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The Justice Prelude: A Socio-Legal Perspective on Women's Access to Justice



Gender Equity Program



SPO
Strengthening
Participatory
Organization

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Acronyms

ACP	Assistant Commissioner of Police
ASCD	Annual Supreme Court Digest
AIGP	Additional Inspector General of Police
AIR	All India Law Reports
AJK	Azad Jammu and Kashmir
ASI	Assistant Sub Inspector
BISP	Benazir Income Support Programme
CCR	Challenges of Criminal Law Reform
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
Cr. L.J	Criminal Law Journal
Cr. P.C	Code of Criminal Procedure
CLC	Civil Law Cases
CSA	Child Sexual Abuse
CSNs	Civil Society Networks
CSEC	Commercial and Sexual Exploitation of Children
CSO	Civil Society Organization
DIGP	Deputy Inspector General Police
DHQ	District Head Quarter
DSP	Deputy Superintend of Police
DPP	District Public Prosecutor
EDD	Expected Due Date
FIR	First Investigation Report
FSC	Federal Shariat Court
GEP	Gender Equity Program
IO	Investigation Officer
MFLO	Muslim Family Laws Ordinance
MLC	Medico Legal Certificate
MLO	Medico Legal Officer
MLR	Medical Law Reports

NGO	Non Government Organization
NLR	National Law Reports
PCr.L.J.	Pakistan Criminal Law Journal
PLR	Peshawar Law Reports
PLJ	Pakistan Law Journal
PLD	Pakistan Legal Decision
PPC	Pakistan Penal Code
PSC	Pakistan Supreme Court Cases
PS	Police Station
PSI	Police Sub Inspector
RCR	Reported Crime Rate
SAFE	Sexual Assault Forensic Evidence
SCMR	Supreme Court Monthly Review
SDPO	Sub-Divisional Police Officer
SHO	Station House Officer
SP	Superintendent Police
SSP	Senior Superintendent of Police
ToT	Training of Trainers
TNA	Training Need Assessment
WMLO	Women Medico Legal Officer
WMO	Ward Medical Officer
YLR	Yearly Law Reports

1. Foreword

Women in Pakistan face daunting challenges in their efforts to achieve gender equality and address Gender Based Violence (GBV), as a result of anti-women customary norms and practices. However, in the past few decades, progress in pro-women legislation has meant that the efforts of the Government of Pakistan, and advocacy at policy level, combined with lobbying of civil society groups working for women's empowerment, have led to a positive change in the situation of women in the country. A financial and administratively autonomous National Commission on the Status of Women (NCSW) has been established to investigate women's rights violations, and provide an oversight to mainstreaming of women in every sphere of life. The Prevention of Anti- Women Practices Bill is now a part of national law, overtly acknowledging practices from acid throwing, gender based violence and forced marriage, to so-called 'Honour killings' as criminal acts, and affording protection and legal action for victims. The Acid Control and Acid Crime Prevention (Amendment) Bill has also been passed in the Senate in recent years. Women are now better protected from sexual harassment in the workplace and from domestic violence, since laws on these issues have also been promulgated in the recent past. The most awaited laws on Honour killing and rape crimes have been passed a few months ago, which shows the commitment and political will to safeguard women in Pakistan. These breakthroughs in legislation of pro-women laws, and concentrated advocacy, indicate that there is commitment to secure women's empowerment in Pakistan at every level. With further monitoring by oversight mechanisms, financial support and the strengthening of women's networks and civil society organizations, these legal endeavors will hopefully translate into real and concrete change for women in Pakistan.

Women's ability to acquire and take advantage of their legal rights depends on their ability to access legal information, advice and representation. Women experiencing violence may need advice on how they can protect themselves from violence. As violence against women is both a cause and a consequence of women's inequality, the ability to access free or low cost legal aid, is particularly important for women who are more likely to experience economic disadvantage and be less likely to be able to pay for legal advice. Women may also be prevented from accessing advice or services for practical reasons, for example, because they are still living with a perpetrator of violence.

This case law book gives a voice to individuals who were protected from violence as a result of legal aid, advice and representation; law professionals who believed in their services and reached out to secure the rights of some of the most vulnerable and disadvantaged women in our society. This book also analyzed problems with the current judicial system, which is currently unable, and cannot serve the needs of women even after these landmark legislations. The book offers progressive precedents to be followed by the legal fraternity, and development practitioners for further advocacy to promote and strengthen women's access to justice. This book provides both substantive law, practice and procedure and examples of how to present cases, bringing substantive law and practice examples together. The authors have set themselves an overwhelming task to keep the book up to date with new laws, rules and decisions.

This case law book was written and researched by Khadija Ali and Shazia Shaheen with substantive contributions and legal review provided by the implementing partners of the Gender Equity Program supported by USAID. The Strengthening Participatory Organization, (SPO) is grateful to other NGO colleagues and national legal practitioners who offered their experiences and thoughts that have greatly contributed to enrich the case law book. This book has been made possible with the support of the Gender Equity Program supported by USAID as part of an on-going multi-year project with Aurat Foundation on empowering women judges, lawyers and human rights defenders as drivers of change.

Naseer Memon
Chief Executive, SPO
6th February 2017

2. Executive Summary

Implementation of pro-women laws and human rights cannot be realised without an in-depth analysis of jurisprudence developed in interpretation of these laws. While the Parliament of Pakistan and respective provincial assemblies are tasked with promulgation of laws, implementation of these laws involves executive and judicial functionaries. Resuscitation of the democratic process and promulgation of numerous laws for women at federal and provincial level have been a source of celebration for civil society in Pakistan, but now interventions have moved to decipher and analyse the impact of implementation of these laws through executive and judicial functionaries.

This case law book seeks to explore the progressive precedents set by the court while also analysing the position of women's access to justice today. The case law book includes three major parts:

1. The first part is an analytical and critical evaluation of women's access to justice in keeping with the current legislative framework and principles linked to the legal rights of women. Sociopolitical and structural barriers are also included in the analysis to emphasize the social impediments that women are facing in accessing justice.
2. The second part includes case studies related to legal aid offered by the implementing partners under "Increased capacity of Gender Equity Program (GEP) under Grant Cycle-8, district level partners for implementing the projects of strengthening and sensitizing District Bar Councils/ Associations on Pro-Women Legislation in Pakistan and in their relevant districts.
3. Trial court or the first court of instance is the first point of interaction between a woman litigant seeking her rights and the judicial system of Pakistan, therefore a review of 35 cases from all over Pakistan compiled by the implementing partners of "Increased capacity of Gender Equity Program (GEP) under Grant Cycle-8" in has been conducted.
4. Five case studies have been compiled based on the case files submitted to reflect the progressive and gender sensitive approach adopted by the lower judiciary in ensuring the rights of women.
5. The third part includes progressive precedents of High Courts of Pakistan and the Supreme Court of Pakistan as reference documents for progressive and pro-women judicial precedents.
6. Findings of the legal research, literature review and analysing the social, political and structural barriers are encompassing the trend that the passing of laws by Parliament is not enough if the government does not offer an implementation strategy to ensure that the intended rights in the laws are guaranteed. Institutionalization and capacity building on alternative dispute resolutions, like mediation and arbitration, to decrease the backlog of cases in the courts is an urgent requirement. Pro bono services and legal aid should be institutionalized in all District

Bar Associations to support and facilitate women's access to justice. Capacity building of the judiciary to ensure gender sensitivity and a sense of gender power disparity must also be addressed when disposing of cases with regards to women.

7. Women's legal empowerment and their access to justice cannot be achieved without complete gender equality. This requires the removal of structural barriers on the way of accessing justice, such as formal legal equality, provision of comprehensive protection mechanisms and psychosocial support services by the police, social welfare departments and the judiciary. Also the removal of barriers restricting women's access to jobs, markets, participation at all levels, including leadership positions, is essential. Women's and girls' rights need to be upheld, protected and enforced.

This case law book is a culmination of legal jurisprudence and research analysis based on the experience, learning and findings of implementing the Gender Equity Program's Project Cycle 8. Through this document, we have sought to produce a case law book, one of its kind, that would be a reference for future interventions related to women's access to justice. We hope that this case law book assists donors, institutes, Non Government Organizations (NGOs), Civil Society Organizations (CSOs), lawyers, judiciary, parliamentarians and other relevant stakeholders, an insight into the myriad of discriminatory legal practices, laws and issues that elude access to justice for women in Pakistan. We also hope that this document provides a guide for designing and conceptualising future interventions regarding access to justice for women and targeting relevant functionaries involved in the process.

3. Introduction

Barriers to women's access to justice in Pakistan are numerous. The laws, systems and procedures that determine the path a woman has to take in her quest for justice are heavily embedded in patriarchal values, which also dictate the larger moral order of Pakistani society. Whether it is a woman seeking legal redress for an induced abortion, rape, domestic violence or cyber stalking, barriers exist or are erected at every stage beginning from barriers to her credibility and often ending in a complete miscarriage of justice.¹ Furthermore, the 1973 Constitution of Pakistan on one hand, guarantees equality of rights to all citizens irrespective of sex, race, and class and empowers the government to take affirmative action to protect and promote human rights but on the other hand, there are several discriminatory laws that have a negative impact, especially on women and minorities.²

The lawyers are responsible for handling, processing and demonstrating verdicts on cases. They are considered custodians of the judicial system but are often overwhelmed with the words of the clauses and laws, and hence are usually accused for giving biased verdicts especially in women's cases. The other hindrance women face while seeking justice is the absence of a conducive environment in the judicial machinery. Bar councils and courts are mostly dominated by men most of whom carry with them a set of stereotypes and biases. The assistance from lawyers becomes less gender sensitized and as a result women end up accepting the status quo and prefer not to access courts because of the fear of being further humiliated. Based on experience, one of the possible reasons for this is an inadequate knowledge of a "gendered approach to law" of these gatekeepers that further promulgate wrong articulation especially on cases related to women. If the lawyers are well versed with the gender concepts, de jure and de facto challenges in the process of access to justice then there are high chances of a reduction in biased verdicts and smooth facilitation to women towards justice in the country.

One of the key focus areas of the Gender Equity Program (GEP) is enhancing women's access to justice through awareness raising and capacity development of government (executive, legislative and judiciary) as well as of civil society organizations. While ensuring that women have access to justice is a key thread running through the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the lawyers are also very important for ensuring implementation of pro- women laws, as lawyers have the opportunity to interpret and apply the provisions under the laws, and thus send a powerful message to society that discrimination against women cannot be tolerated.

In addition to the judiciary, civil society comprising stakeholders from the Police Department, Social Welfare Department and NGOs providing legal aid services that facilitate access to justice also have capacity gaps with regards to gender sensitization. Hence, capacity building of these stakeholders is also required in providing fair, improved and

¹ Zaman, S & Zia, M. Women Access to Justice in Pakistan, Working Paper available at http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/AuratFoundationAndWarAgainstRape_Pakistan.pdf

² Awan, Z A. Violence Against Women and Impediments in Access to Justice, available at <http://siteresources.worldbank.org/PAKISTANEXTN/Resources/293051-1146639350561/CGA-Companion-Paper-1.pdf>

accountable systems for seeking justice from the judiciary. Moreover, the efforts being made by civil society lack coordination. Most of the initiatives are taken in isolation, resulting in miscommunication, gaps in quality of services and duplication of services in some areas while leaving the others unaddressed. A coordinated effort is imperative to reach a maximum number of survivors of violence seeking justice and to provide quality services.

Capacity building of civil society is conceived as an inclusive strategy by SPO as all its programs are designed with an objective of political change that includes citizens and the organizations generating pressure from the grassroots and articulating demands for the marginalized sections of society. The lawyers and key stakeholders from the Police Department, Social Welfare Department and NGOs having a mandate of providing legal aid especially to marginal groups in society are significant members of the Civil Society Networks (CSNs) and District Steering Committees (DSCs) of SPO and are considered change makers reinforcing rights of the citizens including women's rights. The civil society networks of SPO work as social capital that undergo a comprehensive training cycle on the themes of democratic governance, conflict resolution and human rights. SPO prefers to work with civil society through Civil Society Organizations (CSOs) that are considered the building blocks or primary level of civil society and ensure maximum geographical outreach. The purpose of this approach is to create maximum pressure groups within society, and also to build and strengthen the capacities of the CSOs. The trained CSOs carry forward SPO's change agenda through training the key stakeholders of civil society. The outcome is an interactive and mutually reinforcing relationship that exists even beyond the specific interventions, a strong civil society capable of representing citizen interests, and when necessary engages political decision makers to ensure that these interests are heard and implemented. Moreover, SPO plays an effective role in facilitating CSOs, CSNs and other community level institutions taking well-coordinated initiatives for ensuring maximum outreach and quality of services.

Having this very relevant experience, SPO considers itself to be among the most eligible organizations to perform the role of a National Coordinator under the GEP Grant Cycle-8.

SPO's Expected long term and short term impact of its role as National Coordinator:

Long-term: The long term impact of the Grant was in line with the Vision and Mission of SPO that propagates building and strengthening of strong community groups, organizations and networks to take joint actions for controlling corruption, indispensable to responsible government and political stability.

Women have enhanced Access to Justice: Through capacity building of lawyers and other key stakeholders on gender concepts and pro- women legislation in precedents of justice, the overall mechanisms of access to justice to women in the judicial system will be improved. As a consequence of better understanding and improved knowledge of lawyers and other key stakeholders on gender related issues, laws in our patriarchal society, the gender sensitized practices of handling, processing and decision making on women's cases will be followed in the judicial system. The expected impact at different steps of seeking justice is elaborated below.

- **Case handling:** With improved knowledge and sensitization on a gendered approach to justice; as the first step of case handling mechanisms of governance, management systems and policies for transparency and accountability will be established in order to ensure quality and harassment free services to women when they approach courts for registering their cases. Ideally women lawyers are deputed the role of dealing with the oppressed at every stage of seeking justice.
- **Case processing:** The enhanced capacity of the lawyers and other key stakeholders on pro- women litigation would enable them to handle the clients and their registered cases with respect, and ensure protection to the victim at every stage of hearing till the final verdict.
- **Decision making:** With improved behaviour towards pro - women litigation, the decision making on women's cases will ideally be done with an enhanced sense of responsibility, that by justice, it may be understood to mean the restoration of a victim's dignity and her reintegration into society, while the offender is held accountable for actions. It may not be taken to mean simply a favourable court verdict.³

Short-Term: The project envisaged the following short term impact:

- The district level sub -grantees of GEP Grant Cycle -8 will have a clear understanding on gender, gender concepts, legal approaches to equality, pro- women laws, family and minority laws (including *qisas* and *diyat*) and international legal instruments and obligations related to women's rights.
- A group of lawyers, other relevant key stakeholders (male and female) with enhanced understanding of pro -women litigation will be available for improved facilitation of women cases in courts of the district level partners/ sub -grantees.
- The participating sub- grantees will have gender sensitized organizational governance structures, policies and procedures for their daily operations and functions in addition to training lawyers and key stakeholders on gender concepts and pro- women legislation.

Capability of the participating district sub-grantees enhanced on gendered approach to justice that in fact will enable these partners to receive related business through donors and other philanthropists.

Direct Beneficiaries: Twelve district level sub- grantees of GEP's present Grant Cycle 8 in 6 regions, across Pakistan and Azad Jammu & Kashmir develop capacity on the thematic areas of gender, gender concepts, legal approaches to equality, pro – women laws, family and minority laws and international legal instruments and obligations related to women's rights. A training team of approximately 25 staff members (i.e. minimum 2 from each district sub-grantee – 1 male & 1 female) were specifically trained on the above mentioned thematic areas of gender. In addition to the training team, the other staff members of the district level partners were also sensitized on gender concepts and pro- women legislation.

³ Zaman, S & Zia, M. Women Access to Justice in Pakistan, Working Paper available at http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/AuratFoundationAndWarAgainstRape_Pakistan.pdf

Indirect beneficiaries: Approximately 1200 lawyers and other relevant key stakeholders from the Social Welfare Department and NGOs providing legal aid services were trained by the regional/ district sub-grantees on the thematic areas of gender, gender concepts, legal approaches to equality, pro-women laws, family and minority laws and international legal instruments and obligations related to women's rights.

Local women of the target regional/ district sub-grantees having acceptance against their rights and participation, end to Violence Against Women (VAW) through mechanisms in place for free and fair access to justice.

The indefinite number of local population of the target districts that was trained through the district sub-grantees any time on the four developed training manuals developed by the National Coordinator and will frequently be used by the district level partners as per need in the future.

Grant location and duration: Islamabad and 12 districts in 6 regions namely Punjab - District Lahore; Sindh - District Karachi; Balochistan – Districts Quetta, Sibi, Khuzdar and Lasbela; Khyber Pakhtunkhwa ,Districts Peshawar, Abbottabad, Haripur Hazara and Swat; Azad Jammu & Kashmir – District Muzaffarabad; Gilgit Baltistan – District Skardu. The implementation of the project was carried out from SPO National Centre (NC), Islamabad.

Methodology of the Project:

SPO developed a tailor-made, capacity-building program containing development of four training manuals, Training of Trainers (ToTs), a refresher and mentoring of the regional/ district sub-grantees on delivering trainings to their target audience.

The training manuals were developed using feedback of the Training Need Assessment (TNA) exercise, desk research, and gathering of material as per needs of the target groups and using relevant content from already developed manuals of SPO, GEP and Aurat Foundation.

The pretesting of manuals was carried out to ensure the relevance and quality of the developed manuals. The tools and techniques followed for the pretesting exercise were based on an interactive participatory approach for adult learning through trainings.

The ToTs were based on an interactive participatory approach to adult learning and comprised of interactive discussions, plenary sessions, presentations and group exercises. The purpose was to ensure maximum learning of the participants on the four training manuals. In addition, the tools and techniques used for delivering successful trainings were taught to the participants and given in the form of hand-outs for further use in their project trainings.

Later, two mid-term refreshers of ToTs were carried out to analyse the progress and challenges faced by district sub-grantees in delivering their project trainings. The same methods used in delivering ToTs was followed for conducting the refresher trainings. The learning of post training evaluations of ToTs was also incorporated in the mid-term refreshers.

The other targets of the grant namely the coordination meetings, dialogues and project opening and closing meetings were followed by discussions, question and answer sessions among direct beneficiaries (district partners) and indirect beneficiaries (lawyers, Social Welfare Department and other key stakeholders) to promote networking and coordinated efforts among the beneficiaries in facilitating women's access to justice in the respective target districts and regions.

4. Methodology

Purpose: To document the process of implementing pro-women laws as a reference point for future work on women's access to justice.

SPO collected 3 case laws prepared by 12 district partners (3 per district) describing legal proceedings on the cases of women's rights and illustrating different kinds of Gender Based Violence (GBV) and Violence Against Women (VAW) collected from High Courts, and Supreme Courts. The case were documented, analysed and consolidated in the form of a manuscript to be published as a Case Law book. It was envisioned that the Case Law book will be used as reference and can be widely used by the judiciary, law academia, and civil society with a mandate of working on legal aid, access to justice and pro- women litigation in the country. This book may also be used by development practitioners and civil society working on human rights in and outside the country.

A detailed literature review of legal material was conducted in order to produce this document followed by cases filed and submitted by implementing partners of this project. A further addition in bringing about the analysis detailed below was the trend analysis of pro-women laws conducted by the implementing partners which helped portray a practical situation of women's access to justice at grass root level.

The case law book includes a review of the legal system and framework of Pakistan regarding the situation of women. The main sources include:

- Constitution of Pakistan;
- Pakistan Penal Code, Code of Criminal Procedure and Qanun-e-Shahadat;
- Special Laws pertaining to women at federal level before the 18th Constitutional Amendment;
- Special Laws pertaining to women at provincial level;
- Case files submitted by implementing partners in execution of GEP's project activities and legal aid;
- Trend Analysis on implementation of pro-women laws conducted by implementing partners to analyse trends and case studies pertaining to implementation of pro-women laws at district level.

As a major part of this case law book also includes judicial precedents, and the following Law Journals have been reviewed to map out progressive precedents in order to form the third part of the case law.

- | | |
|------------------------------------|--|
| • Pakistan Legal Decision (P.L.D.) | • Yearly Law Reports (Y.L.R.) |
| • Civil Law Cases (C.L.C.) | • Pakistan Supreme Court Cases(P.S.C.) |
| • National Law Reports (N.L.R.) | • All India Law Reports (A.I.R.) |
| • Criminal Law Journal (Cr.L.J.) | |

- Supreme Court Monthly Review (S.C.M.R.)
- Monthly Law Reports (M.L.D.)
- Pakistan Law Journal (P.L.J.)
- Key Law Reports (K.L.R.)
- Pakistan Criminal Law Journal (P.Cr.L.J.)
- Peshawar Law Reports (P.L.R.)
- Annual Supreme Court Digest (A.S.C.D)

While the production of this document has been based on extensive research, it seeks to incorporate and highlight the experiences and learning of women's access to justice at the grass roots by incorporating the documentation submitted by implementing partners working in districts all over Pakistan.

5. Women's Access to Justice in Pakistan

5.1 Legal Framework of Pakistan

5.1.1 Constitution of Pakistan

The Constitution of Pakistan is the primary document enshrining the fundamental rights of all its citizens.⁴ The Constitution enlists right to life, liberty and security⁵; prohibition of slavery and forced labour⁶; dignity and privacy for all⁷; freedom of speech⁸, movement⁹ and assembly¹⁰; freedom to practice religion¹¹; right to fair trial¹²; and preservation of culture and script¹³. An important Constitutional Article espousing the principle of non-discrimination is Article 25 which states:

Article 25. Equality of citizens.—

- (1) All citizens are equal before law and are entitled to equal protection of law.
- (2) There shall be no discrimination on the basis of sex.
- (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

This Article of the Constitution ensures that the principle of non-discrimination is institutionalised in the social contract between citizens and states. However, clause (3) of the Article expressly refers to affirmative actions to promote and encourage women joining professions and educational institutions as an equal member of the society.¹⁴

While the 'Principles of Policy' delineated in the Constitution from Article 28 to 40 may not be 'binding' but rather serve as policy guidelines, they also reiterate the role of women. Article 34 stipulates:

⁴ Constitution of Pakistan 1973, Article 8 – 28

⁵ Ibid Article 9

⁶ Ibid Article 11

⁷ Ibid Article 14

⁸ Ibid Article 19

⁹ Ibid Article 15

¹⁰ Ibid Article 17

¹¹ Ibid Article 20

¹² Ibid Article 10-A

¹³ Ibid Article 28

¹⁴ PLD 1990 SC 295

Article 34. Full participation of women in national life

Article 34. Full participation of women in national life.—Steps shall be taken to ensure full participation of women in all spheres of national life.

While the principles of policy are not binding and cannot allow for a law to be struck down if in contravention of it, the principles of policy in Chapter 2 of the Constitution of Pakistan are relevant to 'facilitate an interpretation of fundamental rights in harmony with and not divorced from their Constitutional setting.'¹⁵ Article 34 therefore aids in a pro-women interpretation of the Constitutional fundamental rights in Pakistan. It also bases a responsibility on the State to take affirmative actions for ensuring women's participation in contributing to all walks of life as a policy guideline. This includes women from all socio-economic strata of society whether urban or rural who could contribute effectively and positively towards national life.¹⁶ In essence, women's voices and perspectives should be incorporated and acknowledged at all levels of State governance.

5.1.2 International Legal Obligations

Ratification of United Nations core human rights Conventions by the state of Pakistan is a commitment to implement the rights enshrined in the international conventions in Pakistan. The Universal Declaration of Human Rights (UDHR), even though not binding, stipulates the basic precepts of human rights and dignity for all human beings.¹⁷ The Universal Declaration of Human Rights voices the foundation of future United Nations Conventions. Pakistan endorsed the Universal Declaration of Human Rights in 1948 and ensured its subsequent commitment to the goal of human rights by ratification of various international instruments. Pakistan has ratified the following core UN Conventions:

1. International Convention Against Elimination of All Forms of Racial Discrimination 1965 (ICERD);
2. International Covenant on Civil and Political Rights 1966 (ICCPR);
3. International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR);
4. Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW);
5. Convention Against Torture and other Inhumane and Degrading Behaviour 1984 (CAT);
6. Convention on the Rights of the Child 1989 (CRC);
7. Convention on the Rights of Persons with Disabilities 2006 (CRPD).

¹⁵ 2015 SCMR 1739

¹⁶ PLD 1991 SC 412

¹⁷ UDHR, Article 1

While CEDAW espouses principles of state obligation, non-discrimination and substantive equality in ensuring the rights of women¹⁸, other international instruments also focus on the rights of women. ICCPR and ICESCR both reiterate the principle of equality between men and women to be subsumed in interpretation of the Covenants.¹⁹ Convention on the Rights of the Child represents an intersectionality between issues of women rights and child rights, especially with regards to the age of majority for marriage.²⁰ CRPD recognizes the principle of equality between men and women in determining rights under the Convention²¹ and also focuses on the multiple discrimination suffered by disabled women and girls demanding additional state attention to realise rights.²²

Pakistan has also ratified various Conventions, relevant to women, of International Labour Organization in order to protect the rights of working women. The purpose of the ILO is to promote decent working conditions and equality between men and women at work places. In keeping with the ideals of ILO, Pakistan has ratified the following ILO Conventions:

- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Abolition of Force Labour Convention, 1957 (No.105)
- Worst Forms of Child Labour Convention, 1999 (No.182)

Due to demarcation of public-private spaces where majority women in Pakistan occupy private spaces, civil society organizations are advocating for Pakistan to ratify two important ILO Conventions to protect the rights of working women:

- Maternity Protection Convention, 2000 (No. 183)
- The Domestic Workers Convention (No.189)

The rights of working women including home based workers and domestic workers are therefore important in ensuring working women are protected in both formal and informal working structures. A Domestic Workers (Employment Rights) Bill 2013 was introduced in 2014 but no progress has been made in ensuring the rights of working women in informal sectors. The same nexus needs to be extended to home based workers to guarantee labour rights as given for women working in formal sectors.

Sexual violence and rape, where women are at a higher risk, have been specifically categorised as war crimes in the Statute for the International Criminal Tribunal for the Former Yugoslavia,²³ International Criminal Tribunal for Rwanda²⁴ and Rome Statute for the

¹⁸ CEDAW, Article 1 – 16

¹⁹ ICCPR & ICESCR, Article 3

²⁰ CRC, Article 1

²¹ CRPD, Article 3

²² CRPD, Article 6

²³ Statute for the International Criminal Tribunal on the Former Yugoslavia, Article 5(g)

²⁴ Statute for the International Criminal Tribunal on Rwanda, Article 3(g)

International Criminal Court.²⁵ The Geneva and Hague Conventions forming the body of international humanitarian law also provide protective measures against sexual violence to women in armed conflict.²⁶

Pakistan's obligations by ratification of international human rights instruments include the obligation to harmonise State laws with international human rights instruments and to ensure that the rights guaranteed under these instruments are implemented in letter and spirit till the grass root level. However, international laws are not directly applicable in the domestic courts of Pakistan by virtue of dualism and can only be implemented when and if incorporated into the domestic legal structures.²⁷

5.1.3 Pro-Women Laws: Federal & Provincial

The Muslim Laws Family Ordinance 1961 (MFLO) was one of the first laws for the protection of women which mandated registration of *nikhanama* in order to protect the rights of women.²⁸ MFLO also mandates permission from the Arbitration Council after furnishing consent of first wife or existing wives in order to contract another marriage.²⁹ Punishment and fines were imposed for failing to fulfil the procedural requirements. In time, it was realised that while the Ordinance was pro-women in nature it proved a mere paper tiger without actual impact on the vulnerabilities of women in Pakistani society under the constant threat of a husband contracting a second or third marriage for her short comings.³⁰ The Family Courts (Amendment) Ordinance 2002 convenience women litigants by amending section 7 of the Muslim Family Courts Act 1964 and providing that a '*plaint for dissolution of marriage may contain all claims relating to dowry, maintenance, dower, personal property and belongings of wife, custody of children and visitation rights of parents to meet their children.*'³¹ The Government of Punjab has introduced some major amendments in Muslim Family Law. The Punjab Muslim Family Laws (Amendment) Act 2015 amends section 6 of MFLO to increase punishment on conviction upon complaint for not obtaining prior permission of the Arbitration Council before contracting another marriage to simple imprisonment which may extend to one year and a fine of Rs. 500,000/-³² Punjab Family Courts (Amendment) Act 2015 stipulates that upon dissolution of marriage through *khula* the Court '*may direct the wife to surrender up to fifty percent of her deferred dower or up to twenty-five percent of her admitted prompt dower to the husband.*'³³

The Protection of Women (Criminal Laws Amendment) Act 2006 was another celebrated development that provided much needed relief to rape survivors who were initially charged under the extreme evidentiary burden of the Hudood Ordinance. The 2006 Act introduced

²⁵ Rome Statute, Article 7(1)(g)

²⁶ Geneva Convention, Article 27(2)

²⁷ 2016 PLD SC 421

²⁸ Muslim Family Laws Ordinance 1961, section 5

²⁹ Ibid section 6

³⁰ David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, Sweet & Maxwell 1998) 256

³¹ Family Courts (Amendment) Ordinance 2002, section 3

³² Punjab Muslim Family Laws (Amendment) Act 2015, section 5

³³ Punjab Family Courts (Amendment) Act 2015, section 8

new offences of 'kidnapping, abducting or inducing woman to compel for marriage';³⁴ 'kidnapping or abducting in order to subject person to unnatural lust';³⁵ 'selling person for the purposes of prostitution';³⁶ and 'buying person for the purposes of prostitution.'³⁷ The 2006 Act inserts sections 375 and 376 in Pakistan Penal Code and subjects it to the same evidentiary burden as given under the law of evidence. The 2006 Act therefore removed 'zina-bil-jabr' from The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979 and inserted 'rape' in the Pakistan Penal Code instead. The 2006 Act purports a progressive definition of rape by removing the initial caveat of the definition which stated that consent to sexual intercourse is implied where the man and woman are married. It also holds that sexual intercourse with a girl under the age of sixteen years is statutory rape and consent given under duress or mistaken belief of marriage is not a valid consent.³⁸ Furthermore, the recent Criminal Law (Amendment) (Offence Relating to Rape) Act 2016 has an important impact on the offence of rape by reforming procedural and evidentiary issues related to the trial of rape offences. The recent Criminal Amendment stipulates punishments for hampering investigation of rape cases;³⁹ and death or life imprisonment for raping a minor or a person with mental or physical disability.⁴⁰ The 2016 Amendment Act also mandates collection of DNA samples within proper timeframe⁴¹ and penalises disclosure of the identity of rape survivor without proper consent.⁴²

Section 509 of the Pakistan Penal Code criminalises sexual harassment by amending the vague offence of 'insulting the modesty of a woman' to include a definition on sexual harassment:

*'(ii) conducts sexual advances, or demands sexual favours, or uses verbal or non-verbal communication or physical conduct of a sexual nature which intends to annoy, insult, intimidate, or threaten the other person or commits such acts at the premises of the workplace, or makes submission to such conduct either explicitly or implicitly a term or condition of an individual's employment, or makes submission to or rejection of such conduct by an individual a basis for employment decision affecting such individual, or retaliates because of rejection of such behaviour, or conducts such behaviour with the intention of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment'*⁴³

The punishment of the crime can include imprisonment for upto three years and a fine that can extend to Rs. 500,000/-. Section 509 is applicable to public and private spaces. Conversely, the Protection Against Harassment of Women at Work Place Act 2010 is applicable to workplaces and formal sector. The Act provides a comprehensive mechanism to deal with complaints of sexual harassment at the work place. The law provides a wide definition of sexual harassment covering all facets of the issue and includes retaliation for

³⁴ The Protection of Women (Criminal Laws Amendment) Act 2006, section 2

³⁵ Ibid section 3

³⁶ Ibid section 4

³⁷ Ibid

³⁸ Ibid section 5

³⁹ Criminal Law (Amendment) (Offence Relating to Rape) Act 2016, section 3 & 4

⁴⁰ Ibid section 5

⁴¹ Ibid section 11

⁴² Ibid section 6

⁴³ Criminal Law (Amendment) Act 2010, section 2

refusal to sexual advances as a caveat of sexual harassment punishable under this law.⁴⁴ The Act stipulates constitution of Inquiry Committees at workplaces to deal with complaints of sexual harassment;⁴⁵ the Act also stipulates the establishment of the Office of the Ombudsman as an appellate and original jurisdiction for such cases;⁴⁶ there is an imposition of a fine of Rs. 25,000 to Rs. 100,000 to organizations for failure to comply with the law.⁴⁷ The Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act 2012 amends this law by substituting 'Ombudsman' with 'Ombudsperson' under the new law and amending section 11 to allow employees to file petition for compliance of the law to the Ombudsperson rather than the District Courts.⁴⁸ While the established precedent for cases under the 2010 Act for sexual harassment at workplaces states that the acts should be of a sexual nature in order to fall within the definition of sexual harassment,⁴⁹ the law promulgated by the Balochistan Assembly has widened the scope. The Balochistan Protection Against Harassment of Women at the Workplace Act, 2016 has added the phrase '*any kind of threats, blackmailing, mental and physical torture, attempt for defamation or defamation through modern techniques*'⁵⁰ in the definition of harassment and also stipulates for a helpline to be set up the Women Development Department of Government of Balochistan provide advice to such cases.⁵¹

The Acid and Burn Crime Criminal Amendment in 2011 amends the offence of 'Hurt' given in PPC to include section 336A and B defining '*hurt caused by corrosive substance*' and stipulating harsher punishments for this crime with fourteen years to life imprisonment.⁵² The Anti-Women Practices Criminal Amendment in 2011 criminalizes and stipulates harsh punishments for cultural practices including '*giving a female in marriage or otherwise in badla-e-sulh, wanni or swara*',⁵³ '*depriving women from inheriting property*',⁵⁴ '*forced marriage*'⁵⁵ and '*marriage with the Holy Quran*'.⁵⁶ Furthermore, these offences have been deemed non-compoundable ensuring that the offences do not allow legal loopholes for compromise between the parties.

The recent Criminal Law Amendment (Offences in the name or on pretext of Honour) Act 2016 amends '*fasad-fil-arz*' as defined in section 299 of PPC to include offences '*committed in the name or on the pretext of honour*'.⁵⁷ Amendment in section 311 further provides that where the principle of *fasad-fil-arz* is attracted, the court can 'punish an offender against whom the right of *qisas* has been waived or compounded'.⁵⁸ Another important development has been the Criminal Law (Second Amendment) Act 2016 pertaining to

⁴⁴ Protection Against Harassment of Women at the Workplace Act 2010, section 2(h)

⁴⁵ Ibid section 3

⁴⁶ Ibid section 7

⁴⁷ Ibid section 11(2)

⁴⁸ Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act 2012, section 8

⁴⁹ 2013 MLD 198

⁵⁰ The Balochistan Protection Against Harassment of Women at the Workplace Act 2016, section 2(j)

⁵¹ Ibid section 13

⁵² Criminal Law (Second Amendment) Act 2011, section 3

⁵³ Criminal Law (Third Amendment) Act 2011, section 2

⁵⁴ Ibid section 3

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Criminal Law Amendment (Offences in the name or on pretext of Honour) Act 2016, section 2

⁵⁸ Ibid section 6

violence against children whereby child pornography,⁵⁹ child sexual abuse,⁶⁰ cruelty to children⁶¹ and exposure to seduction⁶² have been criminalised with strict punishments and penalties.

After 18th Constitutional Amendment, the Provincial Assemblies have promulgated various laws for women in conformity with the legislative powers enshrined in the Constitution.⁶³ Punjab Marriage Restraint (Amendment) Act 2015 updates the definition of Union Councils, increases powers of Family Courts and increases punishments and penalties under the new law. Furthermore, the Sindh Child Marriages Restraint Act 2013 increases the age of girl child from 16 years to 18 years.⁶⁴ The law criminalises child marriage with severe punishment and makes the offence cognizable, non-compoundable and non-bailable.⁶⁵

Sindh Domestic Violence (Prevention and Protection) Act 2013, Balochistan Domestic Violence (Prevention and Protection) Act, 2014 and Punjab Protection of Women against Violence Act 2016 feature a mechanism for grievance redressal regarding domestic violence and include physical violence, economic abuse and psychological violence as definitions of domestic violence.⁶⁶ The Punjab domestic violence is applicable to women only,⁶⁷ however, Sindh's and Balochistan's domestic violence law includes women, children and other vulnerable person in a domestic relationship with the accused.⁶⁸

Sindh has also promulgated the Sindh Hindus Marriage Act 2016 which stipulates a mechanism for registration of marriages of persons from the Hindu community providing much needed relief to Hindu women who can prove their marriage as per the new registration mechanism.⁶⁹

⁵⁹ Criminal Law (Second Amendment) Act 2016, section 4

⁶⁰ Ibid section 7

⁶¹ Ibid section 5

⁶² Ibid section 4

⁶³ Constitution of Pakistan 1973, Article 141 – 144

⁶⁴ Sindh Child Marriages Restraint Act 2013, section 2

⁶⁵ Ibid section 8

⁶⁶ Sindh Domestic Violence (Prevention and Protection) Act 2013, section 5; Balochistan Domestic Violence (Prevention and Protection) Act 2014, section 4 & Punjab Protection of Women against Violence Act 2016, section 2(r)

⁶⁷ Punjab Protection of Women against Violence Act 2016, section 2(a)

⁶⁸ Sindh Domestic Violence (Prevention and Protection) Act 2013, section 2(a) & Balochistan Domestic Violence (Prevention and Protection) Act 2014, section 2(a)

⁶⁹ Sindh Hindus Marriage Act 2016, sections 6 – 7

5.1.4 Institutional and Procedural Impediments of Discriminatory Laws

The resuscitation of the democratic process in Pakistan has been a huge victory for all women's rights activists. A number of laws for women's empowerment have been promulgated at both federal and provincial levels, however, certain discriminatory laws and legal gaps still exist that violate the rights of women. The Muslim Family Law Ordinance, the first law to provide legal cover to the rights of women, introduced mechanisms to register marriages and restrict polygamy, however, the law has been nothing more than a paper tiger. According to Rubya Mehdi (1994, p. 166):

*'All this shows is that, though Pakistan has put academically impressive restrictions on man's unrestricted and arbitrary right to polygamy, in practice the requirement that prior permission for a polygamous marriage be obtained from an Arbitration Council appears to be a formality rather than an effective deterrent.'*⁷⁰

Punjab's amendment (above) may be an effective deterrent against polygamy, however, for the rest of Pakistan, the procedure under MFLO is a mere formality. Petitions made by wives to have the subsequent polygamous marriage declared null and void have failed. If a husband contracts another marriage without complying with the formalities under MFLO, it has no bearing on the validity of the marriage.⁷¹

Khyber Pakhtunkhwa is the only province which lacks a special law to redress grievance against domestic violence. However, the special laws passed by Punjab, Sindh and Balochistan do not criminalise domestic violence per se but provide protection to victims who are subjected to constant domestic violence. The courts can pass interim, residence or protection orders in favour of the complainant or victim of domestic violence.⁷² However, if the domestic violence includes acts already criminalised in the PPC, for example 'hurt', then victims of domestic violence can file a complaint under the mainstream criminal law.

