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Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Criminal Appeal No.2066 of 2012

(Nadeem Masood. ***Vs.*** *The State.)*

JUDGMENT

DATE OF HEARING:	**01.06.2015.**
APPELLANT BY:	Mr. Ghulam Farid Sanotra, Advocate.
STATE BY:	Ch. Muhammad Mustafa, Deputy Prosecutor General.
COMPLAINANT BY:	Mr. Ahsan Ullah Ranjha, Advocate.

MUHAMMAD ANWAARUL HAQ, J:- Appellant Muhammad Nadeem Masood was tried in case F.I.R No.214/2010 dated 23.8.2010, registered at Police Station Miani District Sargodha, in respect of an offence under Section 376 PPC and through the impugned judgment dated 04.12.2012 passed by the learned Additional Sessions Judge, Bhalwal, he has been convicted and sentenced as under:-

Under Section 376 PPC:

Twenty Years R.I. with a fine of Rs.100,000/- and in default of payment of fine to further undergo six months S.I.

Benefit of Section 382-B Cr.P.C has been extended to the appellant.

2. Prosecution story in brief un-folded in the F.I.R (Ex.PC/2) recorded on the statement of Humaira Yasmeen, complainant/ victim (PW-5) is that she is a young unmarried girl; about 6/7 days

prior to registration of F.I.R her parents were out of the house in connection with their work and she was alone in her house; at about 4/5.00 p.m., Muhammad Nadeem (appellant), who was on visiting terms with her family, armed with pistol entered into her house while climbing over the wall, extended threats to her, she remained silent due to fear and he had committed *zina bil jabr* with her; Muhammad Aslam and Mazhar Hayat witnesses reached there and also saw the accused going away; the accused had also earlier committed *zina bil jabr* with her number of times and she was pregnant for seven months.

It is further mentioned in the F.I.R that on the same day she lodged an application to the learned Area Magistrate for her medical examination whereupon her medical examination was conducted by the lady doctor.

3. After registration of case, Karamat Ali Shah S.I. (PW-8) conducted investigation in this case, he has recorded statements of the PWs under Section 161 Cr.P.C. and arrested the accused on 14.10.2010. Investigating Officer also produced the complainant/ victim Humaria Yasmeen for DNA test and the report was received on 21.10.2010. He also got medically examined the appellant Muhammad Nadeem Masood.

4. After completion of investigation, report under Section 173 Cr.P.C was finalized and submitted before the learned trial court; charge was framed against the appellant on 15.03.2011, to which he pleaded not guilty and claimed trial.

5. To substantiate the charge, prosecution produced as many as nine witnesses; complainant/victim tendered her evidence as PW-5. Lady Dr. Lubna Pervaiz, who conducted medical examination of the victim, deposed as PW-2 and observed as under:-

> ***"In my opinion she was also pregnant about 32 weeks. Final opinion about pregnancy will be given after ultra sound report. As per Radiologist report, uterus contained***

> ***single alive fetus of 30 weeks. E.D.D. 1-11-2010. No other pelvic pathology seen.***
>
> ***According to DNA report No.37829 dated 11.11.2010, sample 2 was sent from my side. Sample 1 and 3 were taken from some where else. However, conclusion was that victim Humera Yasmin d/o Allah Yar (item No.1) and Muhammad Nadeem son of Muhammad Ashraf (item No.2) are biological parents of fetus (item 3). It was also my opinion. After receipt of the above said reports which is mentioned in my Medical examination Ex.PA which is in my hand and bears my signature, I referred the victim to DHQ Hospital, Sargodha vide reference Ex.PB which also contains the opinion of the Radiologist Ex.PB/1."***

6. The appellant was examined under Section 342 Cr.P.C; he denied the allegations and professed his innocence. While answering to question ***"Why this case against you and why the PWs deposed against you?"*** appellant replied as under:-

> ***"A false case has been registered against me. I am innocent and allegations in FIR are false and baseless. I have no concern with the occurrence. All the evidence and reports are fabricated by the prosecution and complainant to black-mail me with ulterior motive. No other independent witness has deposed against me."***

The appellant did not make statement under section 340(2) Cr.P.C. and also did not produce any evidence in his defence. The learned trial Judge *vide* impugned judgment dated 04.12.2012 has convicted and sentenced the appellant as mentioned earlier.

7. Learned counsel for the appellant contends that case against the appellant regarding the rape of the victim is concocted one and the conviction and sentence passed by the learned trial court under Section 376 PPC is against the law and facts; that occurrence as stated in the F.I.R remained unproved; that the prosecution has not produced any independent witness except the alleged victim to prove allegation of rape against the appellant. Further adds that contents of F.I.R clearly reflect that the alleged victim of the offence was a consenting party and at the most it is a case of

Fornication; that Section 376 PPC does not attract against the appellant and the offence if any attracted against the appellant falls under Section 496-B PPC and maximum sentence provided for the said offence is five years that has already been undergone by the appellant.

8. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant contends that there is sufficient evidence available on record against the appellant to prove the offence under Section 376 PPC in the shape of statement of victim Humaira Yasmeen as PW-5, her Medico-Legal Report (Ex.PA) and the positive report of DNA test (Ex.PK); that delay in lodging of the F.I.R in this case where offence has been admitted by the accused through a suggestion to the victim that she was a consenting party in the offence, is not a ground to discard the prosecution case and that Section 375 (v) PPC is clear on the point that even consent given by a woman under the age of sixteen years the offence falls within the definition of rape; that the prosecution has proved its case against the appellant beyond any shadow of doubt and the learned trial court has already taken a lenient view while not awarding him death sentence, therefore, he does not deserve any further leniency.

9. **Heard. Record perused.**

10. I have noted that while appearing before the court as PW-5 the complainant/victim Mst. Humera Yasmeen has reiterated her version as set forth in the F.I.R and despite lengthy cross-examination, nothing material elicited in favour of the defence. Lady Dr. Lubna Pervaiz (PW-2) examined the complainant/victim on 23.08.2010 and as per her opinion the complainant/victim was pregnant about 32 weeks. After obtaining the reports of DNA test, she recorded her final report that Humera Yasmeen complainant/victim and Nadeem Masood (appellant) are the biological parents of fetus. Dr. Fazal Rasool (PW-4) examined the

appellant Nadeem Masood and found him physically capable of performing sexual act in his Medico-Legal report (Ex.PF). The above referred medical evidence produced by the prosecution (not challenged by the appellant) furnishes sufficient corroboration to the prosecution version.

11. As far as legal question raised by the learned counsel for the appellant regarding the application of offence of Fornication against the appellant is concerned, the same is misconceived, **firstly** for the reason that the appellant during the trial has denied to have committed rape or illicit intercourse with the victim; there is only a suggestion while cross-examining the victim/PW-5 at Page-3 of her evidence that *"It is incorrect that I was consenting party"*. The said denied suggestion alone is not enough to hold that victim was a consenting party especially when the appellant has not produced any evidence in his defence and even did not opt to make his statement on oath under Section 340(2) Cr.P.C to rebut the prosecution case set up against him. **Secondly**, clauses (iii) and (iv) of the definition of 'rape' in Section 375 PPC clearly reflect that even consent of the victim obtained by putting her in fear of death or hurt or where the man knows that he is doing sexual intercourse with a woman who is not married to him but the woman believes herself to be married to him constitutes an offence of rape. It is appropriate to reproduce here Section 375 PPC that defines the offence of rape:-

> ***"Rape. – A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions, --***
>
> ***(i) against her will;***
>
> ***(ii) without her consent;***
>
> ***(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;***
>
> ***(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or***

> ***(v) with or without her consent when she is under sixteen years of age."***

It is a case where even till today the appellant is not claiming to be married to the victim woman who in result of his intercourse has given birth to an innocent baby girl alive to bear lifelong pain of crime of her father. **Thirdly**, in this case lady doctor at the time of medical examination of the victim had observed her age as 16 years with pregnancy of 32 weeks and in her cross examination she has clarified that age given by her in MLR is based upon her 'expert estimation' and information provided by the victim and her father on 21.08.2010 i.e. after eight months of the alleged occurrence. I have noticed that at the time of recording of evidence in the court the learned trial court has mentioned the age of the victim as 14/15 years, however, during cross-examination the victim has denied the suggestion that she was 18/19 years of age on 10.03.2012 i.e. date of recording of her evidence. The accused remained fail to bring on record any material to disprove that the victim was more than 16 years of age at the time of occurrence. However, it was an application of the victim herself before the learned trial court for exact determination of her age and on the basis of the same PW-9, Secretary Union Council, was summoned by the learned trial court to place on record birth entry record of the victim, but the record produced by him was found illegible being damaged because of flood. I am of the considered view that Medico-Legal Certificate, Affidavit produced on record by the accused himself (Ex.DA), another statement of the victim brought on record by the accused (Ex.DC) and her age mentioned at the time of recording of her statement before the trial court are sufficient to prove that the victim was much less than 16 years of age at the time of the crime, thus the offence against the appellant on this score alone falls within the purview of Section 376 PPC. It goes without saying that the prosecution is duty bound to prove its case against the accused beyond any shadow of doubt but at the same time it is equally

recognized rule of criminal jurisprudence that the accused who comes forward with a specific plea must bring on record some material to establish the same. In this case, the accused remained totally fail to bring his case within the scope of Section 496-B PPC by any stretch of imagination.

