HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Criminal Appeal No.294 of 2022

Shahzad Ahmed Vs. The State and another

Jail Appeal No.302 of 2022

Shahzad Ahmed Vs. The State

Petitioner by	**:**	**Mr. Muhammad Kamran Alam Satti, Advocate.**
Respondents by	**:**	**Ch. Ehsan Majeed Gujjar, State Counsel.** **Ms. Imaan Zainab Mazari-Hazir, Advocate for respondent No.2** **Mr. Muhammad Nawaz, Inspector and Mr. Mukhtar Ahmed, ASI.**
Date of Hearing	**:**	**20.11.2024**

Babar Sattar, J:- The appellant has impugned judgment dated 06.07.2022 whereby he has been convicted for the offence of rape under section 376 of Pakistan Penal Code, 1860 **("PPC")** and has been sentenced to fourteen years rigorous imprisonment along with imposition of fine in the amount of Rs.50,000/-, and in case of default in payment of fine, he has been made liable to serve another six months of simple imprisonment.

2. The victim filed a complaint dated 24.06.2021 (Exh.PA) pursuant to which FIR No.587/2021 dated 24.06.2021 (Ex-PB) was registered. The complainant alleged that the appellant who was the complainant's neighbor forcefully entered her house at a time when her parents were not home and had taken her younger brother to PIMS hospital. He took the victim to an empty room on gun point, raped her, and threatened her not to reveal the incident. The complainant became pregnant and informed her parents about the incident almost eight months after the occurrence. Her parents took a *Jirga* to the

appellant's home to encourage the appellant's family to consider whether the appellant would marry the complainant who was eight months pregnant with the appellant's child. After the appellant refused to do so, the victim filed the complaint. The charge was framed against the appellant on 18.03.2022. He pleaded not guilty and demanded a trial. The prosecution produced eight witnesses. A summary of the testimonies of the witnesses is recorded in the impugned judgment and need not to be recapitulated. After recording the evidence, the prosecution's case was put to the appellant in terms of section 342 of Code of Criminal Procedure, 1898 **("Cr.P.C.")**. The appellant took the position that the pregnancy had been caused by somebody else and not the appellant, and that the appellant had been falsely framed and had been made a scapegoat with the demand to marry the victim. He chose not to make his own statement under section 340(2) of the Cr.P.C. or produce any evidence in defence.

3. After the appraisal of the evidence, as well as the appellant's statement in terms of section 342 of Cr.P.C. and after considering the arguments of the learned counsels for the parties, the trial Court found that the delay in registering the FIR was not material as an incident of rape was considered a source of shame and dishonor within the society and a delay in reporting such an incident was not unnatural. The trial Court also considered the DNA test report (Exh.PJ), according to which there was a 99.9999996% probability that the appellant was the biological father of the baby birthed by the complainant. In view of such DNA evidence, the trial Court concluded that it had been established beyond reasonable doubt that the appellant had engaged in intercourse with the victim, resulting in her pregnancy and the birth of a baby girl. The trial Court further held that rape was a crime that was committed in private and that there were no witnesses of the

same and that it had been held that no corroboration was required to support the statement of a rape victim when there were no other witnesses and the sole statement of the victim was sufficient. The Court, in view of the testimony of the complainant as PW-4, found that her testimony was confidence inspiring and had remained unshaken during the lengthy cross-examination. And as the appellant was a neighbor, there was no question of mistaken identity. In view of the testimony of the victim, corroborated by the DNA report, stating that the baby girl born to the victim was the daughter of the appellant, the trial Court convicted the appellant for an offence under section 376 of the PPC.

4. Learned counsel for the appellant submitted that the delay in registering the FIR reflected that no case under section 376 was made out against the appellant. The complainant neither made any hue and cry that would have woken up her siblings who were sleeping in another room in the house, nor did the medical report reflect that there were any marks of violence. These factors suggested that the sexual intercourse was consensual. He then submitted that Exh.PG/D1 reflected the name Mona and not Mobina, which is the name of the complainant, which suggested that the examination carried out on 25.06.2021 was that of another person. He then submitted that there was no proof that a baby was born to the complainant. There was no evidence presented before the Court to confirm the birth of the baby, nor was there any proof that the baby was born at the PIMS hospital. Furthermore, the complainant claimed that a Jirga had visited the appellant's house, but neither the complainant's parents nor any other members of the Jirga were presented in Court. This suggests that prosecution withheld the most important evidence, and the benefit of this omission should go to the appellant. He submitted that the safe

custody of the blood samples of the appellant as well as of the baby transmitted for DNA purpose was questionable, and it was only the samples of blood of the appellant that were sent to the Punjab Forensic Science Agency, Lahore **("PFSA")**, which is why the blood samples had matched. He finally submitted that there was no recovery of the alleged pistol used by the appellant during the occurrence. He concluded by asserting that the appellant ought not have been convicted by the trial Court on the basis of the solitary statement of the complainant for which there was no corroboration by any other witness.