Sindh is the only province that has raised the age of marriage from 16 years to 18 years in case of women,⁷³ however, for the rest of Pakistan the age is still 16 years for women as per the Child Marriage Restraint Act 1929.⁷⁴ The current law for child marriages in Pakistan, except for Sindh, is in flagrant violation of the Convention on the Rights of the Child. Even more problematic is the fact that where a marriage is a contract with a girl below the age of 16 years, the act is punishable under the law,⁷⁵ yet the marriage itself is valid⁷⁶ and cannot be invalidated by virtue of being an offence under the Child Marriage Restraint Act 1929.

Same problems arise with regards to statutory rape as per Protection of Women (Criminal Laws Amendment) Act 2006. Many judgments of the higher courts have reiterated that statutory rape of a minor is not applicable to child marriages, in case of a marriage with a

⁷⁰ David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, Sweet & Maxwell 1998) 257

⁷¹ 1970 SCMR 753

⁷² Sindh Domestic Violence (Prevention and Protection) Act 2013, section 10 - 11; Balochistan Domestic Violence (Prevention and Protection) Act, 2014, section 11 - 12 & Punjab Protection of Women against Violence Act 2016, section 6 - 8

⁷³ Sindh Child Marriages Restraint Act 2013, section 2

⁷⁴ Child Marriage Restraint Act 1929, section 2

⁷⁵ Ibid section 5 - 6

⁷⁶ 2006 YLR 2936 Lahore High Court

minor girl no crime has been committed as long as she has attained puberty.⁷⁷ This undermines the purpose of the concept of statutory rape and allows it in case the perpetrator contract marriage with a minor.

While the recent criminal amendment with regards to honour killing is a step in the right direction it has been heavily criticised as yet another piece of legislation, cosmetic in nature, without actual authority.⁷⁸ Many jurists are of the opinion that subject to section 311, the accused may still be able to wiggle out of liability or punishment. Same issues are being voiced regarding the Anti-Women Practices Criminal Amendment in 2011, where all the offences defined in the law are non-cognizable and the police cannot arrest perpetrators without warrant.⁷⁹ This undermines efficacy in implementation of the law, especially where the offence is of a serious nature.

The Qanun-e-Shahadat Order of 1984 equates the testimony of one woman as half of a man in cases of financial and future obligations.⁸⁰ While the Article is applicable to cases of financial and future obligations only, it discriminates against women's capabilities in financial matters. However, the proviso under Article 17 cannot be extended to other litigation or issues of circumstantial evidence.⁸¹

The Family Laws of Pakistan grant the husband a unilateral right of divorce⁸² but women do not have this unilateral right unless delegated to them.⁸³ Women have to file for *khula* falling within the ten groups stipulated in the Dissolution of Muslim Marriage Act 1925. The Peshawar High Court recently noted that where the husband neglects the first wife and contracts a second marriage without the consent of first wife, it could be construed as a cruelty and hence a ground for *khula* under Dissolution of Muslim Marriages Act 1939.⁸⁴ Furthermore, when a woman files for *khula* and decides to leave her husband, she has to forego the dower amount,⁸⁵ leading to husbands and in-laws pressurizing women to file for *khula* rather than exercising the unilateral right of divorce given to husbands. The precedent is applicable to all over Pakistan other than the province of Punjab where the Punjab Family Courts (Amendment) Act 2015 (discussed above) shall override judicial precedent.

Pakistan Citizenship Act 1951 is another piece of law that discriminates against women. According to the law '*any woman who by reason of her marriage to a [British Subject] before the first day of January, 1949, has acquired the status of a [British Subject] shall, if her husband becomes a citizen of Pakistan, be a citizen of Pakistan*', therefore making the citizenship of women contingent on the man she marries.⁸⁷ The same is true for domicile

⁷⁷ 2013 PLD 243 Lahore High Court

⁷⁸ Masroor Shah, 'Another set of teeth that cannot bite' (The Express Tribune, 8 November 2016) <<https://tribune.com.pk/story/1224708/another-set-teeth-cannot-bite/>> accessed 12 February 2017

⁷⁹ Criminal Law (Third Amendment) Act 2011, section 5

⁸⁰ Qanun-e-Shahadat Order 1984, Article 17

⁸¹ 2013 PLD 7 Federal Shariat Court

⁸² Muslim Family Laws Ordinance 1961, section 7

⁸³ Ibid section 8

⁸⁴ 2013 CLC 1203 Peshawar High Court

⁸⁵ Family Courts Act 1964, section 10

⁸⁶ 2015 SCMR 804 Supreme Court

⁸⁷ The Citizenship Act 1951, section 10

where a wife's domicile follows that of her husband.⁸⁸ These subtle barriers of discrimination are also present in the Guardians and Wards Act 1890. Precedence is given to the husband or father of a minor girl, or to the father of a minor boy, with regards to the guardianship of his or her property.⁸⁹ Such discriminatory laws, whether overt or covert, create an institutional framework of discrimination against women which is the first step in restricting access to justice.

5.1.5 Barriers in Accessing Justice

Barriers in accessing justice for women can have factors but with the focus entirely on judiciary, the gender sensitization to deal with cases of gender based violence becomes a huge issue. Gender sensitivity in the judiciary has been highlighted in this case law book as positive indicators but cases which reflected a different picture cannot be ignored. In the media frenzied Mukhtaran Mai case with regard to the delay in lodging of FIR it was stated:

*'...in a case of an unmarried virgin victim of a young age, whose future may get stigmatized, if such a disclosure is made, if some time is taken by the family to ponder over the matter that situation cannot be held at par with a grown up lady, who is a divorcee for the last many years; the element of delaying the matter to avoid Badnami may also be not relevant in this case...'*⁹⁰

While it can be argued that the Mukhtaran Mai case was set on its own facts, however the judgment puts a question mark on gender sensitivity with regards to cases of sexual violence. Gender sensitivity and change in mind-set of the judiciary is a huge requirement for women's access to justice in Pakistan. Lack of women in higher judiciary is noted as a huge factor in institutionalizing gender sensitive approach to disposal of cases. According to Asian Human Rights Commission in 2013:

*'the superior courts of the country have only 3 judges out of a total of 103 judges. The percentage of women judges in the country is 2.91 percent compared to the 33 percent required by the UN Beijing Conference of 1996, to which Pakistan is a signatory'*⁹¹

This entails that women voices, perspectives and participation in higher judiciary is virtually non-existent. Affirmative action is required to conscript more female judges in higher judiciary for engraining gender sensitivity within judicial structures.

Litigation costs, other than fee of lawyers is a huge issue for women, especially regarding inheritance. The stamp costs are high when it comes to property rights of women and therefore can be the first hurdle in filing a suit for inheritance or property. In this regard, Punjab is the only province that has a scheme under the Punjab Women Empowerment

⁸⁸ Succession Act 1925, section 16

⁸⁹ Guardians and Wards Act 1890, section 19

⁹⁰ Liliana Corrieri, The Law, Patriarchy and Religious Fundamentalism: Women Right's in Pakistan (Asian Legal Resource Center c2013) 47-58

⁹¹ Ibid

Package 2012 under which women litigants in inheritance lawsuits for rural or urban property are exempted from stamp duty.⁹² This ensures property and inheritance rights of women and is a good precedent for other provinces. Stamp duty is a percentage of the subject property which increases with the value of the property and can be difficult for women litigants to pay up especially considering the lack of financial autonomy and economic dependency of women in Pakistan.⁹³

Gender sensitization and capacity building of District Bar Associations and lawyers provides a further issue. While women are generally more comfortable with female lawyers, the attitude of the lawyers when in conformity with social attitudes raises questions regarding effective representation of women litigants. This has been especially true for cases of sexual violence where victim bashing is visible. Another important barrier identified has been the lack of awareness, knowledge and information amongst lawyers about the new laws promulgated for women rights. Majority of the lawyers trained under this project were unaware of pro-women laws at both federal and provincial levels. Other than lack of awareness of new laws, gender sensitivity and a pro-women approach to issues of violence against women were virtually absent.⁹⁴

Another important barrier has been in the initial stages of the case, before it goes to trial. The role of the Police, Medico-Legal Officers and Police cannot be ignored. Violence against women is usually exacerbated by these institutions rather than providing much needed relief to them. Furthermore, these institutions charged with the primary duties of collecting evidence and building up the case, when biased, impact the entire proceeding until it goes to trial. Police refusal or even torture at times in filing FIR becomes the basic impediment to implementing pro-women laws. In such situations sometimes women have to file an additional process whereby they petition the court to compel police to file FIR.⁹⁵ This makes the filing of FIR – a simple procedure and fundamental right unnecessary costly and time consuming for the already grieved woman litigant. Even if FIR is filed, the Investigating Officer's role is crucial in gathering evidence. The arbitrary powers therefore warrant an accountability mechanism, efficacious in nature, to ensure that Police powers are kept in check and free from bias and prejudice when investigating cases pertaining to women's rights.⁹⁶

Medico-legal Officers and test results are important to build a strong case. It has been a recurring theme that in some smaller district the test results have been carried out three days later as the laboratory was closed or the relevant professional was not on duty.⁹⁷ Such evidence when cross-examined leads to loopholes that can jeopardize the woman litigant's case. In some hospitals, rape kits and medical equipments for cases of gender based violence have not been provided. Where such equipment and resources are absent, it leads to further character assassination, stigma and trauma for survivors of sexual violence.⁹⁸

⁹² Punjab women development department, 'Punjab Women Empowerment Package 2012' (Punjabgovpk, 2012) <<http://wdd.punjab.gov.pk/system/files/pwei2012.pdf>> accessed 12 February 2017

⁹³ Stamp Duty Act 1899, section 3

⁹⁴ Analysis gleaned from Focus Group Discussions for Trend Analysis Reports by DTCE & CTE

⁹⁵ Code of Criminal Procedure, Section 22-A

⁹⁶ Analysis gleaned from Case files and Trend Analysis Reports submitted by IPs

⁹⁷ Case No. 17/2013 [Additional Sessions Judge, Sibi] Judgment dated: 18.03.2014

⁹⁸ Ibid

Sociopolitical and Structural Barriers of Women's Access to Justice

Unequal gendered power relations manifested in discriminatory laws, norms, standards and practices have been identified as one set of root causes for violence, poverty and inequality, and must be addressed to end the trend of violence against women.⁹⁹ The daily consequences that result from violence against women and girls undermine development efforts and the building of strong democracies and just, peaceful societies. Addressing the many and complex root causes is a fundamental prerequisite for the empowerment of women and girls, the democratic process, sustainable economies, development and peace. In everyday life, these factors are a key to understanding the stereotype attitudes and beliefs about gender roles and identities through which violence is perpetuated. For example, in South Asia men admitted to raping their intimate partners, often their spouses, because they felt it was their right to have sex without the consent of women.¹⁰⁰ The belief in women's subordination is also linked to impunity for men using VAW.¹⁰¹ Violence at the household level has an enormous impact on the level of acceptance of violence and its reproduction from generation to generation.¹⁰² Together with a lack of formal gender equality it makes violence against women acceptable.¹⁰³ Violence against women is the most widespread and persistent violation of human rights. According to a the 2013 study of the World Health Organization (WHO), at least one in three women worldwide (35%) will experience physical and/or sexual violence during their lifetime, usually at the hands of someone they know. This means more than one billion women worldwide are affected by VAW. The WHO data found that an average of 25.5% of women in Europe will be affected by violence, and an average of 37.7% of women in South East Asia will experience violence.¹⁰⁴ The collaborative face and deep rooted misogyny of formal statutory laws, Islamic laws, and customary practices are shaping women's lives in Pakistan at every strata of society regardless of their ethnic and social identity. Women's equality protected in formal laws has been disavowed by prevalent customary practices that authorize male members of the family to treat women as "their" personal commodities which leave women in their hands to be murdered, sold or to buy at their convenience. Despite constitutional guarantees and international commitments, violence against women is on the rise with crimes against women being committed in the name of religion, custom, honour and harmful traditional practices. According to the Human Rights Commission of Pakistan, between 2004 and 2016, 15,385 cases of honour killings were reported in the media. Even in the present era the gaps between equality of gender in formal laws and de facto realities of women's life is extremely wide, both vertically and horizontally. Violence against women was a key area of concern in

⁹⁹ See, for example, 'Beijing Platform for Action', VAW critical area 118 stipulates the root causes of VAW. http://unwomenasiapacific.org/docs/WhyDoSomeMenUseViolenceAgainstWomen_P4P_Report.pdf 14 Ibid.

¹⁰⁰ 13 E. Fulu et al (2013) 'Why do some men use violence against women and how to prevent it? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific', UNDP, UNFPA, UN Women and UN Volunteers,

¹⁰¹ World Bank (2012) op. cit. 16 A.M. Goetz (2008) 'Progress of the World's Women 20082009: Who Answers to Women?', UNIFEM, 2008, p.32, http://www.unifem.org/progress/2008/media/POWW08_Report_Full_Text.pdf

¹⁰² Ibid.

¹⁰³ World Bank (2012) op. cit.

¹⁰⁴ Total regional breakdowns from the 2013 WHO study are: Africa: 36.6% of women; Americas: 29.8%; Eastern Mediterranean: 37.0%; Europe: 25.6%; South East Asia: 37.7%; and Western Pacific: 24.6%.

the U.N. Reports in previous years.¹⁰⁵ It is difficult to find conclusive data worldwide, but the report estimates that up to 76% of women globally will be targeted for physical or sexual violence in their lifetimes. One in four women are assaulted by an intimate partner during pregnancy, a figure that endorses the view that husbands and partners perpetrate most episodes of violence. Despite the prevalence of rape and assault of women, only a fraction of reported rapes end in conviction.¹⁰⁶

Women and men are placed in bipolar categories by numerous institutions in society¹⁰⁷. These institutions, through daily practices embedded in long-standing beliefs, construct the behavior and attitude of males and females who face strong forces to conform. Family practices,¹⁰⁸ religious myths, the social division of labour, the sexual division of labour, marriage customs, the educational system, and civil laws combine to produce hierarchies, internalised beliefs, and expectations that are constraining but at the same time "naturalised" and thus seldom contested. In this context, empowerment is a process to change the distribution of power, both in interpersonal relations and in institutions throughout society. Traditionally the state has interpreted women's needs to suit its own preferences.¹⁰⁹ The typical and enduring consideration that women have received from the state has been in their capacity of mothers and wives. Women therefore need to become their own advocates to address problems and situations affecting them that were previously ignored. Empowerment ultimately involves a political process to produce consciousness among policy makers about women and to create pressure to bring about societal change.¹¹⁰

Financial and Economic Barriers

Owing to the multiple costs that access to justice encompasses, the poorest section of society, often cannot afford access to justice. Women living in poverty are disproportionately impacted: many of them are dependent on their husbands and therefore cannot prosecute them in case of violations.¹¹¹ As Magdalena Sepulveda (UN Special Rapporteur on extreme poverty and human rights) stated, *"justice is incredibly expensive for women living in poverty, not only for criminal matters but also for civil cases, since most of the time they do not enjoy free legal aid for such procedures"*.¹¹² Moreover, they also risk losing their job since their employers are unlikely to give them permission to leave work for attending sessions at the tribunal, not to mention some women cannot rely on anyone else for childcare.¹¹³

¹⁰⁵ <http://www.un.org/womenwatch/daw/news/unwvaw.html>

¹⁰⁶ <http://healthland.time.com/2011/07/06/u-n-update-barriers-to-womens-access-to-justice-and-health-care-persist/>

¹⁰⁷ http://www.unesco.org/education/pdf/283_102.pdf

¹⁰⁸ http://www.unesco.org/education/pdf/283_102.pdf

¹⁰⁹ 17 Accelerating Economic Growth and Reducing Poverty: The Road Ahead, Poverty Reduction Strategy Paper. GOP.2003. p. 93

¹¹⁰ http://www.unesco.org/education/pdf/283_102.pdf

¹¹¹ <http://wilpf.org/cedaw-general-discussion-on-women-and-access-to-justice/>

¹¹² <http://www.southernafricallitigationcentre.org/1/wp-content/uploads/2017/01/GOAL-16-Book-Sikwese.pdf>

¹¹³ <http://siteresources.worldbank.org/PAKISTANEXTN/Resources/293051-1146639350561/CGA-Companion-Paper-1.pdf>

Furthermore, women also have to face inequality of having support: in case of divorce, their husbands can afford good lawyers, but women cannot if they financially depend on men, which creates a huge imbalance in a trial and more generally in access to justice.¹¹⁴ There is an obvious and critical need to secure women's access to justice; their rights are violated not only during the assault but also during the whole litigation. Therefore, it is now time to move from acknowledgement to action. To this end, many experts and civil society members called for a holistic and comprehensive approach in order to eliminate discrimination against women, not only in their access to justice, but also in the daily stereotypes they have to face.

Lack of income deprives women of basic needs, such as food and shelter, and limits their opportunities for advancement. As women disproportionately earn less income than men, they are deprived of basic education and healthcare, which lowers their lifetime earning potential. Women are often not aware of their legal rights provided in the statute, due to illiteracy, and lack of legal aid¹¹⁵.

The majority of women in Pakistan are caught between a situation of reliance and subordination owing to their low social, economic, and political status in society. The majority of women suffer from all forms of poverty. Their socioeconomic reliance on men leads to endless suffering. Since women lack the financial means to enter into an expensive, lengthy and more exploitative litigation process, therefore they continue to suffer in violent and discriminatory situations. Complicated legal procedures compounded by gender biases of judiciary and law enforcing agencies, high cost of litigation, lack of access to legal aid, delay in getting justice, complicated court procedures, sexual harassment of women in courts combined with an underlying lack of awareness of their legal rights, a dearth of female judges, gender biases of the judiciary and law enforcing agencies have an adverse impact on women, and make it extremely difficult for women to enter into litigation to get justice for themselves.

Women are not Informed: Many women are uninformed about the processes and the various possibilities they have to access justice. In Pakistan, women suffer from a lack of education, which prevents them from reading and understanding complicated legal language. According to the Pakistan Social and Living Standards Measurement (PSLM) Survey 2015, the literacy rate of the population (10 years and above) is 60% as compared to 58% in 2014. The literacy rate for males during 2015 was 70% and for females 49% which shows that there is a gap of 21%.¹¹⁶ The data shows that the literacy rate is higher in urban areas (76% than in rural areas 51%). Data from the provinces suggests that Punjab leads with 63%, followed by Sindh with 60%, Khyber Pakhtunkhwa with 53% and Balochistan with 44%. Despite the international commitments such as the Millennium Development Goals (MDGs) and respective international financing to attain 100% literacy in Pakistan, we were unable to achieve the majority of the targets of MDG3 which aimed to eliminate gender disparity in primary and secondary education by 2005,¹¹⁷ and in all levels of education by

¹¹⁴ <http://wilpf.org/cedaw-general-discussion-on-women-and-access-to-justice/>

¹¹⁵ <https://www.adb.org/sites/default/files/institutional-document/32562/women-pakistan.pdf>

¹¹⁶ <http://www.pbs.gov.pk/content/pakistan-social-and-living-standards-measurement>

¹¹⁷ <http://www.pk.undp.org/content/dam/pakistan/docs/MDGs/MDG2013Report/final%20report.pdf>

2015. Gender parity in education has improved for primary education, secondary education and youth literacy, but still falls short of the MDG targets set for 2015. Punjab, with its higher base, remains the leader in education indicators.¹¹⁸ Attainment of formal education and improved literacy ratios does not necessarily mean that women are informed about their legal rights but this provides women a chance to at least assert herself, and reduce the economic dependence on male counterparts. Lucy Lazo describes education as "*a process of acquiring, providing, bestowing the resources and the means or enabling the access to a control over such means and resources*". Given the above, the term is therefore more relevant to the marginalized groups the poor, the illiterate, indigenous communities - and of course, cutting across these categories, women. She cites Paz's definition of empowerment as "*the ability to direct and control one's own life*". Citing Depthnews, she writes that "*it is a process in which women gain control over their own lives by knowing and claiming their rights at all levels of society at the international, local, and household levels. Self-empowerment means that women gain autonomy, are able to set their own agenda and are fully involved in the economic, political and social decision-making process*"¹¹⁹

Women in rural settings are not literate, but on the other hand regardless of their status living in urban settlements or rural areas, they tend to suffer because of their minimum knowledge of legal matters. Moreover, apart from formal education, women in Pakistan have very limited awareness of their rights, which irrefutably dismisses them from the judicial system, and prevents them from defending themselves and obtaining remedies and reparations. The passing of pro- women laws over the last few decades has not served women who were meant to be the ultimate beneficiaries. Since the laws were neither implemented in letter and spirit, nor were any state led systematic, structural contemplative efforts made to educate women and citizens of Pakistan on the protection of their rights.

Structural Barriers: Women's competence to access justice is hindered by structural inequalities at state level and coerced directly by traditional stereotypes. The ineffective delivery system to provide justice to women prevents them from filing grievances and suing or prosecuting those who violated their rights. This rampant challenge has become a ruthless reality for women's lives in Pakistan.

The UNDP ranked Pakistan 121st on the Gender Inequality Index due to women's unequal access to resources and entitlement to rights in the country.¹²⁰ National and international statistics published widely across nations, portrays a trend that women in Pakistan do not possess and are not encouraged to occupy senior positions as legislators, managers and senior officials. If they are found in some senior positions, unfortunately, they are seen serving as the 'mouth piece' of political parties safeguarding the interests of their masters.

Structural and political initiatives such as the adoption of the National Plan of Action for Women (1998), as a step forward to the Fourth World Conference on Women: Beijing Platform for Action September 1995, the National Policy for Empowerment and Development for Women (2002) and the Gender Reform Action Plan (2004) failed to translate into implementation and developing concrete measures. There has been evident

¹¹⁸ <http://www.pk.undp.org/content/dam/pakistan/docs/MDGs/MDG2013Report/final%20report.pdf>

¹¹⁹ http://www.unesco.org/education/pdf/283_102.pdf

¹²⁰ <http://www.pk.undp.org/content/dam/pakistan/docs/MDGs/MDG2013Report/final%20report.pdf>

deliberate neglect by the state, a lack of adequate allocation of development budgets and mismanagement within bureaucracies, often resistant to gender-based programmes. Pakistan was one of the first countries to adopt the international agenda of the Sustainable Development Goals (SDGs), which includes a set of 17 goals and 169 targets to end poverty, fight inequality and injustice, and address climate change. It also includes a stand-alone goal on gender equality and empowerment of women and girls. Success of the SDGs will rest largely on its seamless integration into the planning process, in addition to the availability of requisite funds and prudent resource utilization both at the federal and provincial levels.¹²¹

Unfortunately in Pakistan, over the period of almost seven decades, no deliberate effort has been made to include the women's agenda or women's empowerment from its very roots. The Mid Term Development Framework 2005-2010, the operational plan for reducing poverty in Pakistan acknowledges gender issues, emphasizing the integration of women across all sectors and promoting both: gender responsive budgeting in each line ministry and department, and making gender concerns a part of the macro economic framework. However, the analysis in both the documents overlooks the significance of power structures in the creation and maintenance of social exclusion and poverty, and their role in impeding efforts to overcome it.¹²² Despite posturing in the name of women's empowerment policies, and legislation of pro- women laws, the state has not shown a serious commitment and political will to eradicate gender disparity in Pakistan. Since women have not been considered an "agency" thus their political, and economic needs based on self-reliance, and independent identity are not only ignored but also keep them entrenched in their established roles of housekeeping, child rearing and reproduction, and do not allow them to challenge the status quo. The rise of poverty exacerbates conditions of oppression for women and children. The principle barrier in overcoming gender inequality is societal perception of women as lower status dependents. A fact reinforced both by customary practices and the laws of the land. Other obstacles include the invisibility of women's work and inadequate recognition of their contribution within the household and by extension in society. As a result women's work is menial and low paid, even when it is time and energy consuming, contributing relatively little towards poverty eradication. Women remain uninformed about opportunities, assets and services, and they have neither ownership nor control over resources. Moreover, women's mobility is restricted, skills are not always marketable and their voices not heard. In other words women are largely disempowered. The major challenge is to create an acceptance of a more public and active role for them that opens the pathways of empowerment for women.¹²³

Women are completely absent from the state structures and decision-making bodies that could introduce such structural changes to safeguard women. Women's genuine inclusion in spite of being limited to numbers and headcounts in governance structures from macro to micro level is critical to bring about a considerable shift in the development discourse of government lead policy initiatives that would steer a visible shift in gender relations in society. Presently, in order to maintain the status quo, institutionalized violence against women at the family, community, and state levels is used as a mechanism to ensure their compliance with gender norms. This serves to prevent any attempt leading to the

¹²¹ <https://tribune.com.pk/story/1125381/gender-budgeting-pathway-sustainable-development/>

¹²² <http://www.finance.gov.pk/poverty/Gender.pdf>

¹²³ <http://www.finance.gov.pk/poverty/Gender.pdf>

subversion of the patriarchal order. Poignantly, at the same time, a great deal of rhetorical responsiveness has been paid to gender issues at the national level in the form of pro-women legislations and condemning every other murder in the name of honour, and physical abuse of women, burning them alive, or forcing them to remain in an exploitative workplaces. The consistent, informed and conscious persuasion of the state to transform its commitment to gender equality into concrete reality is the major challenge faced by women in Pakistan.

Economic Situation Women in Pakistan: Women participate fully in economic activities in the productive and reproductive sphere. The economic value of women's activities in the reproductive sphere and unpaid work as family labour, in the productive sphere has not been recognized as productive and is not accounted for in national statistics. The nature and sphere of women's productivity in the labour market is largely determined by sociocultural and economic factors.¹²⁴ The state has disappointedly failed to realize that women focused budget processing and conscious efforts for inclusion of a gender perspective that allows policy makers to identify indicators of gender disparity and to address them in accordance to their needs while keeping in consideration the social cultural realities has been ignored. The only way to deal with the feminisation of poverty is the inclusion of systematic structural Gender Responsive Budgeting (GRB) an approach that creates enormous space for women specific needs to be heard at policy level, hence the budgets should be prepared with a gendered lens.

Gender equality and public financial management as a tool of policy analysis, incorporates gender equality principles at all stages of the budget cycle including formulation, discussion, scrutiny and debate. In doing so, the budget transforms a simple exercise of resource allocation into an essential tool for social empowerment, economic progress and social change. GRB ensures that resources are allocated in the budget based on the different needs and interests of individuals from different social groups.¹²⁵

Trend analysis of previous years' spending and budgeting, alarmingly reveals that women centric budgets has always been limited to merely provision of vocational trainings, strengthening of women shelters which run without following Standardized Operating Procedures (SOPs). It has been evident in the development schemes included in the Annual Development Programme (ADPs) invariably from national to district levels, women centric or gender response budgeting is not taken into consideration. Women's needs are mostly dealt with under social welfare charity oriented schemes such as distributing sewing machines, provision of monthly nominal widow's allowance or distribution of ration among the needy during Ramazan under the schemes of Social Safety Nets (SSN). The Poverty Reduction Strategy Paper (PRSP) reiterated GOP's commitment made at the Beijing Conference to mainstream gender as a policy. It also recognized the shift from the earlier social welfare approaches and the need to empower women for equitable access through removing social and economic constraints. The PRSP identified priority areas for addressing gender inequality which include: gender responsive budgeting (GRB) to analyse budgets at different administrative levels for allocation of resources; leadership training of women councilors and members of provincial assemblies; micro-credit facilities for women

¹²⁴ <https://www.adb.org/sites/default/files/institutional-document/32562/women-pakistan.pdf>

¹²⁵ <http://www.finance.gov.pk/poverty/Gender.pdf>

through the Pakistan Poverty Alleviation Fund (PPAF), First Women Bank (FWB), Agricultural Development Bank (ADB) and Khushali Bank; and the reinstitution of 5% quota for women in government jobs. However, the structural inadequacies, inconsistency, political instability, and continued war on terror has pushed women's agenda to the margins. Nevertheless, a little realization has been shown in previous year's budget sessions for the need to mainstream gender in the federal and provincial budgets. The powerful political elite, misogynists legislators, and civil bureaucracy, among others, have failed to realize that gender budgeting is not necessarily about separate and special allocations for women and girls. Instead it is a way of thinking about all social dimensions including but not limited to age, sex, race, ethnicity and location. Policy papers and corresponding rigorous initiatives aided and facilitated by international donors to empower women to reduce their vulnerability in the hands of patriarchal and controlling corridors could not make a difference but rather impacted adversely on the lives of women. A recently published report of the World Economic Forum (WEF) exposed that Pakistan has been ranked the second-worst country in the world for gender inequality for the second consecutive year. According to the World Economic Forum's Global Gender Gap Report 2016, Pakistan ranks 143 out of 144 countries in the gender inequality index, way behind Bangladesh and India which rank 72nd and 87th respectively. Pakistan is also the worst performing state in South Asia and has been for the last couple of years, while Sri Lanka ranks 100th, Nepal 110th, the Maldives 115th and Bhutan 121st.¹²⁶ Pakistan ranked 112th in 2006, the first year of the report. Since then, its position has deteriorated every year. Pakistan ranked 135th in 2013, 141st in 2014 and 143rd in 2015. The report captures progress towards parity between men and women in four areas: educational attainment, health and survival, economic opportunity and political empowerment. In its latest edition, the report finds that progress towards parity in the economic pillar has slowed dramatically with the gap — which stands at 59% — now larger than at any point since 2008.¹²⁷

One of the strong elements of sustainable development lies in the long-term investments in human capital. This means ensuring adequate investment in the health and education sectors without discrimination, as well as ensuring equal opportunities of access to justice and resources for women and men equally. GRB has the potential to undertake policy analysis for fiscal redistribution which is required for the achievement of the SDGs. Nonetheless, In spite of efforts for gender responsive budgeting in the past, the government has not been able to produce a segregated data base on budget spending for women's welfare and rights. Sadly, all governments, federal and provincial, do not divulge what exactly is being spent on women.

Oxfam proposed a comprehensive international action plan post 2015, aimed at monitoring policy implementation, which is time-bound and has strong accountability mechanisms.¹²⁸ This proposal is driven by a sense of urgency to step up existing responses and renew a commitment to the elimination of VAW. Without a focused and co-ordinated approach to the elimination of VAW, as a fundamental human right and development issue, it is highly unlikely VAW can be curbed and eliminated. Such an action plan can also serve as a critical

¹²⁶ <http://www.dawn.com/news/1292347>

¹²⁷ <https://www.weforum.org/reports/the-global-gender-gap-report-2016>

¹²⁸ D. Rosche (2013) 'Ending violence against women: The case for a comprehensive international action plan', Oxfam International, <http://www.oxfam.org/en/policy/ending-violence-againstwomen-action-plan>

measure to complement a target on VAW within a gender goal in the post-2015 agenda. Oxfam proposes the following four priority areas for an international action plan to eliminate VAW:¹²⁹

- Develop and strengthen laws for women's rights and gender equality;
- Prioritize and reallocate financial resources to end VAW;
- Make the elimination of VAW high-level government business;
- Fragile states must develop strategies for organizing responses to VAW in conflict settings.¹³⁰
- Women friendly legislation is a cornerstone of women's empowerment and protection. However, if the implementation mechanisms are not developed, financed and are held accountable, the whole exercise of protecting women would go futile. The Government of Pakistan needs to reconsider its roadmap to women's real empowerment and prioritize its mandate to safeguard women's rights; enhance access to justice, provision of legal aid, holding relevant departments accountable and giving due space to national and provincial Commissions on the status of women to provide oversight to these gender based violence response mechanisms and recommend constructively in the best interest of women of Pakistan.

Women's empowerment and their access to justice cannot be achieved without full gender equality. This requires the removal of structural barriers on the way of accessing justice, such as formal legal equality, comprehensive sexual and reproductive health care, protection by the police and the judiciary and access to justice. Also the removal of barriers restricting women's access to jobs, markets, participation at all levels, including leadership positions, is essential. Women's and girls' rights need to be upheld, protected and enforced. Where rights do not exist yet, they must be established. Policies designed to implement these rights need to be put into practice, complemented by monitoring tools, such as timelines, concrete targets and indicators.

Recommendations

In light of the barriers identified above, the following recommendations have been suggested:

- Reforms of the criminal justice system with a view to achieving greater gender sensitivity, especially for women survivors of violence.
- The aforementioned discriminatory provisions in the law should be harmonised with Pakistan's international commitments.
- Utilisation of the mechanism of the Benazir Income Support Programme (BISP) to recruit new lawyers to provide pro bono services in return for an honorarium for each case they represent.

¹²⁹ Ibid.

¹³⁰ Ibid.

- Ensuring that laws passed by the Parliament also have a government implementation strategy to ensure that the intended rights in the laws are guaranteed.
- Institutionalization and capacity building on alternative dispute resolutions, like mediation and arbitration, to decrease the backlog of cases in the courts.
- Pro bono services and legal aid should be institutionalized in all District Bar Associations for clients' access to justice.
- Capacity building of the judiciary to ensure gender sensitivity and a sense of gender power disparity when disposing of cases with regards to women.
- Provincial Governments of Khyber Pakhtunkhwa (KPK) and Balochistan should appoint an Ombudsmen under the Protection Against Harassment of Women at Work Place Act 2010, to provide grievance redressal mechanisms to complainants of sexual harassment.
- The Punjab Government should institute an implementation strategy for efficacious implementation of the Punjab Protection of Women Against Violence Act 2016, and uphold the 'measures for implementation'¹³¹ provision of the law.
- The Balochistan Government should notify Protection Committees under the Balochistan Domestic Violence (Prevention and Protection) Act 2014¹³² for efficacious implementation and grievance redressal of survivors of domestic violence.
- The Sindh Government should notify Protection Committees according to the Domestic Violence (Prevention and Protection) Act, 2013 to provide grievance redressal to survivors of domestic violence.¹³³
- The Khyber Pakhtunkhwa Government should establish Child Protection Units in all districts of Khyber Pakhtunkhwa with the relevant personnel under the Khyber Pakhtunkhwa Child Protection and Welfare Act 2010.¹³⁴
- The Sindh Child Protection Authority should establish Child Protection Units for each local area as defined under the Sindh Child Protection Authority Act 2011.¹³⁵
- Respective Provincial Governments should ensure that laws passed by the Provincial Assemblies should also have a government implementation strategy so that the intended rights in the laws are guaranteed.
- Criminal Justice Reforms, including police reforms, should be undertaken by respective provincial governments. Implementation of Police Order 1934 for investigations should also be ensured.
- Provincial Governments should introduce a system of online FIRs for easy access for complainants.

¹³¹ Punjab Protection of Women Against Violence Act 2016, section 3.

¹³² Balochistan Domestic Violence (Prevention and Protection) Act 2014, section 14.

¹³³ Sindh Domestic Violence (Prevention and Protection) Act 2013, section 17.

¹³⁴ Khyber Pakhtunkhwa Child Protection and Welfare Act 2010, section 9.

¹³⁵ Sindh Child Protection Authority Act 2011, section 16.

- Women police stations and recruitment of women police should be ensured in all provinces by respective Provincial Governments.
- Provincial Governments should promulgate and institute mechanisms to provide psycho-social support to torture victims.
- Civil society organizations should synergize efforts to eradicate gender based violence and adopt a holistic approach for women's empowerment.
- Development initiatives by Civil Society Organization (CSOs) should form a nexus with previous initiatives and ensure continuity and sustainability in order to bring change.
- Partnerships with government should be strengthened by CSOs to further the human rights agenda.
- CSOs should synergize efforts with the government and judiciary on implementation of pro-women laws.
- CSOs should provide expertise and resources to further a common agenda of women's rights.
- The Federal Government should ensure capacity building of the prosecution branch to deal with cases of violence against women through survivor-centric communication skills.
- Provincial governments should develop a policy framework to address and rectify the power and resource imbalances between public prosecutors and defense lawyers.
- Provincial Governments should institute an accountability mechanism for medico-legal officers, especially in cases of their negligence or tampering with evidence in line with the Criminal Law (Amendment) (Offence Relating to Rape) Act 2016.
- Provincial Governments should ensure the capacity building of prosecutors to deal with cases of violence against women, and understanding the impact of legal trial decisions on survivors of violence.
- Provincial Governments should ensure capacity building and training of prosecutors on evidence based prosecution, and providing efficient services for grievance redressal for women survivors of violence.
- Provincial Governments should ensure provision of medical equipment, like rape-kits, at police stations and medico-legal officers to ensure proper collection of evidence for a trial.
- Provincial government should build the capacity of medico-legal officers regarding gender sensitive support and survivor-centric communication skills to deal with cases of gender based violence.
- Provincial governments should recruit female medico-legal officers and forensic experts to deal with cases of gender based violence.
- Provincial governments should institute necessary reforms regarding Investigating Officers and the police for gender sensitive grievance redressal of complainant or survivors of violence.

