Judgment sheet

IN THE PESHAWAR HIGH COURT PESHAWAR

Judicial department

J U D G M E N T

Cr. Appeal No. 251-P of 2016

Date of hearing:	**13.04.2018**
Appellant by:	Mr. Sohail Akhtar, Advocate.
State by:	Malik Akhtar Hussain, AAG
Respondent:	Mr. Naveed Akhtar, Advocate
Amicus Curie	Mr. Muhammad Ashfaq Afridi, Advocate

ISHTIAQ IBRAHIM, J.- Muhammad Arshad, appellant, through the present criminal appeal has challenged the validity of judgment dated 05.04.2016, rendered by learned Additional Sessions Judge-V, Nowshera vide which he was convicted and sentenced as follows:-

> ***(i) Under Section 53 of Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010: Ten years R.I. with a fine of Rs.200,000/-, in default of payment of fine, to undergo six month S.I.***
> ***(ii) Benefit of Section 382-B Cr.P.C. was extended to him.***

2. The prosecution story, as averred in the F.I.R., is that complainant Mst. Haleema along with her daughter Mst. Malaika aged about 7/8 years appeared in Police Station Akora Khattak on 20.02.2015 at about 20:15 hours and reported that her daughter Mst. Malaika and other kids were playing in the ground near the Baithak of Muhammad Arshad, when he (the appellant herein) took Mst. Malaika to his Baithak and attempted to commit rape on her forcibly. Other children of complainant informed her about the occurrence, she rushed to the spot, Mst. Malaika was weeping, she was taken into her lap and taken to her house. Accordingly, report of the complainant was incorporated in Mad No. 32 of 20.02.2015. Injury sheet of the victim was prepared and she was referred to Medical Examination and inquiry under Section 156 (2) Cr.P.C. was launched and Nawar Khan SI conducted the inquiry. In consequence, F.I.R. No.113 dated 23.02.2015, was registered against him.

3. On completion of investigation, Challan was submitted for trial against the appellant. Formal charge was framed on 09.04.2015 to which he did not plead guilty and claimed trial.

4. In order to prove its case, the prosecution examined twelve witnesses and closed its evidence on 02.03.2016 where after appellant was examined under Section 342 Cr.P.C. but neither he wished to be examined on oath, nor opted to produce defence evidence.

5. Naik Zaman Khan (PW-11) investigated the case. After registration of the case, he applied for the custody of appellant and two days custody was granted by the Court. He produced the accused for his medical examination before the doctor, who was examined by the doctor. He prepared pointation memo at the instance of appellant. He recorded the statement of accused under Section 161 Cr.P.C. who admitted his guilt before him, but when the appellant was produced before the Court for recording his confessional statement, he refused to confess his guilt and was sent to judicial lockup. He took into possession memory card in which he himself recorded the statements of victim Mst. Malaika and her sister Mst. Robina Anwar. He produced the victim Malaika before the Court for recording her statement under Section 164 Cr.P.C which was recorded accordingly. He sent two bottles

containing swabs to the FSL and the report whereof is Ex.PZ. He recorded statements of PWs and that of the accused under Section 161 Cr.P.C.

6. The prosecution produced Dr. Irum Habib DHQ Hospital Nowshera, the examination in chief is reproduced as below:

> ***"On 20.05.2015, victim Malika daughter of Sajjad Anwar was produced before me by the local police for the purpose of medico legal examination at 9:30 pm, I examined the victim and found that there was history of sexual assault. Patient was well oriented in a time space in person. On local examination periurethereal tear with bleeding at 10 O'clock position on right side. Hymen intact. Urethra intact. One burse is seen in the right knee. No other bruises are seen in the body. Perurethereal and rectal swabs are taken and labeled and sent for histopathology. Clothes at the time of incident were not available they were changed. On 21.02.2015 at about 9:10 pm final report/opinion is sign of attempt of sexual assault. To this effect my report is Ex.PW4/1 which is correctly bears my signature."***

7. After hearing the learned counsel for the parties and appraisal of evidence, the learned trial Court convicted and sentenced the appellant, as mentioned in the earlier part of the judgment.