5. The learned State counsel submitted that the appellant had been positively identified by the complainant in her complaint (Exh.PA) on the basis of which the FIR (Exh.PB) was registered. The complainant was medically examined on the day of registration of the FIR at PIMS hospital, and blood samples were also procured at the same time, when the complainant was eight-month pregnant. The baby was born on 03.07.2021 and the police authorities filed an application for purposes of drawing blood samples from the baby as well as the appellant for purposes of DNA analysis. The applications for such purposes were exhibited before the Court. The safe custody of the samples was established through the testimony of the prosecution witnesses, including two doctors, who confirmed overseeing the drawing of blood samples and handing over the samples to police officials. The samples were then dispatched to PFSA and the DNA report concluded that there was a 99.99% probability that the appellant was the biological father of the baby born to the complainant. The complainant appeared as a witness and provided evidence as PW-4. There was no suggestion made by the defence during cross-examination as to why the appellant had been charged in

the event that he was not the culprit. The prosecution successfully proved the charge against the appellant, and the defence failed to create any dent in the prosecution's case or create any doubt the benefit of which could go to the appellant. The judgment convicting the appellant, therefore, suffered from no infirmity.

6. Learned counsel for the complainant submitted that the complainant was a twenty year old uneducated woman who was raped by her neighbor. The complainant was positively identified by the appellant as the perpetrator in the complaint, and there was no question of mistaken identity with the victim herself identifying the offender. She was raped at gun point, at a time when her parents were not at home, and she stayed mum being an unmarried woman fearing for her safety and for the dishonor which the revelation of her rape would bring to herself and her family. The delay in registering the FIR was explained in the complaint. This delay had been further explained by the complainant in her testimony as PW-4. The learned counsel submitted that delay in reporting of a rape case was not fatal as reporting of sexual violence is often influenced by deeply rooted societal notions of shame and honor. The complainant, as PW-4, withstood a lengthy and hostile cross-examination, and her testimony remained consistent and trustworthy, as held by the trial Court. The baby born to the complainant was produced before the doctor at PIMS hospital, as acknowledged by the doctor in her testimony, as PW-6. The doctor testified to overseeing the drawing of the baby's blood sample and handing it over to police authorities. The doctor who appeared as PW-7 testified to drawing the appellant's blood sample and handing it over to the police authorities. PW-2 testified to bringing such blood samples to the Malkhana and PW-8 testified that he kept such samples in the Malkhana in his capacity as Moharrir and

dispatching them along with the road certificate handed over to PW-2. The DNA report issued by PFSA was exhibited as Exh.PJ and confirmed that the appellant was the biological father of the baby birthed by the complainant. The DNA report corroborated the account of the complainant and confirmed that the complainant had been impregnated by the appellant, who had denied ever having intercourse with the complainant in his statement recorded in terms of section 342 of Cr.P.C. The appellant had suggested that the child born to the complainant was a product of consensual intercourse with some other person. While the appellant chose not to produce any evidence in his defence, the position he took in his statement, recorded in terms of section 342 of Cr.P.C., reflected that he had misrepresented himself before the Court. She argued that it was settled law that the solitary statement of a victim was sufficient to support a conviction and did not require corroboration. And in cases of rape, it was extremely unlikely that the victim would misidentify the perpetrator or impute the act of sexual violence to an innocent third party. In these circumstances, the trial Court correctly concluded that the appellant was liable for the offence under section 376 of PPC, and the judgment was sound.

7. The prosecution's story is simple. The victim, a 20-year-old unmarried and uneducated girl, was at home along with her younger siblings, who were all minors. Her parents had taken one of her younger brothers to the hospital. The appellant, a neighbor of the victim, knocked on the door at approximately 09:00 PM. When she opened the door, he took her into an empty room in the house at gunpoint. This room was approximately 20 to 25 feet away from two other rooms in which her younger siblings were asleep. He had sexual intercourse with her against her will or without her consent. After he was done, he threatened her not to inform anyone else or else she

would face harm, and she didn't. She, however, became pregnant and still did not inform anyone. It was only when her pregnancy became apparent to her parents that she informed them about the incident and about who the culprit was. To keep the family's honor intact, the victim's family members went to the appellant's house to see if the appellant and his family would agree to the appellant and victim getting married. The appellant refused. At which point, the victim filed the complaint on the basis of which the appellant was tried. A baby girl was born to the victim on 03.07.2021 approximately nine days after the registration of the FIR. DNA samples from the baby girl and the appellant were procured and subjected to forensic examination. The samples matched and the forensic report concluded that there was a 99.99% probability that the appellant was the biological father of the baby girl. The primary rape evidence produced by the prosecution was the testimony of the victim. This was corroborated by the DNA report confirming that the appellant was the biological father of the child delivered by the victim, proving beyond reasonable doubt that the appellant had intercourse with the victim. It is on this basis that the trial Court came to the conclusion that it had been proven beyond reasonable doubt that the appellant had intercourse with the victim, and in view of the statement of the victim, it had also been proven beyond doubt that such intercourse was without the victim's consent and against her will.