6. Women Accessing Justice: Case Studies

6.1 Rape

Rubina¹³⁶, aged 15/16 years lived in Village Marghzani of District Sibi along with her parents. On an ordinary day, Rubina's father and mother went about their usual business. The father went to the fields to work along with his wife. When he returned home at around 6:00 pm, his daughter, in a state of distress, told her father that her maternal uncle had forcibly taken her to his house where he raped and violated her. Rubina's hair had been torn off, and she had visible wounds on her face. The father seeing his daughter in this state went to the police to file his complaint. An FIR under Sections 376 and 337 was filed against the accused rapist. Formal investigations were conducted. Rubina and her uncle were both examined by the Medical Officer of District Head Quarter (DHQ) Sibi.

The medical legal certificate of the accused uncle proved potency to commit sexual acts. However, the Medico Legal Certificate (MLC) highlighted a lack of any marks of violence on the accused rapist while the stained cloth pieces of a *shalwar* were to be sent for chemical analysis. Rubina was examined at 11:30 pm, approximately four and half hours after the rape incident. However, as the laboratory was closed her tests were taken three days later. Rubina's examination showed a different story. Rubina's medical examination revealed that there were three scratches on her cheeks, her hymen had been completely perforated and she was six weeks pregnant. The dentist's opinion was sought who confirmed that Rubina was under 18 years old. Rubina's clothes were torn but no trace of semen was found on her clothes. The medical examination of both the accused uncle and Rubina was therefore inconclusive in bringing a guilty verdict beyond reasonable doubt.

The lawyer for the accused cross examined the medical legal officer who had examined Rubina. During the cross examination the MLO agreed with the defence lawyer that generally when a girl of the same age as the survivor is raped, she may become unconscious, unlike Rubina. The MLO during the trial also stated that Rubina's genitals were not damaged or bruised as per the expectation when examining a rape survivor of her age. By such questioning, the defence sought to prove consent between Rubina and the accused uncle and acquit the accused from rape. The medical evidence and questioning did not conclusively favour Rubina's story.

However, during the trial one of the eye witnesses for the rape incident turned out to be the accused's wife and Rubina's maternal aunt who admitted under oath that she had witnessed the accused committing rape, and when she confronted him he threatened to divorce her. At the same time he threatened Rubina with her life and the life of her parents in case she told anyone. On the said day of 5th January, Rubina's maternal aunt and key witness was present in the house when the accused forcibly brought her to his house to rape her. In view of these findings the defence resorted to "cheap tactics". The accused submitted in court that he was being victimized as Rubina had illicit relations with her maternal uncle, and were framing the accused as he had forbidden them from such acts and had also informed Rubina's father about their illicit relations.

¹³⁶ Name of the survivor has been changed to maintain anonymity of the survivor.

While the defence resorted to defamation and character assassination of Rubina, the court pointed out to the testimony of the accused's wife and Rubina's maternal aunt. The court stated that her testimony was of paramount importance and it inspired confidence. Furthermore, the court also stated that the witness testimonies fully corroborated the averments made by the prosecution. In terms of Rubina's pregnancy, it was proved through witness testimonies and prosecution's version of events that the accused had raped Rubina four or five times and therefore the pregnancy arose as a result of that. The Additional Sessions Judge referred to the definition of rape and augured that the acts of the accused fell within the definition:

Rape Section 375:

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.

His Honourable Judge also relied on the case of **Shabbir alias Kukku & others V State** which held:

'Solitary statement of the victim if found truthful and confidence inspiring in a rape case under the law is sufficient to base conviction'.

Rubina was therefore able to receive justice from the courts in the form of a guilty verdict for her maternal uncle who had repeatedly raped her. The Additional Sessions Judge Sibi convicted Rubina's maternal uncle for rape with imprisonment for a term of ten years and a fine of Rs. 50,000.

6.2 Dowry

Dania¹³⁷ was a divorced woman in Pakistan. Her husband exercised his unilateral right to divorce and pronounced *talaq* in 2009, thereby rendering her the stigma of a divorced woman. Despite initiating divorce, Dania's husband in order to evade any liability towards her rights vehemently denied having divorced her. Dania in pursuit of her right to maintenance and dower filed a suit with the courts under the Family Laws of Pakistan. On her plea and appeal, the Additional District Court of Abbottabad issued a verdict in her favour thereby granting her maintenance from 2009 to 2015, as per the terms of the *nikahmana* in consonance with the denial of the husband regarding his pronouncement of *talaq*. During the trial, Dania put on record the mental and emotional abuse suffered during her marriage. She also highlighted the cruel and degrading behaviour of her husband and the misery she suffered as a consequence of his actions.

However, the case was appealed to the Peshawar High Court, Abbottabad Bench. After the High Court pursued the facts of the case, it was decided that the pronouncement of *talaq* occurred in 2009. Due to the end of marriage, Dania was entitled to maintenance for three months of her *iddat* period and not six years as decided by the lower courts. In consideration of the facts and documentation submitted by Dania, the courts highlighted the cruel and ill-intentioned actions of her husband who practically forced her into litigation by denying and suppressing her rights even after a divorce.

The High Court referred to the *nikahnama* contracted between Dania and her husband and stated that even though her husband was not liable for maintenance for more than three months, he was liable to give her dower amount as agreed. Therefore, the High Court ordered Dania's husband to give her the dower amount of Rs. 100,000 as well as the possession of a two bedroom house as stipulated in their marriage contract. Overall, the High Court protected Dania's right by ensuring her that she receive her rightful dower amount as well as her maintenance for *iddat* by her husband. In order to ensure execution, the High Court further gave Dania's husband a time frame of two months to ensure implementation of this Order.

6.3 False Accusation of Zina

Farhat¹³⁸ lived near Nala Mehal in a small village in Azad Jammu and Kashmir (AJK). Farhat's father arranged her engagement to Saif Khan with whom she eventually fell in love. She and Saif Khan developed an attachment and could not imagine living a life without each other. One day, her father told her that he intended to break off her engagement and want her to marry Waleed Hassan. Farhat refused and married Saif Khan against the will of her family which led to her family filing a complaint against Saif Khan for abduction of Farhat and *zina* between the parties. The FIR was duly registered by the police and the case was litigated till the Supreme Court of Azad Jammu and Kashmir.

Farhat's brother was the main complainant and alleged that Farhat was already married to Waleed Hassan, and therefore could not have contracted a marriage with Saif Khan. Farhat's

¹³⁷ Name of the survivor has been changed to maintain anonymity of the survivor.

¹³⁸ Name of the survivor has been changed to maintain anonymity of the survivor.

brother's case was represented by the Additional Advocate-General in the Supreme Court who vehemently argued that Farhat was already under the *nikah* of Waleed Hussain, and therefore she was committing *zina* by living with Saif Khan. Saif Khan's lawyer however presented the story that Farhat was initially engaged to Saif Khan but her father broke off the engagement and was forcing her to marry Waleed Hussain. However, Farhat refused and married Saif Khan instead. The entire FIR and criminal litigation has been a case of revenge by Farhat's brother and father.

The Honourable Judge noted that despite all allegations by Farhat's brother, they did not produce any *nikahnama* in court proving her marriage with Waleed Hussain. However, Farhat has been married to Saif Khan since 2003, and even had children with him. Upon losing this argument, Farhat's brother argued that her marriage with Saif Khan was invalid as her father, the *Wali*, did not consent to it. In response to these arguments, the Supreme Court stated the following by relying on **Mst. Dilshad Akhtar & another vs. State etc.** reported as PLJ 1996 Lahore, 91:

"Reference here may be made to Art. 4(2) (b) of the Constitution of Pakistan wherein it is laid down that no person shall be prevented from or be hindered in doing that which is not prohibited by law. The law did not prohibit the petitioners from marrying each other and does not prohibit them from living with, each other as husband and wife. This is their Constitutional guarantee and it cannot be taken away by any one. Similarly Art. 35 of the Constitution of Islamic Republic of Pakistan makes it the duty of the State to protect the marriage, the family, the mother and the child."

The Supreme Court of Azad Jammu and Kashmir upheld the constitutional rights of Farhat. Moreover, the Supreme Court also reiterated the validity of consent and willingness given by a woman to marry a man of her choice, even in the absence of her father's or *wali's* consent. The Supreme Court relied on **Mst. Nasrin Akhtar vs. State**, reported as PLJ 1994 Cr.C (AJK) 389, and observed:

"She stated that she wanted to contract her marriage with Aurangzeb out of her own free will but her father and uncle Wazir and her cousin Mehboob were against this marriage and now they were all out to damage her. She also deposed that she apprehends some foul play on their part. It is also admitted by the prosecution that she subsequently contracted her marriage with Aurangzeb accused on December 28, 1993. After her arrest, she was produced before a lady doctor, who opined that she was above 16 years of age and further that intercourse was committed, with her within the last six days. This report was given by her on 5.1.1994. This shows that apparently in the light of this report, the spouses enjoyed their sex after they contracted the marriage with each other. In this case, admittedly no accusation has been levelled against the female accused-petitioner that previously she was married to any other person. I think, as she was adult, therefore, was legally competent to contract marriage with any person of her choice including Aurangzeb."

By referring to the case above the Supreme Court of Azad Jammu and Kashmir upheld Farhat's right to contract marriage with any man of her choice and also that her choice was valid as she was a sane adult legally competent to make her choice. In light of this, the FIR's registered against her husband were dismissed by the Court.

6.4 Inheritance

Iram¹³⁹ and her two daughters resided in a small village of Sibi named Gharibabad. Iram's husband was a landowner. The basic source of income for the family was from the agricultural lands owned by the family. Iram and her daughters observed *purdah* and therefore were not aware of matters related to land. Even after the death of Iram's husband the land was cultivated by her late husband's nephews who provided income to the family from the lands owned.

However, one day, abusing the trust of Iram and her daughters, the nephews stopped paying the income earned from the lands. When Iram inquired about the income she learned that the nephews had taken over the lands, refused to make payment or give possession and threatened Iram and her daughters of dire consequences if she did anything to recover the lands. Iram feared for her as well as her daughters' safety. Iram pondered over her situation but failed to convince her nephews to give her any income or possession of the property.

After a great deal of negotiations, reluctantly, Iram approached the courts for justice. Since she observed *purdah* as per the customs of her village, she was not exposed to dealing with the outside world. She won the case against the nephews in front of the Senior Civil Judge but the nephews appealed to the District and Sessions Judge. The nephews argued that twenty years ago, upon the death of Iram's husband, as per custom, the lands were mutated in favour of the legal heirs who were the nephews in this case. The lands were not mutated in favour of Iram and her daughters and therefore they could not claim any income or possession of the property.

The Judge however noted that the nephews failed to prove through documents that the lands were mutated in their favour alone upon the death of Iram's husband. Upon failure of this argument the nephews had also argued that their father, the brother of Iram's husband, had actually purchased the share of Iram's husband. Therefore, the lands solely belonged to Iram's brother-in-law and now his sons'. The Judge looked into the mutations filed of the lands in question and concluded that no evidence existed of this transaction.

In view of the documents available on record and Iram's plea the Judge decided that Iram and her daughters had a legal right and share in the lands of her husband, and this right was guaranteed by the laws of the land. Iram was therefore able to get justice and secured the income of her household to live in dignity with her daughters.

¹³⁹ Name of the survivor has been changed to maintain anonymity of the survivor.

6.7 Sexual Harassment

Sakina¹⁴⁰ and her work colleagues worked at a reputable Club with a passion to serve in the hospitality sector and also to gain financial support in the current times of inflation and poverty. Sakina and her colleagues were excited to step out into the real world and develop their careers. They entered the profession at the Club with a certain innocence and naiveté, oblivious to the dangers of people who abuse their authorities. One such person was their Manager.

Sakina and her colleagues dreaded going to his office. His sexual advances were to the point of being physical where he even forced himself on one of her colleagues. With one of Sakina's colleagues he forced her to massage his shoulders and asked her to do the same to his feet. He even tried kissing them and his attempts at satisfying his ill intentions and lust would not stop. When Sakina and her colleagues would resist his advances, he would make them wash his clothes or order other tasks just to humiliate them or pressurize them to submit to his demands. His actions were in line with retaliation as defined in the law on sexual harassment:

'Means any unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment.'

His actions and his sexually charged language, advances and conduct which was resisted by Sakina and her colleagues propelled them to file a complaint with the Ombudsman under the Protection Against Harassment of Women Act 2010. Upon receipt of the complaint, the Club formed an Inquiry Committee under the Protection Against Harassment of Women Act 2010 and conducted its inquiry. Upon the Club's inquiry, the allegations by Sakina and her colleagues proved true and the Manager was terminated from his job.

The Manager filed an appeal with the Ombudsman against the decision of the Inquiry Committee. He argued that he was never successful in his sexual advances and therefore he should be absolved of the charges and reinstated. The Ombudsman in response to his averments stated in the judgement:

'How much he succeeded in that or not; is not a question but his conduct is material which is creating an atmosphere of sexual harassment and offensive work environment in institution among female employees.'

The recommendations and findings of the Inquiry Committee were therefore upheld by the Ombudsman and the Manager was not reinstated.

¹⁴⁰ Name of the survivor has been changed to maintain anonymity of the survivor.

7. Pro-Women Precedents: Case Law

7.1 Rape

7.1.1 2013 SCMR 203 [Supreme Court of Pakistan]

Present: Iftikhar Muhammad Chaudhry, C.J., Jawwad S. Khawaja and Khilji Arif Hussain, JJ

SALMAN AKRAM RAJA and another Petitioners

Versus

GOVERNMENT OF PUNJAB through Chief Secretary, and others Respondents

Constitution Petition No.38 of 2012, decided on 2nd October, 2012.

(Petition under Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973).

(a) Penal Code (XLV of 1860)

Ss. 375 & 376---Constitution of Pakistan, Art. 184(3)---Petition under Art. 184(3) of the Constitution---Rape---DNA test---Significance---DNA test provided the courts a mean of identifying perpetrators with a high degree of confidence---By using DNA technology the courts were in a better position to reach a conclusion whereby the real culprit would be convicted, potential suspects would be excluded and wrongfully involved accused would be exonerated.

Muhammad Shahid Sahil v. The State PLD 2010 FSC 215; Amanullah v. The State PLD 2009 SC 542; Vidhya v. Deputy Superintendent of Police (Crl.O.P. No.36969 of 2007; United State v. Yee 134 F.R.D. 161; Muhammad Azhar v. The State PLD 2005 Lah. 589; Khizar Hayat v. Additional District Judge, Kabirwala PLD 2010 Lah. 422; Khurram Shahzad v. State PLD 2012 FSC 1; The Matter of: Estate of Assets of Late Abdul Ghani 2012 YLR 1752; The State v. Abdul Khaliq PLD 2011 SC 554 and Khadim Hussain v. State 2011 PCr.LJ 1443 ref.

(b) Penal Code (XLV of 1860)

Ss. 375 & 376---Constitution of Pakistan, Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution---Rape---DNA test, conducting of---Scope---Request for administration of DNA test should be made at the earliest stage of the case.

D. Rajeswari v. State of Tamil Nadu (1996) CCR 774 = 1996 Cr.LJ 3795, Geeta Saha v. NCT of Delhi 1999(1) JCC 101; Km. Mahima v. State 106 (2003) DLT 143; Thogorani alias K. Damayanti v. State of Orissa 2004 Cr.LJ 4003; Solaimuthu v. State rep. by Inspector of Police 2005 Cr.LJ 31 and Raghuvir Dessai v. State 2007 Cr.LJ 829 ref.

(c) Penal Code (XLV of 1860)

Ss. 375 & 376--- Constitution of Pakistan, Art.184 (3)--- Constitutional petition under Art. 184(3) of the Constitution---Rape--- DNA test--- Consent of victim, obtaining of--- Scope---Consent of victim was necessary and he/she could not be subjected to DNA testing or other medical test forcibly for prosecution purposes because that would amount to infringement of personal liberty of victim.

Bipinchandra Shantilal Bhatt v. Madhuriben Bhatt AIR 1963 Guj 250; Polavarapu Venkataswarlu v. Polavarapu Subbayya AIR 1951 Mad. 910; Sabayya Gounder v. Bhoopala Subramanian AIR 1959 Mad. 396; Goutam Kundu v. State of West Bengal AIR 1993 SC 2295; Ms. X v. Mr. Z and another 96 (2002); DLT 354; Syed Mohd. Ghouse v. Noorunnisa Begum 2001 Cr.LJ 2028 and Haribhai Chanabhai Vora v. Keshubhai Haribhai Vora AIR 2005 Guj 157 ref.

(d) Penal Code (XLV of 1860)

Ss. 375 & 376---Constitution of Pakistan, Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution---Rape---DNA test---Consent of accused, obtaining of---Scope--- Consent of accused was not required for conducting DNA test or any blood test in order to ascertain truthfulness of the allegation.

Solaimuthu v. State rep. by Inspector of Police (IP) 2005 Cr.LJ 31 ref.

(e) Penal Code (XLV of 1860)

Ss. 375 & 376---Constitution of Pakistan, Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution---Rape---DNA test---DNA samples, preservation of---Scope---DNA samples should be preserved for making their use at an appropriate stage or whenever they were required.

Regina v. Robert Graham Hodeson [(2009) EWCA Crim 490; People v. Pressely 804 (Colo.App.1990); 2010 Maryland Code, Criminal Procedure Sec. 8 - 201; DNA Testing Availability Act Sec. 2292, 106th Congress 1999-2000 and American Bar Association Criminal Justice Standards on DNA Evidence 2006 ref.

(f) Penal Code (XLV of 1860)

Ss. 375 & 376---Constitution of Pakistan, Art. 184 (3)---Constitutional petition under Art. 184 (3) of the Constitution---Rape, victim of--- Non-Governmental Organizations (NGOs), role of---Significance---NGOs played an important role to help the victims of rape, especially girls belonging to poor families---Supreme Court observed that sometimes families of victims were unable to reach NGOs, therefore, such organizations must be registered in police stations so that on receipt of information regarding commission of rape, the Investigating Officer/Station House Officer (S.H.O.) could inform such an organization at the earliest. *Delhi Commission of Women v. Delhi Police* (W.P. No.696/2008 and Delhi Police Standing Order, 303/2009 ref.

(g) Penal Code (XLV of 1860)

Ss. 375 & 376---Criminal Procedure Code (V of 1898), S. 164---Constitution of Pakistan, Art. 184(3)---Constitutional petition under Art.184(3) of the Constitution---Rape, victim of---Recording of statement by a female Magistrate---Propriety---Victims of rape were reluctant to appear before male Magistrates as they could not express their agony appropriately before them, therefore, it was more appropriate if the statements of victims were recorded before female Magistrates, wherever available. *Delhi Commission for Women v. Delhi Police* [W.P.(CRL) 696/2008] ref.

(h) Penal Code (XLV of 1860)

Ss. 375 & 376---Constitution of Pakistan, Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution---Gang-rape---Procedure of trial---Scope---For gang-rape cases, where there was a threat to the life of the victim and her family members, statements could be recorded in camera and trial could be conducted inside the jail. *State of Maharashtra v. Dr. Praful B. Desai* (2003) 4 SCC 601 ref.

(i) Penal Code (XLV of 1860)

Ss. 375 & 376---Criminal Procedure Code (V of 1898), S. 345---Offence of rape, compounding of---Legality---Offence of rape under S.376, PPC was not compoundable.

(j) Penal Code (XLV of 1860)

Ss. 375 & 376--- Constitution of Pakistan, Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution---Rape---Out-of-court settlement/compromise between the parties---Prosecution of case---Scope---Rape was an offence against the whole society and case was registered in the name of the State, therefore where complainant party did not come forward to pursue the matter or produce evidence due to an out-of-court settlement, the State should come forward to pursue the case and courts should also take into consideration such aspects of the case while extending benefit to the accused.

(k) Penal Code (XLV of 1860)

Ss.375 & 376---Constitution of Pakistan, Art.184 (3)---Constitutional petition under Art. 184(3) of the Constitution challenging the legality of a compromise/out-of-court settlement between a gang-rape victim and the accused rapists---Supreme Court observed that rape was an offence against the whole society and case was registered in the name of the State, therefore where complainant party did not come forward to pursue the matter or produce evidence due to an out-of-court settlement, the State should come forward to pursue the case and courts should also take into consideration such aspects of the case while extending benefit to the accused---Supreme Court, however, directed that every police station that received rape complaints should involve reputable civil society organizations for the purpose of legal aid and counselling; that a list of such organizations might be provided by bodies such as the National Commission on the Status of Women; that on the receipt of information regarding commission of rape, the Investigating Officer (IO)/SHO should inform such organizations at the earliest; that administration of DNA tests and preservation of DNA evidence should be made mandatory in rape cases; that as soon as the victim was composed, her statement should be recorded under S. 164, Cr.P.C., preferably by a female Magistrate; that trials for rape should be conducted in camera and after regular court hours; that during a rape trial, screens or other arrangements should be made so that the victims and vulnerable witnesses did not have to face the accused persons, and that evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the victims, particularly juvenile victims, did not have to be present in court---Constitutional petition was disposed of with the said directions.

Muhammad Shahid Sahil v. The State PLD 2010 FSC 215; Amanullah v. The State PLD 2009 SC 542; Vidhya v. Deputy Superintendent of Police (Crl.O.P. No.36969 of 2007); United State v. Yee 134 F.R.D. 161; Muhammad Azhar v. The State PLD 2005 Lah. 589; Khizar Hayat v. Additional District Judge, Kabirwala PLD 2010 Lah. 422; Khurram Shahzad v. State PLD 2012 FSC 1; The Matter of: Estate of Assets of Late Abdul Ghani 2012 YLR 1752; The State v. Abdul Khaliq PLD 2011 SC 554; Khadim Hussain v. State 2011 PCr.LJ 1443; Regina v. Robert Graham Hodeson (2009) EWCA Crim 490; People v. Pressely 804 (Colo.App.1990); 2010 Maryland Code, Criminal Procedure Sec. 8 - 201; DNA Testing Availability Act Sec. 2292, 106th Congress 1999-2000 American Bar Association Criminal Justice Standards on DNA Evidence 2006; State of Punjab v. Gurmit Singh AIR 1996 SC 1393; Sakshi v. Union of India AIR 2004 SC 3566-(2004) 5 SCC 518; State of Maharashtra v. Dr. Praful B. Desai (2003) 4 SCC 601; Delhi Police Standing Order 303/2009 and Delhi Commission for Women v. Delhi Police [W.P.(CRL) 696/2008] ref. Delhi Commission of Women v. Delhi Police (W.P. No.696/2008 rel.)

Salman Akram Raja, Advocate Supreme Court, Ms. Tahira Abdullah, in person assisted by Malik Ghulam Sabir, Amna Hussain Zainab Qureshi and Nadeem Shahzad Hashmi, Advocates for Petitioners.

Jawwad Hassan, Addl. A.G., Punjab, Sadaqat Ali Khan, P.G. Punjab and Muhammad Hanif, S.P., Rawalpindi for Respondents.

Date of hearing: 2nd October, 2012.

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHRY, C.J. ---A 13 year old girl Ayesha Alias Aashi resident of Ratta Amral, Rawalpindi was subjected to gang-rape in March, 2012. Her father Muhammad Aslam approached the concerned Police Station on 21-3-2012 for registration of FIR. No formal FIR was registered, however, upon entry of the complaint in the *roznamcha*, Sub-Inspector Zafar Iqbal took the rape victim to District Headquarters Hospital, Dheenda Road, Rawalpindi for medical examination on 21-3-2012. The concerned medical officer gave his findings/opinion after eight days of examination. Despite confirmation of commission of the offence, the FIR could not be registered. The attitude of the investigating agencies, added to the plight of the victim /girl; she attempted to end her life by committing suicide on 16-4-2012. This incident was highlighted by the media, as such, it came into the notice of this Court, thus the suo motu action was initiated and the matter was registered as HRC No.13728-P of 2012. The Prosecutor-General, Punjab was directed to pursue the case against the accused persons as well as the concerned police officers/officials who delayed the registration of F.I.R. In pursuance whereof, on 18-4-2012 an F.I.R. No.178 of 2012 under sections 375 and 376 of the Pakistan Penal Code, 1860 was registered at Police Station, Ratta Amral. On the direction of this Court, a 4-member police investigation team headed by Additional Inspector General of Police (AIGP), Punjab was constituted, which submitted a report before the Court, holding responsible therein Deputy Superintendent of Police (DSP) Taimur Khan, Sub-Inspectors Jawwad Shah and Zafar Iqbal for tampering the *Roznamach* and causing inordinate delay in the registration of FIR. Departmental proceedings were initiated against all the responsible police officers/officials, but on 22-5-2012 when the case was fixed before the Sessions Judge, Rawalpindi, the complainant Muhammad Aslam informed the court that he had reached an out-of-court settlement for a consideration of Rs.1 million with the accused persons and would drop the charge of gang-rape against them.

2. In the above background, the petitioners, apprehending the acquittal of the accused under section 265-K of the Criminal Procedure Code, 1898 approached this Court by means of instant Constitution Petition. According to them, in such cases, the out-of-court settlement constitutes a mockery of justice and abuse of law (Cr.P.C.) and violates the fundamental rights of the victim because such offences i.e. rape etc. are not against a single person but affect the whole society. They made the following prayers:

- (i) That the out-of-court settlement reached between this complainant and the accused persons be declared as invalid and a nullity in the eyes of the law and any order, including acquittal, passed by the trial court be set aside.
- (ii) That the criminal liability of an accused person for a non-compoundable offence such as rape be declared to be wholly unaffected by any out-of-court settlement.
- (iii) That the Province of Punjab and the Prosecutor-General Punjab be directed to proceed with the prosecution of the accused persons for the gang-rape of the victim committed that complainants and witnesses can safely depose the truth without fear of intimidation and threats.

- (iv) That the Inspector-General Punjab be directed that the accused police officers liable for misconduct and causing delay in the registration of the F.I.R be duly punished according to the law.
- (v) That the Inspector-General Punjab be directed to enforce stringent checks and policies within the Police Department to ensure that superior police officers are more vigilant in preventing delays which result in such grave miscarriages of justice.
- (vi) The State and the Provinces be directed to ensure DNA testing in every rape case.
- (vii) Make such other directions as are necessary to protect victims, complainants and witnesses so as to enable proper and due prosecution of rape cases.

3. The matter was taken up on 31-5-2012 and the notices were issued to respondents as well as to Prosecutor General and PPO, Punjab to appear and explain the circumstances, under which the acquittal in the said case was recorded by the trial Court and as to whether they had filed an appeal or not? On the next date of hearing Mst. Tahira Abdullah submitted a report stating therein that the aggrieved family did not receive any compensation for the *razinaamas* (compromise) through which they forgave the nominated accused and the said compromise was a result of violent intimidation and threat to their lives. Mr. Salman Akram Raja, Advocate Supreme Court stated that due to interjection by the *jirga*, the prosecution witnesses had not supported the prosecution case and were compelled to make compromising statements before the Court which culminated into acquittal of the accused.

4. Mr. Salman Akram Raja, learned Advocate Supreme Court/ petitioner has submitted that the administration of DNA tests should be made mandatory in rape cases because the courts have accepted the DNA test results as an admissible form of evidence in terms of the Qanun-e-Shahadat Order, 1984 as well as the Holy Quran and Sunnah. He has placed reliance upon the case of Muhammad Shahid Sahil v. The State (PLD 2010 FSC 215), wherein the DNA tests have been deemed admissible to determine paternity of the child of a rape victim by the Federal Shariat Court. The Court has further held that the Quran and Sunnah nowhere forbid the use of DNA tests rather strongly recommend recourse to such scientific methods; the DNA tests are the best possible evidence in rape cases and therefore should be adopted by prosecution agencies. He has also placed reliance on the case of Amanullah v. The State (PLD 2009 SC 542) wherein it has been held that while relying upon the DNA test results in cases where confidence cannot be placed on the capacity, the competence and the veracity of the laboratory and the integrity of one conducting such a test, caution should be taken, whereas, it does not prevent making the administration of DNA tests mandatory in rape cases. In fact, the judgment prevented the accused from placing reliance on DNA test results exonerating his guilt even though all other circumstantial evidence indicated the contrary. He has further submitted that making the administration of DNA tests mandatory in rape cases will not violate Article 13 of the Constitution which provides protection against self incrimination. He has placed reliance on the case of Vidhya v. Deputy Superintendent of Police (Crl. O.P.No.36969 of 2007) wherein the court held that compelling an accused in a rape case does not amount to testimonial compulsion. The petitioner has also submitted

that directives for making DNA tests mandatory have been issued by the Faisalabad police in cases of sexual assault and therefore can similarly be extended to rape cases in all jurisdictions.

5. In this regard it is to be noted that the administration of DNA tests in order to determine the truthfulness of the allegation of crime is not new. Initially the DNA was not so reliable, therefore, the Courts often excluded it from the evidence and not based the conviction on it. However, in the last decade or so DNA technology has advanced significantly, and introduction of DNA profiling has revolutionized forensic science. Now DNA tests provides the courts a means of identifying perpetrators with a high degree of confidence. By using the DNA technology the courts are in a better position to reach a conclusion whereby convicting the real culprits and excluding potential suspects as well as exonerating wrongfully involved accused. Reference may be made to the case of *United State v. Yee* (134 F.R.D. 161), wherein conviction was recorded on the basis of DNA test results.

In Pakistan the courts also consider the DNA test results while awarding conviction, however, the same cannot be considered as conclusive proof and require corroboration/support from other pieces of evidence. In the case of *Muhammad Azhar v. The State* (PLD 2005 Lahore 589) the Court has accepted the admissibility of DNA test results in the following words:

"18. The DNA test may be an important piece of evidence for a husband to establish an allegation of zina against his wife and use this as a support justifying the taking of the oath as ordained by Surah Al-Noor, which leads to the consequences of breaking the marriage. The DNA test may further help in establishing the legitimacy of a child for several other purposes. Therefore, its utility and evidentiary value is acceptable but not in a case falling under the penal provisions of zina punishable under the Hudood Laws having its own standard of proof."

In *Muhammad Shahid Sahil's* case (supra) the Federal Shariat Court has laid great emphasis on the administration of DNA tests in rape cases. The Court has also overruled the finding of the High Court in *Muhammad Azhar's* case to the effect that DNA tests has no evidentiary value in a case falling under the penal provisions of *zina* punishable under the Hudood Laws having its own standard of proof. Relevant paragraphs, from the said case are reproduced below:

10. In criminal cases the identity of the actual accused is an element of primary importance. A lot of pre-meditation, improvements and tactical delays on the part of the complainant party can be checked if scientific analysis is resorted to. Apart from saving time and ensuring quick disposal of cases particularly of sexual assault, such an exercise can act as a deterrent in future. Many genuine complaints remain unresolved due to a stereotype method of investigation. From the point of view of a new born it is his right to be born with known paternity. The law, be it enacted or judge made, must come to the rescue of the aggrieved.

12. Article 164 of the Qanun-e-Shahadat Order, 1984 has resolved the problem by enacting that in such cases that the Court may consider it appropriate it may allow it to produce any evidence that may become available because of modern devices or techniques.

Reference may also be made to the cases of *Khizar Hayat v. Additional District Judge, Kabirwala* (PLD 2010 Lahore 422), *Khurram Shahzad v. State* (PLD 2012 FSC 1). The matter of: *Estate and Assets of Late Abdul Ghani* (2012 YLR 1752), *The State v. Abdul Khaliq* (PLD 2011 SC 554). In the case of *Khadim Hussain v. State* (2011 PCr.LJ 1443) the Federal Shariat Court has held that despite the fact that the DNA report about the swabs did not match with the profile of accused, the observations of lady doctors, were enough evidence of the fact that victim had been subjected to sexual intercourse; opinion of the lady doctor lent corroboration to the statement of the victim that accused had subjected her to *zina* ; non-receipt of matching report of DNA test, did not negate the ocular account of prosecution witness. In *Abdul Khaliq's* case (supra), the Court has emphasized upon the administration of DNA test especially in gang rape cases. However, it is consistently held by the superior Courts that the request for administration of DNA tests should be made at the earlier stage of the case. Reference may also be made from Indian jurisdiction to the cases of *D. Rajeswari v. State of Tamil Nadu* ((1996) CCR 774) = (1996 CrLJ 3795), *Geeta Saha v. NCT of Delhi* (1999(1) JCC 101), *K. M. Mahima v. State* (106 (2003) DLT 143), *Thogorani alias K. Damayanti v. State of Orissa* (2004 Cr.LJ 4003), *Solaimuthu v. State rep. By Inspector of Police* (2005 Cr.LJ 31) and *Raghuvir Dessai v. State* (2007 Cr.LJ 829).

6. It is well settled that the consent of victim is necessary and she/he cannot be subjected to DNA or other medical test forcibly for prosecution purposes because that would amount to infringement of personal liberty of such persons. Reference may be made to the cases of *Bipinchandra Shantilal Bhatt v. Madhuriben Bhatt* (AIR 1963 Guj. 250), *Polavarapu Venkataswarlu v. Polavarapu Subbayya* (AIR 1951 Mad. 910), *Sabayya Gounder v. Bhoopala Subramanian* (AIR 1959 Mad 396), *Venkateswarulu v. Subbayya* (AIR 1951 Mad. 910), *Goutam Kundu v. State of West Bengal* (AIR 1993 SC 2295), *Ms. X v. Mr. Z and another* (96 (2002) DLT 354), *Syed Mohd. Ghouse v. Noorunnisa Begum* (2001 Cr.LJ 2028) and *Haribhai Chanabhai Vora v. Keshubhai Haribhai Vora* (AIR 2005 Guj. 157). In *Syed Mohd. Ghouse's* case (supra), the Andhra Pradesh High Court relying upon the case of *Gautam Kandu* (supra), quashed and set aside the order for conducting a DNA test by observing that before ordering the blood test, either for DNA or other test, the court has to consider the facts and circumstances of the given case and the ramifications of such an order. But the Court cannot compel a person to give the sample of blood. In *Haribhai Chanabhai Vora's* case (supra) the Gujarat High Court has held that when the petitioner (therein) had not given consent, he could not be compelled to submit himself for DNA test as it would be interfering with the personal liberty, and at the most, adverse inference can be drawn at the final conclusion. Thus, it is held that the Court has power to order for DNA or any blood test in order to ascertain the truthfulness of the allegation levelled by the victim but such an order must be with the consent of the victim. However, this benefit cannot be extended to the accused. Reference in this behalf may be made to *Solaimuthu's* case (ibid), wherein the Madras High Court held that DNA tests did not offend Article 20(3) of the Indian Constitution.

7. The petitioner has further submitted that the preservation of DNA samples should be made mandatory in rape cases because the same is essential to allow the administration of DNA tests after a considerable amount of time has passed since the commission of rape. He has placed reliance on the case of *Regina v. Robert Graham Hodeson* ((2009) EWCA Crim 490) wherein the court quashed a conviction for rape and murder after 27 years due to a DNA test conducted post-conviction that proved the innocence of the accused. The petitioner has further submitted that failure to preserve potentially exculpatory evidence

can amount to a violation of due process if the accused can show that the evidence was suppressed or destroyed by the prosecution; the evidence possessed an exculpatory value that was apparent before it was destroyed; and the victim was unable to obtain comparable evidence by other reasonably available means. Reliance in this behalf has been placed on the case of *People v. Pressley*, 804 (Colo. APP. 1990); 2010 Maryland Code, Criminal Procedure Sec 8-201; DNA Testing Availability Act Sec 2292, 106th Congress (1999-2000) and American Bar Association Criminal Justice Standards on DNA evidence 2006. According to the petitioner, these provisions and standards stipulate mandatory collection and preservation of DNA samples and also provide ramifications for failures to do the same.

We are in agreement with the learned counsel to the extent that DNA samples etc. should be preserved to make use of it at the appropriate stage whenever is required. However, the legislature is free to regularize the procedure by making appropriate legislation in this behalf.

9. Petitioner, Mr. Salman Akram Raja, Advocate Supreme Court has submitted that NGOs which provide counseling and other forms of support to rape victims, must be registered in Police Stations so that on receipt of information regarding the commission of rape, the Investigating Officer/Station House Officer should inform such NGOs at the earliest. He placed reliance upon the case of *Delhi Commission of Women v. Delhi Police* (Writ Petition No. 696 of 2008), wherein the Delhi High Court classified certain NGOs providing counselling services for rape victims as "Crisis intervention centers". He also placed reliance on a Delhi Police Standing Order 303 of 2009 in which the Police implemented the aforementioned judgment by directing the IOs/SHOs to contact these NGOs at the earliest when they receive information about the commission of a rape. It is to be noted that in Pakistan the NGOs play their important role to help the victims of rape, especially girls belonging to poor families. However, sometimes, the family of a victim cannot approach such NGOs. Therefore, the suggestions of Mr. Salman Akram Raja, carry weight.

10. The petitioner has also submitted that as soon as a victim of rape approaches, her statement should be recorded under section 164 of the Code of Criminal procedure, 1898 preferably by a female Magistrate. He has placed reliance on the case of *Delhi Commission for Women v. Delhi Police* (Writ Petition (CRL) 696 of 2008) wherein Delhi High Court has issued directions that the Magistrate, unless there are compelling reasons, shall record the statement of the victim under section 164 on the day the application is moved by the Investigating Officer.

It is to be noted that the victims of rape are reluctant to appear before a male Magistrate as they cannot express their agony appropriately before them, therefore, it would be more appropriate if the statements of victims are recorded before a female Magistrate, wherever available.

11. The petitioner has also submitted that the trials for rape cases should be conducted in camera, by female judges, where possible, and after regular court hours. According to him, these measures are essential to allow the victim to make her statements free from further psychological distress and trauma. He referred to the proviso to section 327(2) of the Indian Code of Criminal Procedure which provides that in-camera trials under the subsection "should be conducted as far as practicable by a woman judge or magistrate". Reliance is also

placed on the case of *State of Punjab v. Gurmit Singh* (AIR 1996 SC 1393) wherein it has been held that wherever possible it may also be worth considering whether it would not be more desirable that the cases of sexual assault on females should be tried by lady judges, wherever available, so that prosecutrix can make her statement with greater ease and that trial of rape cases in camera should be the rule and an open trial in such cases an exception.

