offenders), allegedly involved in this case are still at large despite lapse of a period of about 8 years since the incident. It appears that the case file has been dumped under the dust of time. We, therefore, direct the office to send a copy of this judgment to the Inspector General of Police, Punjab who shall personally supervise the efforts of the District Police, Rawalpindi in bringing the proclaimed offenders to justice, in accordance with the law. The Inspector General of Police, Punjab shall submit the progress report in this regard within one month from the date of receipt of copy of this

¹⁶ See Section 276(1) of the Canadian Criminal Code that contains guiding principles in this regard.

judgment, which shall be placed before us in Chambers for our perusal.

Judge

Judge

Islamabad,
04th January, 2021.
Approved for reporting.

Judge

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