8. The defence did not come up with a counter-version. The defence story begins and ends with blanket denial of any interaction or engagement between the appellant and the victim. The appellant also denied that he was the biological father of the baby delivered by the victim. The appellant's version can be deciphered partly from his statement recorded in terms of section 342 of Cr.P.C., where he

asserted that he had been named to cover up the act of another person who engaged in consensual intercourse with the victim. Such other person was, however, not named by the defence, nor was any evidence produced before the Court to suggest that the victim indulged in consensual intercourse with anyone else. The counsel for the appellant made a frail attempt to argue that the DNA sample of the child born to the victim was never drawn and that the DNA report was based on two samples of the blood of the appellant himself. In other words, aside from the outright denial of the occurrence itself, the defence did not present a counter-version of facts either before the trial Court or before this Court. This Court, during the course of hearings, gave the learned counsel for the appellant an opportunity to consult with his client and see if his plea would remain that of denial of the occurrence altogether in face of the DNA evidence or whether he wanted to reconsider the same. The appellant remained committed to his original defence, maintaining that he never had intercourse with the victim. Consequently, it wasn't the appellant's case that the baby delivered by the victim was the outcome of consensual intercourse between the victim and the appellant. His defence was that he never had intercourse with the victim.

9. Let us first consider the law in relation to the evidentiary value of a solitary statement and whether a solitary statement by a rape victim requires corroboration. We will also examine the law in relation to absence of evidence of physical violence in determining the veracity of the victim's statement and whether a delay in the registration of the FIR casts aspersions on the credibility of such statement. While the appellant has not raised the defence of engaging in consensual intercourse with the victim, we find it imperative to also consider the manner in which consent is to be appreciated in rape cases.

10. In the criminal law jurisprudence that has evolved in Pakistan primacy is given to the direct evidence produced by witnesses. The question of whether or not it is imperative to corroborate the testimony given by an eye-witness came before the Federal Court in ***Ashraf vs. The Crown* (PLD 1956 FC 86),** wherein the following was held:

> *"In the statement of the rule relating to corroboration in criminal cases it has, I think, never been held that corroborative evidence should itself be sufficient for conviction. Even in cases where as a matter of law corroboration is required, all that is insisted upon is that the corroborative evidence should tend to show that the witness or witnesses evidence that the accused took part in the crime is true...To say that certain witnesses require corroboration and then to lay down that the corroborative evidence must show that the accused did the precise act attributed to him by the witnesses is tantamount to doing away with the evidence of those witnesses…The true rule governing such situations in my opinion is that the corroborative evidence should at least tend to show that the evidence of the witnesses when they name the accused as taking part in the crime is true."*

11. The same question was then considered in ***Ramzan Ali vs. State* (PLD 1967 FC 545)** where it was held that, "*[t]he extent and the nature of corroboration required may, no doubt, vary from witness to witness and from case to case, but as a rule it is not necessary that there should be corroboration in every particular, all that is necessary is that the corroboration must be such as to affect the accused by connecting or tending to connect him with the crime … It is sufficient if it establishes the existence of circumstances from which the connection of the accused with the crime can be reasonably inferred*

and supports the approver's evidence in such a substantial manner as to make it safe to be relied upon."

12. The aforementioned law laid down some seven decades back remains good law both in relation to a conviction being based on the sole testimony of a victim as well as the rule that such testimony need not be supported by corroborative evidence. It was held in ***Shahzad alias Shaddu vs. The State*** ***(2002 SCMR 1009)*** that *"[c]orroboration is not a rule of law but that of prudence. There is no denying the fact that acid test of the veracity of the prosecutrix's statement is the inherent merit of her statement because corroborative evidence alone could not be made a base to award conviction…".* It was held by the Supreme Court, in its Shariat appellate jurisdiction, in the case of ***Ibrar Hussain vs. State*** ***(2007 SCMR 605)*** that, *"in rape/Hadood cases conviction can be awarded on the sole testimony of the victim subject to the condition that the statement of the victim must inspire confidence."*

13. The Supreme Court in the case of ***Shakeel vs. State (PLD 2010 SC 47)*** reiterated the law laid down in ***Ashraf, Ramzan Ali, and Shahzad alias Shaddu*** in the following terms:

> *"[t]here is no denying the fact that acid test of the veracity of the prosecutrix's statement is the inherent merit of her statement because corroborative evidence alone could not be made a base to avoid conviction…By now it has been well-settled that if the statement of prosecutrix is considered trustworthy, no corroboration would be needed and such need would only arise in the circumstances indicating the possibility of her being consenting party to sexual intercourse which is a rare phenomenon in case of Zia-bil-Jabr…"*

14. In ***Habib Ullah vs. The State*** ***(2011 SCMR 1665)*** while relying on ***Ashraf vs. Crown***, ***Ramzan Ali vs. State, and Shahzad Vs. State*** it was held that, *"[i]t is well settled by now that conviction*

could have been awarded on the solitary statement of prosecutrix alone…it may be kept in view that veracity of the prosecutrix's statement is the inherent merit of her statement because corroborative evidence alone could not be made a base to award conviction."