12. The petitioner has further submitted that during a rape trial, a screen or some other arrangement should be made so that the victims and vulnerable witnesses do not have to face the accused. He has placed reliance upon the case of *Sakshi v. Union of India* (AIR 2004 SC 3566) = ((2004) 5 SCC 518) wherein the court directed that in holding trials of child sex abuse or rape, a screen or some other arrangement may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused. The petitioner has also submitted that the questions put in cross-examination on behalf of the accused should be given in writing to the Presiding Officer of the Court who should put them to the victim or witnesses in a language which is clear and not degrading. Reference in this behalf has also been made to *Sakshi's* case (supra). It is further contended by the petitioner that evidence of rape victims should be recorded through video conferencing so that the victims do not need to be present in court. He has placed reliance upon the case of *State of Maharashtra v. Dr. Praful B. Desai* ((2003) 4 SCC 601) wherein the court has held that recording of evidence by video conferencing also satisfies the object of section 273, Cr.P.C. that evidence is to be recorded in the presence of the accused.

It is to be noted that in the cases where the accused are hardened criminals, sometimes the Courts allow the recording of statements in camera and in some cases the trial are conducted inside jails. Therefore, in the gang rape cases, where there is threat to the life of the victims and her family members, such practice can be adopted.

13. The petitioner has also prayed that in the instant case the out-of-court settlement reached between the victim, and the accused persons may be declared invalid and nullity in the eyes of the law on the ground that the same was the result of coercion and even the victim did not receive a single penny as compensation from the accused.

In this regard it is to be noted that section 345, Cr.P.C. provides procedure for compounding of offence and no offence can be compounded except as provided in the said provision. The offence of rape under section 376, P.P.C. is non-compoundable, therefore, compounding of such offence is not permissible. Even otherwise sometimes due to out-of-court settlement, the complainant party does not come forward to pursue the matter or produce evidence, which results in the acquittal of the accused. The cases like rape, etc., are against the whole society and the cases are registered in the name of the State, therefore, in the cases where the accused succeed(s) in out-of-court settlement, the State should come forward to pursue the case and the courts should also take into consideration all these aspects while extending benefit to the accused.

14. At this juncture, it would be appropriate to consider in detail Delhi Commission of Women's case (supra), referred to by the petitioner. In the said case, the Delhi High Court has issued the guidelines to police, hospitals/doctors, Child Welfare Committees, Sessions Courts, Magistrate Courts, Prosecutors and other concerned authorities, which include the following:

(I) POLICE

- (a) Every Police station shall have available round the clock a lady police official/ officer not below the rank of Head Constable.
- (b) As soon as a complaint of the offence is received, the duty officer receiving the complaint/ information shall call the lady police official/ officer present at the police station and make the victim and her family comfortable.
- (c) The duty officer, immediately, upon receipt of the complaint/ information will intimate the "A Rape Crises Cell" on its notified helpline number.
- (d) After making preliminary inquiry/investigation, the investigation officer along with the lady police official/officer available, will escort the victim for medical examination.
- (e) The Assistant Commissioner or police shall personally supervise all investigation into the offence.
- (f) The statement of the victim shall be recorded in private, however, the presence of family members while recoding a statement may be permitted with a view to make the victim comfortable. In incest cases where there is a suspicion of complicity of the family members in the crime such family members should not be permitted.
- (g) The investigation officer shall bring the cases relating to "child in need of care and protection" and the child victim involving in incest cases to the Child Welfare Committee.
- (h) The accused should not be brought in the presence of the victim except for identification.
- (i) Except the offences which are reported during the night no victim of sexual offence shall be called or made to stay in the police station during night hours. The Social Welfare Department of the Govt. of NCT of Delhi shall ensure that Superintendents of the Foster Home for Women will provide necessary shelter till formal orders secured from the concerned authorities.
- (j) The Investigation Officer shall ensure that in no case the accused gets undue advantage of bail by default as per the provisions of section 167, Cr.P.C. it is desirable that in cases of incest the report under section 173, Cr.P.C. is within 30 days.
- (k) Periodically training to deal with rape cases should be provided to the Police Officers, Juvenile Police Officers, Welfare Officers, Probationary Officers and support persons. A training module should be prepared in consultation with the Delhi Judicial Academy.
- (l) The police should provide information to the Rape Crises cell regarding the case including the arrest and bail application of the accused, the date of filling of the investigation report before the Magistrate.

- (m) The police should keep the permanent address of the victim in their file in addition to the present address. They should advise the victim to inform them about the change of address in future.
- (n) Subject to the outcome;2 of the Writ Petition (C) 2596 of 2007 titled *Rajeev Mohan v. State*, pending before this Hon'ble Court in cases where the victim informs the police about any threats received by the accused family, the concerned DCP should consider the matter and a fresh F.I.R. must be registered under section 506 of the Indian Penal Code;

(II) DOCTORS/HOSPITALS/HEALTH DEPARTMENT

- (a) Special rooms to be set up in all government hospitals for victims to be examined and questioned in privacy.
- (b) A sexual assault evidence collection kit or sexual assault forensic evidence (SAFE) kit consisting of a set of items used by medical personnel for gathering and preserving physical evidence following a sexual assault should be available with all the Govt. hospitals. .
- (c) A detailed description of "Assault/Abuse History" be mentioned by the attending doctor on the MLC of the victim. The doctor must ensure that the complete narration of the history of the case detained by the victim and her escort is recorded.
- (d) After the examination is complete the victim should be permitted to wash up using toiletries provided by the hospitals. The hospitals should also have clothing to put on if her own clothing is taken as evidence.
- (e) All hospitals should co-operate with the police and preserve the samples likely to putrefy in their pathological facility till such time the police are able to complete their paper work for despatch to forensic lab test including DNA.

(III) COURTS

- (a) The Magistrate unless there are compelling reasons shall record the statement of the victim under section 164, Cr.P.C. on the day on which the application is moved by the Investigation Officer. The Magistrate before proceeding to record the statement shall ensure that the child is made comfortable and she is free any extraneous pressure.
- (b) An endeavour shall be made to commit such cases of offence to the Court of Sessions expeditiously and preferably within 15 days.
- (c) The Hon'ble Supreme Court in *Delhi Domestic Working Women Forum v. Union of India*, 1995 (1) SCC 14 and reiterated by this Hon'ble Court in *Khem Chand v. State of Delhi* 2008 (4) JCC 2 497 had directed that the victim be

provided with a counsel. The existing practice of the victims being represented by a counsel from the Rape Crisis Cell may continue. In cases where the victim has a private lawyer, she may be allowed to retain the private lawyer.

- (d) That as far as possible chief examination and cross-examination of the victim must be conducted on the same day.
 - (e) The Additional Sessions Judge/District Judge shall maintain a panel of psychiatrists, psychologists and experts in sign language etc. who would assist in recording the statement of witnesses as and when requested by the Sessions Courts.
 - (f) If it is brought to the notice of the Court from a support person/ Rape Crises Cell Advocate/victim, regarding threats received by the victim or her family members to compromise the matter, the judge shall immediately direct the ACP to look into the matter and provide an action taken report before the court within 2 days. The court must ensure that protection is provided to the victim and her family.
 - (g) In cases in which the witness is sent back unexamined and is bound down, the Court shall ensure that at least the travelling expenses for coming to and from for attending the Court are paid.
16. In view of the above proposals, the petitioner has prayed that following points may be approved and the concerned public authorities be directed to enforce them through the course of investigation and prosecution of all rape matters in Pakistan:--
- (a) Every Police station that receives rape complaints should involve reputable civil society organizations for the purpose of legal aid and counselling. A list of such organizations may be provided by bodies such as the National Commission on the Status of Women. Each Police station to maintain a register of such organizations. On receipt of information regarding the commission of rape, the Investigating Officer (IO)/Station House Officer (SHO) should inform such organizations at the earliest.
 - (a) Administration of DNA tests and preservation of DNA evidence should be made mandatory in rape cases.
 - (b) As soon as the victim is composed, her statement should be recorded under section 164, Code of Criminal Procedure, 1898, preferably by a female Magistrate.
 - (c) Trials for rape should be conducted in camera and after regular court hours.
 - (d) During a rape trial, screens or other arrangements should be made so that the victims and vulnerable witnesses do not have to face the accused persons.
 - (e) Evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the victims, particularly juvenile victims, do not need to be present in court.

When we inquired from the learned Advocate-General and Prosecutor-General, Punjab etc. that as to whether they had any objection, if the petition is disposed of in the light of the

above said recommendations/ prayers, they stated that they have no objection because such suggestions are already under consideration of the concerned authorities and legislation is likely to be made in this regard. Thus, the petition is disposed of in the above terms.

7.1.2 Nadeem Masood Vs the State (Lahore High Court)

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 Pakistan Penal Code (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 unfolded 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; and about six or seven days prior to registration of FIR her parents were out of the house in connection with their work and she was alone in her house; at about 4 or 5.00 p.m., Muhammad Nadeem (appellant), who was on visiting terms with her family, armed with a pistol entered 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 a number of times and she was seven months pregnant. . 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 the case, Karamat Ali Shah S.I. (PW-8) conducted an investigation in this case, and he has recorded statements of the PWs under Section 161 Cr.P.C. and arrested the accused on 14.10.2010. The Investigating Officer also produced the complainant/ victim Humaria Yasmeen for a DNA test and the report was received on 21.10.2010. He also had the appellant Muhammad Nadeem Masood medically examined.

4. After the completion of investigation, report under Section 173 Cr.P.C was finalized and submitted before the learned trial court; a 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 the 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. Expected Due Date (EDD) 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 the 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 blackmail 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 the case against the appellant regarding the rape of the victim is a 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 FIR 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 FIR 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 a 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 FIR 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 about 32 weeks pregnant. 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 the 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 the victim was a consenting party especially when the appellant has not produced any evidence in his defence and did not even 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 the 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 a 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 a failure 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 a flood. I am of the considered view that the 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 an 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 a failure to bring his case within the scope of Section 496-B PPC by any stretch of the 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 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 an 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/Deputy Magistrate, Toba Tek Singh, till the hearing of the petition for leave to appeal."

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 mankind that right of life must be honoured even if the same is a result of a sin of biological parents.

15. From the 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.1,000/- 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.

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 entire 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.1, 000,000 (Rupees One Million) to the victim child namely Shazia Nadeem (her name is mentioned in Ex.PG, an application to the SHO 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

7.1.3 2016 PCr.LJ 1888 [Sindh]

Before Zulfiqar Ahmad Khan, J

IMRAN---Applicant

Versus

The STATE---Respondent

Criminal Bail Application No.524 of 2016, decided on 30th May, 2016.

(a) Criminal Procedure Code (V of 1898)---S. 497---Penal Code (XLV of 1860), Ss. 376, 375, 337-A(i), 506, 34 & 90---Rape; *shajjah-i-khafifah*; criminal intimidation; common intention---Bail, refusal of---'Will' and 'consent'---Meaning---'Against her will'/'without her consent'---Interpretation---'Consent' known to be given under fear of misconception---Effect---'Consent' obtained through fraud or deception---Effect---Positive DNA report based on two months old vaginal swab samples---Probative force---'Sexual intercourse'---Meaning---Injury to genitals and semen stains not necessary/mere penetration was sufficient to constitute offence of rape---Sole testimony of victim of rape, evidentiary value of---Under special provisions of S. 376, PPC., 'will' and 'consent' had been differentiated, which meant that even if there was 'will' but no 'consent' or vice versa, offence of rape would be actualized---Word 'will' implied the faculty of reasoning power of the mind that determined whether or not to do an act---First ingredient 'against her will' was related to the psychological state of the victim (as compared to 'without her consent', which referred to actions and performative (enacted as said/commanded))---Fine distinction existed between an act done 'against her will' and an act done without consent ('without her consent')---Every act done 'against her will' was 'without the consent', but every act 'without her consent' was not 'against her will'---Section 376(i), PPC. applied where the woman was both in her senses and capable of consenting---Expression 'against her will' ordinarily meant that the intercourse was done by a man with a woman despite her resistance and opposition---Evidence available on the record showed that the victim was not a consenting party, and the rape had been committed 'against her will'---Term 'consent' as used in S. 376(ii), PPC. meant 'an act of reason, accompanied with deliberation, the mind weighing in a balance, the good and evil on each side'---'Act done with consent' always meant that the act was done with free will or voluntarily---In the present case, the victim's consent for taking her out of her house had been obtained on the basis of some past friendship or allurements with the hidden intent; therefore, victim's consent was either tainted or based on deception and fraud---Had the victim known that she would be raped, she would not have left her house with the accused---Victim had left her house with the accused due to the fraud and deception practised on her; therefore, her consent could be held to be the consent 'without her consent'---Consent obtained by deceitful means was no consent in terms of S. 376, PPC., and the same not only came within the ambit of the ingredients of the definition of rape but qualified the exception provided for under S. 90, PPC being a 'vitiated consent' given under a

'misconception of fact'---DNA Laboratory report although provided that 'no human male DNA profile was identified in the vaginal swab', but said report showed that vaginal swab samples presented to the laboratory were more than two months old, and that was not sure as to how those samples had been preserved during such a long period of time, since the external factors (such as temperature and humidity), and internal factors (other bodily fluids) had affected the validity of the samples---Earlier the sample had been collected and tested, the higher would have been the chances of yielding solid results---DNA testing from vaginal swabs could reliably lead to an offender only if the sample was tested within the first 7 days of the rape---Foul play was also evident from the fact that the DNA report suggested that the swab samples had been consumed, leaving no opportunity to challenge the results shown in the report---Penetration was sufficient to constitute the 'sexual intercourse' necessary to constitute the offence of rape without producing any injury to the genitals or leaving any seminal stains---Testimony of the victim in rape cases was of vital significance, and unless compelling reasons existed which necessitated looking for corroboration of her statement, the Court ought not to find any difficulty in convicting the accused on victim's testimony alone---Victim was neither willing nor had she consented for the sexual act, which had been forced upon her by the accused; therefore, necessary ingredients of S. 376, PPC had been satisfied---Accused belonged to a relatively influential class, and if he was released on bail at present stage, he was likely to intimidate or influence the victim and/or the witnesses---Bail application was dismissed accordingly.

2007 SCMR 605; PLD 2011 SC 554; Stroud's Judicial Dictionary (Fifth Edition - page 510; <http://www.forensicmag.com/articles/2015/01/dna-forensic-testing-and-use-dna-rape-kits-cases-rape-and-sexual-assault>; Parikhs Textbook Jurisprudence and Toxicology by C.K. Parikh; Modi in Medical Jurisprudence and Toxicology (23rd Edition - page 897); Salman Akram Raja and another v. Government of Punjab through Chief Secretary and others 2013 SCMR 203; Muhammad Sajid v. The State 2000 PCr.LJ 1948; Jehangir v. The State 1987 PCr.LJ 964; Akbar Ali v. The State 2003 PCr.LJ 385 and Umar Din and another v. The State 2007 PCr.LJ 1627 rel.

(b) Words and phrases'Consent'----Meaning and scope.

Stroud's Judicial Dictionary (Fifth Edition - page 510) rel.

(c) Medical jurisprudence

'Sexual intercourse'----Illustrated.

Parikhs Textbook Medical Jurisprudence and Toxicology by C.K. Parikh and Modi in Medical Jurisprudence and Toxicology (23rd Edition - page 897) rel.

Samsam Ali Khan for Applicant.

Akhtar Rehana, Additional P.G. for the State.

Date of hearing: 2nd May, 2016.

ORDER

ZULFIQAR AHMAD KHAN, J. Applicant has moved this bail application being aggrieved and dissatisfied with the Order dated 11.03.2016, passed by the learned IV-Additional Sessions Judge, Karachi (West) in Sessions Case No.2513/2015, arising out of FIR No.299 of 2015, under sections 376, 506, 337-A(i)/34, PPC, registered at Police Station Iqbal Market, Karachi (West).

Brief facts of the case are that complainant Anita who resided in a low income community of Karachi, while at home on 11.09.2015 received a call from the accused Imran asking her to come out of her home, whereupon she was taken on a motorcycle driven by Imran to a vacant room, where the accused raped her, and thereafter she was brought by the accused on the same motorcycle to the house of Mst. Bushra, bhabhi of the accused. The complainant informed Mst. Bushra about the rape committed by the accused Imran, on which Mst. Bushra replied that it was good for her and now she will have to marry the accused at all costs. Subsequently, Mst. Sidra, cousin and mother of the accused Imran also came to that house and threatened the complainant to be ready to marry Imran. As the complainant was not ready to marry Imran, she was beaten up, thereafter, the accused Imran and his elder brother Faisal took the complainant on a motorcycle and left her near her home but forcibly put petrol in her mouth. They also said that if she would have any shame then she should eat something else (poisonous) and die. After reaching her home, the complainant who was not feeling well, in the morning was brought by her parents by ambulance to Abbasi Shaheed Hospital for a medical checkup and treatment. During the treatment, Assistant Sub Inspector (ASI) of Police Station (PS) Iqbal market appeared at the hospital and recorded her statement under section 154, Cr.P.C. which was incorporated in the FIR book. During the investigation, the complainant was medically examined by WMLO who confirmed that the complainant was subjected to rape. The Investigation Officer (IO) let off the accused Mst. Bushra and submitted a *challan* against the remaining accused. The accused Mst. Margina and Faisal were granted pre-arrest bail on 15.12.2015 and the co-accused Amin also filed a request for a post-arrest bail which was dismissed. The present accused also filed a post-arrest bail application in the Sessions Case, however, his counsel at the trial stage did not press the said bail application, which was dismissed, as not pressed.

From the impugned order, I note that Mr. Mohammad Khan, learned counsel for the accused in the initial case argued that the two accused were let off during the investigation and two accused namely Faisal and Mst. Margina were granted bail. He added that there was delay in lodging the FIR, which was not reasonably explained and there were no independent witnesses nor was the statement of the victim recorded during the investigation under section 164, Cr.P.C. According to him the medical certificate was challenged by the accused and the Medical Board had suspended the said medical certificate. He also pointed out that the DNA report was not also in favor of the prosecution, hence the case became one of 'further enquiry' and prayed that accused Imran be released on bail. These assertions were challenged in the first bail application by the learned District Public Prosecutor (DPP) who opposed the grant of bail to the accused on the grounds that his previous bail application was dismissed as withdrawn and no fresh ground was shown in that bail application.

In the impugned order the learned Additional Session Judge refused the bail by recording that the previous bail application, which was filed by the accused (though later withdrawn) is to be treated as dismissed on merits, and held that the grounds shown in that initial bail application cannot be pressed in the subsequent bail application. To the learned Judge, the only new ground was the decision of Special Medical Board whereby Medico Legal Certificate (MLC) in respect of the complainant Anita that was kept in abeyance/suspended on the DNA report. I however, upon examination note that the reason of such abeyance/suspension as provided for in the Annexure D-5 is not on any technical ground, rather it is on the account of the victim's unavailability to appear (on the date and time stipulated in the said letter) before the Special Medical Board constituted. One can easily imagine the restrictions imposed on the free movement of a rape victim by domestic and social forces, not to mention the looming threat from the perpetrators of the offence themselves. I therefore will not give much weight to such findings rendering keeping the report in abeyance and/or suspension. However, what is important to note in the said letter of 27.02.2016 is that the Medical Superintendent, Services Hospital, Karachi confirmed that the Board was constituted in respect of MLC No.6625/2015, dated 12.09.2015 which was in respect of the injuries from petrol intoxication, and not for rape. Thus, such abeyance/suspension has no effect on the confirming of rape having been committed. The learned Judge has fully recognized this fact that the medical certificate that was suspended was not in respect of the allegations of rape which has been separately issued by WMLO Dr. Farkhanda Qureshi on 12.09.2015 after the examination of the victim, wherein it was confirmed that rape has been committed upon the victim, it was only in respect of petrol intoxication.

Levelling new round of arguments Mr. Samsam Ali Khan, learned counsel of the accused in the present case posed the following contentions:

- (i) The lady was the consenting party and she had accompanied the accused of her own will and, therefore, the accused cannot be convicted for the said offence of rape under section 375;
- (ii) Results of DNA Test Report dated 27.02.2016 are in favor of the accused; and
- (iii) There is a discrepancy between the statements made by the accused in FIR and in that she made before the IO, as well as, all evidence is against the accused, etc.

To me, except for the first two assertions, all other submissions of the learned counsel for the accused seem to be identical to those made before the trial court and the impugned order has addressed them properly. I would therefore start with responding to the first assertion in the following, for which I find it relevant to reproduce full text of section 375 of PPC, as under:

Section 375 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.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Also of relevance is section 90 which is also reproduced in the following:

90. Consent known to be given under fear or misconception:

A consent is not such a consent as is intended by any action of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

As 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. To start with, I would thus like to focus on the first ingredient of section 375 being 'against her will', which relates to psychological state of the prosecutrix (as compared to 'without her consent', which refers to actions and performative). The word 'will' implies the faculty of reasoning power of mind that determines whether to do an act or not. There 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.' To me clause (1) of section 375 applies where the woman is in possession of her senses and therefore, capable of

consenting. Courts have explained that the expression 'against her will' ordinarily means that the intercourse was done by a man with a woman despite her resistance and opposition.

Examination of the statement of the victim and the evidence clearly shows that she was not a consenting party, and the rape was committed against her will. Testimony of a victim in cases of rape is held to be of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to find any difficulty in convicting the accused on prosecutrix's testimony alone as per the cases reported a 2007 SCMR 605 and PLD 2011 SC 554.

With regards to the second ingredient of section 375, being the act done 'without her consent', I note that the term 'consent' has been given to mean "an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side" by the Stroud's Judicial Dictionary (Fifth Edition - page 510). There is no dispute that an act done with consent always means the act done with free will or done voluntary. In this case, though the victim's consent for taking her out of her home was obtained on the basis of some past friendship or allurements with hidden intent, therefore to me, this tainted consent or a consent of this nature which is based on deception and fraud, cannot be termed, prima facie, to conclude that she consented to the sexual act also. Had the victim known that ultimately she would be raped, there is no doubt in my mind that she would have not refrained herself from leaving home with the accused. Then a question would arise what was the purpose for which she gave consent and left home with him. To me, it was a fraud that was practiced on her and she was deceived, therefore such type of consent is rightly held to be the consent obtained without her consent. Consent obtained by deceitful means, as per the language and intent of section 375 is no consent and comes within the ambit of the ingredients of definition of rape, as well as, qualifies the exception provided for under section 90 of being a 'vitiated consent' given under a 'misconception of fact'.

With regards the second assertion that the DNA laboratory report dated 29.01.2016 declared "No human male DNA profile was identified in the vaginal swab", I note from the said report that the case was received at the National Forensic Science Agency on 16.11.2015. While per FIR, rape was committed on 11.09.2015, which means that whatever swab samples were presented to the said DNA laboratory, they were more than two months old. It is not sure how these samples were preserved in this long period of time since external factors (such as temperature and humidity) and internal factors (other bodily fluids) affect the validity of a sample. Studies show that earlier the samples are collected and tested, the higher the chances of yielding solid results. DNA testing from vaginal swabs can reliably lead to an offender only if the sample is tested within the first 7 days of rape (See: <http://www.forensicmag.com/articles/2015/01/dna-forensic-testing-and-use-dna-rape-kits-cases-rape-and-sexual-assault>), therefore the conclusion given in the said report of non-finding of a male DNA from the swab tested after more than two months of rape is not surprising at all. Some foul play is also evident from the fact that the said report suggests that the swab sample has been consumed, leaving no opportunity to challenge the results shown in the said report.

With regards the contention of the learned counsel about missing seminal stains, beside the foregoing reasons of late DNA testing, reference could also be made to Parikhs Textbook of

Medical Jurisprudence and Toxicology by C.K. Parikh which describes 'sexual intercourse' to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. Similar views are also found in Modi in Medical Jurisprudence and Toxicology (23rd Edition - pages 897) where it is stated that to constitute the offence of rape, it is not necessary that there would be complete penetration of the penis with emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. These views also find consistency with the explanation given in respect of section 375 which shows that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Now I would like to consider the case-law referred by the learned counsel which is discussed in the following:

- (1) Salman Akram Raja and another v. Government of Punjab, through Chief Secretary and others (2013 SCMR 203)

This judgment encourages the use of DNA technology by the courts. The said case also directs that a request for administration of DNA test should be made at the earliest stage of the case. In the present case, there are two medical reports at hand and the one that is undisputed, actually confirms that rape was committed. Discussion on the scientific value of DNA report after delays of more than two months of taking the sample is already presented in the foregoing.

- (2) Muhammad Sajid v. The State (2000 PCr.LJ 1948); Jehangir v. The State (1987 PCr.LJ 964) and Akbar Ali v. The State (2003 PCr.LJ 385)

The view expressed in these cases that the solitary statement of the victim not being sufficient to warrant conviction of the accused has been reversed in the light of the Apex Court judgments reported as 2007 SCMR 605 and PLD 2011 SC 554.

- (3) Umar Din and another v. The State (2007 PCr.LJ 1627)

In this case the lady was seen with the accused in public places and it was alleged that she did not make any hue and cry nor sought help from the public. Facts of the case in hand are different. The lady was taken to an isolated place where she was

raped. She had no opportunity to make hue and cry, thus the instant case can be distinguished accordingly.

To conclude, in the instant case where the complainant was neither willing nor that she consented for the sexual act forced upon her by the accused, therefore in my view the necessary ingredients which are to be satisfied to bring home the charge under section 376 of the PPC have been satisfied, and in the light of the pronouncements of the Apex Court (2007 SCMR 605 and PLD 2011 SC 554) holding that the testimony of the victim is of vital significance, and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to have any difficulty in adjudicating the matter on prosecutrix's testimony alone. It appears that there is enough material to arrive at the prima facie conclusion that the applicant was involved in the offence, as well as, added with the fear that the applicant, belonging to a relatively influential class, if released on bail at this stage it is most likely that he would intimidate or influence the victim and/or the witnesses. One could also imagine a strong likelihood that in the above circumstances, the victim would make herself scarce and might flee from justice, I am therefore not inclined to grant bail at this stage. For the aforesaid reasons, this bail application is dismissed.

The observations made in this order shall however not affect the decision of the case at any stage of the trial or other proceedings.

Adequate medical attention shall be provided to the victim. MIT-II should liaise with MLO and the victim (if needed) and submit reports in this regard at frequent intervals. SL/I-20/Sindh Bail declined.

7.1.4 PLD 1959 (W. P.) Lahore 38

Before A. R. Changez, J

NAWAB-Appellant

Versus

THE STATE-Respondent

Criminal Appeal No. 725 of 1957, decided on 3rd November 1958.

- (a) Witness-A poor man-Testimony whether can be rejected on ground that he was amenable to Police influence.

The mere fact that the witness was a poor man selling sugarcane without obtaining the necessary licence is no ground to hold that he was amenable to the police influence and his testimony cannot be rejected on this ground alone.

- (b) Confession-Mere acknowledgement of subordinate facts not directly involving guilt-Do not amount to confession.

Narayana Swami v. Emperor A I R 1939 P C 47 fol.

- (c) Criminal Procedure Code (V of 1898), S. 164-Statement not amounting to confession recorded under S. 164-Can be used against maker as admission within purview of Ss. 18 to 21, Evidence Act (1 of 1872).

Ghulam Hussain v. The King P L D 1949 P C 326 rel.

- (d) Penal Code (XLV of 1860), S. 376-Consent of insane woman-No consent in the eye of law-Penal Code (XLV of 1860), S. 90.

The consent of an insane woman is no consent in the eyes of the law, and a person who subjects such a woman to sexual intercourse even though she apparently consents to it, cannot escape liability for 'an offence under section 376 of the Penal Code.

- (e) Penal Code (XLV of 1860), S. 375-Consent and submission-Not synonymous terms.

Consent and submission are not synonymous terms. Every consent involves a submission, but it by no means follows that a mere submission involves consent. Mere submission by one who does not know the nature of the act done, cannot be consent.

(f) Admission-Short of confession-Cannot be used against co-accused.

H. A. Rahman for Appellant.

Gulzar Hasan for Respondent.

Dates of hearings: 9-10-58, 21-10-58 and 22-10-58.

JUDGMENT

Muhammad Sharif, aged 30 years, Ashiq Hussain, aged 22 years, Nazir Alias Jeera, aged 20 years, Ali Muhammad alias Kaka, aged 31 years, Nawab aged 55 years, and Abdul Hamid Alias Hamida, aged 28 years, were tried on the allegations that on the 7th of December 1956, Muhammad Sharif, Ashiq Hussain and Nazir had abducted Mst. Rahiman Bibi, an insane woman, from a place near Akbari Gate and had taken her to the *dera* of Nawab accused in a tonga with the intention of forcing her to illicit intercourse, and that they and Nawab, Ali Muhammad and Abdul Hamid accused had raped her. The learned Magistrate acquitted Abdul Hamid accused and convicted Muhammad Sharif, Ashiq Hussain and Nazir accused under section 366 & 376, P.P.C. and sentenced them each to three years rigorous imprisonment under the former section and to seven years rigorous imprisonment under the latter section. These sentences were, however, ordered to run concurrently. He also convicted Ali Muhammad Alias Kaka accused under section 376, PPC and sentenced him to seven years rigorous imprisonment. Nawab accused was convicted under section 366, PPC and was sentenced to three years rigorous imprisonment. Against their convictions and sentences, Nawab has filed Criminal Appeal No. 725 of 1957 through Hakim Abdur Rahman Advocate, Nazir Alias Jeera has filed Criminal Appeal No. 732 of 1957 through Mr. Mahmud Ali Advocate, and Muhammad Sharif and Ashiq Hussain have filed Criminal Appeal No. 761 of 1957, through Khan Bahadur Mushtaq Hussain Khan Advocate. Ali Muhammad Alias Kaka has not filed any appeal against his conviction and sentence. This judgment will dispose of all these appeals.

2. The case for the prosecution was that Abdul Ghafur (P. W. 1) had brought his wife, Mst. Rahiman Bibi, aged 25 years, from village Khatib, District Muzaffargarh, to Lahore on the 2nd of December 1956, for treatment, as she used to have fits of hysteria. They stayed in the house of Hakim Muhammad Ali, situated inside Akbari Gate, Lahore. On the 7th of December 1956, at about 4-30 p.m., Abdul Ghafur P. W. found that Mst. Rahiman Bibi was missing from the house. Her *burqa* and *chappals* were, however, lying in the house. He went out in search for her along with Sh. Nazir Hussain (P. W. 3) and Sayed Shabbir Hussain Foot Constable (P. W. 4), but could not find any clue about her. Abdul Ghafur then went to the Police Post Akbari Gate and lodged the report Exh. F. A. at 6-30 p.m. Ch. Abdul Haq,

Assistant Sub-Inspector (P. W. 23), set out with Abdul Ghafur P. W. in search of Mst. Rahiman Bibi but they failed in their attempt, and while they were returning to the Police Post at about 9 p.m., they met Sh. Nazir Hussain and Shabbir Hussain P. Ws. who told them that they had been informed by Taj Pathan and others that Mst. Rahiman Bibi had been taken away by Sharif, Nazir and Ashiq Hussain accused in a tonga towards Gowlamandi. A little later, 'Muhammad Shafi (P. W. 13) and Babu Muhammad Zafar produced before the Assistant Sub-Inspector, Muhammad Sharif, Ashiq Hussain and Nazir Alias Jeera accused. These accused were then taken to the Police Post Akbari Gate. The Assistant Sub-Inspector removed shirt Exh. P. 1, and *salari* Exh. P. 2 from the person of Muhammad Sharif accused vide recovery memo. Exh. P. C. He also removed shirt Exh. P. 3 and *chaddar* P. 4 from the person of Ashiq Hussain accused vide recovery memo. Exh. P. D. He also took into possession shirt Exh. P. 5 and *pajama* Exh. P. 6 from the person of Nazir accused, vide recovery memo. Exh. P. E. These clothes were made into three separate sealed parcels. The three accused were then put under arrest.

3. On the 8th of December 1956, Dr. Abu-ul-Hasan, (P. W. 19), examined Muhammad Sharif accused and found him capable of having sexual intercourse. He prepared two slides from the discharge obtained after milking the urethra of Muhammad Sharif accused and these were sent to the Chemical Examiner for detection of semen. He also prepared a pair of slides from the external swabbing of the glans penis and these were also forwarded to the Chemical Examiner for detection of semen and vaginal epithelium. A pair of slides made from the urethral discharge was also sent to the Bacteriologist to the Government of West Pakistan for detection of gonococci. The Bacteriologist's report showed that the slides were positive for gonococci and the Chemical Examiner's report showed that the slides were positive for pus and semen, and the other pair of slides were found stained with vaginal epithelium vide report of the Chemical Examiner Exh. P. X. On the same day, he examined Ashiq Hussain accused and found him capable of having sexual intercourse. He prepared two slides from the discharge of urinary meatus and external swabbing of glans penis and sent them to the Chemical Examiner for detection of semen and vaginal epithelium. According to the report of the Chemical Examiner Exh. P. Y. the slides were found to be stained with semen and vaginal epithelium. On the same day he examined Nazir Ahmad Alias Jeera accused and found him capable of having sexual intercourse. He prepared two slides from meatus discharge and the external discharge of glans penis which were, sent to the Chemical Examiner for detection of semen and vaginal epithelium. The Chemical Examiner's report Exh. P. Z. showed that the slides were stained with semen and vaginal epithelium.

4. During the investigation, a piece of cloth Exh. P. 7 and *shalwar* Exh. P. 8 were taken into possession from the *kothri* of Nawab accused vide memo. Exh. P. J. *Chaddar* Exh. P. 9 and *pajama* Exh. P. 10 were taken into possession from the *dera* of Ali Muhammad and Abdul Hamid accused vide memo. Exh. P. K. These clothes were also made into sealed parcels. Ali Muhammad, Nawab and Abdul Hamid accused were also arrested. The Police, however, could not find any trace of Mst. Rahiman Bibi.

5. On 17th December 1956, one Muhammad Akbar of Hasilpur produced Mst. Rahiman Bibi before Sub-Inspector Ch. Chiragh Din (P. W. 24). He accordingly informed Ch. Sikandar Hayat, DSP of Bahawalpur about it who gave a ring to the Lahore Police, and on the 18th of December 1956, Sayyed Wilayat Ali Shah, Assistant Sub-Inspector was ordered by DSP City

Lahore to go to Bahawalpur to bring Mst. Rahiman Bibi to Lahore. Abdul Ghafur P. W. accompanied him. He then went to the house of Sikandar Hayat D. S. P. Bahawalpur and found Mst. Rahiman Bibi there. She was identified by Abdul Ghafur P. W. as his wife and she was then brought back to Lahore. On the evening of the 18th of December 1956, this A. S. I. had taken into possession the *shalwar* Exh. P. 11 and *dupatta* Exh. P. 12 of Mst. Rahiman Bibi vide recovery memo. Exh. P. L. On the 19th of December 1956, Sh. Aftab Ahmad, Magistrate, (P. W. 15), recorded the confession Exh. P. M. of Muhammad Sharif, Exh. P. O. of Nazir alias Jeera and Exh. P. N. of Ashiq Hussain. Abdul Hamid accused was produced before Ch. Muhammad Shaukat Tarar Magistrate (P. W. 16) who recorded his statement Exh. P. R. All these accused were then sent to the judicial lock-up and the confessional statements were forwarded to the *ilqa* Magistrate.

6. On the 20th of December 1956, Dr. Aziz, Medical Superintendent, Mental Hospital (P. W. 20), admitted Mst. Rahiman Bibi, wife of Abdul Ghafur, into the Mental Hospital, and he declared her to be insane.

7. In support of the prosecution case, 25 witnesses were examined at the trial. The accused denied the commission of the offences and pleaded that they had been falsely implicated in the case. Muhammad Sharif, Ashiq Hussain and Nazira accused, however, admitted the recovery of the clothes mentioned above from their persons. They produced ten witnesses in their defence. Miraj Din (D. W. 1), Taj Din (D. W. 2) and Muhammad Said (D. W. 3) stated that Nazir accused was with them at the time of the occurrence and Haider Ali Shah (D. W. 4) stated that Nazir accused bore a good moral character. Muhammad Rafiq (D. W. 5) and Hafiz Nur Muhammad (D. W. 6) stated that Ashiq Hussain accused was with them at the time of the occurrence, and Din Muhammad (D. W. 7) and Shahab Din (D. W. 8) stated that Muhammad Sharif accused was with them at the time of the occurrence. Mahboob Ali (D. W. 9) stated that Nawab accused was with him at the time of the occurrence, and Naseer Ahmad (D. W. 10) stated that he did not see any woman at the *dera* of Nawab accused.

8. After carefully reviewing the evidence on the record, the learned Magistrate rejected the defence version and accepting the prosecution case as true convicted and sentenced the accused as stated above.

9. Learned counsel for Muhammad Sharif, Ashiq Hussain and Nazir appellants contended that there was no reliable evidence to show that these accused had abducted Mst. Rahiman Bibi or that they had committed rape. They also maintained that the confessions of these accused were obtained under pressure by the police, and that, in fact, these statements were not confessions at all, and in any case they had no evidentiary value. They further maintained that there was no proof that Mst. Rahiman Bibi was insane at the time of the occurrence and even if she was insane there is nothing to show that these accused knew that she was insane when she accompanied them to the *dera* of Nawab.

