

**IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT**

1. Criminal Appeal No.1052 of 2017
(Yasir Ayyaz Vs. The State)

2. Criminal Appeal No.1085 of 2017
(Qamar Fayyaz & another Vs. The State)

Date of hearing: 30.1.2019

Appellants by: Raja Ghaneem Aabir Khan, Raja Aamnat Ali Khan and Mr. Zohaib Ashraf, Advocates.

Complainant by: Sardar Munir Hussain Munir, Advocate.

State by: Khawaja Noman ul Haq, A.A.G. assisted by Mr. Khalid Pervaiz Uppal, Deputy Prosecutor General with Naveed Aslam A.S.I. and Muhammad Naeem I.T. Expert.

QAZI MUHAMMAD AMIN AHMED, J:-Sonia Bibi, 22, prosecutrix (PW-3) left home to fetch milk was taken by Muhammad Qamar Fayyaz appellant to nearby bushes; it is alleged that he raped the prosecutrix and also sent for Basit and Yasir appellants to join the carnal assault; Muhammad Qamar Fayyaz captured the incident on a cell phone camera; the prosecutrix was let off with a caution to hold back with a threat of a disclosure; as the few days went past, the accused once again desired the prosecutrix to oblige them and this finally impelled her to take her father Abdul Raheem (PW-5) into confidence, who lodged the report same day with Police Station Kotli Sattian; she was medically examined by Dr. Maryam Ali (PW-8) with whom she shared the details of assault; the Medical Officer noticed her as shy, confused and depressed, albeit with no clinical symptoms of assault except for old ruptured hymen; specimens were taken for forensic analysis.

Imtiaz Hussain SI (PW-10) commenced investigation; besides taking various formal investigative steps, he arrested the accused on 6-9-2015; Qamar Fayyaz and Basit Ali accused led him to a premises wherefrom a cell phone (P-5) was taken into possession whereas Basit Ali independently got recovered cell phone P-6, secured vide inventories; Yasir Ayyaz accused also followed the suit and led to the recovery of Nokia handset same day; awaiting forensic findings, he sent the accused to face trial. Muhammad Akhar, SI (PW-11) received a memory card (P-3) by Abdul Raheem complainant (PW-5); it contained graphic details of the assault, captured during the incident. Forensic analysis validated details captured by the video camera installed in the handsets, however, absence of seminal stains impeded DNA profile generation. Indicted on 11-11-2015, the accused claimed trial, pursuant whereunto, prosecution produced as many as 11 witnesses besides its reliance upon forensic reports. Fate of the prosecution case is primarily structured on statement of Sonia Bibi (PW-3) with corroborative parental support, explanatory to circumstances preceding as well as subsequent to the incident. Accused confronted prosecution evidence with denial under different reasons. According to Qamar Fayyaz, he was hounded for siding with the opponent of the complainant whereas Basit Ali and Yasir Ayyaz blamed their prosecution on account of their friendship with Qamar Fayyaz; when specifically confronted with their prominence in video film (Ex.PD), they relied upon a simpliciter denial without offering anything in their defence or to be their witnesses in disproof of the charge. Unimpressed by the position taken, the learned trial Judge, vide impugned judgment dated 3-11-2017, convicted the appellants under Section 376-ii of the Pakistan Penal Code, 1860 and sentenced them to imprisonment for life each with payment of compensation in the sum of Rs.50,000/- or to undergo six months simple imprisonment in the event of default each; they were additionally convicted under Section 13 of the Prevention of Electronic Crimes, 2009 and sentenced to rigorous Imprisonment for five(05) years each

alongside payment of fine of Rs.50,000/-or one month simple imprisonment in default of payment thereof each with benefit of Section 382-B of the Code of Criminal Procedure 1898, vires whereof, are being challenged through Criminal Appeal No.1052 of 2017 and Criminal Appeal No.1085 of 2017 by the appellants; bearing a common thread, these are being decided through this single judgment.