15. In ***State vs. Abdul Khaliq* (PLD 2011 SC 554)** the Supreme Court explained that determination of reliability of the testimony of a sole witness or a victim is to be made on a holistic view of the facts of the case and that prior enmity between the complainant and accused was an exception to the rule that solitary statement is sufficient for conviction. It was held that, *"[i]f on account of totality of facts the Court is of the view that such statement should not be believed and for that good reasons are assigned it cannot be set that any illegality has been committed by the Court in this behalf…the sole testimony view, should be applied with due care and caution in the cases where there is backdrop of grudge, rift and tiff between the parties."*

16. It was held in ***Atif Zareef vs. The State* (PLD 2021 SC 550)** that, *"[r]ape 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 a 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."*

17. The matter was then considered in ***Atta ul Mustafa vs. The State* (2023 SCMR 1698)** wherein it was held that, *"[b]y now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to solely rely on the testimony of the victim of a sexual*

assault to convict the accused. However, the strict condition for this is that the same shall reflect that it is independent, unbiased and straightforward to establish the accusation against the accused and if the court finds it difficult to accept victim's version, it may seek corroboration from some evidence which lends assurance to her version…"

18. Pakistan's jurisprudence on the sufficiency of a solitary statement of victim to support a conviction and the absence of the need to augment such evidence through corroboration is consistent with that in India. It was observed by the Indian Supreme Court in ***State of Punjab vs. Gurmit Singh*** ***(1996 (2) SCC 384)*** that no self-respecting woman in an honor-based society, such as India, would make a false statement impugning her own honor by falsely alleging that she had been raped. The Indian Supreme Court in this case held the following:

> *"[t]he testimony of the victim in such case is vital and unless there are compelling reasons which necessitate looking for corroboration of his statement…there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused… [c]corroborative evidence is not imperative component of the judicial credence in every case of rape…[t]he courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal*

nature, be allowed to throw out an otherwise reliable prosecution case…[c]orroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances…[i]f evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars."

19. While relying on ***Gurmit Singh,*** the Indian Supreme Court reiterated in ***State of Uterperdaish vs. Choteylal (2011 (2) SCC 550)*** that, *"[t]he testimony of the prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration."*

20. The existence of marks of physical violence on the body of a victim has in some jurisdictions been considered as a factor in determining whether the intercourse was consensual. The law in this regard has also been discussed in our jurisprudence as well as the Indian jurisprudence, which would be discussed later in the judgement. The existence of marks of physical violence has therefore been used to determine (i) whether there exists evidence of sexual abuse, and (ii) whether or not there existed consent for intercourse where the same was alleged.

21. In English law, rape was a common law offence up until the enactment of the Sexual Offenses Act 2003 and was traditionally defined in a manner that use of force was deemed to be an ingredient of the offence. In ***Regg vs. Morgan (1976 AC 182)*** the House of Lords held while considering the necessary *mens rea* for the offence of rape, that a genuine even if unreasonable belief in consent of the victim was found to exist in the mind of the accused, such belief would

negate the *mens rea* required for the offence. Subsequently, an advisory group on the law of rape was set up which submitted its report to the Home Secretary of UK on 14-11-1975 ***(Report of the Advisory Group on the Law of Rape, 1975 (Cmnd. 6352))***. This report relied on the enumeration in the textbook on ***Criminal Law by Smith and Hogan*** which notes that, *"[e]arlier authorities emphasized the use of force; but it is now clear that lack of consent is the crux of the matter and this may exist though no force is used. The test is not 'was the act against her will?' but 'was it without her consent?'".* The report went on to note that *"[it was] wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it…The actus reus in rape, which the prosecution must establish for a conviction consists of (a) unlawful sexual intercourse and (b) absence of the woman's consent."* The UK subsequently enacted the Sexual Offences Act 2003 that now provides a statutory definition of the offence of rape.

22. The point to note here is that there did exist a time when use of force constituted an ingredient of the offence of rape. And, consequently, evidence of lack of use of force, including lack of injury marks, was seen as negating the allegation that a victim had been raped. That time has now passed. The contemporary view across common law jurisdictions is not that use of force while having intercourse is a necessary ingredient of the offence of rape. The focus has shifted from whether force was used to whether or not the woman consented and whether or not the intercourse was against her will.

23. It was held in ***South Australia in Question of Law (No.1 of 1993 (1993) 59 SASR 214)*** that, *"[t]he law on the topic of consent*

is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual".

24. In the US it was held in ***Hazel vs. State, (221 Md. 464, 157 A.2d 922 (1960))*** that force was an essential element of the crime of rape but that, *"[n]o particular amount of force, either actual or constructive, is required to constitute rape…force may exist without violence. If the acts and threats of the defendant were reasonably calculated to create in the mind of the victim — having regard to the circumstances in which she was placed — a real apprehension, due to fear, of imminent bodily harm, serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force…[c]onsent may involve submission, but submission does not necessarily imply consent. Furthermore, submission to a compelling force, or as a result of being put in fear, is not consent."*

25. It was held in ***State vs. Rusk (289 Md. 230 (1981) 424 A.2d 720)*** that, *"[a] victim did not scream out for help or attempt to escape, while bearing on the question of consent, is unnecessary where she is restrained by fear of violence".*

26. It was further emphasized by the US Supreme Court in ***People vs. Evans (85 Misc.2d 1088, alternate citation: 379 N.Y.S.2d 912)*** that, *"[t]he prevailing view in this is that there can be no rape which is achieved by fraud, or trick, or stratagem".* In Words and Phrases (Permanent Addition (Vol.8A) at PP 205-206) it has been noted that, *"[i]n order to constitute 'rape', there need not be resistance to the utmost, and a woman who is assaulted need not*

resist to the point of risking being beaten into insensibility, and, if she resists, to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not 'consent'".