10. Before considering the question whether she was actually abducted by these three accused, it is necessary to determine whether Mst. Rahiman Bibi was, in fact, insane at the time of the occurrence. Abdul Ghafur (P. W. 1), husband of Mst. Rahiman Bibi, stated that she was suffering from hysteria and he had brought her to Lahore for treatment. It is unfortunate that further details were not brought out on the record in the statement of this witness to show the mental condition of Mst. Rahiman Bibi. The fact, however, remains that

all of a sudden Mst. Rahiman Bibi disappeared from the house of the Hakim where she stayed along with her husband and she left behind, her *burqa* and *chappals*. Soon thereafter, she was seen by Manzur Hussain (P. W. 5) Taj Muhammad Khan (P. W. 6) and Abdur Rashid (P. W. 7) on the back side of the cattle-pond of Akbari Gate. They also saw a number of boys following her and teasing her. She was then taken away by these accused in a *tonga*, and thereafter she disappeared from Lahore, and about ten days later Muhammad Akbar produced her before Ch. Chiragh Din at Police Station Hasilpur, and when she was brought back to Lahore she was admitted into the Mental Hospital on the 20th of December 1956, and was declared insane by Dr. Aziz (P. W. 20). All these circumstances clearly indicate that she was insane at the time of the occurrence.

11. The next question which requires determination is whether these three accused, namely, Muhammad Sharif, Ashiq, Hussain and Nazir had abducted her on the 7th of December 1956, with the intention of seducing her to illicit intercourse. On this point, we have got only the testimony of Manzur Hussain (P. W. 5). Although Taj Muhammad Khan (P. W. 6) and Abdur Rashid (P. W. 7) were also expected to support the prosecution case on this point, but they have not stated anything in this regard. Manzur Hussain P. W. has, however, stated that he was selling sugarcane on the back side of the cattle-pond of Akbari gate on the 7th of December 1956, when he saw Mst. Rahiman Bibi in the evening coming from the direction of a *Matti*, and a number of boys were following her and the woman then sat at a distance of six to seven yards from him and a large crowd gathered there. Muhammad Sharif accused then appeared on the scene and told the people as to why they were teasing that woman and he then shouted to a *tonga-wala* and inquired from the woman as to where she was to go to which she did not make any reply. Muhammad Sharif accused then told her that he would take her to the place where she wanted to go. The woman again did not make any reply. Muhammad Sharif accused then caught hold of her arm and made her sit in a *tonga*. Ashiq Hussain and Jeera accused also sat in the *tonga* and these three accused took the woman away in the *tonga* towards the stand of Crown bus service. He identified the woman from the photograph Exh. P. B, which is of Mst. Rahiman Bibi. On the same night this witness made the statement before the police. The learned counsel for the appellants have criticised the evidence of this witness on the ground that he is a man of no status and as he used to sell sugarcane without a licence, therefore, he was amenable to the police influence. They also invited my attention to his statement Exh. D. D. made before the police in which the castes and addresses of the accused have also been given, but the witness denied having given the castes and addresses of the accused while making his statement before the police. I have very carefully gone through the evidence of this witness, and although he is a poor man, I have not been able to discover any reason to reject his testimony. The mere fact that he used to sell sugarcane without obtaining the necessary licence is no ground to hold that he was amenable to the police influence. The witness was examined on the very night of the 7th of December 1956, and nothing has been elicited in his cross-examination to shake his credit. The Sub-Inspector was not questioned whether the witness had given the castes and addresses of the accused while making his statement before the police. It may be that the castes and addresses of these accused were known to the police and when the witness named these accused the Sub-Inspector himself added the castes and addresses. However, I do not find any material on the record to show that the witness did not know these accused. The police could not have learnt the names of these accused if Manzur Hussain, Taj Muhammad Khan and Abdur Rashid had not conveyed the

information to Nazeer Hussain and Shabbir Hussain P. Ws. while they were searching for Mst. Rahiman Bibi. There is no indication on this record that the police was, in any way, inimical to these accused. It is true that Taj Muhammad Khan and Abdur Rashid P. Ws. have not supported Manzur Hussain as regards the part played by these accused in taking away Mst. Rahiman Bibi, but the circumstances clearly indicate that these witnesses had been won over. They do concede that the woman was there and that the boys were teasing her but thereafter they disclaimed all knowledge as to how she disappeared. Their explanation was that they became busy with their own work. It may or may not be true but I have already observed that I find no reason to doubt the testimony of Manzur Hussain P. W. I accordingly hold that these three accused had taken Mst. Rahiman Bibi away in a *tonga* from Akbari Gate on the evening of the 7th of December 1956. From the evidence of Inayat Ullah Khan (P. W. 8), it is clear that from Akbari Gate she was brought to Patiala Ground. It appears that the *dera* of Nawab accused is situated in Patiala Ground. Inayat Ullah Khan has stated that on the evening in question a *tonga* arrived in the Patiala Ground from which Mst. Rahiman Bibi got down as well as Muhammad Sharif and Jeera accused. When he was asked to identify the accused he correctly picked out Sharif accused but wrongly picked out Ashiq Hussain accused instead of Jeera accused. He could not identify Jeera accused as he did not know him before. He identified the woman from the photograph Exh. P. B. It is true that this witness has not named all the three accused but it may be that one of the accused had got down from the *tonga* a little earlier. His evidence is important only on the point that Mst. Rahiman Bibi had been taken to the Patiala Ground on the evening in question.

12. As to what happened at the *dera* of Nawab there is no direct evidence on the record. Mst. Rahiman Bibi being insane was not examined as a witness at the trial. However, the evidence led by the prosecution on that aspect of the case consists of the statements of the three accused which were recorded by Sh. Aftab Ahmad, Magistrate (P. W. 15) on the 19th of December 1956. At the time of the hearing of the appeals these statements were found missing from the judicial file. It, however, appears that the statements were certainly on the judicial file when it was received in the High Court, as copies were prepared from these statements in the office of the Advocate - General. These copies were produced before me by Mr. Gulzar Hasan, Advocate, who represented the State on behalf of the Advocate - General. The practice in the High Court is that after the file is received in the High Court, the clerk concerned of the Advocate - General's office takes it away and the relevant copies are prepared in that office and then the file is returned to the High Court. It appears that these statements were somehow lost either in the Advocate - General's office or in the High Court. As they were not traceable I had to reconstruct the record of these statements, by examining *Qalb-i-Abid* and Faiz Ahmad of the Advocate -General's office. *Qalb-i-Abid* (C. W. 2) was a Section Writer in the Advocate -General's office and he prepared the copies Exhs. P. M./1 and P. N./1 of the statements of Muhammad Sharif and Ashiq Hussain accused respectively. He did not add or omit anything while copying out these statements. Mr. Faiz Ahmad (C. W. 3) was also a Section Writer in the Advocate -General's office and he correctly prepared the copy Exh. P. O./1 of the statement of Nazir accused. These copies have now been placed on the file. In the course of their arguments, learned counsel for the appellants read out from their own copies of the statements of these accused and they tallied with the copies Exhs. P. M/1 and P. O/1. I am, therefore, satisfied that these were the statements made by the three accused before Sh. Aftab Ahmad Magistrate.

13. I have very carefully gone through these statements and it is perfectly clear to me that these are not confessional statements. In his statement, of which the copy is Exh. P. M/1, Muhammad Sharif accused stated, inter alia, as follows :-

"At about 4 p.m., I went to the garden near Akbari Gate in order to get myself shaved. I saw Jeera and Ashiq, and some children and a woman standing there. The woman did not speak but was smiling. In the meantime, a tonga arrived and Ashiq accused enquired from the woman, as to where she would like to go and she told him that she wanted to go to her house. The woman then sat on the back seat of the tonga and Ashiq accused also sat with her, and I sat in the front seat of the tonga. Ashiq called out to Jeera who also sat with him in the tonga, and we took the tonga to the Patiala house and seated the woman in the dera of Nawab. Jeera and Ashiq accused sat outside the dera and I went inside and enquired from her as to what was her name but she merely smiled. The woman then undid the cord of her shalwar and placed her legs upon me. I then had sexual intercourse with her and thereafter Ashiq and Jeera accused had sexual intercourse with her. After that, the woman and all of us took tea and then I left".

To the same effect are the statements of Ashiq Hussain and Nazir accused of which the copies are Exhs. P. N/1 and P. O/1. The word "confession" is not defined in the Evidence Act, but in *Narayana Swami v. Emperor* (A I R 1939 P C 47) their Lordships of the Privy Council, while construing the meaning of the word "confession", observed as follows :-

"That in their Lordships' view no statement that contains self-exculpatory matter can amount to a confession if the exculpatory statement is of some fact which if true would negate the offence alleged to be confessed. Moreover a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of "confession" in Art. 22 of Stephen's 'Digest of the Law of Evidence' which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872, and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed' the crime".

In the light of the above observations of their Lordships I have carefully gone through the statements of Muhammad Sharif, Ashiq Hussain and Nazir Ahmad accused, and I am of the opinion that none of these statements amounts to a confession. The accused did not admit having committed any offence, nor did they admit any facts constituting the offence, The learned Magistrate also held that these statements did not amount to confessions but in the latter portion of his judgment he confused the issue and treated these statements as confessions and actually used them as against the co-accused presumably under section 30

of the Evidence Act. These statements are mere admissions of certain facts within the meaning of section 17 of the Evidence Act and could be proved only against the makers of the statements under section 21 of the Evidence Act. The Learned counsel for the appellants vehemently argued that these statements were obtained by the police under coercion. It is true that these accused were arrested on the 7th of December 1956, and had remained in the police custody till the 19th of December 1956, when they were produced before Sh. Aftab Ahmad Magistrate. But if the police had put pressure on the accused to confess, they would have made statements admitting in terms the offence, or at any rate, substantially all the facts which constituted the offence. But a perusal of their statements clearly shows that the accused were taking up the position that the woman was a consenting party and that they had sexual intercourse with her with her consent. These are merely acknowledgements of subordinate facts not directly involving guilt and, therefore, fall short of being confessions, and do not come within the rule of exclusion laid down in section 24 of the Evidence Act. The very nature of the statement indicates that these statements were not made under any inducement, threat or pressure, but were voluntarily made by the accused of their own free-will in order to exculpate themselves. The Magistrate had complied all the formalities required by law before recording these statements. The statements are, therefore, admissible under section 21 of the Evidence Act against the makers of the statements. I am fortified in this view by a decision of the Privy Council in *Ghulam Hussain v. The King* (P L D 1949 P C 326 : 771 A 65.) where it was held by their Lordships that a statement of an accused recorded under section 164 of the Code of Criminal Procedure not amounting to a confession could be used against the maker as an admission within the purview of sections 18 to 21 of the Evidence Act.

14. These three accused had also identified Mst. Rahiman Bibi before the Magistrate as the woman in respect of whom they had made their statements. The admission of each of these accused that he had sexual intercourse with the woman is fully borne out by the reports of the Chemical Examiner Exhs. P. X, P. Y. and P. Z., which show that the slides which had been prepared by the doctor from the urethral discharge of these accused were found to be stained with semen and vaginal epithelium. Even the clothes of these accused which were removed from their persons by the police, were found to be stained with semen. It is true that Lady Doctor Mrs. Ijaz (P. W. 2) who had examined Mst. Rahiman Bibi on the 19th of December 1956, could not say if she had been subjected to sexual intercourse recently, but in view of the circumstances enumerated above, I am satisfied that after taking Mst. Rahiman Bibi to the *dera* of Nawab from Akbari Gate, the three accused had sexual intercourse with her.

15. It was contended on behalf of these appellants that they had sexual intercourse with Mst. Rahiman Bibi with her consent and as such were not liable for any offence. I have already held that Mst. Rahiman Bibi was insane at the time of the occurrence. In my opinion the consent of an insane woman is no consent in the eyes of the law, and a person who subjects such a woman to sexual intercourse even though she apparently consents to it, cannot escape liability for an offence under section 376 of the Pakistan Penal Code. Section 90 of the Pakistan Penal Code provides as follows:

"A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of

such fear or misconception : or if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

In view of the aforesaid provision of law, I am of the considered opinion that the 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. Mere submission by one who does not know the nature of the act done, cannot be consent. This section will only protect a man from the charge of rape if he obtains the intelligent consent of the woman concerned. A person who indulges in having sexual intercourse with a sleeping woman, or with a woman under intoxication or of an unsound mind commits rape and is as much guilty of an offence under section 376, PPC., as a person who has sexual intercourse with a woman against her will. It is, therefore, clear that even if Mst. Rahiman Bibi had submitted to sexual intercourse she did not know the nature of the act done because of unsoundness of her mind and she was therefore incapable of giving her consent from defect of understanding.

16. Learned counsel for the appellants further contended that, at any rate, the accused did not know that Mst. Rahiman Bibi was insane or that she was not a consenting party to the sexual intercourse. Manzur Hussain (P. W. 5), Taj Muhammad Khan (P. W. 6) and Abdur Rashid (P. W. 7) have definitely stated that Mst. Rahiman Bibi at the time of the occurrence was being teased by the boys and a crowd had collected there. Manzur Hussain P. W. has further stated that Muhammad Sharif accused when he had appeared at the scene had told the people as to why they were teasing that woman, and Taj Muhammad Khan (P. W. 6) has clearly stated that a large crowd had gathered there and they were saying that the woman was insane. The statements of the accused themselves which they made therefore Sh. Aftab Ahmad, Magistrate clearly go to show that the behaviour of the woman was such that any reasonable man would have arrived at the conclusion that the woman was insane. The manner in which she submitted to sexual intercourse to all and sundry also indicates that she was behaving like an insane woman. I have therefore no doubt in my mind, that at the time when these accused took away Mst. Rahiman Bibi in a *tonga* from Akbari Gate to the *dera* of Nawab, and had sexual intercourse with her, they knew perfectly well, that the woman was insane. The accused are, therefore, clearly liable both under sections 366 and 376, P. P. C. The defence evidence as regards the alibi of the accused has rightly been rejected by the learned Magistrate. It consists of oral testimony and although Miraj Din (D. W. 1) and Taj Din (D. W. 2) stated that Nazir accused had corrected their accounts on the evening in question, the account books were not produced before the Magistrate. Such evidence can be easily procured and no reliance can be placed on it.

17. I am, therefore, satisfied that these three accused, viz., Muhammad Sharif, Ashiq Hussain and Nazir alias Jeera, were rightly convicted under sections 366 and 376 of the Pakistan Penal Code. As regards sentence, it appears from the evidence of Manzur Hussain P. W. that Muhammad Sharif accused is the principal offender. He is aged 30 years. Nazir is aged only 20 and Ashiq Hussain is aged 22 years. Nazir accused claimed that he was a student, and Muhammad Said (D. W. 3) has corroborated his statement on this point. In all probability, these two accused had joined Muhammad Sharif at his instance. I think that in the circumstances of the case, some reduction is called for in the case of Ashiq Hussain and

Nazir accused. The sentences awarded to Muhammad Sharif accused are not severe and I accordingly dismiss his appeal. The sentences of Ashiq Hussain and Nazir accused are reduced to two years rigorous imprisonment each under section 366 PPC, and to four years rigorous imprisonment each under section 376, PPC. These sentences shall run concurrently.

18. Now, I shall take up the appeal of Nawab accused. This appellant was charged only under section 376, PPC, but has been convicted under section 366 PPC. I have read his statement recorded under section 342 of the Code of Criminal Procedure. No question was put to him whether he had abducted Mst. Rahiman Bibi with the intention of seducing or forcing her to illicit intercourse and in fact there is no reliable evidence on the record in support of this allegation. The only evidence on this point is that of Nazir Ahmad (P. W. 12). He stated that he had seen Nawab accused taking away Mst. Rahiman Bibi from his own *dera* to the *dera* of Hameeda accused. He was examined by the police ten days after the occurrence. He was in police service before starting his business as a shopkeeper. He was confronted with his police statement Exh. D. G., where it was not mentioned that he had seen Nawab accused taking away Mst. Rahiman Bibi from his own *dera* to that of Hameeda accused. This evidence is, therefore, of no evidentiary value. The other evidence consists of the statements of Muhammad Sharif, Ashiq Hussain and Nazira accused who stated in their statements made before Sh. Aftab Ahmad Magistrate that Nawab accused had admitted before them that he had sexual intercourse with Mst. Rahiman Bibi. These statements being not confessions cannot be used under section 30 of the Evidence Act against Nawab accused. There is, therefore, no evidence against Nawab accused that he had either taken part in the abduction of Mst. Rahiman Bibi or had committed rape upon her. I accordingly set aside his conviction and sentence and acquit him. He is already on bail and is discharged from his bail bound.

19). Ali Muhammad Alias Kaka accused has not filed any appeal against his conviction and sentence, but after going through the entire evidence on the record, I am convinced that no offence has been made out against this accused. He has been convicted under section 376 of the Pakistan Penal Code and has been sentenced to seven years rigorous imprisonment. The evidence on which reliance has been placed by the learned Magistrate consists of the testimony of Abdur Rauf (P. W. 10) and Muhammad Afzal (P. W. 14). These witnesses stated that they had gone to the *jhugi* of Abdul Hamid accused and on entering the *jhugi* they had seen Ali Muhammad alias Kaka accused lying naked with Mst. Rahiman Bibi who was also naked. They were confronted with their police statements in which they had not mentioned that they had seen them lying naked. These two witnesses were examined by the police ten days after the occurrence. In my opinion, this evidence is unreliable, and in any case does not warrant the conviction of the accused under section 376, PPC. The other evidence on which reliance has been placed by the learned Magistrate consists of the so-called confessions of Muhammad Sharif, Ashiq Hussain and Nazir Ahmad co-accused. But it appears that the learned Magistrate completely forgot his own findings that these were not confessions. It is only a confession of an accused which can be taken into consideration against his co-accused under section 30 of the Evidence Act. An admission short of confession can be proved only against its maker. There is no provision of law under which such a statement can be used against a co-accused. These statements were, therefore, irrelevant and inadmissible against Ali Muhammad accused and should not have been taken into consideration at all. There is no other evidence to connect this accused with the offence. No incriminating articles were recovered from his possession. I, therefore, set

aside his conviction and sentence and acquit him in the exercise of the revisional jurisdiction of this Court under section 439 of the Code of Criminal Procedure. I regret that this accused had to, remain in *jail* for more than a year before he could be cleared of the charge. I direct that he shall be set at liberty forthwith. KBA Order accordingly.

7.2 Acid and Burn

7.2.1 PLD 2016 Lahore 89

Before Muhammad Anwaarul Haq and Erum Sajad Gull, JJ

BASHIR AHMAD---Petitioner

Versus

The STATE and others---Respondents

Writ Petition No.34275 of 2015, decided on 19th August, 2015.

Anti-Terrorism Act (XXVII of 1997)

S. 23 & Third Sched. Para 4(iv)---Penal Code (XIV of 1860), Ss.336-B, 452 & 34---Constitution of Pakistan, Art.199---Constitutional petition---Hurt by corrosive substance (acid)---Jurisdiction of Anti-Terrorism Court---Scope---Offence of throwing acid on victim in a house---Plea of accused that since such alleged offence took place in the room of a house, and did not create any sense of fear or insecurity in the mind of public at large, therefore the Anti-Terrorism Court did not have the jurisdiction to try the case---Application for transfer of case from Anti-Terrorism Court to ordinary court was allowed by Anti-Terrorism Court---Validity---Offence (of throwing acid) committed by the accused, in the present case, fell under S.336-B, P.P.C. and the same was duly reflected in the Third Schedule to the Anti-Terrorism Act, 1997---Paragraph No. 4(iv) of Third Schedule to the Anti-Terrorism Act, 1997 clearly postulated that the Anti-Terrorism Court to the exclusion of any other court shall try the offence relating to hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance---Medico-legal certificate of the victim issued, in the present case, clearly reflected that the injuries on the person of the victim were the result of acid---Anti-Terrorism Court constituted under the Anti-Terrorism Act, 1997 had direct jurisdiction in the offences mentioned in Paragraph No.4(iv) of Third Schedule to the Anti-Terrorism Act, 1997 and no nexus was required to be searched for such scheduled offences as the very commission of said offences created terror, panic and sense of insecurity amongst the general public---Application moved by accused for transfer of his case from Anti-Terrorism Court to the court of ordinary jurisdiction was dismissed in circumstances---Constitutional petition was allowed accordingly.

2013 PCr.LJ 1880 distinguished.

Muhammad Yousaf v. The State and another PLD 2014 Lah. 644; Rana Abdul Ghaffar v. Abdul Shakoor and 3 others PLD 2006 Lah. 64 and Mst. Ruggia Bibi v. Special Judge, Anti-Terrorism Court and 2 others 2015 PCr.LJ 456 ref.

Ch. Zaheer Ahmad Cheema and Muhammad Younas Bhullar for Petitioner.

Ch. Muhammad Mustafa, Deputy Prosecutor General for the State.

Ch. Muhammad Anwar Bhinder for Respondents.

Date of hearing: 19th August, 2015.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J. Through this petition, the petitioner assails the order dated 15-12-2014 passed by the learned Special Judge, Anti-Terrorism Court-II, Gujranwala, whereby the application under section 23 of Anti-Terrorism Act, 1997 moved by respondents Nos.2 and 3/accused for transfer of case FIR No.200/2014 dated 15-5-2014 under sections 336-B, 452, 34, PPC to a court of ordinary jurisdiction has been allowed.

2. Learned counsel for the petitioner contends that offence under section 336-B, PPC is a scheduled offence and is triable by the special court constituted under Anti-Terrorism Act, 1997, therefore, the impugned order is not sustainable in the eyes of the law.

3. Learned counsel for respondents Nos.2 and 3 has vehemently argued that irrespective of the fact that offence under section 336-B, PPC has been included in the Schedule to Anti-Terrorism Act, 1997, the same has to be read jointly with the provisions of sections 6 and 7 of Anti-Terrorism Act, 1997 as well as with the preamble of the Act and that the offences mentioned in the Schedule to the Act should have nexus with sections 6 and 7 of Anti-Terrorism Act, 1997; further that the offence mentioned in the FIR has no nexus with terrorism as the alleged occurrence took place in a room of the house of the victim and that has not created any sense of fear and insecurity in the mind of public at large.

4. Heard. Record perused.

5. Law on the subject is very clear. Section 12 of Anti-Terrorism Act, 1997 clearly provides that a scheduled offence committed in an area in a province shall be triable only by Anti-Terrorism Court exercising territorial jurisdiction in relation to such area. Offence committed by the accused in this case falls under section 336-B, PPC and the same duly reflects in the Third Schedule to Anti-Terrorism Act, 1997. Plain reading of section 336-A, PPC provides that "*Whoever with the intention or knowingly causes or attempts to cause hurt by means of a corrosive substance or any substance which is deleterious to human body*

when it is swallowed, inhaled, comes into contact or received into human body or otherwise shall be said to cause hurt by corrosive substance", and in the Explanation it has been clarified that "corrosive substance" also includes every kind of acid which has a corroding effect and is deleterious to human body. Paragraph No.4 of the Third Schedule to Anti-Terrorism Act, 1997 clearly postulates that the Anti-Terrorism Court to the exclusion of any other court shall try the offence relating to hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance. Medico-legal certificate issued in the case clearly reflects that the injuries on the person of the victim were result of acid.

6. Learned trial Judge while deciding the application of respondents Nos.2 and 3 has relied upon the judgment dated 23-4-2013 passed in Writ Petition No.2902 of 2013 by another Hon'ble Division Bench of this Court and has been reported as 2013 PCr.LJ (Lahore) 1880, and has further observed that the same has been upheld by the Hon'ble Supreme Court of Pakistan in Civil Petition No.700 of 2013 titled "Malik Zafar Hussain v. Saifullah Saleem Arshad and others". We are afraid, the learned trial Judge remained totally fail to distinguish the present case than the case in the aforementioned Writ Petition No.2902 of 2013 as in that case the matter under consideration was application of section 7 of Anti-Terrorism Act, 1997 and the Hon'ble Supreme Court of Pakistan while dismissing Civil Petition No.700 of 2013 filed against the judgment dated 23-4-2013 passed in Writ Petition No.2902 of 2013 has observed as under:--

"We have heard the learned counsel for the petitioner and have also gone through the impugned judgment, particularly para. 7 thereof reproduced herein above. The learned High Court after having taken into consideration the peculiar facts and circumstances of the case, rightly came to the conclusion that section 7 of the Act does not attract in this cases as the offence did not create panic or sense of insecurity among the people in terms of the provisions of the Act."

The above referred paragraph clearly reflects that section 7 of Anti-Terrorism Act, 1997 does not attract in the absence of any panic or sense of insecurity among the people as provided under the law itself, but the learned trial Judge remained oblivious of para 5 of the judgment of the Apex court wherein it has been observed as under:

"In view of the foregoing discussion, we find no merit in this petition which is dismissed and leave to appeal is declined. However, we leave it open for examination the jurisdiction of Anti-Terrorism Court in respect of the offence of causing hurt by corrosive substance or attempt to cause hurt by means of a corrosive substance, as inserted in the Third Schedule vide notification noted herein above."

In this case, there was no question of application of section 7 of Anti-Terrorism Act, 1997 that, as observed by the Hon'ble Supreme Court of Pakistan, necessarily requires its nexus with the preamble of the Act, rather the matter only relates to the trial of offence against the respondents under section 336-B, PPC that is a scheduled offence. In the case of Muhammad Yousaf v. The State and another (PLD 2014 Lahore 644), another Hon'ble Division Bench of this Court after taking into consideration the facts and circumstances of a case relating to the similar offence has observed that the Special Court constituted under the Anti-Terrorism Act, 1997 shall have direct jurisdiction in the offences mentioned in paragraph No.4 of the Schedule to Anti-Terrorism Act, 1997 and no nexus is required to be searched for such scheduled offences as very commission of the said offences creates terror, panic and sense of insecurity amongst the general public. The Hon'ble Division Bench has also taken into consideration the case of Malik Zafar Hussain v. Saifullah Saleem Arshad and others (Civil Petition No.700 of 2013) supra and while dismissing the writ petitions filed against the orders of dismissal of applications under section 23 of Anti-Terrorism Act, 1997 for transferring the matters to the ordinary court has observed as under:

"From the above mentioned verdict of the august Supreme Court of Pakistan, it is clear that above said judgment passed by the learned Division Bench of this Court was confined to the fact and circumstances of the case in question and point of jurisdiction in respect of the offences of causing hurt by corrosive substance or attempt to cause hurt by means of corrosive substances as inserted in Third Schedule was kept open for Anti-Terrorism Court."

In the case of Rana Abdul Ghaffar v. Abdul Shakoor and 3 others (PLD 2006 Lahore 64), the Hon'ble Division Bench of this Court has observed as under:

"According to subsection (1) of section 12 of the Anti-Terrorism Act, 1997 an offence mentioned in the Third Schedule appended with the Anti-Terrorism Act, 1997 can be tried only by an Anti-Terrorism Court constituted under the said Act and no other Court has any jurisdiction in that regard. The Third Schedule appended with the Anti-Terrorism Act, 1997 not only mentions the offence of 'terrorism' but also mentions other offences which now, through the above mentioned amendment introduced on 11-1-2005, includes an offence of abduction or kidnapping for ransom. This unmistakably shows that an Anti-Terrorism Court can try not only an offence of 'terrorism' as defined in section 6 of the Anti-Terrorism Act, 1997 but it can also try any other offence which is declared by the law to be exclusively triable by such a Court."

The same view has also been expressed in the case of Mst. Ruqqia Bibi v. Special Judge, Anti-Terrorism Court and 2 others (2015 PCr.LJ 456).

7. Therefore, keeping in view the peculiar circumstances of this case and the case-law referred above, this writ petition is allowed, the impugned order dated 15-12-2015 passed by the learned Special Judge, Anti-Terrorism Court-II, Gujranwala being not sustainable in the eyes of law is set aside resulting in dismissal of the application moved by the accused/respondents Nos.2 and 3 for transfer of case to the court of ordinary jurisdiction. However, the learned trial court is directed to conclude the trial of the case within a period of four months after the receipt of this order.

MWA/B-27/L Petition allowed.

7.2.2 2016 YLR Note 13 [Lahore]

Before Abdul Sami Khan and Sadaqat Ali Khan, JJ

SHABBIR AHMAD Appellant

Versus

The STATE and others Respondents

Criminal Appeal No.91-J of 2011, heard on 11th February, 2015.

Penal Code (XLV of 1860)

Ss. 324, 337-A(i) & 337(F(i)---Attempt to commit *qatl-i-amd*, causing *shajjah-i-khafifah*, *damiyah*---Appreciation of evidence---Case of acquitted co-accused was absolutely on different and distinct footing---Specific role of pouring the acid on the body of injured complainant was attributed to accused---Credibility of injured complainant, could not be shattered due to acquittal of co-accused---Maxim 'falsus in uno falsus in omnibus', had no universal application; and it was bounden duty of the court to sift the grain from the chaff---Complainant was cross-examined at length, but her evidence could not be shaken during cross-examination; she remained consistent on all material aspects of the case---Evidence of the complainant was straightforward, trustworthy and confidence inspiring---Medical evidence had fully supported ocular account furnished by injured complainant---No other evidence was required to support the statement of the complainant, which was confidence inspiring and supported by medical evidence and same was sufficient to prove the guilt of accused for his conviction---Defence plea of accused which was nothing, except denial, was discarded---Conviction and sentence awarded to accused by the Trial Court, were maintained---Benefit of S.382-B, Cr.P.C., was also given to accused. [Paras. 15, 16, 19, 20, 21 and 22 of the judgment]Maqbool Ahmad and another v. The State 2007 SCMR 116; Elahi Bakhsh v. Rabnawaz and another 2002 SCMR 1842 and Ehsan alias Qadri v. The State and another 2002 SCMR 1170 rel.

Hafiz Abdul Rehman Ansari, Miss Shagufta Kausar for Appellant on State expenses.

Khurram Khan, DPG for the State.

Date of hearing: 11th February, 2015.

JUDGMENTSADAQAT ALI KHAN, J.The instant Criminal appeal has been filed by Shabbir Ahmad present appellant against the judgment dated 12.04.2010 passed by Special Judge Anti-Terrorism Court-III, Lahore according to which present appellant was convicted and sentenced as under: -

"Shabbir Ahmad was convicted under section 324, PPC and sentenced to ten years' R.I. along with fine Rs.50,000/- and in default thereof further undergo one year S.I.

He was also convicted under section 7(c) ATA 1997 and sentenced to life imprisonment along with fine Rs.50,000/- and in default thereof further undergo one year S.I.

He was also convicted under section 337-A(i), PPC and sentenced to two years' R.I. along with Daman of Rs.50,000/- payable to Mst. Goshi Bibi victim.

He was also convicted under section 337-F(i), PPC and sentenced to one year R.I. along with Daman Rs.50,000/- payable to Mst. Goshi victim."

Whereas his co-accused namely Zia ur Rehman, Mst. Azra Bibi, Mst. Sana and Naveed Ahmad were acquitted by the learned trial court. The sentences awarded to the appellant were ordered to be run concurrently with benefit of section 382- B Cr.P.C by the trial court in case FIR No. 991 dated 16.10.2009 under section 324/34, PPC read with section 21-L/7 ATA, 1997 Police Station Kot Lakhpat, Lahore.

2. The facts of the case has been stated by Goshi Bibi/complainant PW-8 in her statement before the learned trial court and same statement is hereby reproduced for narration of the facts:--

"Shabbir Ahmad accused present in court is my husband. I have filed suit for dissolution of marriage against Shabbir Ahmad accused which is pending in the court of Family Judge, Lahore. Out of the wedlock three children were born out of whom a daughter aged 9 years and a son aged 5 years are alive. Shabbir Ahmad accused forcibly snatched my children from me and I filed a petition at Sessions Court, Lahore and a case was registered against him. My children were returned to me and I was living in the house of my sister Cheemo at H-Block Sabzazar Scheme, Lahore. On 8.10.2009 Shabbir Ahmad and Zia accused present in court came to the house of my sister and forcibly took away my all the household articles. On the same day, Shabbir Ahmad accused made a telephonic call to my

sister at night and asked her to send Goshi and he will return her household articles. On 9.10.2009 at 8:30-am, I went to the house of Shabbir Ahmad accused who on seeing me became angry and called his wife first Azra accused present in court; then Shabbir Ahmad accused called his daughter Sana and said that Goshi should not be spared. Then Shabbir Ahmad accused called Zia and Naveed accused. Naveed and Zia accused caught me and Shabbir Ahmad accused brought a bottle of acid from his house. I rescued myself from Zia and Naveed accused I tried to put pillow on my mouth. In the meanwhile, Shabbir Ahmad accused poured acid on my head, face, ears, back, legs. My right ear was amputated by acid. My whole of the body was burnt by acid. My clothes were also burnt by acid. Azra and Sana accused threw me out of the house. I became unconscious. When I came to my senses, I found myself at General Hospital, Lahore. I remained under treatment in the hospital for one month. On 16.10.2009 I filed application Exh.PA before police for registration of case which was thumb marked by me. Shabbir accused used to make telephonic calls to me from jail and gave me threats"

3. After the completion of the investigation, report under section 173, Cr.P.C. was submitted in the trial court and trial court after observing the legal formalities provided under the Criminal Procedure Code framed the charge on 22.02.2010 against appellant who pleaded not guilty and claimed trial.

4. Prosecution evidence was summoned and the prosecution produced Amjad Ali, ASI as PW-1, Rashid Minhas H.C PW-2, Shakeel Ahmad, Constable PW-3, Muhammad Ashraf, HC PW-4, Dr. Naheed Waris, Ward Medical Officer (WMO) PW-5, Muhammad Akmal 7457, HC PW-6, Zahid ur Rehman ASI PW-7, Mst. Goshi Bibi victim/ complainant as PW-8, Aurangzeb ASI PW-9, Dr. Muhammad Ansar Aslam PGR PW-10, Muhammad Anwar Inspector PW-11, whereas PW namely Munawar Hussain constable was given up by the prosecution being unnecessary and after tendering in evidence complaint Ex.PA, FIR Ex.PA/1, recovery memo of bottle of acid Ex.PB, warrants of arrest Ex.PC, proclamation against the accused persons Ex.PF to Ex.PG, injury statement of Mst. Goshi complainant Ex.PJ, site plan of recovery of bottle of acid Ex.PK, site plan Ex.PL, report of Chemical Examiner Ex.PN closed the evidence.

5. Medical evidence was furnished by Dr. Muhammad Ansar Alam PGR PW-10 and Dr. Naheed Waris WMO, PW-5 detail of which is as under: -

"Doctor Mohammad Ansar Aslam PGR PW-10, stated that on 27.10.2009, he was performing emergency duty as post graduate resident in emergency ward of Mayo Hospital Lahore. On the same day, Mst.Goshi injured aged 26 years came to

emergency ward for treatment. He medically examined the victim and found the following multiple burn injuries on her body”:

- 1- A burn wound on upper back from the tip of left shoulder to few cm below the inferior angle of scapula and upper abdomen oblique from tip of the left shoulder to the right axilla.
- 2- A burn on the right side of face extending from right ear to the right clavicle. Ear was burnt and necrosed.
- 3- A burn on little part of right side of abdomen. Extending from axilla to iliac crest.
- 4- A 4 x 5 cm burn wound on and above forehead.
- 5- 4 x 4 cm burnwound on left cheek.
- 6- A 15 x 20 cm burn wound on left buttock, and 5 x 5 cm burn wound on right buttock.
- 7- 15 x 10 cm burn wound on anterior surface of right thigh.

OPERATIVE NOTES:-

I did the debridement of the burn wound and antiseptic cream was applied. Injuries Nos.1, 3, 6, 7 are *jurh ghyar jaifah damiayah*, whereas, injuries Nos.2, 4, 5 are *shajjah-e-khafifah*. The original operation notes of the victim Exh.PM comprising nine pages are in my hand and signed by me."

Further, Dr. Naheed Waris, W.M.O. Lahore General Hospital PW-5 stated that on 09.10.2009 she was posted as W.M.O. Lahore General Hospital. On the same day, she conducted medico legal examination of Mst. Goshi w/o of Shabbir aged 30 years, sex female, R/o St. No.4, Kot Lakhpat, Lahore brought by Nasir Iqbal/HC. On examination following injuries were noted: -

1. On the back extending from tip of the left shoulder to the right axilla up to the angle of scapula.
2. On the face large area from right ear to the right shoulder.
3. At lumbar region 4 x 5 cm up to the right iliac crest.
4. Red brown area about 5 x 4 cm on left cheek.
5. About 3 x 4 cm at forehead.

6. 15 x 20 cm on left buttock.
7. About 5 x 5 cm on right buttock.
8. Multiple black areas on right thigh ulterior aspect with a large area about 15 x 10 cm.

Patient was referred to Surgery for management.

According to Chemical examiner report No.6295 and Surgeon Notes Injury Nos.1, 3, 6, 7 and 8 were declared as *jurh ghayr jaifah damiyah* and injury Nos.2, 4 and 5 were declared as *shajjah-i-khafifah*.

IDENTIFICATION MARKS.

1. Scar mark left foot.
2. Scar mark right eye lateral side.

Ex.PJ is the true carbon copy of MLC of Goshi which is in my hand and signed by me. This medico legal was conducted on the written application of police. Ex.PK which is signed by me."

5. Statement of the present appellant under section 342, Cr.P.C. was recorded in which he refuted the allegations leveled against him and the appellant did not opt to record his own statement under section 340(2), Cr.P.C. and also did not produce oral defence evidence, however, he produced document Ex.DA (FIR) and in reply to question: "*why this case against you and why the PW's deposed against you?*" The appellant replied as under: -

"The complainant of this case is inimical to me as I lodged a case FIR No. 116/2009 offences under sections 337-F(v), 337-A(i) Police Station, Sabzazar was registered against the complainant on my application. There is also litigation about the custody of minors which are presently in the custody of Goshi Bibi."

6. After conclusion of the trial, learned trial court while acquitting co-accused of the present appellant stated above, convicted the present appellant Shabbir Ahmad with above stated sentences. Hence this appeal.