2. Learned counsel for the appellants contends that there is inordinate delay of almost 15 days in recourse to law, for which according to him, there is no explanation and this circumstance by itself renders the prosecution case highly doubtful. Learned counsel has laid much stress on the absence of any incriminatory forensic material on account of absence of seminal traces as well as prosecutrix's anatomy by referring to old healed/ruptured hymen to impeach prosecutrix virtue as well as credibility. According to the learned counsel, the genesis of video film (Ex.PD) is a memory card presented by no other than the complainant himself and, thus, he maintained that entire case stood shattered between the lines; he has made an oblique reference on the basis of first statement of accused to a volitional intimacy leading to a consensual encounter to suggest consent as his defence by relying upon prosecutrix's age as 22. Contrarily, the learned Law Officer assisted by learned counsel for the complainant has vehemently defended the impugned judgment; he argued that prosecution came up with truthful, straightforward and trustworthy evidence, available under circumstances to squarely rule out any hypothesis of appellants' innocence; he has cited trauma, pain and anguish endured by the prosecutrix for her initial silence, according to him, not an unusual reaction by the victims of rape, particularly in rural neighbourhood.

3. Heard. Record perused.

4. Adverting to the foremost argument of delay in recourse to law, vehemently argued at inordinate length, it certainly cannot be denied that the prosecutrix was violated almost a fortnight before, she took her father Abdul Raheem (PW-5) into confidence, nonetheless,

prosecutrix's initial silence is to be essentially viewed in its own contextual framework. In criminal adjudications, there are situations where delay on part of the prosecution is fatally detrimental such as in cases, involving mistaken identity or non-availability of witnesses more so in the face of long standing enmities; these are the cases, possibly suggestive of deliberations or consultations, exercises essentially time intensive; case in hand is structured in its own peculiar background of carnal assault endured by single individual. While the human responses and reactions cannot be assessed on paradigmatic scales, nonetheless, psychological and emotional trauma and its aftermaths experienced by a victim of rape are the concepts by now fairly well identified, "*rape is a particular traumatic violation of an individual. Immediately post-assault, most victims will experience shock, intense fear, numbness, confusion, feelings of helplessness, and/or disbelief, in addition to self blame, hyper-arousal and high levels of anxiety.....furthermore, many victims who tell others about their assault, must endure a "second assault" in the form of negative reactions*". Therefore, in such like cases, delay cannot be received as a silence, fraught with mischief. The prosecutrix was forced to speak out with only alternate option of suicide when she was coerced once again by the appellants with her nude video footage, in this backdrop, bald suggestion alone, unanimously denied by the witnesses, does not reflect upon the prosecution case as there appears no motive on part of the prosecutrix or other family members to set up a false case, that too, at the expense of perennial embarrassment in a small rural neighbourhood. In retrospect, ultimate outburst by the prosecutrix corroborates allegations of threats calculated upon silence. Absence of DNA profile generation is not of much consequence; this advance microbiological technique to generate identical profile requires optimal storage and transportation conditions to rule out even the minutest contamination, facilities hardly available even in tertiary hospitals. A confidence inspiring ocular account would require no forensic corroboration; presence of old healed hymen as an argument to impeach

prosecutrix credibility is preposterously fallacious. Hard work, age beyond nubility and household pursuits and folk sports in vogue amongst girls cause rupture of hymen more often than not. Interregnum between the assault and medical examination itself provided healing period. Virtue of a woman is not embedded in her anatomy; it gleams in her soul on the basis of her conduct as of human being, found above reproach in the present case.

Prosecution has relied upon video footage (Ex.PD), film prepared by Muhammad Qamar Fayyaz, appellant graphically capturing the assault upon the prosecutrix. Defence objection on the admissibility of video footage is beside the mark, in view of the mechanism provided under Article-164 of the Qanun-e-Shahadat Order, 1984, reproduced below:-

“In such cases, as the Court consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques. [Provided that conviction on the basis of modern devices may be lawful].”