27. Similarly, consent has been explained *Stroud's Judicial Dictionary* (4th Edition. Vol.1 (1971) at p.555) by noting that, *"[e]very 'consent' to an act, involves a submission; by it by no means follows that a mere submission involves consent, e.g. the mere submission of a girl to a carnal assault, she being in the power of a strong man, is not consent."*

28. It was held by the Supreme Court of India in ***State of Uttar Pradesh vs Chhotey Lal (2011 (2) SCC 550)*** that, *"[c]onsent supposes three things — a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as delusion, and not as a deliberate and free act of the mind."*

29. It was held by the Gauhati High Court in India in ***State of Assam vs. MD Taleb Ali (Criminal Appeal No. 24 of 2008)*** while relying on ***Rao Harnain Singh vs. State (AIR 1958 P&H 123)*** that, *"a mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law."* In the context of a false representation of intent to marry a woman with the intent of adducing her to engage in intercourse it was held that, *"a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent."*

30. There is a significant body of case law in India holding that the false promise of marriage for purposes of inducing a woman to have a sexual intercourse vitiates consent where, but for such representation, the woman is found not be inclined to engage in intercourse (see for example ***State of UP vs. Naushad (2013 (16) SCC 651), Yedla Srinivas Rao vs. State of A.P. (2006 (11) SCC 615) and Sujith vs. State of Kerala (CRL.MC No. 9538 oF 2023).***

31. The law that has evolved in Pakistan for determining consent in rape cases aligns with the evolved understanding of the constituent elements of rape across common law jurisdictions, as discussed above. It was held in ***Nawab vs. The State (PLD 1959 (W.P.) Lahore 38)*** that, *"[t]he consent must be free, real and intelligent. Consent and submission are not synonymous terms. Every consent involves a submission, but it by no means follows that a mere submission involves consent".*

32. The Sindh High Court in ***Imran Vs. The State (2016 PCr.LJ 1888)*** built on the law laid down in ***Nawab*** and borrowed from the law, as has evolved in other common law jurisdictions. It held that, *"[a]s it could be seen from the special provisions of section 375, 'will' and 'consent' are differentiated, meaning thereby even if there is a will but no consent, rape will be actualized, and vice versa…[t]here is a fine distinction between an act done 'against the will' and 'an act done without consent'. Every act done 'against the will' is obviously 'without the consent'. But every act 'without the consent' is not 'against the will'."*

33. It is evident from the case law and from studies on human behavior that physical resistance resulting in violence is only one manifestation of the reaction of a woman to an act of violence without her consent. But different people act differently in a state of fear

and/or shock. There is, therefore, no basis for a Court to conclude that indulging in physical violence as a means of resistance is an automatic and necessary reaction of a victim to the act of rape where the aggressor is in a position of authority or there otherwise exists an element of fear induced by the threat of injury or hurt, whether express or implied. There is nothing to gainsay that the natural reaction of a woman to sexual abuse could not range from silent submission at one end of the spectrum to screaming and/or engaging in violent physical resistance on the other. It can therefore not be concluded that silent submission of a victim due to the shock and horror of being subjected to rape is a sign of consent. Consent, in other words, means the permission granted by a person. In the context of sex crimes, consent involves the voluntary agreement to engage in sexual activity and grant permission for intercourse by a person who has the legal freedom and mental capacity to grant such permission. Use of force manifested by physical injury etc. is not an essential ingredient for purposes of establishing rape. Likewise, delay in reporting the offence of rape has been found by the superior courts in Pakistan to be understandable in view of our societal ethos, where concepts of honour and shame influence the reactions of victims of sexual abuse.

34. The law on the relevance of marks of violence on the body of a victim was initially discussed in the case of ***Haji Ahmed vs. State (1975 SCMR 69)*** wherein the Supreme Court upheld the finding of the High Court that the absence of the *"[m]ark of injury or violence… [did] not imply that she had not been raped by the petitioner…".* A similar view was taken by the Supreme Court in the case of ***Ghulam Sarwar vs. State (PLD 1984 SC 218)*** by holding that, *"[i]t may be observed that merely because no scratches were found on the body of*

Mst. Parveen would not by itself show that she was not dragged in the fields". Also in the case of ***Shakeel vs. State*** ***(PLD 2010 Supreme Court 47)*** it was held that *"[t]he contention of learned Advocate Supreme Court that in the absence of visible marks of violence it cannot be inferred that the prosecutrix was subjected to Zina-bil-Jabr is devoid of merit for the simple reason that medical evidence has confirmed it that sexual intercourse had taken place and even otherwise the marks of violence were not necessary to prove the factum of Zina-bil-Jabr". In* ***Habibullah vs. State*** ***(2011 SCMR 1665)***, the court held that, *"[r]ape has been proved on the basis of cogent and concrete evidence including medical evidence and more so the marks of violence are not essential to establish the 'factum of zina bil jabar'".*

35. The view of the courts from the Indian jurisdiction is that absence of marks of violence does not, alone, impugn the credibility of the victim's statement, which is otherwise found reliable in the circumstances of the case. The Supreme Court of India in the case of ***Sheikh Zakir vs. State of Bihar*** ***(1983 (4) SCC 10)*** held that, *"[t]he absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved."* In the case of ***State of Rajasthan vs. N.K.*** ***(AIR 2000 SC 1812)*** the Court held that, *"[a]bsence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case..."* The Supreme Court in ***State of Uttar Pradesh vs. Chhotey Lal*** ***(2011 (2) SCC 550)*** reiterated the law laid down in ***Sheikh Zakir*** and ***State***

of Rajasthan v N.K. and held that, *"[i]t is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal parts of the victim…[t]he absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence; she was a helpless victim."*