7. Learned counsel for the appellant contended that:-

- (i) The judgment of the trial court dated 12.04.2010 is against law and facts on the file and is liable to be set-aside;
- (ii) It is submitted that the story of the prosecution is improbable and not believable;
- (iii) It is further submitted that prosecution has failed to prove its case against the appellant beyond shadow of doubt and the learned trial court wrongly convicted present appellant in surmises and conjectures;
- (iv) And lastly submitted for the acceptance of the appeal of the present appellant;

8. On the other hand, learned DPG has vehemently opposed the appeal and submitted that:

- (i) Prosecution has proved its case beyond any shadow of doubt against the appellant with solid evidence and prayed for the dismissal of the present appeal.

9. We have heard the learned counsel for the parties and perused the record.

10. The detail of prosecution case as mentioned in the FIR Ex.PA/1 recorded on the written application Ex.PA of Mst. Goshi Bibi complainant PW-8 has already been given in paragraph No. 2 of this judgment, therefore, there is no need to repeat the same to avoid the repetition and duplication.

11. Firstly, we would like to see the applicability of offence under section 7 (c) of ATA 1997.

12. We have observed that in the present case occurrence took place on 09.10.2009 at 08:30 p.m. and FIR was registered on 16.10.2009 at 12:15 a.m. (night) whereas offence regarding hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance was inserted in the third schedule of ATA 1997 on 05.09.2012 through notification No.SO(Judl.-I)10(1-36(1)/2010 dated 05.09.2012 and was not schedule offence at the time of present occurrence and the appellant could not be convicted under section 7 (c) of 1997. In this regard relevant section 38 of ATA is hereby reproduced:--

"38. Punishment for terrorist act committed before this Act Where a person has committed an offence before the commencement of this Act which if committed

after the date on which this Act comes into force would constitute a terrorist act hereunder he shall be tried under this Act but shall be liable to punishment as authorized by law at the time the offence was committed".

Further reliance is placed on case Maqbool Ahmad and another v. The State (2007 SCMR 116) in which Hon'ble Supreme Court of Pakistan has observed at pages 117 and 118 as under: -

"In the instant case the offence has taken place on 05.06.1997 when, according to section 10(3) of Ordinance VII of 1979 the punishment of the offence was imprisonment for a term which could extend to 25 years and whipping numbering thirty stripes. So far as section 10(4) of the Ordinance is concerned, it was introduced in December, 1997 and hence no punishment could be awarded under the said section, being in glaring violation of Article 12 of the Constitution.

The objection regarding the conduct of trial by Special Court under Anti-Terrorism Act, 1997, is unfounded. Any person accused of having committed an offence before the commencement of Anti-Terrorism Act of 1997 could be tried by the Court constituted under the Act but the punishment awarded shall be in accordance with law prevailing at the time when the offence was committed; provided the offence otherwise constituted a Terrorism Act. We are of the considered view that the trial by Anti-Terrorism Court was in accordance with law, protected by section 38 of the Anti-Terrorism Act, 1997. However, section 38 of the Act read with Article 12 of the Constitution would certainly under the punishment awarded under section 10(4) of the Ordinance void ab initio, with reference to the date of occurrence and the date of insertion of section 10(4) in the Ordinance.

Consequently, while partially accepting the appeal, the imprisonment for life awarded to the appellant is reduced to imprisonment for a term which shall extend to 20 years with the infliction of 30 stripes each and a compensation of Rs.50,000/- each under section 544-A Cr.P.C to be paid to the victim".

13. In view of the above, conviction and sentences under section 7 (c) of ATA 1997 awarded by the learned trial court to the appellant are not sustainable and the same are hereby set aside.

14. So far as convictions and sentences of present appellant under sections 324, 337A1(i) and 337F(i), PPC are concerned, we have observed that Mst. Goshi Bibi complainant PW-8 was the wife of present appellant at the time of occurrence. She specifically stated in her statement before the trial court as under: -

"Shabbir Ahmad accused poured acid on my head, face, ears, back, legs. My right ear was amputated by acid. My whole of the body was burnt by acid. My clothes were also burnt by acid."

15. Although Zia-ul-Rehman, Mst. Azra Bibi, Mst. Sana and Naveed Ahmad co-accused of the present appellant have been acquitted by the trial court through the impugned judgment by disbelieving the statement of Mst. Goshi Bibi complainant/ injured PW-8 to their extend but the case of the acquitted accused was absolutely on different and distinct footings whereas specific role of pouring the acid on the body of Mst. Goshi Bibi complainant/ injured PW-8 is attributed to the present appellant. In such an eventuality the credibility of Mst. Goshi Bibi complainant/ injured PW-8 could not be said to have been shattered due to the said acquittal. It is well settled by now that the maxim 'falsus in uno falsus in omnibus' has no universal application and it is bounden duty of the court to sift the grain from the chaff. Reliance is placed on case Elahi Bakhsh v. Rabnawaz and another (2002 SCMR 1842) in which Hon'ble Supreme Court of Pakistan has observed at page 1847 as under: -

"We have also adverted to the contention of Sardar Muhammad Latif Khan Khosa, learned Senior Advocate Supreme Court that on the basis of same evidence Rabnawaz (petitioner) could not have been convicted but it has been ignored while raising the said contention that the case of acquitted accused is absolutely on a different and distinct footing as no specific role whatsoever was assigned to them which has been attributed to Rabnawaz (petitioner) in a categoric manner. In such an eventuality the credibility of "Ellahi Bukhsh PW-7 and Abdur Razzaq PW-10 could not be said to have been shattered due to the said acquittal. It is

well settled by now that the maxim 'falsus in uno falsus in omnibus' has no universal application and it is bounden duty of the court to sift the grain from the chaff. In this regard reference can be made to Khairu v. State (1981 SCMR 1136). A thorough scrutiny of the entire evidence would reveal that the statements of prosecution witnesses are consistent, confidence inspiring and in consonance with the probability in the case and fitted in with other evidence and circumstances of the case and being worthy of credence could not have been brushed aside. The prosecution, in our considered opinion has substantiated the allegation beyond shadow of doubt and accordingly Criminal Petition for Leave to Appeal (108/2001) being devoid of merit is dismissed".

16. Mst. Goshi Bibi complainant/ injured PW-8 was cross-examined at length but her evidence could not be shaken during the process of cross-examination. She remained consistent on all material aspects of the case. Her evidence is straight forward, trust worthy and confidence inspiring. Reliance is placed on case Elahi Bakhsh v. Rabnawaz and another (2002 SCMR 1842) in which Hon'ble Supreme Court of Pakistan has observed at page 1847 as under: -

"We have also adverted to the contention of Sardar Muhammad Latif Khan Khosa, learned Senior Advocate Supreme Court that on the basis of same evidence Rabnawaz (petitioner) could not have been convicted but it has been ignored while raising the said contention that the case of acquittal of accused is absolutely on a different and distinct footing as no specific role whatsoever was assigned to them which has been attributed to Rabnawaz (petitioner) in a categoric manner. In such an eventuality the credibility of "Ellahi Bukhsh PW-7 and Abdur Razzaq PW-10 could not be said to have been shattered due to the said acquittal. It is well settled by now that the maxim 'falsus in uno falsus in omnibus' has no universal application and it is bounden duty of the court to sift the grain from the chaff. In this regard reference can be made to Khairu v. State (1981 SCMR 1136). A thorough scrutiny of the entire evidence would reveal that the statements of prosecution witnesses are consistent, confidence inspiring and in consonance with the probability in the case and fitted in with other evidence and circumstances of the case and being worthy of credence could not have been

brushed aside. The prosecution, in our considered opinion has substantiated the allegation beyond shadow of doubt and accordingly Criminal Petition for Leave to Appeal (108/2001) being devoid of merit is dismissed".

17. Further, medical evidence was furnished by Dr. Muhammad Ansar Aslam PW-10 who stated that on 27.10.2009 he medically examined Mst. Goshi Bibi, complainant/injured PW-8 and observed following injuries on her body.

- 1- A burn wound on upper back from the tip of left shoulder to few cm below the inferior angle of scapula and upper abraded oblique from tip of the left shoulder to the right axilla.
- 2- A burn on the right side of face extending from right ear to the right clavicle. Ear was burnt and necrosed.
- 3- A burn on little part of right side of abdomen. Extending from axilla to iliac crest.
- 4- A 4 x 5 cm burn wound on and above forehead.
- 5- 4 x 4cm burn wound on left cheek.
- 6- A 15 x 20 cm burn wound on left buttock and 5 x 5 cm burn wound on right buttock.
- 7- 15 x 10 cm burn wound on anterior surface of right thigh.

18. Likewise Dr. Naheed Waris WMO PW-5 stated that on 09.10.2009 she medically examined Mst. Goshi Bibi and observed as under: -

1. On the back extending from tip of the left shoulder to the right axilla up to the angle of scapula.
2. On the face large area from right ear to the right shoulder.
3. At lumbar region 4 x 5 cm up to the right iliac crest.
4. Red brown area about 5 x 4 cm on left cheek.
5. About 3 x 4 cm at forehead.
6. 15 x 20 cm on left buttock.
7. About 5 x 5 cm on right buttock.

8. Multiple black areas on right thigh ulterior aspect with a large area about 15 x 10 cm.

Patient was referred to Surgery for management.

According to Chemical Examiner report No.6295 and Surgeon Notes Injury Nos.1, 3, 6, 7 and 8 were declared as *jurh ghayr jaifah \damiyah* and injury Nos.2, 4 and 5 were declared as "*shajjah-i-khafifah*".

19. In view of the above, it is concluded that medical evidence has fully supported the ocular account furnished by Mst. Goshi Bibi complainant/injured PW-8.

20. The argument of the learned counsel for the appellant that solitary statement of Mst. Goshi Bibi complainant/ injured PW-8 without independent corroborative evidence is not sufficient for the conviction of the present appellant has no substance. We have already observed that medical evidence furnished by Dr. Muhammad Ansar Aslam PW-10 and Dr. Naheed Waris WMO PW-5 has fully supported the statement of Mst. Goshi Bibi complainant/injured PW-8. No other evidence is required to support the statement of Mst. Goshi Bibi complainant/injured PW-8. Solitary statement of Mst. Goshi Bibi complainant/injured PW-8 which is confidence inspiring supported by medical evidence as discussed earlier is sufficient to prove the guilt for the conviction of the appellant. Reliance is placed on case "Ehsan @ Qadri v. The State and another" (2002 SCMR 1170) in which august Supreme Court of Pakistan has observed at pages 1172 and 1173 as under:-

"We have considered the arguments of the learned counsel for the petitioner and minutely examined the record. The prosecution examined the injured complainant, who received the injuries at the hands of the petitioner, which are supported by the medical evidence. The Medical Officer was also examined during trial. No doubt, Muhammad Ashfaq and Ilyas PWs were given up by the Inspector Legal on the ground that those witnesses were won over. The two brothers of the complainant Muhammad Younas and Muhammad Yaseen were also given up finding them to be unnecessary. In this case the defence did not allege any malice or ill-will with the injured complainant. The defence has not been able to show any reason so that the accused-petitioner may be implicated in this case.

We have also perused the judgment of the trial Court, which shows that the trial court did not appreciate the evidence adduced by the prosecution in its proper perspective and the same was rightly set aside by the learned High Court in appeal. The learned High Court has properly analysed and examined the evidence available on record. The impugned judgment is based on the proper appreciation of evidence. We do not find misreading or non-reading of evidence or jurisdictional error. It would be pertinent to refer to the relevant portion of the impugned judgment, which reads as under:

"It may be stated here that Muhammad Umar complainant was cross-examined by the learned counsel for the defence on 15.02.2000 and he himself got proved through cross-examination that there were two injuries on his person, one on his buttock and other one near his testicles. As far as statement of PW-3 recorded in Urdu is concerned, I would like to refer the same below:-

For the above facts and reasons this petition has no merit, which is hereby dismissed and leave to appeal is declined."

21. Adverting to the defence plea of the present appellant Shabbir Ahmad he stated in a question: *"why this case against you and why the PWs made statements to involve you?"* Appellant Shabbir Ahmad replied as under:-

"The complainant of this case is inimical to me as I lodged a case FIR No. 116/2009 offences under sections 337-F5, 337-A1 Police Station, Sabzazar was registered against the complainant on my application. There is also litigation about the custody of minors which are presently in the custody of Goshi Bibi."

Appellant has not opted to appear under section 340(2) Cr.P.C. and also did not produce oral defence evidence. However, he produced document Ex.DA (FIR). Considering above defence plea of the appellant which is nothing except denial and same is hereby discarded.

22. In view of the above discussion, we have persuaded to hold that learned trial court has rightly convicted the present appellant, hence, the conviction and sentences of the present appellant under sections 324, 337-A(i), 337-F(i) awarded by the learned trial court are maintained. Benefit of section 382-B Cr.P.C is also given to the present

appellant. All the sentences shall run concurrently. The appellant is directed to pay Daman to Mst. Goshi Bibi victim awarded by the trial court under sections 337-A(i) and 337-F(i) PPC failing which he shall be kept in jail until Daman is paid. Resultantly, this appeal has no merits and the same is dismissed. HBT/S-38/L Appeal dismissed.

7.2.3 2016 YLR 2601 [Lahore]

Before Sardar Muhammad Shamim Khan, J

ASGHAR ALI Appellant

Versus

The STATE and another Respondents

Criminal Appeal No.695 of 2012, decided on 29th February, 2016.

Penal Code (XLV of 1860)

Ss. 376, 365-B, 324, 334 & 336---Rape, kidnapping, abducting or inducing woman to compel for marriage etc.---Attempt to commit *qatl-i-amd*, *Itlaf-i-Udw*, *Itlaf-i-Salahiyyat-i-Udw*---Appreciation of evidence---Defence Counsel was unable to shatter the evidence of victim in any manner, in her cross-examination---Ocular account furnished by the victim found corroboration from her medical examination---Medical evidence confirmed that victim was subjected to *zina-bil-jabr*---Statement of victim, corroborated by medical evidence, was sufficient to record conviction against accused---Report of Chemical Examiner was positive--Medical examination of the victim showed that offence under S.336, P.P.C., was made out against accused, his conviction under S.334, PPC., was converted into offence under S.336, P.P.C., and he was sentenced to ten years' R.I. as *tazir* along with *arsh* Rs.5,06,340---Disfigurement was sufficient to attract the provisions of S.336, P.P.C.---Accused being husband of sister of the complainant, it could not be believed that the complainant and his daughter (victim) would falsely involve accused in the case without any serious enmity between the parties---Deposition of defence witness, that victim stated before Police that persons, other than accused had committed *zina-bil-jabr* with her and threw acid on her face, was not believable as no such statement of victim was available on record---Said defence witness being not an eye-witness of occurrence, his evidence, was hearsay, which was inadmissible in evidence---Prosecution had proved its case against accused beyond reasonable doubt---Trial Court having convicted accused after proper appraisal of evidence available on record, impugned judgment passed by the Trial Court, was upheld, and appeal having no force, stood dismissed, in circumstances.

Khadim Hussain v. The State 2011 PCr.LJ 1443 and Zafar Iqbal v. The State and another 2010 SCMR 401 rel.

Shahid Shoukat for Appellant.

Ali Hassan DPP for the State.

Muhammad Nauman Khan for the Complainant.

Date of hearing: 9th February, 2016.

JUDGMENT

SARDAR MUHAMMAD SHAMIM KHAN, J. The instant appeal was filed by Asghar Ali convict (appellant) against the judgment dated 28.03.2011 passed by learned Addl. Sessions Judge Sheikhpura, whereby, appellant was convicted under section 376, PPC and sentenced to 14-years R.I. along with fine of Rs.1,00,000/-, in default thereof, to further undergo six months R.I. He was also convicted under section 334, PPC and sentenced to ten years R.I. as *Taz'ir* along with *Arsh* Rs. 5,06,340/-. The appellant was further convicted under section 324, PPC and sentenced to five years R.I, in case FIR No. 613/2009 dated 31.07.2009 offences under sections 365-B, 376, 324 and 334, PPC registered at Police Station Bhikhi District Sheikhpura. All the aforesaid sentences were ordered to run concurrently. Benefit of section 382-B, Cr.P.C. was also extended to appellant.

2. Brief facts of the case as narrated by Muhammad Arshad complainant in written complaint (Ex.PA) submitted by him before the police are that on 30.07.2009 at evening time, his daughter Ayesha aged about 14/15-years went to the house of her grand-father but she did not return. The complainant started searching for his daughter Ayesha Bibi but she could not be traced. On the following day, i.e. 31.07.2009 at about 5:00 a.m. he along with his brother Muhammad Ashraf and Asghar reached in the plot of one Riaz Ahmed where they saw that Ayesha Bibi was lying unconscious and acid had been thrown on her face and on her left arm. She was taken to Civil Hospital Sheikhpura in an injured condition. It was alleged in the complaint that some unknown culprits committed *zina-bil-Jabr* with Ayesha Bibi and threw acid on her face and left arm. On the basis of application submitted by Muhammad Arshad complainant, formal FIR EX.PA/1 was chalked out.

3. On 01.08.2009 statement of Ayesha Bibi /victim was recorded by the police under section 161, Cr.P.C. wherein she implicated Asghar Ali and Shama Bibi accused persons in the commission of instant occurrence.

4. After completion of investigation, report under section 173, Cr.P.C. was submitted against the accused persons before the learned trial court for trial. Charge was framed which was denied by the accused persons including the appellant who professed their innocence and claimed their trial. In order to prove its case, the prosecution examined as many as seven witnesses.

P.W-1. Mst. Ayesha Bibi is victim of this case who supported the prosecution story.

P.W-2 Muhammad Arshad is the complainant of this case.

PW-3 Muhammad Iqbal ASI chalked out formal FIR (EX.PA/1) on the basis of complaint (EX.PA) sent by Muhammad Ishaque Sub-Inspector through Abdul Sattar 1305/C.

PW-4 Ali Ahmad 953/C transmitted one sealed parcel containing swabs to the office of Chemical Examiner Lahore. He also transmitted one sealed parcel containing swabs and syring to the office of DNA laboratory Lahore.

P.W-5 Muhammad Ishaque Sub-Inspector conducted the investigation of this case and deposed regarding the steps of investigation.

P.W-6, Lady Doctor Waalia Mohsin medically examined Mst. Ayesha Bibi victim on 01.08.2009 and found the following injuries on her person.

i. Superficial burn on the whole face with disfigurement. Face swollen. Small area also burnt on left breast 1 X 1 cm, multiple burns on both eyes and leg areas. These injuries were K.U.O. for surgeon opinion. She also complained of decreased eye sight, left eye was K.U.O for eye specialist opinion. Probable duration of the injury was 24 to 48-hours.

Hymen torn permitting one finger, bleeding P.C. present. Two vaginal swabs were taken for chemical examiner. 2 CC blood and 2 vaginal swabs were taken for D.N.A test and handed over to police.

P.W-7 Dr. Nasir Majeed Khan, Senior Medical Officer medically examined Muhammad Asghar (accused) on 11.08.2009 at about 4:00 p.m. and found that he was physically and mentally fit and well oriented in time and space. His secondary sexual character was all well built. His cremextaric reflex were normal. All the above character and facts suggest that nothing is available on the record that he was unable to perform sexual act.

5. Learned DPP gave up Muhammad Ashraf P.W being un-necessary and closed the prosecution evidence after tendering report of chemical examiner Exh. PJ and report of DNA Exh.PK.

6. Thereafter, accused persons including appellant were examined under Section 342, Cr.P.C., they professed their innocence and denied the prosecution allegations levelled against them. The appellant opted to produce evidence in his defence but did not opt to depose on oath as required under section 340(2), Cr.P.C. Muhammad Asghar appellant took

the following stance in reply to a question: *"why this case was registered against you and why the PWs have deposed against you?"*:--

"All the PWs including victim were inimical to him. Mother of Ayesha Bibi was married as exchange marriage of his wife Mst. Parveen, who was previously married with Khalid, the brother of the mother of Ayesha Bibi (victim). This was the exchange marriage. After the death of said he married with said Perveen Bibi. . He and his wife Parveen Bibi demanded the property left by the ex-husband (Khalid) of his wife. He also refused to give hands of Shama Bibi to the nephew of the mother of the victim. Due to this grudge he had falsely been implicated in this case. Complainant firstly nominated the accused Tanveer and Irfan and after joining hands with the said accused exonerated them."

The appellant produced Muhammad Ashraf as D.W-1 and closed his defence evidence.

7. After conclusion of the trial, above mentioned conviction and sentence was passed against the appellant whereas Shama Bibi co-accused was acquitted by learned trial court vide judgment dated 28.03.2011.

8. Learned counsel for the appellant contended that Asghar Ali appellant was not nominated in the FIR; that Mst. Ayesha Bibi the alleged victim appeared before the learned trial court as P.W-1 and conviction of the appellant has been recorded on her solitary statement which is not confidence inspiring; that report of DNA test negates the prosecution story; that nothing was recovered from the possession of the appellant during investigation of this case; that no expert evidence was available on record in order to establish that eye of the victim was dismembered, amputated or served but appellant was convicted under section 334, PPC, by learned trial court without any lawful justification; that infact Tanvir and Arfan committed *zina-bil-jabr* with Ayesha Bibi and threw acid on her body but after receiving money from them, the complainant has falsely implicated the appellant in the commission of instant occurrence on account of family dispute between the parties; that Muhammad Ashraf who is real brother of the complainant appeared before the learned trial court as D.W-1 and deposed that Tanvir and Arfan committed *zina-bil-jabr* with his niece Ayesha Bibi, therefore, appellant has proved the plea taken by him by producing uncle of the victim; that prosecution has failed to prove its case beyond reasonable doubt against Asghar Ali appellant. Thus, it is submitted that by accepting instant Criminal Appeal Asghar Ali appellant is liable to be acquitted.

9. Learned counsel for the complainant and learned DPP have vehemently opposed the contentions raised by learned counsel for the appellant and contended that Asghar Ali appellant was not nominated in the FIR because at the time of lodging the FIR, it was not in the knowledge of the complainant that Asghar Ali appellant had committed the instant

occurrence; that appellant was implicated in the instant case on the basis of statements of Mst. Ayesha Bibi/victim (P.W-1) recorded under section 161, Cr.P.C. by police as well as under section 164, Cr.P.C. recorded by learned Magistrate; that real sister of the complainant is wife of Asghar Ali appellant, therefore, it would be out of question that complainant would falsely involve his brother-in-law in the commission of instant occurrence without any serious enmity between the parties; that report of DNA test is not a conclusive proof of commission of zina-bil-jabr; that Mst. Ayesha Bibi/victim was 13/14-years old and was virgin at the time of occurrence and according to the statement of lady doctor, her hymen was torn, therefore, ocular account furnished by the prosecution finds corroboration by medical evidence of the victim; that although Muhammad Ashraf brother of the complainant appeared before the learned trial court as D.W-1 yet his evidence is not believable as he was not an eye-witness of the occurrence; that prosecution has proved its case beyond reasonable doubt against the appellant. Thus, it is submitted that instant appeal is liable to be dismissed.

10. I have heard the arguments advanced by the learned counsel for the parties and perused the record with care.

11. According to prosecution story, on 30.07.2009 at about 8/9:00 P.M., Mst. Ayesha Bibi aged about 14/15-years went to the house of her grand-father but did not return home. The complainant and other P.Ws. started searching her and on 31.07.2009 at about 5:00 A.M., Mst. Ayesha Bibi was found lying unconscious in the plot of one Riaz Ahmed. The complainant and other witnesses observed that acid was thrown on her face and on her left arm. She was taken to Civil Hospital Sheikhpura in an injured condition where Muhammad Arshad father of the victim submitted written complaint (EX.PA) before the police for registration of FIR.

12. In his written complaint, (EX.PA) the complainant did not nominate any accused because Ayehsa Bibi his daughter was unconscious and in his complaint (EX.P.A) complainant took stance that he would inform regarding the accused persons when it would come into his knowledge, therefore, contention of learned counsel for the appellant that appellant was not nominated in the FIR is without any substance as complainant was not an eye-witness of the occurrence.

13. The appellant was implicated in the instant case on the following day i.e. 01.08.2009 on the basis of statements of Mst. Ayesha Bibi victim recorded by the police under section 161, Cr.P.C.

14. The ocular account in this case was furnished by Mst. Ayesha Bibi/victim who appeared before the learned trial court as P.W-1 and deposed that on 30.07.2009 at about 8/9:00 p.m. she went to the house of her grand-father in order to answer the call of nature and when she was coming back to her house, Mst. Amina Bibi met her in the street and asked her that her mother was calling her in the house, therefore, she went to the house of Amina Bibi where Shama Bibi offered water to her (victim) and after drinking water she became a bit unconscious. It has further been deposed by Ayesha Bibi victim that Asghar Ali accused took her to another room of the house where he (appellant) forcibly committed *zina-bil-jabr* with her. She (victim) asked the accused that she would talk to her mother about this occurrence whereupon Asghar Ali accused threw acid upon her face and arms

through a bottle whereby her left eye was completely damaged and her face was disfigured. After the occurrence Asghar Ali accused threw her (Ayesha Bibi) outside of his home. In her examination-in-chief, Mst. Ayesha Bibi further contended that her statement under section 164, Cr.P.C. was also recorded by learned Magistrate regarding the instant occurrence.

15. Cross-examination was conducted on Ayesha Bibi victim (P.W-1) but learned defence counsel remained unable to shatter the evidence of Ayesha Bibi in any manner, rather he (learned defence counsel) simply put some suggestions to the victim which were denied by her.

16. The ocular account furnished by Ayesha Bibi victim (P.W-1) finds corroboration from her medical examination. Doctor Waalia Mohsin. WMO DHQ Hospital, Sheikhpura, appeared before the learned trial court as P.W-6 and deposed that she observed the following injuries on the person of the victim:--

1. Superficial burn on whole face with disfigurement. Face swollen. Small area also burn on left breast 1 x 1 c.m. multiple burns on both eyes and leg areas. These injuries were K.U.O for surgeon's opinion. She also complained of decreased eye sight, left eye was K.U.O for eyes specialist opinion.

Hymen torn permitting one finger, bleeding PC present. Two vaginal swabs were taken for chemical examiner.

2 CC blood and 2 vaginal swabs were taken for DNA test and were handed over to police.

17. Perusal of evidence of lady doctor reveals that she observed burns on her face with disfigurement and hymen of the victim was torn permitting one finger, bleeding PC was present. As Mst. Ayesha Bibi was a virgin and according to the evidence of the lady doctor, her (victim) hymen was torn and bleeding P.C. was present, therefore, medical evidence confirms that victim was subjected to *zina-bil-jabr*.

18. Report of chemical examiner Ex.P.J was positive and according to said report semen were detected in the said swabs. Although report of D.N.A test did not match with the profile of the accused yet according to statement of the victim that Asghar Ali appellant committed *zina-bil-jabr* with her and her said statement was corroborated by medical evidence was sufficient to record the conviction against the appellant. Reliance has been placed in this regard on the case law reported as Khadim Hussain v. The State (2011 PCr.LJ 1443 Federal Shariat Court).

19. It has been noticed that during medical examination of the victim lady doctor did not observe that any organ of body of Mst. Ayesha Bibi victim was dismembered, amputated or severed, rather, according to the evidence of lady doctor, she observed burns on whole face with disfigurement, therefore, learned trial court inadvertently convicted the appellant under section 334, PPC From the medical examination of the victim, offence under section 336, PPC is made out against the appellant. In view of the matter, conviction of the appellant under section 334, PPC is converted into offence under section 336, PPC, therefore, appellant is convicted under section 336, PPC and sentenced to ten years R.I as *Taz'ir* along with *Arsh* Rs.5,06,340/-. Although expert opinion is not available on record in order to establish that by throwing acid on the person of the victim, the appellant caused

itlaf-i-salahiyyat-i-udw (left eye) of the victim yet left eye of the victim was completely closed by throwing acid on her which was observed by this Court as Mst. Ayesha Bibi victim was present before this Court in person when arguments were heard in the instant appeal, therefore, this court has reason to believe that victim was unable to see from her left eye. Even otherwise, disfigurement is sufficient to attract the provisions of section 336, PPC Reliance has been placed on case law reported as Zafar Iqbal v. The State and another (2010 SCMR 401) wherein Hon'ble Supreme Court of Pakistan has observed as under:--

"Accused along with his co-accused had allegedly thrown acid on the wife of complainant causing burns on her face, neck and left arm, covering 17 per cent of the body area FIR, no doubt, was delayed, but it had not been indicated as to what benefit the prosecution had derived by such delay Clothes of the injured lady, even if produced, would have at the most proved the same thing which resultantly was given in her medico-legal report Victim appeared to have changed her clothes due to damage caused to them. Personal appearance of the victim with marks of occurrence on her body was sufficient to connect the accused with the commission of the offence -Conviction of accused was consequently maintained, as disfigurement was enough to constitute offence under section 336, PPC However, facial disfigurement was only to the extent of five per cent, which might be a scar of small size Sentence awarded to accused, therefore, was a bit on the heavier side Sentence of Arsh of Rs.50,00,000/- was reduced to five years in circumstances Petition after conversion into appeal was partially accepted to the extent of sentence alone in the above terms".

20. Asghar Ali appellant is husband of sister of Muhammad Arshad complainant, therefore, it can not be believed that complainant and his daughter would falsely involve him (appellant) in this case without any serious enmity between the parties. Although, Muhammad Ashraf real brother of Muhammad Arshad complainant appeared before the learned trial court as D.W-1 and deposed that Mst. Ayesha Bibi stated before the police during investigation of this case that Tanvir and Arfan had committed *zina-bil-jabr* with her and threw acid on her face yet his evidence is not believable as no such statement of Ayesha Bibi victim is available on record. Muhammad Ashraf D.W-1 was not eye-witness of the occurrence, therefore, his evidence is hearsay which is inadmissible in evidence. Muhammad Ishaq Sub-Inspector/IO of this case appeared before the learned trial court as P.W-5. Neither he (IO) deposed nor any question was put to him by the defence that Ayesha Bibi made any statement before him that Arfan and Tanvir committed *zina-bil-jabr* with her. Admittedly sister of Muhammad Ashraf (D.W-1) is wife of Asghar Ali appellant, therefore, possibility can not be ruled out that Muhammad Ashraf appeared in the defence of Asghar Ali accused in order to save his sister from sufferings in case of conviction of the appellant.

Muhammad Ashraf D.W-1 did not appear before the police during investigation of this case in order to get his statement recorded before the I.O. in this regard, rather, he appeared before the learned trial court on 14.03.2011 after about one year and 7-1/2 months of the occurrence, therefore, his evidence is not confidence inspiring because possibility cannot be ruled out that he made statement before learned trial court after deliberations and consultation. According to the evidence of D.W-1 Asghar Ali accused was implicated in the instant case after about four days of the occurrence by the complainant and his wife but his evidence is totally in conflict with the record as Asghar Ali appellant was nominated by Ayesha Bibi victim on the following day i.e. 01.08.2009 after registration of FIR and he (appellant) was neither implicated in any statement made by the complainant nor his wife, therefore, evidence of D.W-1 is against the record. During cross-examination Muhammad Ashraf D.W-1 admitted that Ayesha Bibi victim had no dispute with any one, therefore, it cannot be believed that appellant was implicated in the instant case on account of dispute of '*rishta*' between the parties as alleged by the defence. The appellant had taken the specific plea that he has been implicated in this case on account of dispute of '*rishta*' and that Tanvir and Arfan committed *zina bil-jabr* and threw acid on the victim has not been proved by him during trial of the case.

21. It is pertinent to mention here that Muhammad Ishaq (P.W-5)/I.O. tried to give undue concession to Asghar Ali appellant by deposing that prior to involving Asghar Ali accused in this case, complainant entertained suspicion against Tanvir and Arfan pertaining to commission of *zina bil-jabr* and throwing acid on her daughter and that they (Tanvir and Arfan) were nominated by the complainant on 07.08.2009. In order to verify the aforesaid deposition of I.O. (P.W-5) I have perused the police file and observed that on 02.08.2009 Muhammad Arshad complainant got his supplementary statement recorded before the police and implicated Asghar Ali appellant in the commission of instant occurrence. The complainant did not entertain suspicion against Tanvir and Arfan during investigation of this case and did not get any statement recorded in this regard rather, perusal of police file reveals that on 07.08.2009 Muhammad Ishaque Sub-Inspector (P.W-5) incorporated in case Diary No.4 that through some reliable sources he came to know that on the night of occurrence Tanvir and Arfan were not available in their residences, therefore, they should be joined in the investigation. P.W-5/I.O. summoned Tanvir and Arfan at the police station and when complainant came to know regarding this fact he appeared before the I.O. on the aforesaid date and produced his affidavit to the effect that Arfan and Tanvir were innocent in this case, therefore, evidence of I.O./P.W-5 that complainant entertained suspicion against Tanvir and Arfan is false and against the record.

22. For what has been discussed above, I am of the considered view that prosecution has proved its case against the appellant beyond reasonable doubt. Learned trial court convicted the appellant after proper appraisal of evidence available on the record, therefore, impugned judgment dated 28.03.2011 passed by learned trial court is upheld and instant appeal having no force stands dismissed.

HBT/A-48/L Appeal dismissed.

7.2.4 2016 PCr.LJ 722 [Lahore]

Before Sayyed Mazahar Ali Akbar Naqvi and Mazhar Iqbal Sidhu, JJ

ABDUL SATTAR Appellant

Versus

The STATE Respondent

Criminal Appeal No.400-J of 2011, heard on 28th May, 2015.

(a) Anti-Terrorism Act (XXVII of 1997)---

Ss. 7(b) & 25---Penal Code (XLV of 1860), Ss. 324 & 336---Attempt to commit *qatl-i-amd*, *itlaf-i-salahiyyat-i-udw*, act of terrorism---Appreciation of evidence---Accused along with another, was alleged to have thrown acid on face of victim causing serious injuries to her body --Accused was convicted and sentenced, whereas, the co-accused were acquitted---Validity---Medical evidence had fully supported ocular account of occurrence---Incident took place inside house, so presence of witnesses there was quite natural---Statement of victim was sufficient to uphold conviction and sentence---Two eye-witnesses, victim and her mother, both were consistent in their statement qua culpability of accused---Statement of victim had also been corroborated by two medical officers---Bottle of acid had been recovered from accused during investigation--- Motive was not always sine qua non for proof or disproof of guilt---All three sentences were ordered to run concurrently instead of consecutively---Prosecution had fully established its case against appellant--- Appeal was dismissed accordingly.

(b) Criminal trial

Motive---Motive is not always sine qua non for proof or disproof of guilt.

Arif Hussain Cheema for Appellant.

Zulfiqar Ali Tarab for the Complainant.

Tariq Javed, District Public Prosecutor for the State.

Date of hearing: 28th May, 2015.

JUDGMENT

MAZHAR IQBAL SIDHU, J. Abdul Sattar appellant in the appeal as mentioned above, has impugned the punishing judgment dated 03.11.2011 handed down by the learned Judge, Anti-Terrorism Court No. 1, Faisalabad, having been tried to conviction in a case registered

vide FIR No. 278/2011, dated 30.07.2011 under sections 324/336/34, PPC read with section 7 of Anti-Terrorism Act, 1997 lodged at Police Station City Jhang was punished as follows:

Under section 324, PPC 10 years' R.I. with fine of Rs.1,00,000/- and in default of payment of fine to further suffer simple imprisonment for 1 year.

Under section 336, PPC, 8 years' R.I. along with direction to pay "*Arsh*" (half of *Diyat*) payable to Mst. Najma Bibi victim failing which the convict was directed to be kept in jail in simple imprisonment.

Under section 7(b) of A.T.A., 1997, 10 years' R.I. along with direction to pay Rs. 100,000/- as fine and in case of default in payment of fine to further undergo simple imprisonment for 1 year.

The sentence under section 336, PPC was directed to run consecutively to the other two sentences which were directed to run concurrently. Benefit of section 382-B, Cr.P.C. was also extended to the convict-appellant.

2. The case of the prosecution is that Mst. Haleema Bibi complainant was resident of Chak No. 453/JB and during those days, she was living in Jhang near Churchi Ground. She served in some houses as maid servant. Some times ago, her daughter Mst. Najma Bibi victim became angry with her and went to Abdul Sattar accused in Shorkot. On 29.07.2011, the complainant came to know that said Najma Bibi victim has come to the house of her friend Mst. Kausar Bibi, in Basti Dewanwali. She along with her "*damad*" Rafique and Tassarwar, in the evening went to the house of Mst. Kausar Bibi where Abdul Sattar appellant and Umar Ali (acquitted accused) were also present. They all remained busy in talks for long time and at about 3.00 a.m., she (complainant) and the PWs slept in the adjacent house. Mst. Najma Bibi victim was being forced by Abdul Sattar appellant and Umar Ali (acquitted accused) to accompany them to Shorkot, but she was refusing. All of a sudden, there was scream which attracted the complainant and the PWs. They rushed to the spot to see that Mst. Najma Bibi victim was lying on the cot, Umar Ali (acquitted accused) had fixed Najma Bibi victim by her legs and Abdul Sattar appellant was throwing acid on the face and eyes of Mst. Najma Bibi victim and she was crying. Within the view of the PWs, the accused fled the place while intimidating the PWs and brandishing the empty bottle of acid.

3. The reason behind the occurrence was that Abdul Sattar appellant willed to marry Mst. Najma Bibi victim and take her to Shorkot, but she was not ready. Due to this grouse, both the accused committed this occurrence of throwing acid on the eyes, chest and other parts of her body and she was taken to hospital while in agony and fighting for her life.

4. After usual investigation, challan was prepared and a report in terms of section 173, Cr.P.C. was submitted before the learned trial court recommending the trial of the accused persons.

5. Learned trial Court after observing all the pre-trial codal formalities, indicted the appellant and the acquitted accused to which they pleaded non-culpabilis and claimed trial. Thereafter the prosecution in order to prove its case produced as many as 09 witnesses.

6. Thenceforth statements of the accused were recorded under section 342, Cr.P.C. wherein they negated the charge and professed their innocence. Neither did they opted to make statements on oath as permissible under section 340(2), Cr.P.C., nor did they produced any evidence in their defence.