12. **For the above reasons, I am of the considered view that conviction and sentence awarded to the appellant Muhammad Nadeem Masood under Section 376 PPC by the learned trial court is based upon well-settled principles of appreciation of evidence, thus the same is accordingly upheld.**

13. Before parting with this judgment, I have to observe with a serious concern that the learned trial court has not passed any order under Section 544-A or Section 545 Cr.P.C regarding the compensation to the victim of the offence and at the same time he has also ignored to award any compensation to the innocent girl born in result of the offence committed by the appellant.

14. The Supreme Court of Bangladesh in ***The State v. Md. Moinul Haque and Ors.*** **(2001) 21 BLD 465** has boldly observed that ***"victims of rape should be compensated by giving them half of the property of the rapist(s) as compensation in order to rehabilitate them in the society."*** Indian Supreme Court in the case of ***Dilip v. State of Madhya Pradesh*** **(2013 AIR (SC) (Cri) 1200)** reaffirmed the view already taken in ***Delhi Domestic Working Women's Forum v. Union of India & Ors.*** **1995 (1) R.C.R (Criminal) 194: (1995) 1 SCC 14)**, wherein it was found that in the cases of rape, the investigating agency as well as the subordinate Courts sometimes adopt totally an indifferent attitude towards the prosecutrix and therefore, various directions in order to render assistance to the victims of rape were issued including an instruction regarding compensation in the following words:-

> ***"Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken***

> ***place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape."***

Needless to add that under the Islamic Law a child born out of the wedlock/outcome of rape has no legal relationship with his biological father as far as his inheritance is concerned, however, said child has an undeniable right of life to be protected by the biological parents and the State. Here, I respectfully refer ***Sahih Muslim (Volume 4), Hadith [4432], Pages-471-472***:-

> ***"Then the Ghamidi woman came and said: "O Messenger of Allah, I have committed Zina, purify me;" but he turned her away. The next day she said: "O Messenger of Allah, why are you turning me away? Perhaps you are turning me away as you turned Ma'iz away. But by Allah, I am pregnant." He said: "Then no (not now), go away until you give birth." When she gave birth, she brought the child to him wrapped in a cloth, and said: "Here he is, I have given birth." He said: "Go away and breastfeed him until he is weaned." When she had weaned him, she brought the boy to him, with a piece of bread in his hand and said: "Here, O Prophet of Allah, I have weaned him, and he is eating food." He handed the boy over to one of the Muslim men, then he ordered that a pit be dug for her, up to her chest, and he ordered the people to stone her."***

The Hon'ble Supreme Court of Pakistan in the case of ***Mst. Nusrat vs. The State*** **(NLR 1995 Criminal 8)** has observed as under:-

> ***"In famous case of Ghamidiyyah, our Holy Prophet Muhammad (P.B.U.H) has suspended the sentence on pregnant-woman, not only till delivery of the child but also postponed it till suckling period i.e., two years, obviously for the welfare of the child. This shows the paramount importance and significance of the right of a suckling child in Islam and the unprecedented care taken of, and the protection given to a child born or expected to be born, by our Holy Prophet Muhammad (P.B.U.H). This golden principle of administration of justice enunciated by the Holy Prophet Muhammad (P.B.U.H) must be strictly observed and followed in our country. So, respectfully following the same, I allow ad interim bail to the petitioner in the sum of Rs.20,000/- with one surety in the like amount to the satisfaction of the Assistant Commissioner/Duty Magistrate, Toba Tek Singh, till the hearing of the petition for leave to appeal."***
>
> ***5. Before parting with the order, I would like to add that the principles of justice enunciated by Muslim Jurists/Imams/ Qazis are more illuminating and full of wisdom than principles***

> ***enunciated by Western Jurists and scholars. For the true and safe administration of justice in civil and criminal cases, the Courts in Pakistan must seek guidance from the decisions given and the principles of dispensation of justice enunciated by our Holy Prophet Muhammad (P.B.U.H), the four Caliphs (Razi Allah Ta'aala un Hum), Imams and eminent Qazis. These decisions and principles should be given over-riding effect over western principles of justice."***

The quoted reference is an exemplary rule for the mankind that right of life must be honoured even if the same is result of a sin of biological parents.