36. In ***Nasreen vs. Fayyaz Khan (PLD 1991 SC 412)*** the Supreme Court accepted the explanation furnished by the victim of delay of several months in lodging the FIR. It was held by the Federal Shariat Court in ***Muhammad Umar vs. State (1999 PCr.LJ 699)*** *that, "[d]elay of such type in reporting the occurrence of this sort to the police is not uncommon in this country particularly, in the tribal society where people are normally hesitant to report to the police the matters concerning womenfolk and involving their honour."*

37. It was held by the Supreme Court in ***Mehboob Ahmed vs. State (1999 SCMR 1102)*** that, *"[w]e cannot be unmindful of the prevailing taboos in our society…A victim of rape should not be penalized on account of ostensible delay in reporting what she has undergone."* It was held by the Supreme Court in ***Zahid vs. State (2020 SCMR 590)*** in relation to a complaint of sexual assault by a married woman that, *"delay in reporting the crime to the police in respect of an offence involving a person's honour and reputation in which society may view unsympathetically, could prey on the minds of a victim and her family and deter them to go to the police."*

38. The general principle that has evolved in our jurisdiction is that a delay in the reporting of a crime creates a presumption that the content of the complaint may be premeditated and not the most natural account of an occurrence. This presumption is, however, not applicable in cases of sexual assault and abuse, including rape, as societal reactions and values including those related to the honour and

shame of not just the victim but also her family, provide a natural explanation as to why the offence is not reported in real time.

39. The precise statistics on rape are hard to obtain in Pakistan due to non-reporting and/or underreporting of such crime. According to the United Nations, that endorses rape statistics put together by World Population Review (see WorldPopulationReview.com/country-rankings/rape-statistics-by-country), observes with concern that globally around 35% of all women face sexual harassment, but only 40% of the victims of sexual harassment seek help. And only less than 10% of the victims of sexual harassment reach out to law enforcement for help.

40. The reporting of rape in Pakistan is similarly low due to the fear of stigmatization and retaliation as well as due to lack of trust in the legal system to produce just results efficiently. Reporting the crime and testifying to the acts of the rapist can entail reliving the trauma multiple times. According to a report issued by the Human Rights Commission of Pakistan in 2020, only around 20% of rape cases in Pakistan are reported. The aforementioned statistics rationalize the manner in which delay is dealt with by Courts in rape cases. In a country (and in a world) where only 10% of victims of sexual harassment and/or assault report the matter and 90% of such offences go unreported, it is the reporting of the offence of rape that is the exception and not just reporting an incident of rape with delay. In such circumstances, social stigma, the fear of being shamed and chastised by the society that indulges in victim-shaming, the fear of sullying the honor of the family, and concerns revolving around re-victimization and/or lack of support from law enforcement agencies as the investigation and trial proceedings drudge along are all obstacles to reporting as well as explanations for the delay in reporting the crime

of rape and other crimes of sexual abuse. In these cases, while the defence can raise the issue of delay if, in the facts and circumstances of the case, the delay is of a nature that gives rise to a reasonable doubt regarding the occurrence-in-question, it cannot be automatically assumed by a court that delay manifests pre-meditation and is to be viewed with suspicion. Victims of rape report the crime not with the confidence that the society will not judge them, but despite the judgment of the society that they will be made to embrace. In view of such prevalent social ethos, delay in reporting such crime cannot be seen as irrational human reaction to a grisly act.

41. While we have already discussed that corroboration is not necessary to support a conviction where the solitary statement of a victim is found reliable, corroborative evidence, where available to link the accused with the offence he has been charged with, strengthens the prosecution's case. In ***Salman Akram Raja vs. Government of Punjab (2013 SCMR 203),*** the Supreme Court issued directions that in cases of sexual assault, law enforcement agencies must use DNA technology to determine the identity of the real culprits and to exonerate those who are wrongfully accused. It was held by the Supreme Court in ***Ali Haider alias Pappu vs. Jameel Hussain (PLD 2021 SC 362)*** that, *"DNA evidence is considered as a gold standard to establish the identity of an accused. As a sequel of the above discussion, it can safely be concluded that DNA test due to its accuracy and conclusiveness is one of the strongest corroborative pieces of evidence...DNA test with scientific certainty and clarity points towards the perpetrator and is, therefore, considered one of the strongest corroborative evidence today, especially in cases of rape."*

42. What emerges from the case law cited above are the following principles:

(i) The sole testimony of a victim in a case of sexual abuse, where such testimony is independent, unbiased, straightforward and reliable, is sufficient to support conviction, as it is understood that offences of sexual assault transpire in private, for which reason they are mostly not witnessed by others.

(ii) The exception to the rule, that the sole testimony of the victim of an offence of sexual abuse needs no corroboration, are cases where there exists evidence of enmity or a prior grudge between the complainant and the accused. In such cases a court must be cautious in relying on the sole testimony of the complainant, where such testimony is not corroborated by other evidence establishing a link between the accused and the offence he/she has been charged with.