Abdul Sattar appellant in reply to a question: "*why this case against you and why the PWs to make statements to involve you?*" replied infra:

"This case is false as against me. Muhammad Rafique is the brother-in-law of Mst. Najma Bibi and is named as an eyewitness of the occurrence. He resides adjacently to my plot. He has become in forcible possession of my plot. I got, the possession restored in my favour and due to this grudge, Muhammad Rafique managed my implication in this case."

7. Upon conclusion of the trial, the appellant was convicted and sentenced as mentioned op-cit by the learned trial Court. Hence, the instant appeal.

8. Learned Counsel for the appellant has submitted that co-accused Umar Ali has been acquitted by the learned trial Court observing that allegation against him is shrouded in thick clouds of history whereas, the same evidence is relied upon against the appellant without any corroboration; incident took place during the darkness of night in this way identity of the culprits remained in shrouded; the motive setup by the prosecution has not been proved whereas except the statement of Mst. Haleema (PW-7) and Mst. Najma Bibi (PW-8) who are inter se mother and daughter having not been corroborated by any independent evidence, therefore, appeal may be accepted.

8. Submissions have been opposed on the ground that the learned. trial Court has rightly applied principle of sifting the chaff from grains in this case and the distinguishability in between the case of acquitted co-accused as well as the appellant exists as appellant sprinkled acid on the body of victim Mst. Najma Bibi and also got recovered bottle in which it was containing; the medical evidence fully supports the ocular account whereas incident took place inside the house, therefore, presence of these two witnesses was quite natural. Even otherwise, in the circumstances of the case statement of Mst. Najma Bibi the victim is sufficient to uphold the conviction and sentence, therefore, it has been longed to dismiss the appeal.

9.

10. Heard intently. Record perused minutely.

11. Facts have been mentioned in detail in preceding paragraphs of the judgment, therefore, no need remained to rewrite the same to avoid prolongation of the judgment.

12. Prosecution produced two eye-witnesses one is victim Mst. Najma Bibi and the other her mother Mst. Haleema Bibi. Both are unison and consistent in their statements qua inculpability of the accused. Statement of the victim has also been corroborated by the two Medical Officers. PW-1 Lady Dr. Sadaf Naqvi has noticed superficial to deep burn involving whole side of face and half of left side of face, right side of neck, right side of front of chest involving 3/4 of right breast, left side of front of chest about 1/2 of left chest, upper part of right shoulder, front and back, upper right arm of front side, right forearm on back and front, back of right hand, left arm and forearm on front and back in sprinkled manner, upper part of abdomen on front in sprinkled manner, front of right thigh and leg in sprinkled manner.

She opined after the report of eye specialist that according to eye specialist, right eye cornea was opaque with no view seen inside anterior chamber. Right eye is blind with disfigurement. So, the said injury has resulted into loss of function of right eye declared the right eye as "*Itlaf-e-Salahiat-e-Udv.*"

13. PW-6 Dr. Mohsin Niaz Mighiana, Senior Consultant, District Headquarter Hospital, Jhang has been examined as a secondary evidence because Dr. Farooq Hussain Khan, Eye Specialist had proceeded to perform Hajj. He identified his handwriting and made statement as to his opinion regarded to the loss of vision of right eye of the victim. In this way again the prosecution version has been beefed up. During investigation the appellant also got recovered bottle in which he brought acid.

14. So far as the apple of discord is concerned, it is not always regarded a sine-qua-non for proof and disproof of the guilt. Now it has been settled by the Hon'ble Supreme Court of Pakistan that it remains convert in the brain of wrong doer.

15. For what has been discussed above, the Court has been persuaded that the prosecution has fully proved its case against the appellant, therefore, instant appeal being devoid of force stands dismissed. However, it is strikingly clarified that all sentences imposed upon the appellant shall run concurrently instead of consecutively.

16. Before parting with this judgment, the Court expresses its regret and disquietude on happening of such like unfortunate incidents by the malefactors having no equanimity whereas, human being are ever best creature of Almighty Allah and to disfigure or to disfigure the most beautiful part of a woman, i.e., face permits punishability to a maleficent but may be regarded a sin the schadenfreude had visioned incessant plight and pity of the hapless victim till death. Oh! What a yelling and moaning, anyhow, Allah Almighty has absolute powers to dispense the real and ultimate justice.

SL/A-86/L Appeal dismissed.

7.3 Giving a Woman as BudAl-I-Sulha

7.3.1 2013 PCr.LJ 950 [Peshawar]

Before Rooh-ul-Amin Khan, J

MUHAMMAD SULTAN and another---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous B. A. No.647-M of 2012, decided on 26th December, 2012.

Criminal Procedure Code (V of 1898)

S. 497---Penal Code (XLV of 1860), Ss. 310-A, 147 & 149---Giving female in marriage or otherwise in '*swara*', rioting, unlawful assembly---Bail, refusal of---Complainant was suspected of having illicit relations with a lady and to this effect, a *jirga* was convened, wherein the elders of the locality gave the hand of complainant's sister/victim to a person as '*swara*' on the pretext of prevailing custom of the area---Accused and co-accused, who were father and brother of the victim respectively, fully participated in the *jirga* and gave away/sacrificed the victim in lieu of threat to complainant's life---Since accused and co-accused participated in the *jirga* and were in charge of the victim being her father and brother respectively, therefore, prima facie case under S.310-A, P.P.C. existed against them, which fell under the prohibitory clause of S.497, Cr.P.C.---Bail application of accused and co-accused was dismissed with the observation that handing over a lady, without her consent, in such a humiliating manner was not only against the fundamental right and liberty of human beings, but also against the importance and value of human beings given by Allah to mankind.

Abdul Qayum for Petitioners.

M. Ikram for the Complainant.

Ikramullah Khan, A.A.G. for the State.

Date of hearing: 26th December, 2012.

JUDGMENT

ROOH-UL-AMIN KHAN, J.---The accused/petitioners herein, after refusal of concession of bail by the Courts below, in case FIR No.383 dated 16-10-2012 registered at Police Station Gandigar, District Dir Upper, under sections 310-A/147/149, PPC, seek their release on bail as such.

2. As per FIR the accused/petitioners are charged for giving sister of the complainant Mst. Sardari Gul as '*swara*' to one Mukhtiar. As such, present case was registered vide F.I.R. referred above.

3. Perusal of the record would reveal that the complainant Rahim Shah had submitted an application/complaint dated 28-9-2012 before the Hon'ble Chief Justice of Peshawar High Court, Peshawar, which was referred to DIG Malakand Division for necessary action and report. In compliance of the above said order of the Hon'ble Chief Justice of this Court, Shaukat Ali Khan, SHO along with police contingent visited village Gorkohi, Tehsil and District, Dir Upper, where the complainant in presence of Mst. Sardari Gul reported the matter, that about three years ago, one Mst. Khan Bibi, wife of Hakim Khan was ousted by her in-laws ('*susral*') and to the house of her parents on allegation of illicit relation with the complainant. After some time the elders of the locality constituted a '*jirga*' for settlement of the animosity between complainant and in-laws of Mst. Khan Bibi, wherein the sister of complainant namely Mst. Sardari Gul was handed over to one Mukhtiar son of Taur Khan as "*swara*", and '*rukhsati*' was effected after 40/41-days. Subsequently, after three months, the complainant came to know that Mst. Khan Bibi had been killed by his in-laws at "Lund Khwar", District Mardan. He charged all the '*jirga*' members for giving her sister Mst. Sardari Gul to Mukhtiar as "*swara*". The report of the complainant was incorporated into FIR mentioned in the preceding Para. During investigation, the petitioner Muhammad Sultan and his son Rahimuddin were found involved in the commission of offence and they were also arrayed as accused.

4. Learned counsel for the petitioners contended that the FIR has been lodged within an unexplainable delay of two years and three months that the petitioners are not nominated by the complainant or the victim Mst. Sardari Gul, in the FIR and they are innocent and have been involved in the case on mere suspicion. He also argued that the complainant had submitted an affidavit before the lower Courts, that he has no objection if the petitioners are released on bail.

5. Learned counsel for the complainant straightaway conceded and stated at the bar that, under the instruction of his client/complainant, he has no objection if the petitioners are released on bail; the learned AAG resisted the bail application in a lukewarm manner.

6. Perusal of the record would reveal that the complainant was suspected for having illicit relation with Mst. Khan Bibi and to this effect a '*jirga*' was convened, wherein the elders of the locality gave the hand of Mst. Sardari Gul to one Mukhtiar as '*swara*', on the pretext of prevailing custom of the area. The record further reveals, that during proceedings of *jirga* the petitioners, being father and brothers respectively, sacrificed their daughter and sister in lieu of threat to the life of the complainant. At the time of above mentioned decision of the *jirga*, section 310-A had already been inserted in the Pakistan Penal Code vide Criminal Amendment Act 2004 (Act I, 2005) and in presence of the sections 310 and 310-A, a practice of such tradition was mere derogation and disobedience of law.

Handing over a lady, without her consent, in such a humiliating manner is not only against the fundamental right and liberty of human beings, enshrined in the Constitution of the Islamic Republic of Pakistan 1973, but also against the importance and value of human beings given by the Allah Almighty to the most imminent of created things; mankind '*ashraf-ul -makhlukat*').

7. To eradicate this self-imposed menace from the society the government has amended the Pakistan Penal Code (PPC) by inserting the amended section of 310-A, PPC, vide Criminal Law Third Amendment Act 2011 which is reproduced as under:

"310-A. Punishment for giving a female in marriage or otherwise in '*badal-i-sulh*', *wanni* or *swara*:

"Whoever gives a female in marriage or otherwise compels her to enter into marriage, 'badal-i-sulh', wanni, or swara or any other custom or practice under any name, in consideration of setting a civil dispute or a criminal liability, shall be punished with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine of five hundred thousand rupees."

8. Since the petitioners have fully participated in the *jirga* and were incharge of Mst. Sardari Gul being father and brothers, therefore, prima facie, case exist against them, falling under prohibitory clause of section 497, Cr.P.C., thus are not entitled to the concession of bail. In the wake of the above discussion, this bail application is dismissed as such MWA/7/P Bail refused.

7.3.2 2013 PCr.LJ 1230 [Lahore]

Before Abdus Sattar Asghar, J

AKHTAR ALI---Petitioner

Versus

The STATE and 3 others---Respondents

Writ Petition No.9768 of 2012, heard on 22nd June, 2012.

(a) Penal Code (XLV of 1860)

S. 310-A--- Constitution of Pakistan, Art. 199--- Constitutional petition--- Quashing of FIR--- Giving a female in marriage or otherwise in *badal-i-sulh*---Cognizability of S.310-A, PPC--- Scope---Allegation against the accused (petitioner) was that he had forcibly handed over the complainant (respondent) in "*vanni*" to her alleged husband Contentions of the accused were that the complainant was lawfully wedded to her alleged husband ; that the offence under S.310-A, PPC, was non-cognizable, therefore, registration of impugned FIR by the police was unlawful, and that before registration of the impugned FIR the complainant had lodged a suit for dissolution of marriage against her alleged husband without agitating the plea of '*vanni*' in the contents of the plaint Validity--- Schedule-II attached with the Criminal Procedure Code, 1898, which furnished tabular statements of offences, clearly described that offence under S.310-A, P.P.C., was cognizable--During cross-examination of the complainant in the proceedings of the dissolution of marriage suit, it was categorically suggested that her hand was given to her alleged husband in '*badal-i-sulh*'. Accused had been found guilty during the police investigation and was accordingly placed in column No.3 of the report under S.173, Cr.P.C. Supreme Court had also taken up the present matter in exercise of its suo motu jurisdiction and adjourned the matter to a further date--- Accused had not been able to make out any exceptional ground for quashing of FIR., therefore, he had no case to invoke the constitutional jurisdiction of the High Court---No factual or legal infirmity was found in the registration of the FIR Constitutional petition was dismissed, in circumstances.

(b) Constitution of Pakistan

Art. 199---Constitutional petition---Quashing of FIR---Grounds.

Grounds ordinarily considered for quashing of FIR were either jurisdictional error, or violation of any provision of law, or allegation failing to constitute an offence. [p. 1233] C

(c) Constitution of Pakistan

Art. 199---Criminal Procedure Code (V of 1898), S. 561-A---Constitutional petition---Quashing of F.I.R.---Power of High Court under Art.199 of the Constitution and S. 561-A, Cr.P.C.---Scope---High Court had no jurisdiction to quash the FIR while exercising constitutional power under Art. 199 of the Constitution or under S. 561-A, Cr.P.C., except in exceptional circumstances.

Dr. Ghulam Mustafa v. The State and others 2008 SCMR 76 rel.

Muhammad Zafar Choudhry and Ms. Kishwar Naheed for Petitioner.

Muhammad Saeed Tahir Solehri, A.A.-G. with Fida Bakhsh, ASI for the State.

Azmat Ali Chohan for Respondent No.4. Date of hearing: 22nd June, 2012.

JUDGMENT

ABDUS SATTAR ASGHAR, J.---Akhtar Ali petitioner has invoked the constitutional jurisdiction of this Court under Article 199 for quashing of the FIR No.89 of 2012, dated 1-4-2012, registered under section 310-A, PPC, Police Station Kallurkot, District Bhakkar.

2. As per FIR lodged on 1-4-2012 at Police Station Kallurkot on the statement of Mst. Tahira Bibi it is alleged that her brother Ahsan Ullah had lawfully wedded Mst. Saima Bibi daughter of Alam Ali at her own accord and free-will without the blessings of her parents; that being unhappy on the said marriage, brother of Mst. Saima Bibi and other influential persons including the petitioner armed with firearm weapons to take revenge had forcibly handed over the complainant in '*vanni*' to Rana Waqar Ahmed who has been committing *zina bil jabr* with her.

3. It is argued by learned counsel for the petitioner that complainant's plea of '*vanni*' is false and an afterthought concocted story; that in fact she was lawfully wedded to Rana Waqar Ahmed vide *nikahnama* dated 31-1-2011 in exchange of Mst. Saima Bibi wedded to her brother namely Ahsan Ullah; that offence under section 310-A, PPC is non-cognizable, therefore, registration of impugned FIR by the police in terms of section 154, Cr.P.C. is

unlawful; that before registration of the impugned F.I.R. complainant had lodged a suit for dissolution of marriage etc. against Rana Waqar Ahmed without agitating the plea of 'vanni' in the contents of the plaint; that no offence is made out against the petitioner for want of incriminating material, therefore, impugned FIR is liable to be quashed.

4. It is resisted by learned counsel for respondent No.3/complainant as well as learned AAG with the arguments that during the police investigation petitioner has been found guilty and accordingly placed in Column No.3 of the report under section 173, Cr.P.C. sent up to the court of competent jurisdiction for trial; that during the cross-examination upon complainant/respondent No.3 before the learned Judge Family Court it was categorically suggested that her hand was given to Rana Waqar Ahmed as '*badal-i-sulh*' attracting the offence under section 310-A, P.P.C., which is cognizable by the police; that petitioner has not been able to make out any factual or legal infirmity to seek quashing of F.I.R. by invoking the constitutional jurisdiction of this Court, therefore, this petition is liable to be dismissed.

5. I have given patient hearing to learned counsel for the parties, learned AAG and gone through the record.

6. At the outset it is pertinent to mention that during the course of arguments learned counsel for the petitioner has laid much emphasis on his plea that offence under section 310-A, P.P.C. is non-cognizable. I am afraid he is misconceived. Schedule-II attached with Criminal Procedure Code 1898 furnishing tabular statement of offences clearly describes that offence under section 310-A, PPC is cognizable. It is a non-bailable offence prescribed punishment whereof is rigorous imprisonment upto ten years, but shall not be less than three years. For ready reference section 310-A, PPC is reproduced hereunder:--

"Whoever gives a female in marriage or otherwise in badal-i-sulh shall be punished with rigorous imprisonment which may extend to ten years but shall not be less than three years."

7. There is no denying of the fact that in the proceedings of the family suit during cross-examination upon complainant/respondent No.3 it was suggested to her that she was given in '*badal-i-sulh*'. Simultaneously, it is also on the record that petitioner has been found guilty during police investigation and accordingly challaned in Column No.3 of the report under section 173, Cr.P.C. sent up to the court of competent jurisdiction for trial.

8. Needless to say that for quashing of F.I.R. following grounds are ordinarily considered:--

- (i) Jurisdictional error;
- (ii) Violation of any provision of law;
- (iii) Allegation failing to constitute an offence.

In the instant case, however, learned counsel for the petitioner has not been able to make out any of the above noted grounds to substantiate his plea for quashing of FIR. Besides, it is pertinent to mention that Hon'ble Supreme Court of Pakistan has also taken up the matter in exercise of suo motu jurisdiction and having been informed that after completion of the investigation the *challan* has been submitted and trial Court seized of the matter is likely to proceed with the same in accordance with the law in the near future, has adjourned the matter further to a date in office vide order dated 17-5-2012.

9. In the case of Dr. Ghulam Mustafa v. The State and others (2008 SCMR 76), the Hon'ble Apex Court has settled that the High Court has no jurisdiction to quash the FIR while exercising Constitutional power under Article 199 of the Constitution or under section 561-A, Cr.P.C., except in exceptional circumstances. Learned counsel for the petitioner has not been able to make out any exceptional ground for quashing of the FIR, therefore, petitioner has no case to invoke the constitutional jurisdiction of this Court.

10. For the above discussion and reasons, I do not find any factual or legal infirmity in registration of the FIR This petition having no merit is dismissed.

MWA/A-124/L

Petition dismissed.

7.4 Forced Marriage with the Holy Quran

7.4.1 PLD 2016 Sindh 268

Before Salahuddin Panhwar, J

Mst. RAHAMAT BIBI and another---Petitioners

Versus

STATION HOUSE OFFICER, KARAN SHARIF and 8 others---Respondents

Set - 1

Constitutional Petitions Nos.S-907, 1074 of 2012, 636, 1028 of 2013, 120, 196, 307, 336, 350, 515, 531, 550, 576, 644, 662, 671, 754, 764, 775, 844, 871, 903, 929, 967, 993, 1028, 1048, 1051, 1085, 1173, 1180, 1201, 1231, 1233, 1250, 1259 of 2014, 2, 20, 31, 33, 34, 40, 51, 80, 119, 141, 148, 175, 211, 213, 230, 244, 248, 292, 297, 298, 301, 313, 384, 405, 414, 443, 458, 492, 513, 530, 673, 712, 788, 803, 942, 959, 986, 1034, 1083, 1094, 1098, 1108, 1115, 1116, 1141, 1222, 1204 and 1230 of 2015, decided on 17th November, 2015.

Set - 2

Constitutional Petitions Nos.S-602, 683 of 2012, 184, 225, 342, 391, 446, 451, 549, 558, 612, 633, 822, 833, 846, 876, 888, 899, 947, 995, 1000, 1025, 1041, 1093, 1103, 1105, 1193, 1219, 1221, 1240, 1263, 1264 and 1268 of 2014; 76, 105, 186, 198, 223, 235, 237, 241, 255, 566, 282, 304, 305, 314, 326, 330, 336, 345, 415, 659, 735, 793, 886, 918, 1002, 1147 and 1209 of 2015, decided on 17th November, 2015.

Custom

Violence against women---Honour killings---Forced marriages---*jirga*, holding of---Legality---Killing of women on the allegation of "*karo kari*"---Forcible marriage and giving the hands of women as penalty in "*jirga*"---Equality of women---Contracting marriage by two sui juris was not an offence---State was bound to ensure protection of every single soul and make laws for protection of women and children---Woman would be free in choosing her life partner and protecting her property and honour---Women were considered as true and complete owner of their respective property which they had received---Men had no right to part a

woman from her own belonging or property---Constitution had ensured 'dignity' and 'privacy' of a home as inviolable---Woman could not be declared as "*kari*" and no one could decide the fate of a lady while awarding her death penalty on pretext of "*kari*"---Woman could not be married with Quran to escape her right in property---No one could give a lady as compensation for sin if any of others and maltreat her---No custom could be in conflict with law of the land---*jirga* could not be backed by any law and only courts would be competent to pass a decree and enforce it---Law enforcing agencies were bound to prohibit happening of offences and ensure sense of security to each single individual---Every participant of *jirga* must be dealt with in accordance with law---Police officer failing to stop the *jirga* should be prosecuted in the list of accused---State should establish '*Dar-ul-Amman*' and safe-house(s) at each district/*taluka* level where a victim's family could safely reside/stay till she was able to be sent to her demanded place or she agreed to go with the person of her choice---Such safe-house should be managed and controlled by women only---Provincial Chief Secretary was directed by High Court to establish safe-house(s) at *taluka* level and make necessary arrangements for the said houses and victims---Commissioners were directed to supervise the issue with regard to women in their respective divisions---District and Sessions Judges were directed to dispose of cases with regard to violence against women within a specified period---Constitutional petitions were disposed of accordingly.

Habibullah G. Ghouri, Abdul Rehman Bhutto, Sarfraz Khan Jatoi, Rafique Ahmed K. Abro, Muhammad Murad Chachar, Rasool Bux Soomro, Muhammad Afzal Jagirani, Mohsin Ali Pathan, Ashique Hussain Abbasi, Muhammad Ali Pirzado, Abdul Rasheed Abro, and Imtiaz Ahmed Bhatti for Petitioners.

Abdul Hamid Bhurgri, Additional Advocate-General along with Fida Hussain Solangi, Deputy Superintendent of Police (DSP) Legal on behalf of Deputy Inspector General Police (DIGP), Sukkur, Farooque Ahmed Bhutto, Superintendent of Police (SP) on behalf of DIGP, Larkana PDSP Muhammad Bachal on behalf of SSP, Kamber-Shahdadkot, DSP Ansar Ali Mithani on behalf of Senior Superintendent of Police (SSP), Kashmore at Kandhkot, Inspector/PDSP, Bashir Ahmed Abro, District Larkana, DSP Muhammad Sadiq, Sub-Divisional Police Officer (SDPO) Tangwani, SIP Ghulam Hyder on behalf of SSP Sukkur, SIP Khalil Ahmed on behalf SSP, Khairpur Mirs, SIP Sikandar Ali Khoso on behalf of SP, Ghotki, SIP Abdul Fattah SHO PS Tangwani, Police Sub Inspector (PSI) Shoukat Ali on behalf of SSP, Shikarpur, P.I Atta Muhammad Soomro on behalf of SSP, Jacobabad, ASI Zulfiqar Ali and Khadim Hussain Khooharo, Deputy Prosecutor General for Respondents.

Dates of hearing: 27th and 28th October, 2015.

JUDGMENT

SALAHUDDIN PANHWAR, J. During hearing of C. P. No.S-1204 of 2015 on 19.10.2015, the issues relating to violence against women, killing of innocent women on the allegation of *karo-kari*, , and forcible marriage and giving the hands of women as penalty in *jirgas* and petitions filed by women to this Court (High Court) in considerably huge numbers (seven hundred and seven) in two years, with such complaint(s), not only raises serious questions towards effectiveness of pro-women laws, but also upon the object and purpose of the

police, meant to provide protection on an emergency call. The above-titled Constitutional Petitions, on perusal of grievances, were classified into two sets and heard together.

2. **Set-1** of the petitions relates to the grievance of couples, who have contracted marriage against the consent and wish and will of their parents/elders/relatives and in some of the cases ex-husband (in case of ladies, who contracted second marriage after divorce from first/ex-husband) and some of them seek protection of law under the serious threat and apprehension of their lives at the hands of feudals/*sardar* of that clan, on the allegation of "*karo-kari*". In some of these petitions, quashment of FIRs lodged by parents/relatives of lady petitioner against their husband and his family has been sought. In most of such petitions, restraining order regarding arrest of persons indicted in such FIRs has been passed.

3. **Set-2** of the petitions pertains to the grievance of lady petitioners, who have sought protection against the harassment and threats to life for different reasons including their forcible marriage etc.

4. The cause to address the issues jointly was not only the surprising increase in number of petition(s) by women with such grievances but also typical facts of some of grievance(s) particularly the facts of case filed by Mst. Nasreen Golo; during pendency of such case she was murdered, are that she filed C.P. No.S-1230/2015 (initially filed as criminal miscellaneous application and converted into Constitutional Petition vide order dated 21.10.2015) challenging the order of II-Civil Judge and Judicial Magistrate, Kandhkot. Perusal of the contents of said petition reveals that in the year 2011, petitioner Mst. Nasreen Golo lodged a FIR bearing crime No.242/2011 at Police Station A/Section, Kandhkot, under Sections 452, 506(2), 34, PPC, stating that on 09.06.2011, at about 8.00 a.m. the accused persons, named in the FIR, intruded her house and issued threats of murder. Initially her F.I.R was not lodged by the police; same was ultimately registered in compliance of orders passed under section 22A Cr.P.C. by the Additional Sessions Judge, Kandhkot. After investigation, the FIR was disposed of as false. Records show that on 21.10.2015 it was brought to the notice of the Court that after one month of filing the petition, petitioner Mst. Nasreen Golo was murdered, therefore, notice was issued to investigating officer of crime No.242/2011.

5. C. P. No.S-1222 of 2015; with regard to a news item published in the daily newspaper DAWN, Karachi regarding killing of a woman by her husband under suspicion of her relationship with a person, namely Munir Bajkani and imposition of fine of Rs.1.2 million by *jirga* held by tribal elder in the said extramarital affair case. Such news item reads as:

"Sukkur: A jirga (tribal court) held in Kech Bajkani village near Tangwani town of Kandhkot-Kashmore district on Monday imposed a fine of Rs.1.2 million on a man found guilty of having 'an extramarital affair'".

Presided over by a tribal elder, Baban Bajkani, the jirga heard the aggrieved and defence sides and found Munir Bajkani of having an extramarital affair with a married woman belonging to his own community.

She was killed by her husband soon after he came to know about her relationship with the suspect.

A large number of Bajkanis who attended the jirga endorsed the ruling after which the guilty side was ordered to pay a fine of Rs.1.2 million to the woman's husband.

The 'convict' paid an amount of Rs.100,000/- on the spot and undertook to pay off the remaining amount within the next three months."

6. C.P. No.S-1204/2015 (initially filed as Crl. Misc. Application No.S 133 of 2015) was filed by petitioner Noor Muhammad, seeking recovery of his daughter abductee Mst. Naseeban, and showing apprehension of her murder on the allegation of "*kari*". The brief narration of facts in the petition reveals that petitioner's daughter Mst. Naseeban after only 6 months of her marriage was divorced by her husband Gulzar Ahmed (arrayed as respondent No.6 in the petition), where-after she was residing in the house of her father i.e. petitioner, but on 14.9.2015 she was abducted from the house of petitioner by her ex-husband and others and such FIR bearing crime No.244/2015 was lodged by petitioner at Police Station C/Section, Kandhkot, under Sections 324, 452, 365-B, etc. of Pakistan Penal Code. On 19.10.2015, accordingly following order was passed:-

"Learned DPG contends that issue is serious; many women are filing petitions for their protection".

Looking into the gravity of the situation, this criminal miscellaneous application is converted into a constitutional petition. All the S.S.Ps of Larkana Division and Sukkur Division as well as DIGPs concerned shall submit a report that in the last two years, how many criminal cases have been registered on the allegation of abduction for forcible marriage; murder on the allegation of *karap* and against *jirgas* conducted by feudals of all these areas wherein they have settled the issue of *karap* by receiving payment/compensation and exchange of girls. This report shall be submitted upto Thursday i.e. 22.10.2015. Office shall examine the record of this Court that in the last two years how many petitions have been filed by women petitioners due to marriage, due to dispute over property and due to false allegation of *karap*. All learned District and Sessions Judges of both Divisions shall submit reports regarding pendency of cases involving issue of *karap* and other cases wherein victims are women. Office shall also tag all those similar type of petitions with instant petition. The person's incharge of the Dar-ul-Aman, Larkana and Sukkur are directed to furnish a detailed report as to how many women have sought shelter to their life, on the issue of *karo-kari*.

To come up on 22.10.2015 at 11.00 a.m. "All concerned shall ensure that compliance is made. Office shall communicate this order to all concerned."

7. In compliance of directions contained in the above-referred order passed in C.P. No.S-1204/2015, the Deputy Inspector General of Police, Larkana and Sukkur Ranges, so also the S.S.Ps. of both the said Ranges furnished their reports. Report of DIGP. Larkana Range, provides details as under:

1) That, in pursuance of order dated 19.10.2015, passed by this Hon'ble Court, report was called from Senior Superintendents of Police, all of Larkana Range, vide this office letter No. Legal/DIGP/LRK/33710-16 dated 20.10.2015.

2) They have reported that following cases are registered under *karo-kari* abduction for forcible marriage and *jirga* settle issue of *karap* and imposing of compensation of payment or exchange of girls within their respective districts.

S. No.	District	Year	Karo Kari	Abduction for forcible marriage	Jirga settle issue of Karap and impose compensation of payment or exchange of girls
01.	Larkana	2014	03	83	0
		2015	05	75	0
02.	Kamber	2014	14	35	0
	Shahdadt	2015	08	47	0
03.	Shikarpur	2014	36	52	02
		2015	12	47	02
04.	Jacobabad	2014	29	40	02
		2015	17	33	01
05.	Kashmore	2014	43	18	0
	Kandhkot	2015	25	10	0
	RANGE TOTAL		192	440	07

8. Whereas, the figure of such cases as reported by D.I.G.P, Sukkur Range, reflects as under:

S. No,	Name of District	Abduction/Forcible Marriage	Murder on the Allegation of Karap	Jirga Cases
01.	Sukkur	115	49	01
02.	Khairpur	193	21	00
03.	Ghotki	85	39	05
	RANGE TOTAL	393	109	06

9. As per details provided by Assistant Director, Dar-ul-Aman, Larkana, figure of inmates lodged is:

1.	Karo Kari	23
2.	Love Marriage	21
3.	Domestic Violence	80
4.	Rape	01
5.	Divorced	07
6.	Forced Marriage	05
7.	Kidnapped	07
8.	Escaped	03
	Total:	147

10. As per information collected from the learned District and Sessions Judges of Larkana and Sukkur Divisions, the number of cases involving violence against women, such as,

abduction for forcible marriage, murder on the allegation of karo-kari , within a short span i.e from 01.10.2013 to 21.10.2015 was found as 332 (three hundred and thirty two).

11. Such statistics are prima facie admission by the police that in just two years in two ranges only there have been reported:

1. 301 murders on allegation of 'karo-kari'

2. 833 cases of abduction for forcible marriage;

3. Conduct of as many as thirteen (13) *jirga's*

4. Seven hundred and seventy petitions were filed by women in two years in Circuit Bench Larkana, for seeking protection.

12. At the outset the learned counsel for respective parties contended that there may have been a number of complaints, which remained in the hearts of the victims, culprits.

13. At this juncture, it would be significant to examine as to whether there exists any room either religiously or constitutionally which could be made as an excuse for committing illegal act(s)/offences with no pain of guilt; suffice to say that Islam insists 'justice' without any discrimination whether it be with reference to colour, caste, creed, blood-relation and even against one's own-self, as is:

'O you who believe stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents or your kin, and whether it be (against) rich or poor.' [Noble Quran 4:135]

14. The 'Islam', per Article-2 of the Constitution, is the 'State Religion' of Pakistan which nowhere gives power or authority to a person to decide the fate of women:

"And when the female (infant) buried alive - is questioned, for what crime she was killed."[Noble Quran 81:8-9]

The Holy Quran while criticizing the attitudes of those (parents), who reject their female children, states:

"When news is brought to one of them, of (the birth of) a female (child), his face darkens and he is filled with inward grief! With shame does he hide himself from his people because of the bad news he has had! Shall he retain her on (sufferance) and contempt, or bury her in the dust? Ah! What an evil (choice) they decide on?" [Noble Quran 16:58-59]

15. The Holy Quran provides clear evidence that a woman is completely equated with man in the sight of God in terms of her rights and responsibilities. The Quran states:-

"Every soul will be (held) in pledge for its deeds" [Noble Quran 74:38]

It also states:

"So their Lord accepted their prayers, (saying): I will not suffer to be lost the work of any of you whether male or female. You proceed one from another" [Noble Quran 3:195]

"Whoever works righteousness, man or woman, and has faith, verily to him will, We give a new life that is good and pure, and We will bestow on such their reward according to their actions." [Noble Quran 16:97, see also 4:124]

16. Thus, suffice to say that Islam does not recognize any discrimination between man and woman. The equality of man and woman is even stamped by the Constitution which is the basic structure of all Laws. A reference to Article-25, being relevant, is made hereunder:

Article 25. Equality of citizens. - (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provisions for the protection of women and children.

17. It is always the undeniable duty of the State to ensure protection of every single soul, but above Article also recognizes the status of both men and women as equal and encourages the State to make law(s) focusing on the protection of women and children in-particular. It would be germane to have a glance over existing laws, relating to women; as well rights, status and position of a woman from a religious and constitutional view.

18. It is an undeniable legal position that all the laws of the land, enshrines that a woman is free in:

- (i) Choosing her life partner; and
- (ii) Protecting her property and honour;

19. According to Islamic Law, women cannot be forced to marry anyone without their consent.

Ibn –e-Abbas *“reported that a girl came to the Messenger of God, Muhammad (peace and blessings be upon him), and she reported that her father had forced her to marry without her consent. The Messenger of God gave her the choice... (between accepting the marriage or invalidating it).”* Ref. Ibn Hanbal page no. 2469.

In another version, the girl said:

"Actually I accept this marriage but I wanted to let women know that parents have no right (to force a husband on them)" Ref. Ibn Majah, page No. 1873

The Constitution in its Article 4(2)(b) & (c) ensures that:

"No person shall be prevented from, or be hindered in doing that which is not prohibited by law; and

"No person shall be compelled to do that which the law does not require him to do.'

20. So far as 'property and honour', the women are considered as true and complete owner(s) of their respective property which they (women) either receive in result of

inheritance or as dower, dowry or gift even. The 'woman' does find her entitlement in law of inheritance and Islam does not recognize any excuse to exclude the woman from her such right. The Holy Quran dictates that:

"Unto men (of the family) belongs a share of that which Parents and near kindred leave, and unto women a share of that which parents and near kindred leave, whether it be a little or much - a determinate share." [Noble Quran 4.7].

21. The men have no right to part a woman from her own belonging or property and even the Constitution guarantees such protection as is evident from:

Article 2(a): no action, detrimental to the life, liberty, body, reputation or property of any person, shall be taken except 'in accordance with law';

Let's not forget that accusing a chaste woman falsely shall receive the 'curse' of Allah Subhana-wa-Tala both for this life and hereafter as:

"Indeed, those who falsely accuse chaste women, are cursed in this life and in the Hereafter. Theirs will be an awful doom." [The Quran. 24:23]

Article 14 of the Constitution of Pakistan ensures 'dignity' and 'privacy of a home' as inviolable. Suffice to say that though the word 'man' is used in this Article yet the protection thereof cannot be confined to the 'man' because 'dignity' is also inviolable for women.

22. Accordingly, even a cursory review of the relevant Articles of the Constitution of Pakistan delivers that:

- i) Articles 26 and 27 provide for equal access to public places and equality of employment in the public and private sector;
- ii) Articles 11 and 37 (g) prohibit trafficking in human beings as well as prostitution;
- iii) Article 32 makes special provisions for the representation of women in local Government;
- iv) Article 34 directs the State to take appropriate measures to enable women to participate in all spheres of life and social activities;

- v) Article 35 asks the State to protect the marriage, the family, the mother and the child;
- vi) Article 37(e) directs the State to make provisions for securing just and humane conditions of work ensuring that children and women are not employed in vocations unsuited to their age or sex, and for ensuring maternity benefits for women in employment;
- vii) Articles 51 and 106 provide for the reservation of seats for women in the legislatures.

23. It is pertinent to state that if one claims to be a citizen of this soil then he, regardless of his status and power, cannot:

- i) Declare a woman as *kari*;
- ii) Decide the fate of a woman, or to award her the death penalty on the pretext of *kari*;
- iii) Marry her with the Quran to deny her right in property;
- iv) Give a woman as compensation for sin (if any) of others;
- v) Maltreat/ torture her;

24. The continuity of the poor status of women in our society reflects complete negation of legislation with regard to women's laws, aimed with an object to achieve desired 'object'. The scope of Women in Distress and Detention Fund Act, 1996 was aimed to 'rehabilitate' by providing legal assistance, jobs and shelter even to those women who are:

- i) Under trial, convicted or detained in Dar-ul-Amans;
- ii) Disabled;
- iii) Suffering from serious ailments, including mental ailment;
- iv) Victims of burn cases;
- v) Women in distress and their minor children, if in need of shelter;
- vi) Seriously maltreated by their husband(s);

25. Our claim of being a civilized society; the dictates of pro-women laws, and even decrees of *sharia* should have eliminated all these evils, and there should be not a single custom or usage degrading/lowering a woman or depriving women of their guaranteed

rights to have a fair trial against any charge or allegation. But the examples above reflects a different scenario such as;

- i) Holding *jirgas*;
- ii) Illegal decree(s) in such *jirgas*;
- iii) Rape(s) of women in name of compensation;
- iv) Awarding women, even minor, as *budal-i-sulh*;
- v) Throwing/sprinkling of acid etc. on the faces of women even at public places;

This is a routine practice particularly in Larkana and Sukkur Division, therefore judicial propriety demands to examine this issue seriously with a view to ensure strict application of law and to curb these illegal activities. Most of the offences against women are a result of so- called custom or usage which allows the holding of *jirgas* or illegal and inhuman decisions taken in the name of *ghairat* etc. It may be observed here that every 'society/community' may have its own rituals; traditions and other customs to lead a life but that should not in any way be in conflict with dictates of laws of the land. It (society) shall have to honour the law(s) of land so as to let the sense of 'good governance' prevails as is demand of Article-5 of the Constitution of Pakistan, 1973, which reads as:

'Article 5. Loyalty to State and obedience to Constitution and law.-(1) Loyalty to the State is the basic duty of every citizen.