15. From criminal law perspective in Pakistan, a Court while convicting the accused under Section 376 PPC or Section 496-B PPC can validly pass an order in favour of a child given birth in result of the crime committed by the accused while taking full advantage of Section 544-A and Section 545 Cr.P.C. To understand the scope of Section 544-A and Section 545 Cr.P.C, reproduction of both these sections shall be beneficial:-

> ***"[544-A. Compensation of the heirs to the person killed, etc.***
>
> *(1) Whenever a person is convicted of an offence in the commission whereof the death of, or hurt, injury, or* ***mental anguish or psychological damage, to, any person*** *is caused or damage to or loss or destruction of any property is caused the Court shall, when convicting such person, unless for reasons to be recorded in writing it otherwise directs, order, the person convicted to pay to the heirs of the person whose death has been caused, or to the person hurt or injured,* ***or to the person to whom mental anguish or psychological damage has been caused,*** *or to the owner of the property damaged, lost or destroyed, as the case may be,* ***such compensation as the Court may determine having regard to the circumstances of the case.***
>
> *(2) The compensation payable under sub-section (1) shall be recoverable as [an arrears of land revenue] and the Court may further order that, in default of payment [or of recovery as aforesaid] the person ordered to pay such compensation shall suffer imprisonment for a period not exceeding six months, or if it be a Court of the Magistrate of the third class, for a period not exceeding thirty days.*

(3) The compensation payable under sub-section (1) shall be in addition to any sentence which the Court may impose for the offence of which the person directed to pay compensation has been convicted.

(4) The provisions of sub-sections (2-B), (2-C) and (4) of section 250 shall, as far as may be apply to payment of compensation under this section.

(5) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.]

545. Power of Court to pay expenses or compensation out of fine.

(1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied --

(a) in defraying expenses properly incurred in the prosecution;

*(b) in the payment to **any person** of compensation for any loss [injury or **mental anguish** or **psychological damage**] **caused by the offence,** when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;*

(c) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser, of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made, before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal."

Under both these sections, whenever a person is convicted of an offence and in the commission whereof, mental anguish or psychological damage is caused ***(to any person)***, the court **shall**

order the convicted person to pay such compensation as the court may determine having regard to the circumstances of the case. Plain reading of Section 544-A Cr.P.C highlights that such compensation is not restricted to the complainant, the legal heirs of the deceased or the injured persons rather the same can be awarded to **"any person"** who suffers mental anguish or psychological damage and even to the owner of the property damaged, lost or destroyed, as the case may be, "in result of the crime committed" by the accused. Sub-section (3) of Section 544-A Cr.P.C further clarifies that compensation payable under sub-section (1) shall be in addition to any sentence which the Court may impose for the offence.

Needless to add that an Appellate Court while examining the correctness or propriety of the sentence awarded by the learned trial court can also modify the same by invoking the provisions of Sections 435, 439, 439-A and Section 544-A(5) Cr.P.C and this Court can do the same even under Section 561-A Cr.P.C to ensure complete and safe administration of justice. Here, I respectfully refer the case of ***Mokha vs. Zulfiqar & 9 others*** **(PLJ 1978 SC 19)**, wherein the Apex Court has observed as under:-

> ***"35. The trial Court had failed to award compensation under section 544-A Cr.P.C. The Division Bench while maintaining the convictions of Zulfiqar, Azam and Rajada also did not award any compensation. Accordingly, there was no compliance with the mandatory provision. I would, therefore, direct, that the respondents shall pay a fine of Rs.1000/- each as compensation to the heirs of the two deceased in equal shares, under section 544-A Cr.P.C or in default, to suffer rigorous imprisonment for six months.***
>
> ***36. Accordingly, the appeal is allowed and the judgment of the High Court stands modified to the extent indicated above."***

16. In view of all above, I am of the considered view that the minor baby girl born in result of crime committed by the appellant is ***"a person"*** suffering mental anguish and psychological damage for her whole life, thus, she is entitled for the compensation provided under the law. I, therefore, under Section 544-A (5)

Cr.P.C, direct the appellant to pay a compensation of Rs.10,00,000/- (Rupees One Million) to the victim child namely Shazia Nadeem (her name is mentioned in Ex.PG, an application to the S.H.O for incorporation of fact of birth of girl child dated 07.12.2010) and in case of default of payment of such compensation the appellant shall suffer further imprisonment for a period of six months. Needless to add that the victim having her independent right to sue the appellant under the Civil Law is at liberty to do the same as and when she so desires and this order of compensation in her favour shall not prejudice her any claim on civil side. The compensation amount after realization shall be deposited in the name of the minor girl in the shape of Defence Saving Certificates and the amount so deposited shall only be payable to the minor after she attains her majority. It is important to clarify that in case of dire need of the minor, her legal Guardian can apply to the court of learned Guardian Judge for encashment of any part or the whole amount and the learned Guardian Court concerned shall pass an order keeping in view the best interest of the minor strictly in accordance with law. As far as fine of Rs.100,000/- ordered by the learned trial court is concerned, the amount of fine if realized shall be paid to the victim of the rape Mst. Humaira Yasmeen under Section 545 Cr.P.C.

17. Resultantly, with the modification in the sentence mentioned above, this appeal is **dismissed**.

(MUHAMMAD ANWAARUL HAQ)
JUDGE

APPROVED FOR REPORTING.

JUDGE

Faiz