(iii) Where corroboration is required, the focus of such corroboration is to determine whether the accused is linked to the offence he/she has been charged with and/or can be placed at the place of occurrence, to ensure that the complainant does not falsely allege that an occurrence took place involving the accused, which never did.

(iv) In view of prevalent social realities that inform individual reactions, there can be no presumption that a rape victim would falsely identify an innocent person for the criminal and violent act of a third person who actually committed the offence.

(v) Any delay in reporting of an offence of sexual abuse, if not accompanied by facts and circumstances that create reasonable doubt about the occurrence itself, will not create a presumption that the complaint was false in view of a

natural inclination of victims of sexual abuse to never report the offence at all.

(vi) The evidentiary and probative burden of establishing the *actus reus* of rape and that intercourse took place without the consent of the victim is on the prosecution. And where the *actus reus* has been proven beyond doubt, the sole testimony of the victim, when found truthful and reliable by the Court in face of cross-examination, may be sufficient to discharge the onus of proving the *mens rea* of rape.

(vii) Where the fact that intercourse took place is established, and the complainant testifies that the intercourse was against her will and without her consent, the defendant not pleading that intercourse was a consequence of consent granted by the complainant is at his own peril. While the evidentiary burden of proving *mens rea* remains on the prosecution, the threshold for discharging probative burden is low and can be discharged on the basis of the testimony of the complainant, unless the accused can establish on a balance of probabilities that the complainant granted consent, after which the burden would shift back to the prosecution to prove beyond reasonable doubt that the complainant had not granted consent for intercourse as claimed by the accused.

(viii) Use of force is not a necessary ingredient of the offence of rape and intercourse against the will of the victim or in the absence of her consent is in itself sufficient to constitute rape.

(ix) While consent may involve submission, submission does not necessarily imply consent and therefore passive submission

by a victim, out of fear, without putting up physical resistance, cannot be mistaken for grant of consent.

43. While it may be a truism that a Court must dispense justice in accordance with the law, it is essential to reiterate that in any matter involving the rights of citizens, and especially within the realm of criminal law involving a vulnerable segment of the society, the Court can only appreciate the grounds raised before it in view of the evidence produced before it. A court must not assume what may or may not have transpired while determining essential facts on the basis of conjecture or the judge's subjective understanding of human behavior.

44. A court cannot assume the existence of facts not proved before it, or try to contextualize acts to provide justifications on the basis of assumptions. There can be no cavil with the contention that it is for the prosecution to prove a case beyond reasonable doubt. But where the prosecution discharges its onus, it is equally imperative that the accused takes up an appropriate defence where it seeks to inject doubt in the story presented by the prosecution. It is not for a Judge to make assumptions about what might have happened in a certain case on the basis of his or her lived experience. Having said that, it is equally imperative for a judge to bear in mind, especially while deciding criminal cases involving sexual abuse, that judges, like all human beings, are the products of their own experience and the gender identity of an individual does have a role to play in informing the social consciousness of such individual. Bearing this in mind it is also essential because women are disproportionately represented in the judiciary. A consequence of the gender imbalance within the judiciary is that the jurisprudence produced and the assumptions of law that have evolved over time within our jurisprudence, including on

questions of sexual abuse, is the work of judges who were largely men. It is thus, that while ruling in a case involving sexual abuse, a judge must be aware of his own construct of the social reality as a means to preventing his own lived experience from interfering with the discharge of adjudicatory authority, to enable him to draw conclusions that naturally flow from the file and the evidence as produced and established before the Court in accordance with law.

45. Let us now apply the principles highlighted above to the facts of the present case. The victim appeared before the Court as PW-4 and narrated the occurrence involving the appellant. Her account remained consistent despite facing lengthy cross-examination and in face of suggestions made to her that she had had intercourse with another person consensually. The trial Court found her testimony credible and reliable, and also noted that there was no previous enmity between the complainant and the accused and consequently no motive for the victim to falsely implicate the appellant. The appellant lived in the victim's neighborhood and there was thus no question of the victim being unable to identify the accused.

46. When the appellant reported the crime, she admitted that it transpired almost eight months back at 09:00 PM. At the time of registration of the FIR, the victim was pregnant as a consequence of being raped. She subsequently delivered a baby girl. The prosecution took samples of the blood of the baby girl as well as the blood of the appellant and the forensic report issued by PFSA confirmed that there was a 99.99% probability that the appellant was the biological father of the baby girl. The DNA report (Exh.PJ) was the corroborative evidence that supported the testimony of the victim as PW-4. While the trial Court found that the testimony of the victim inspired confidence, the DNA report confirmed beyond reasonable doubt that

the appellant had had intercourse with the victim and a baby girl was born as a consequence of such intercourse.

47. The learned counsel for the appellant has raised objections with regard to the manner in which samples were collected and what the DNA report proves. The arguments are largely misconceived. The prosecution produced the doctors that administered and oversaw the drawing of samples of blood of the baby girl born to the victim as well as the accused. The prosecution also produced witnesses who testified how the blood samples were handed over by the hospital to the police authorities, how they were kept in the *Malkhana*, and how they were dispatched to PFSA for DNA analysis. The DNA report has been exhibited in evidence. In this view of the matter, no case has been built up by the defence to establish that the DNA report or its content ought not be read into evidence or that the conclusion drawn from such a report that the appellant is the biological father of the baby born to the victim is erroneous.