Hand phone sets, memory cards as well as Subscriber Identity Module secured during the course of investigation, dispatched to Punjab Forensic Science Agency; report (Ex.PV) confirms integrity of video footage in the following terms:-

“no editing features were observed in the contents of the visuals in the video clip named “imajm, avi”.

The video was played in the Court in the presence of appellants summoned from the jail; they unmistakably feature while assaulting the prosecutrix, one by one, in a manner nauseatic and abhorrent; digitally generated evidence, through an automated process, stored in Ex.PD is not amenable to human interference, as confirmed by forensic analysis; sciences do not perjure. Article-164 of the Order *ibid* has revolutionized the scope to accommodate modern innovative techniques to secure, preserve and reproduce the

information, hitherto unavailable, it independently provides a wide mechanism to bring on record evidence through visual, audio, digital, sonic or biological and other means on the basis of information capable to establish or negate any fact in issue, certainly subject to integrity of the procedure/process, duly qualified in the case. When confronted with the contents of the footage by the learned trial Court under Section 342 of the Code of Criminal Procedure, 1898, the appellants had nothing to offer in their defence. Ex.PD establishes appellants' culpability in terms of Article-22 of the Order ibid leaving no space to entertain any hypotheses of mistaken identity or their innocence. Argument of the consent is outrageously scandalous to say the least. The prosecutrix was on way when intercepted and taken to a nearby place in a rural neighborhood; it is inconceivable that she would consent for the treatment meted out to her in a most tormenting manner and would also countenance while its details being capture by the appellants, it is certainly not expected from an unmarried girl in her early twenty, from a rural neighbourhood to be a willing object of a most repugnant exposure and ridicule. On the contrary, anguish and pain, helpless and agony while she is being ravished in detention is a writ large in her face. Even in cases of individual assault consent is not to be readily inferred. Difference between consent/unwillingness and inevitable compulsion quiescence and non resistance has been most aptly illustrated in the case of Rao Harnarian Singh v. The State (AIR 1958 Pnj 123), relevant portion whereof is advantageously reproduced below:-

“ A mere Act of helpless resignation in the face of inevitable compulsion, quiescence, nonresistance, or passive given in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be ‘consent’ as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of

the significance and moral quality of the Act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence of fear or terror is not consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere Act of submission does not involve consent. Consent of the girl in order to relieve an Act, of a criminal character, like rape, must be an Act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure. A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to Act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

An accused cannot claim benefits of any exception in his defence through reticent imputations alone; he is required to positively discharge onus, cast upon him in terms of Article 121 of the Order *ibid*. Reliance is placed in the cases of Muhammad Raheel alias Shafique Vs. The State (PLD 2015 S.C. 145) as well as Malik Muhammad Mumtaz Qadri Vs. The State (PLD 2016 S.C. 17) wherein parameters have been laid down for an accused claiming benefit/protection of any of the exceptions available under the law; it has nowhere been appellants' case nor they ever opted to produce any evidence either in disproof of the charge or to prosecute the plea of exception; totality of circumstances does not admit any such hypothesis as well. The learned trial Court has rightly placed implicit reliance on the prosecution evidence so as to return a guilty verdict, therefore, no interference is called for. Criminal Appeals No. 1052 & 1085 of 2017 **fail**. Appeals are **dismissed**. Video clip (Ex.PD) shall be inaccessibly kept in safe custody and destroyed after conclusion of proceedings, after period of limitation provided for Petition for Leave to Appeal in the Supreme Court or after conclusion of proceedings thereof, if any. The fine imposed upon the appellants shall be recovered as arrears of land revenue and paid

to the prosecutrix as compensation within the contemplation of Section 544 of the Code of Criminal Procedure, 1898.

(Qazi Muhammad Amin Ahmed)
Judge

APPROVED FOR REPORTING