(2) Obedience to the Constitution and law is the (inviolable) obligation of every citizen, wherever he may be and of every other person for the time being within Pakistan.

26. Let me insist that the Constitution and all other law(s) of the land nowhere recognize any person to conduct judicial proceedings and to determine guilt or innocence, charged for any crime. Since the *jirga* is not backed by any law, hence cannot be recognized as legal. The Court(s) are the competent forum(s) to pass a decree and to enforce its decree by taking all necessary assistance from all organs of the State. It is a matter of fact that in certain parts of this country the true meaning of education is yet to be achieved, hence the tradition of *jirga* is permitted (acceptable) as 'custom' or 'usage' but even acceptance thereof by certain sections of society, cannot give it any legal status or capability of enforcement, because it is illegal but has no legal means for enforcement of decisions.

27. The above context also demands a reference to Article-8 of the Constitution which reads as:-

Article 8. Laws inconsistent with or in derogation of Fundamental rights to be void.--

(1) Any law or any custom or usage having the force of law, (in so far as it is inconsistent with the rights conferred by the Chapter), shall, to the extent of such inconsistency, be 'void'.

(2) The State shall not make any Law, which takes away, or abridges the rights so conferred, and any law made in contravention of this clause, shall, (to the extent of such contravention), be 'void'.

28. Thus, the question of the legality of a *jirga* should no longer be in dispute, which otherwise stood declared as 'illegal' by this Court.

29. If there exists laws and punishments specifically addressing the issues for all said illegal acts yet there is no change in statistics, as it shows above. It is relevant to state that the purpose of a law enforcing agency is not only restricted to lodging FIR(s) or submitting reports in Court(s) to try the accused but the prime duty of a law enforcing agency is:

- i) Prohibiting happening of offences;
- ii) Assuring sense of security / protection to each single individual;
- iii) Ensuring a sense that a guilty person shall not escape from legal and lawful punishment;
- iv) Punishment to guilty (guilt or innocence is determined first on evidence /documents of police);

30. Albeit, a law enforcing agency cannot directly be held responsible for the occurrence of those offence(s), which happen suddenly because complete deployment of police is not practical. But the occurrence of those acts which otherwise shall result in a conclusion of failure of concerned police officials towards discharge of his duties, which does demand a 'watch over his territory ensuring peace and security'. Holding a *jirga*, and efforts for enforcing the illegal and unauthorized decree are not such acts which should remain hidden from the police of such territory as it will include approach to 'giants' of the *Illaka* (area); calling parties on a scheduled date; gathering of people at particular place (*dera / otaqs*) , but unfortunately, such *jirgas*, even brings the victim to sell his daughters (children) in market (as reported in Jacobabad so as to fulfil the decree of such illegal *jirgas*).

31. Every participant of such *jirga* must be dealt with in accordance with law not only for such illegal act(s) but also for those offences which the illegal and unauthorized decree(s) dictate. I have no hesitation in saying that since the failure of a police officer of that

particular territory amounts in either facilitating or aiding such conduct of a *jirga* and encouraging people to insist on execution of decree of such *jirga* hence in future conduct of such *jirgas* should not only be stopped but in case of failure of the police officer (incharge of that territory) results in successful conduct of *jirga* and compulsion upon victims, then such police officer should also be prosecuted for his failure by lining him up in the list of accused. A proper and vigilant eye of the police on 'conduct of such *jirga* shall not only result in discouraging the people taking the role of 'State within State' but no female shall also be declared as *kari* nor shall be punished with such status.

32. Record reflects that two 'Dar-ul-Amans' were notified in division Larkana and Sukkur by the Government of Sindh; Services General Administration and Co-ordination Department vide its Notification No.SO(C-IV)SGA&CD/3-14/13 which was issued with an object:

- a) To provide women with temporary refuge and safe haven against violence, abuse and exploitation;
- b) To facilitate women's access to justice;
- c) To ensure provision of protection and services to the women in a manner that recognizes and respects their right to security, liberty and dignity;
- d) To assist women in provision of relief and redress against violence or threat of violence;
- e) To make available rehabilitation programs for psychological, social and economic recovery and empowerment;
- f) To prevent isolation of women in distress and to enable them to maintain social contacts and engagement;
- g) To support women through a process of reconciliation of negotiating conditions for rehabilitation within the family, and to impart confidence in them by dispelling their sense of isolation;
- h) To assist women in resettlement after crises and to establish alternative social support systems where necessary;
- i) To protect women against exploitation resulting from compromises imposed on them by taking advantage of their desperation and a feeling that no alternatives are available to them;
- j) To provide women a peaceful environment in which they can make decisions about their future and determine the appropriate course of action to secure their interests;

Since there can prevail no concept of safety and rehabilitation unless all related departments are in co-ordination with each other. The Dar-ul-Aman guidelines specifically state the active role of the Social Welfare Department, District Administration, District Police and NGOs. Since, it was/is the responsibility of the State to provide 'security' at grass root level hence the establishment of a Dar-ul-Aman was to be established at each District but the record and facts are otherwise.

33. Although, the Sindh Commission on the Status of Women Act, 2015 was promulgated with preamble:

'WHEREAS it is expedient to set up Provincial Commission on the Status of Women for promotion of social, economic, political and legal rights of women, as provided in the Constitution of the Islamic Republic of Pakistan 1973, and in accordance with international declarations, Conventions, treaties, Covenants and agreements relating to women, including Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and for matters connected therewith or incidental thereto.'

But, the Commission has not been established so far, which cannot be allowed as an excuse to let an escaped woman or a victim of violence remain without a shelter. I am equally conscious that cases of '*jirgas*', violence against women and even that of *karo-kari* often take places in interior areas, or those which are still stuck in inhuman rituals and customs, therefore, there has always been a need to begin from those places where the need is greatest, but there has never been any Dar-ul-Aman or safe-house at such places. The Social Welfare office, should have focused on such areas. However, even such prima facie failure cannot be made an excuse for the District Administration and the police, being direct custodians of such guarantee, hence till such time the Commission operates fully and comes forward with a mechanism to ensure safety of women at the grass roots, the dictates of the Constitution, assuring such protection, insist for:

- i) Establishing safe-house(s) at District/*Taluka* level where a victim's family could safely reside/stay till she is safely sent to her demanded place or she agrees to go with a person of her choice whose fitness shall be subject to satisfaction of Deputy Commissioner;

This is with an aim to make sense of the 'immediate safety/protection' at grass root level to such victim(s), who otherwise need not approach the Constitutional Court(s) by spending a considerable amount, till the Court orders such protection for which every official, in particularly the police and Deputy Commissioner (being holders of administrative posts) are under undeniable duty. This shall also reduce the burden of the police in protecting such

victim(s), as they all remain with such safe-house(s). The safe- house shall be managed and controlled by women only, for which assistance can be taken from NGO(s), known to be working for women or women police with coordination of Senior Superintendent of Police.

34. Hence, the Chief Secretary, Government of Sindh, is hereby directed to establish the 'Commission' under Status of Women Act, 2015 within a period of three months, which would be competent to recommend for permanent arrangements in place of above temporary arrangement, which however should not take a period exceeding three months from its establishment. However, denial and infringement of constitutionally guaranteed fundamental rights is apparent, hence as temporary arrangement the Chief Secretary is hereby directed:

- i) To immediately direct the Deputy Commissioner(s) to establish safe-house(s) at *taluka* level in Larkana Sukkur and Nawabshah Divisions: to be managed, controlled and supervised by Deputy Commissioner(s) of respective area(s). The establishing of such safe-house(s) should not take more than two months; due to special circumstances of these areas;
- ii) To direct Senior Superintendent(s) of Police to immediately establish Cell (Rescue Centres) at *Taluka* level' and District level in Larkana, Sukkur and Nawabshah Divisions, whereas in other Divisions such centres shall be established at District level; under the charge of women police officer(s) and staff but may include male police staff, which shall attend the complaint(s) of any kind of violence against women, and shall ensure safe access of such victim(s) to safe-house(s). This should not take more than two months in interior Sindh and within three months at other places;
- iii) To direct the Senior Superintendent of Police of each district to ensure security of such safe-house(s) by deploying *Jawans* , who, however, shall have no access inside the safe-house(s) in normal situation;
- iv) To direct Deputy Commissioner(s) and Senior Superintendent(s) of Police to make publication of such Rescue Centre(s) and safe-house(s) and their purpose(s) in their respective areas with coordination of Bar Association(s) and NGOs, working on the subject with good reputation;
- v) This exercise shall be completed within one month with, compliance report; non-compliance can be the reason for initiating contempt proceedings.

Till such time till the 'Commission' develops its own mechanism the safe-house(s) in the whole Province, all the related persons, in particularly the Deputy Commissioner, Senior Superintendent of Police, Social Welfare Office, NGOs shall take advantage of the guidelines, so meant for Dar-ul-Amans vide notification of the Government of Sindh, Services General Administration and Co-ordination Department vide its Notification No.SO(C-IV)SGA&CD/3-14/13, for management, control and functioning of the safe-house(s).

35. The role of NGOs is acknowledged in the 'Commission' therefore, well reputed NGOs working on the subject should be made effective, in achieving the ultimate object which is nothing else but 'woman with dignity, honour, respect and equal status within parameters.' This cannot however be achieved unless proper education is made at grass root level by local authorities with help of such NGOs, social activists and social welfare offices. Accordingly, all Commissioners of respective Divisions shall form committees consisting of Directors of Women Development Department, Government of Sindh, Senior Superintendent of Police, Deputy Commissioner and all other stake holders as well as Bar Associations. Such committees shall supervise the issues relating to women in their respective divisions and in case of any malfeasance or misfeasance they shall recommend it for legal action in accordance with law.

36. Since, it is apparent that the Sindh Government established a Women's Development Department but prima facie there appears no substantive work of the department, hence Secretary of that department shall submit a detailed report with regard to steps taken by the government in welfare of women and such report shall include budget allocation and expenditure thereon since 2003. A.R. of this Court shall ensure that compliance is made within one month.

37. While concluding, I would say that since the law is clear that an act of contracting marriage by two sui juris is not an offence, hence the Senior Superintendent(s) or the Court(s), as the case may be, shall examine the FIR(s)/cases, complained through some of the petitions, and shall ensure that no FIR or case, involved therein, is pending merely on allegation of forcible marriage, if both (contracting partners) deny such allegations. This however shall not prejudice the application of the Sindh Child Marriage Restraint Act, 2013. As regard the petitions, involving question of protection, it would suffice to say that police officials have acknowledged their liabilities with undertaking to provide required protection, which otherwise was/is the absolute responsibility of the police. Such an undertaking by learned A.A.G. and DPG is sufficient for grievances of such petitioners; in case, any grievance is not redressed in any petition, petitioners would be competent to move an application, and office shall fix it for further order, in the light of this order. With regard to C.P. No.S-1230/2015, DIGP, Larkana Division shall initiate departmental proceedings against such

investigation officer. Office shall send, this order to all the concerned quarters, with regard to prayer of petitions as well as general directions to the relevant authorities, this order shall be circulated to Inspector General of Police and all SSPs in Sindh; for compliance. The learned District and Sessions Judges of Larkana and Sukkur Divisions, are directed to dispose of above referred cases in their respective judicial Districts, as well all other cases instituted preceding thereto, in respect of violence against women, within a period of three months hereof with compliance report through MIT.

38. Copy of this order shall be provided to learned AAG for compliance.

39. In above terms captioned 145 (one hundred forty-five) cases of different categories are disposed of.

ZC/R-22/Sindh

Order accordingly.

7.5 Inheritance

7.5.1 2014 MLD 1706 [Peshawar]

Before Abdul Latif Khan, J

KHALIQ DAD---Appellant

Versus

AHMAD NAWAZ---Respondent

Civil Revision No.100 of 2011, decided on 9th December, 2013.

Specific Relief Act (I of 1877)---

---S. 42---West Pakistan Land Revenue Act (XVII of 1967), Ss.39 & 41---Khyber Pakhtunkhwa Muslim Personal Law (Shariat) Application Act (VI of 1935)---Custom (*riwaj*)---Suit for declaration---Wrong entry in periodical records---Effect---Limitation---Entitlement of female heirs to inheritance---Deletion of names of female heirs from inheritance mutation---Defendant contended that *riwaj* (Custom) was in force when original owner/predecessor of parties died---Validity---Inheritance mutation contained pedigree table which showed the names of female heirs (wife and daughter) of predecessor of the parties but later their names were deleted and substituted by the name of said predecessor's son only without any reason/justification---Entries of relations and pedigree table shown on mutation had not been questioned by defendants---Plaintiff's witness also supported the entry which established relation of plaintiff as claimed in plaint and refuted the version made in written statement---Other plaintiff's witnesses also supported plaintiff's version in respect of relations and his (plaintiff's) entitlement to inheritance---Appellate court based its findings on the plaintiff's deposition that he had no documentary evidence of relation of female heirs with the predecessor---Defendant admitted that he could not produce any evidence to show that *riwaj* (Custom) was in force at the time of death of the predecessor---Defendants being beneficiaries of mutations were legally bound to prove the same by producing marginal witnesses besides the Revenue Officer *Halqa Patwari*---Mutation was attested in 1938 when *riwaj* was not in force---Khyber Pakhtunkhwa Muslim Personal Law (Shariat) Application Act, 1935 was promulgated in 1935 whereby female heirs became entitled to their share in accordance with law---Plaintiff was related to original owner/predecessor

through his mother---Female heirs were deprived of their legal share on the pretext that *riwaj* was in force in 1938---Practice of depriving of females of their share in inheritance was deprecated---Wrong entry made in record of rights after every four years in the *jamabandi* gave fresh cause of action to the plaintiff on every denial and suit could not be termed as time-barred---Rights of female (heirs) could not be denied by male members on the score of adverse possession on ouster, as succession opened immediately on the death of Muslim owner and possession of brothers would be taken as possession of sisters unless there was an express repudiation of the claim of the sisters by the brothers---In view of *pardanashini* of female heirs (through whom plaintiff had claimed relationship with the original owner) relief could not be refused to plaintiff because said heirs had not challenged the mutations and claimed their shares inheritance in their lifetime---Plaintiff would not be barred from claiming his right as his predecessors had not waived their right to inheritance which could not be waived under the law---Where women were deprived of their share in inheritance under the garb of '*riwaj*', successors would not be barred claiming their right in due share---Courts below did not consider that matter related to inheritance and non-suited the plaintiff for failing to produce documentary evidence of his relation with the predecessor---Impugned judgments were not sustainable in the eyes of law---Revision was allowed---Suit was decreed.

Abdul Ghafoor and others v. Kallu and others 2008 SCMR 452; Muhammad Iqbal and another v. Mukhtar Ahmad through L.Rs. 2008 SCMR 855 and Ghulam Ali's case PLD 1990 SC 1 rel.

Muhammad Younis Thareem for Appellant.

Zainul Aabidin for Respondent.

Date of hearing: 9th December, 2013.

JUDGMENT

ABDUL LATIF KHAN, J.---Aggrieved of the judgments and decrees dated 8-12-2010 and 12-4-2010 passed by the learned Additional District Judge-V and learned Civil Judge-VI, D. I. Khan respectively vide which his appeal and suit were dismissed, the petitioner has preferred the instant revision petition.

2. Learned counsel for the petitioner contended that judgments and decrees passed by the Courts below are against facts and are the result of misreading and non-reading of evidence available on file. It was argued that the Courts below have wrongly held the burden of proof upon the plaintiff, as respondents/defendants being beneficiaries were bound to prove the validity of mutation. It was added that after the death of Fateh, his widow Mst. Bakhu and daughter Mst. Jannu were deprived of legacy and thereafter on the death of Sawan, his legacy rightly devolved upon his real sister Mst. Jannu and mother Mst.

Bakhu but their names were simply crossed without assigning any reasons and name of Sohna was entered and mutation was wrongly attested on the basis of another Mutation No.349 attested on 25-3-1938 of Jhok Ladhu in favour of Sohna. It was also argued that the Courts below have wrongly relied upon the pedigree table produced by ADK and failed to understand the situation that pedigree table only contains the names of those, who were shown in the disputed inheritance mutation and were incorporated in the revenue record. It was added that written statements contain the plea that '*riwaj*' was in force at the time of death of Fateh but not proved through evidence and Islamic law governing inheritance has been ignored.

3. As against that, learned counsel for the respondents contended that plaintiff has to prove the case. It was contended that relations averred in para-1 of the plaint were specifically denied by the defendants in the written statement and as such had to prove it. He argued that though in the written statement Fateh was shown to have died during *riwaj* but in fact *shariah* was in force. He contended that in the year 2010, Allah Bakhsh was aged about 60/65 years as per his statement recorded in the Court, hence his deposition is hearsay evidence and cannot be relied upon. It was argued that pedigree table does not contain the name of plaintiff and has no relation with Fateh and Mst. Bakhu and Mst. Jannu. He contended that property originally belonged to Fateh but plaintiff could not establish his relation with him and as such not entitled to any relief and rightly non-suited by the Courts below.

4. I have given my deep thought to the arguments of learned counsel for the parties and perused the record with their able assistance.

5. The perusal of plaint reveals that plaintiff has made claim that one Fateh son of Ghulam Mohammad was the original owner of suit property, who had two wives namely Mst. Bakhu and Mst. Jantan. From his wife Mst. Bakhu, his son Sawan and daughter Mst. Jannu were born and from other wife Mst. Jantan, his son Sohna and a daughter and she was predeceased. The legacy of Fateh devolved upon his two sons, depriving his widow Mst. Bakhu and daughter Mst. Jannu. Later on Sawan also died issues and his legacy was to be devolved upon his mother Mst. Bakhu and real sister Mst. Jannu and to this effect a mutation was also entered with *patwari halqa*, but subsequently their names were deleted from it, substituted by step brother Sohna and mutation was thus entered in his name and got attested.

6. Admittedly the name of plaintiff does not find mention in the revenue record as not incorporated in it and similarly not disclosing in pedigree table, as only those names are to be entered in it which are incorporated in mutations and thereafter recorded in revenue record. These entries have been questioned by the plaintiff. The scanning of evidence

available on file reveals that inheritance mutation No.405 of Sawan son of Fateh contains pedigree table showing that Fateh had two wives namely Mst. Bakhu and Mst. Jantan. Sawan (issueless) was shown as son of Fateh from his wedlock with Mst. Bakhu and a daughter Mst. Jannu, and Sohna, as son from his wedlock with Mst. Jantan. Column No.8 of mutation contains names of Mst. Bakhu as widow of Fateh and Sohna as son and Mst. Jannu as daughter (mother, step brother and sister of deceased Sawan) but later on their names were cut and substituted by Sohna only, without any reason. Remarks column also reveals that pedigree table shown on the mutation has been supported. Despite cutting names of Mst. Bakhu and others in column No.8, the pedigree table shown on mutation remained intact and has become part of the record, however, not made part of pedigree table, as mutation was not attested in their name and only attested in the name of Sohna and thus his name was shown in pedigree table Exh.P.W.4/5. These entries of relations and pedigree table shown on mutation have not been questioned by the defendants. P.W.5 also supported this entry which clearly establishes the relation of plaintiff as claimed in the plaint and refutes the version made in written statement. The order of Revenue Officer circle on this mutation reveals that it was not attested on the verification of relation by attesting witness, rather attested on the basis of another mutation bearing No.349, which is also inheritance mutation of Sawan deceased in favour of Sohna, step brother, depriving all others and that mutation too was not attested by any verification by notables, rather on the basis of another Mutation No.344, wherein, on the basis of incomplete pedigree table and on verification of one Habibullah Luntherdar, it was attested in the year 1938. Now the question is whether pedigree table given on this mutation showing only two sons of Fateh is correct or that shown on Mutation No.405 showing his two sons, two widows and one daughter has not been met with by the Courts below and can be dealt with in the light of evidence available on file. P.W.5 has given the entry of names of legal heirs of Fateh in mutation No.405 and later on cutting made by adding the name of Sohna only to the exclusion of those already mentioned in column No.8. P.W.6 plaintiff deposed and reiterated his stance taken in the plaint. He added that he has not thumb impressed Mutation No.405 as marginal witness not thumb impressed Mutation No.405 as marginal witness and is a fake one. P.W.7, Ellahi Bakhsh also supported the version of plaintiff in respect of relations and his entitlement in the inheritance. Nothing adverse could be taken out of these statements, however, the appellate Court was impressed and based its findings on the deposition of plaintiff to the extent that he had no documentary proof of these relations, which is obviously pedigree table, questioned in suit and as such cannot be non-suited on this score alone. Reliance in this respect can be placed on the case of Abdul Ghafoor and others v. Kallu and others (2008 SCMR 452) wherein it was held that:--

"We have heard the teamed counsel for the parties at some length and have also perused the available record. We find that the petitioners had produced P.W.1 Mohammad Yasin Khan, who was Lambardar of the village Takri Brahmin in India where late Mst. Ghogan, had been living in India and left her land in lieu of which the suit land was allotted to her. He categorically stated that Mst. Shakoori and Batu were the real daughters of late Mst. Ghogan. Similarly Yousaf Khan, P.W.2 also hailed from the same village in India who also

stated that Mst. Ghogan had four daughters namely late Mst. Shakoori, Batu, Mst. Bassi and Mehmoodi. The evidence of both the witnesses was quite relevant as they belonged to the same place of later Mst. Ghogan in India. The mere fact that P.Ws. were not sure about the names of the forefather of the parties or of Mst. Ghogan would not be sufficient to disbelieve them."

7. On the other hand, the defendant relied on their solitary statement who deposed that Sohna and Sawan were real brothers and their mother was Mst. Jantan and Fateh had no other wife namely Mst. Bakhu or daughter Mst. Jannu. He also deposed that Sawan died during *riwaj* which is not correct, as mutation attested in 1938 after promulgation of Shariat Act, 1935. He admitted in cross-examination that he has not produced any proof that *riwaj* was in force when Sawan died. He showed his ignorance as to whether Sawan died in life time of Mst. Bakhu and voluntarily added that he was either minor or not even born at that time. He admitted that pedigree table given on Mutation No.405 has not been challenged by them till date and has also admitted that marginal witness of mutation No.405 namely Allah Bakhsh has not been produced by them.

8. The defendants being beneficiaries of Mutations No.405, 444 and 449 were legally bound to prove the same by producing the marginal witness besides the revenue officer and *patwari halqa*, who are the most important entities, as burden heavily lies on them to prove these mutations. Reliance in this respect is placed on the case of Muhammad Iqbal and another v. Mukhtar Ahmad through L.Rs. (2008 SCMR 855) wherein it was held that:--

"Before entering into appreciation of evidence, we may recall that this Court on numerous occasions has categorically held that the mutation proceedings are not judicial proceedings and mutations do not at all happen to confer title. That, therefore, whenever the genuineness of any such mutation is challenged, the burden squarely lies on the parties relying upon the mutation, to prove the actual transaction. Hakim Khan. v. Nazeer Ahmad Lughmani 1992 SCMR 1832 can be referred in this behalf. This Court in a recent judgment rendered in Mohammad Akrom. v. Altaf Ahmad PLD 2003 SC 688 has categorically declared that mutation confers no title and once a mutation is challenged, the party relying thereon is bound to revert to the original transaction and to prove such original transaction which resulted into the entry of attestation of any such mutation."

No effort made to this effect, with special reference to the entries of names of legal heirs in pedigree table on Mutation No.405. They do admit it as correct on one hand and refute it to the extent of pedigree table, on the other, which is against the principles of law relating to interpretation of documents and cannot be allowed to blow hot and cold in same breath. The mutation was attested in 1938, when *riwaj* was not in force, rather Muslim Personal Law was promulgated in the year 1935 and female heirs were entitled to get their share in accordance with law. The contents of mutation No.405, admitted and taken benefit out of it

by the defendants, regarding pedigree table and mala fide cutting of their names in column No.8 of mutation coupled with oral evidence produced by the plaintiff, it stands established that plaintiff had the relation with original owner Fateh through his mother and in inheritance mutations female heirs were deprived of their legal shares on the pretext that *riwaj* was in force, which is totally misconceived, as Shariat Act was in force in 1938. It is common practice that females are deprived of their share in inheritance, specially in rural areas through various devices, which should be deprecated. The wrong entry made in record of rights after every four years in the *jamabandi* gives fresh cause of action to the plaintiff or every denial and suit cannot be termed as time barred. Even otherwise, rights of female cannot be denied by male members/brothers on the score of adverse possession on ouster, as succession opens immediately on the death of Muslim owner and possession of brothers could be taken as possession of sisters, unless there is an express repudiation of claim of the sisters by the brothers. Reliance can be placed on Ghulam Ali's case (PLD 1990 SC 1).

9. The plea that Mst. Bakhu and Mst. Jannu have not challenged the mutations and claimed their shares in the inheritance, in their life time, would not debar the plaintiff from claiming his right as his predecessors have not waived their right as inheritance cannot be waived under the law. The circumstances are to be seen and taken into consideration as it differ from case to case, with special reference to *pardanashini* of Mst. Bakhu and Mst. Jannu and cannot be refused claim on the plea that if predecessors have not claimed in life time then the successors would be debarred to claim their right in due share, especially when deprived the womenfolk under the garb of *riwaj* allegedly in force at the time of attestation of mutations in dispute. The facts of every case have to be considered in the prevailing circumstances, qua application of relevant law to the matter, as there exists no hard and fast rule to be followed in this respect. The learned Courts below have not focused and considered the matter as an inheritance issue and non-suited the plaintiff mainly on failure of non-production of documentary proof of his relation with the predecessor, which is alien to law and thus the impugned judgments are not sustainable.

10. For the reasons mentioned above, I allow the instant petition, set aside the impugned judgments and decrees of the Courts below and decree the suit of plaintiff to the extent of his due share in the legacy of Fateh and Sawan, in accordance with law. No order as to costs.

ARK/274/P

Revision allowed.

7.6 Sexual harassment

7.6.1 2013 MLD 198 [Federal Ombudsman]

Before Musarrat Hilali, Mohtasib

PROTECTION AGAINST HARASSMENT OF WOMEN AT WORKPLACE, ISLAMABAD: In the matter of

Appeal No.9/FOS of 2011, decided on 5th October, 2011.

(a) Protection against Harassment of Women at the Workplace Act (IV of 2010)

---S. 2(h)---"Harassment", definition of---Scope---Reading of S.2(h) of Protection against Harassment of Women at the Workplace Act, 2010 made it clear that key part of the definition of the word "harassment" was the use of the word unwelcome or uninvited conduct or communication of a sexual nature---Sex-based behaviour should be severe or persuasive enough to alter the conditions of the victim's employment and it should create an abusive working environment or render the workplace atmosphere intimidating, hostile or offensive.

(b) Protection against Harassment of Women at the Workplace Act (IV of 2010)

---S. 2(h)---Harassment---Appreciation of evidence---Use of the words *jahil* and *badtameez aurat*---Accused (appellant) allegedly misbehaved with the alleged victim at her workplace in front of other employees and called her *jahil* and *badtameez aurat*---Competent Authority on the recommendation of the Inquiry Committee permanently transferred the accused to a different unit within the Organization---Contention of accused was that words *jahil* and *badtameez aurat* did not cover the definition of "harassment" as defined under S. 2(h) of Protection against Harassment of Women at the Workplace Act, 2010---Validity---Words *jahil* and *badtameez aurat* did not qualify as "sexual harassment"---Although said words were sufficiently offensive to cause discomfort to a woman but they did not rise to the level of interfering with the alleged victim's work performance as it was an isolated incident, which occurred over a minor dispute---Alleged victim had failed to make out a prima-facie case of sexual harassment---Appeal was allowed and competent Authority was directed to send the accused back to the position from where he was transferred. [pp. 200, 201] A, B & C

Agha Sayyad Ali Raza for Respondents.

ORDER

This matter arises out of an Appeal No.9/FOS/2011.

MS. MUSARRAT HILALI, MOHTASIB.---Briefly the facts are, that Ms. Shamim Bano, Accounts Officer Finance Department Pakistan International Airlines submitted a complaint against Amir Mehmood, Senior Accounts Officer Pakistan International Airlines, Jinnah International Airport Karachi before inquiry committee. It was alleged that Amir Mehmood P-48051, Senior Accounts Officer misbehaved with the respondent at her workplace in front of other employees by saying *jahil* and *badtameez aurat*. Upon receipt of complaint, the competent authority constituted an Inquiry Committee comprising of Ms. Mahreen Fatima, Mrs. Mariam Aftab and Mr. Abid. The committee communicated the appellant the charges levelled against him by Ms. Sahmim Bano, the respondent No.2. The appellant submitted his reply on 8-3-2011 denying all the charges levelled against him and opted to defend himself before the Inquiry Committee.

2. The appellant and the respondent No.2 appeared before the committee, statements of both the parties were recorded. The Inquiry Committee also recorded the statements of 12 witnesses. The appellant, respondent No.2 and all the witnesses were put to the clarification of Inquiry Committee. The committee gave its detailed report on 18-3-2011. On the recommendation of Inquiry Committee, the Managing Director PIA being the competent authority issued letter of censure to the appellant and permanently transferred him to Finance unit (Engineering).

3. Aggrieved of the recommendation of the Inquiry Committee dated 18-3-2011 and order of the competent authority dated 31-3-2011, the appellant filed the instant appeal under section 6 subsection (1) of the Protection Against Harassment of Women at Workplace Act, 2010.

4. Learned counsel for appellant submitted that the impugned order of competent authority is without Jurisdiction as according to the learned counsel matter was beyond the purview and scope of the Act. That the alleged words *jahil* and *badtameez aurat* were used which do not cover the word harassment as defined under section 2 subsection (h) of the Protection Against Harassment of Women at Workplace Act, 2010.

5. Learned counsel further submitted that Inquiry Committee and the competent authority acted in a biased and perverse manner, resulted into miscarriage of Justice, he prayed that the recommendation of Inquiry Committee dated 18-3-2011 and the order of competent authority dated 31-3-2011 be set aside.

On the other hand, Mr. Agha Sayyad Ali Raza appearing on behalf of respondents submitted that the findings/recommendations of Inquiry Committee be treated as his arguments.

6. I have gone through the statements of appellant, the respondent No.2 and the witnesses and have perused the record. The foremost and pivotal question for adjudication is "whether the complaint filed before the harassment committee constituted a case under section 2 subsection (h) of the Act which is reproduced as under:--

"harassment" means any unwelcome sexual advance, request for sexual favors or other verbal or written communication or physical conduct of a sexual nature or sexually demeaning attitudes, causing interference with work performance or creating an intimidating, hostile or offensive work environment, or the attempt to punish the complainant for refusal to comply to such a request or is made a condition for employment".

7. From the plain reading of the above mentioned section it is clear that a key part of the definition is the use of the word unwelcome or uninvited conduct or communication of a sexual nature is prohibited. The sex based behavior shall be severe or persuasive enough to alter the conditions of the victims employment and create an abusive working environment or renders the work place atmosphere intimidating, hostile or offensive. The respondent No.2 has alleged that appellant called her "jahil and badtameez aurat. None of the words uttered by appellant qualifies the term sexual harassment. Although the comments were sufficiently offensive to cause discomfort for a women but they did not rise to the level of interfering with the respondent's work performance as it was an isolated incident, occurred on a very minor dispute. Had there been a man in her place, situation would have been equally bad for him. The respondent No.2 failed to make a prima facie case of sexual harassment.

8. In view of the foregoing this appeal is allowed.

The Managing Director PIA is directed to send back the appellant to the position from where he was transferred pursuant to the order dated 31-3-2011.

A copy of this order be sent to Managing Director PIA, Karachi for its implementation.

Case file be consigned to the record room after its necessary completion and compilation.

MWA/2/FOW

Appeal allowed

7.7 Child Marriage

7.7.1 PLD 1964 Dacca 630

Before Sikander Ali, J

SHAMSU MIA AND OTHERS-Petitioners

Versus

THE STATE-Opposite-Party

Criminal Revision No. 137 of 1963, decided on 6th August 1963.

(a) Child Marriage Restraint Act (XIX of 1929), Ss. 4, 5 & 10 Provision of S. 10 mandatory-Mere contravention of such provision-Conviction under Ss. 4 & 5 however, in revisional proceedings, cannot be held illegal unless prejudice thereby caused to accused-Criminal Procedure Code (V of 1898), S. 439.

Pt. Harlhar Tiwari v. Etwari Crop and another A I R 1939 Pat. 525 rel.

(b) Child Marriage Restraint Act (XIX of 1929), S. 5-Provision wide enough to cover fathers of both bridegroom and bride.

Munshi Ram and another v. Emperor 158 I C 107 ref.

Abdus Salam for Petitioners.

Abdul Hamid for the Opposite-Party.

JUDGMENT

In a summary trial held by a competent Magistrate the accused petitioners Nos. 1 and 4 were convicted under sections 4 and 5 respectively of the Child Marriage Restraint Act, 1929 and sentenced to pay a fine of Rs. 100 each and the other two accused petitioners, namely,

Nos. 2 and 3, were convicted under section 5 of the said Act and sentenced to pay a fine of Rs. 200 each; and their revisional application filed before the learned Sessions Judge against the order of their convictions and sentences was rejected. It is thereafter that they approached this Court in the exercise of its criminal revisional jurisdiction.

2. The facts of the case, in a nutshell, are that petitioner No. 1 contracted a child marriage by marrying a 9/10 years old girl, named Roushana, daughter of petitioner No. 4 (*jahera khatoon*) by her first husband, and the said mother, i.e., petitioner No. 4 and petitioners Nos. 2 and 3 (father of the petitioner No. 1 and the present husband of the petitioner No. 4 respectively) conducted and directed, i.e. promoted, the said child marriage.

3. Mr. Abdus Salam, the learned Advocate appearing on behalf of the accused petitioner, has taken two grounds calling in question the legality of the said order of convictions. The first of these is that the impugned order of conviction is legally insupportable for non-compliance with the mandatory provision of section 10. That section reads:-

"The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry."

It is apparent from the plain language of the section itself that the provision is mandatory and there is no dispute, too, that in the present instance no preliminary inquiry as contemplated thereby was held. The question arising, therefore, is whether violation of the said mandatory provision is such as may invalidate the proceeding and render the conviction of the accused petitioners bad in law. In this connection it is important to bear in mind that the aforesaid question has arisen in a revisional proceeding and in such a proceeding mere contravention of a provision of the relevant statute, even though of a mandatory nature, cannot by itself render the proceeding or the conviction recorded therein illegal unless it is further established that such contravention or noncompliance has actually caused prejudice to the accused. It was thus held in the case of *Pt. Harihar Tiwari v. Etwari Gop and another* (A I R 1939 Pat. 525).

"The object of the preliminary inquiry under section 10 is to inquire whether there is a prima facie case or not. If the accused objects to being tried until a preliminary inquiry has been made, the Magistrate is bound to make such an inquiry, and if he has proceeded in disregard of the objection of the accused his order would have to be set aside. But where the accused makes no objection to the trial he cannot, when the result has gone against him benefit by an objection, based on non-compliance with

section 10 which is entirely technical in its nature, if the trial has established that there was not only a prima facie case but there was a substantive case against the accused."

4. I am in respectful agreement with the proposition of law as laid down above.

5. Now turning to the present case it may be pointed out that the learned Magistrate was satisfied and has found that there was not only a prima facie case but that the prosecution has actually proved the allegations made against the accused petitioners. Mr. Salam, too, found it difficult, in the facts and circumstances of the case, to argue that there has been any prejudice to his clients for non-compliance of the provisions of section 10 in this instance. So the aforesaid objection taken on the ground of violation of the said provision, is overruled as having no force or substance.

6. The next point made by Mr. Salam is that the conviction of the accused petitioners Nos. 2-4 under section 5 cannot be supported and that according to him, these petitioners could be convicted, if at all, under section 6 and not under section 5. Section 6 is as follows: -

"Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both."

It may be worthwhile also to quote here the provision of section 5 which runs thus:

"Whoever performs, conducts or directs any child-marriage shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child-marriage."

7. Sections 5 and 6 deal with different offences. Section 5 deals with the person who performs, conducts or directs any child-marriage. Section 6 provides for the offence in case where a minor himself contracts a child-marriage. It is only in the case a minor contracts a child-marriage that any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or

permits it to be solemnized, or negligently fails to prevent it from being solemnised, shall be punishable. The case before me is not one of a minor contracting the marriage and, as such, section 6 can have no manner of application at all. That, however, does not answer the point finally inasmuch as it remains to be considered whether the accused petitioners concerned, i.e., petitioners Nos. 2-4, can be rightly brought within the mischief of section 5. In this connection reference may be made to the case of *Munshi Ram and another v. Emperor* (158 I C 1007) wherein it has been held that section 5 of the Child Marriage Restraint Act, 1929, is wide enough to cover the case of the fathers of both the bridegroom and the bride.

8. As has already been made clear above, petitioner No. 2 is the father of the bridegroom while petitioner No. 4 is the mother of the child-bride and petitioner No. 3 is the present husband of petitioner No. 4. Evidence on the record is that the said child was living with her uncle at a different place from where, however, her mother, i.e., petitioner No. 4, brought her on a visit to her husband's house and there gave her in marriage to petitioner No. 1. The marriage was solemnised in the house of petitioner No. 3. It also appears to be in evidence, and the learned trying Magistrate, too, appears to have been satisfied, that besides the mother of the girl, petitioners Nos. 2 and 3 also participated in the marriage and conducted and directed, i.e., promoted, the same. That being so, they have, in my opinion, been rightly convicted under section 5 (See 158 I C 1007). Thus there appears to be no substance in this contention as well.

9. Lastly, Mr. Salam also urged that the sentences inflicted upon the accused petitioners are rather excessive. Regard being had to the circumstances, however, I think a fine of Rs. 50 each in the case of petitioners Nos. 1 and 4, and Rs. 100 each in the case of petitioners Nos. 2 and 3, will suffice the ends of justice and I order accordingly.

Subject to the modification of the sentence as above, the Rule is discharged.

S. Q,

Rule discharged.

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