48. The trial Court has also dealt with the question of the eight-month delay in registering the FIR while highlighting conceptions of honor and shame that prevent the reporting of crimes involving sexual abuse. The victim was a twenty-year-old unmarried girl at the time of the occurrence, belonging to a family of laborers where all her siblings were younger than her. That she did not report the occurrence to her family is understandable as according to her testimony she was not only fearful of the appellant inflicting harm on her, but was equally fearful of the stigma she and her family would face if the occurrence became a matter of public knowledge. The victim may never have reported the occurrence had she not been impregnated. She only revealed her ordeal when her state of pregnancy became physically apparent close to the time of delivery. Given the statistics regarding

reporting of cases of sexual abuse, with only 10% of the victims ever reporting such occurrences, no presumption can be drawn that the victim falsified the story that the appellant had had intercourse with her. As discussed above, this has already been corroborated by the DNA report. The only question then was whether the intercourse was without the consent of the victim or against her will constituting rape.

49. The victim testified that the appellant entered her home under the pretext of asking for water and raped her after instilling fear in her. She stated that he was carrying a weapon at the time. He raped her in an empty room that was 20 feet away from another room in the house in which her younger siblings were asleep. The rape happened at a time when the victim's parents were away from the house and had taken her younger brother to the hospital. During cross-examination, no inconsistencies in the victim's story could be effectively made out by the defence. In response to a question in the statement recorded by the appellant in terms of Section 342 of Cr.P.C., he claimed that the victim was blaming him for the act of another person, which act was one of consensual intercourse between the victim and a third person. This contention stands negated by the DNA report which confirms the victim's statement that the appellant had intercourse with her. The appellant never took the plea that he did have intercourse with the complainant and that such intercourse was consensual. This is despite being aware of the DNA report that established that he was the biological father of the baby girl born to the victim.

50. In the event that the appellant had taken the defence that the intercourse was consensual, and had proved so through evidence on a balance of probability, the onus would then revert back to the prosecution, which would need to prove beyond reasonable doubt that

such consent had not been given. The appellant, however, made out no such case. The remaining arguments of the learned counsel for the appellant are of no benefit to the appellant. It does not matter whether or not the parents of the victim took a *jirga* to the appellant's house to settle the matter amicably through marriage between the appellant and the victim. The assertion that the victim was blackmailing the appellant has not been supported by any evidence produced by the defence. Even otherwise, the trial Court correctly held that it does not appeal to the prudent mind that an unmarried girl would name an innocent unconnected person to take the fall for a rapist or even for another person where the intercourse was consensual.

51. It also appeals to a reasonable mind that after the occurrence, the victim had decided not to report the crime either to her family or to police authorities. This is consistent with statistics on rape suggesting that 90% of victims of sexual abuse never report such incidents. Once the pregnancy of the victim began to show, she had no option but to report the matter to her family. When she did, the victim’s family, as expected in a society that indulges in victim blaming and shaming and chastises victims of sexual abuse for sullying the honor of the family, approached the appellant's family to settle the matter amicably with the appellant marrying the victim. Once the appellant refused, it was only logical for the victim to report the matter to the police as she would otherwise have no explanation as to how, while being an unmarried girl, she was giving birth to a baby. She named the appellant as the offender prior to the birth of the baby girl. After the birth of the baby girl and comparison of the blood sample with that of the appellant, it stood established that the baby girl was the biological daughter of the victim and the appellant. This

corroborated the version of the victim with regard to the *actus reus* of the offence.

52. The victim's testimony sufficiently established *mens rea* on part of the appellant by making a confidence inspiring testimony that she had not consented to the intercourse which was forced upon her by the appellant. And the defence failed to create reasonable doubt either in relation to the *actus reus* or the *mens rea* for the crime of rape. This Court, therefore, agrees with the findings of the trial Court that the prosecution proved beyond reasonable doubt that the appellant was guilty of the offence of rape. Section 90 of PPC holds in any event that a consent given in consequence of fear falls outside the definition of consent. Section 375 of PPC defines rape as a man having sexual intercourse with a woman including *inter-alia* against her will or without her consent or with her consent when it has been obtained by putting her in fear of death or hurt. The prosecution successfully established that the appellant was guilty of an offense in terms of section 376 of PPC as held by the trial Court. We, therefore, confirm the findings of the trial Court with regard to the conviction of the appellant.

53. Further, no grounds have been raised before us to convince this Court that a sentence of 14 years of rigorous imprisonment for the offence of rape was excessive in the facts or circumstances of the instant case. The appellant has continued to deny the offence as well as his liability. He has even denied that he indulged in intercourse with the victim and has not acknowledged the existence of the baby girl born to the victim. The victim was a 20-year-old unmarried girl at the time of the occurrence and she will live with the burden of being a single unmarried mother of the baby girl for the rest of her life. In view of these facts, we do not find that there are any mitigating

factors on the basis of which this Court ought to interfere with the sentence passed by the trial Court. We, therefore, also confirm the sentence passed by the trial Court.

54. For the aforementioned reasons, we find that the appeals are without merit and are accordingly **dismissed**.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open Court on 03.03.2025

JUDGE **JUDGE**

Approved for reporting.