8. On 05.09.2016 when this appeal was taken up for hearing, it was brought into the notice of the Court that the appellant had died. On

24.10.2016 report of the Superintendent Jail, Haripur was received which confirmed the death of the appellant. In addition to the imprisonment, the appellant was also burdened with the payment of fine of Rs.2,00,000/- (two lacs). Counsel for the parties were directed to assist the Court as to whether after the death of the appellant, the appeal would abate u/s 431 Cr.PC. Mr. Muhammad Ashfaq Advocate volunteered to assist the Court as amicus curie on the above mentioned proposition.

9. Learned counsel for the appellant filed power of attorney on behalf of legal heirs of the appellant.

10. Learned counsel for the appellant submitted that Section 431 Cr.PC in unequivocal terms provides that during pendency of the appeal, when the appellant dies, his appeal would abate and further submitted that the appeal will not abate in those cases where there is sentence of fine only. His submission is that the appellant was convicted for imprisonment as well as sentence of fine, therefore, his appeal shall abate as provided u/s 431 Cr.PC. On merits, he submitted that the prosecution has been miserably failed to prove charge against the appellant. The testimony of the victim Mst. Malaika

(PW-7) is in direct conflict with the medical evidence, the conduct of the complainant is not above board. He further submitted that as the charge was not proved and the appellant was acquitted of the charges of rape and sexual assault while he was only convicted u/s 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010. He also assailed the conviction of the appellant as the same was not in consonance with the provision of the Khyber Pakhtunkhwa Child Protection Act. He prayed that the appeal of the appellant be abated u/s 431 Cr.PC and in alternate prayed for the acquittal of the appellant from the charges leveled against him on merits as well.

11. The learned AAG, assisted by the learned counsel for the complainant submitted that the appeal will be heard u/s 431 Cr.PC only if the appellant has been adjudged guilty for imprisonment and for fine and if the conviction is of fine and imprisonment, then appeal would abate about the imprisonment while to the extent of fine it will remain alive and is to be heard on merits because a separate mechanism has been provided under the law for the recovery of fine, estate of the appellant would be liable for the recovery of fine under the Code of Criminal Procedure and

submitted that appeal is to be heard on merits to the extent of fine. On merits, they have stated that the appellant was charged for committing rape of minor girl aged about 7/8 years. The medical evidence, statement of Mst. Haleema (PW-8) support case of the prosecution and the appellant was rightly found guilty by the learned trial Court and prayed for the dismissal of the appeal.

12. The learned amicus curie submitted that appeal abates only when the appellant is convicted for imprisonment if his conviction is of fine also in either case whether that is only fine or with fine, the appeal would not abate, the language of Section 431 Cr.PC is clear, if the intention of the legislature was that appeal would abate only in cases where the sentence is of fine, then the word ***only*** or either its other synonyms would have been mentioned in Section 431 Cr.PC. He relied on the judgments of the Apex Court in case titled ***Dr. Ghulam Hussain (represented by 8 heirs) Vs The State*** cited as ***1971 SCMR 35***, ***NLR 1998 Criminal 112*** titled as ***Dilbar Sher Vs The State*** and he prayed that the appeal will abate only to the extent of imprisonment while regarding the fine the same is to be heard.

13. Arguments of the learned counsel for the parties were heard on the question of abatement as well as on merits.

14. Before adverting to the maintainability of the appeal and its abatement, this Court deems it necessary to reproduce the relevant provision of law i.e. Section 431 Cr.PC which is as under:

> ***"431. Abatement of appeals. Every appeal under [section 411-A, sub-section (2), or section 417] shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant."***

As it is manifest from the plain reading of section 431 Cr.PC, appeal does not abate due to death of an accused who has been sentenced to imprisonment as well as fine. Sentence of imprisonment abates only and not that of fine on his death pending hearing of an appeal. Appellate Court may go into propriety and legality of sentence of fine even after death of accused/appellant. Usually a criminal appeal abates on the death of the appellant but Section 431 Cr.PC seems to have made an exception to this general rule, however watchful glance of the section will show that an appeal against a sentence of fine shall not abate by reason of the death of the

accused/appellant, because it not a matter which affects his person, but one which affects his estate, where an accused has appealed against the sentence of imprisonment and fine and before the appeal comes up for hearing he dies, that part of the appeal which relates to the sentence of imprisonment shall abate on the death of the appellant but the other part which relates to the sentence of fine shall not abate on the death of the appellant.

In case of ***Dr. Ghulam Hussain and others Vs The State***, published in ***1970 SCMR 35*** it was held by the Apex Court that if the appeal is pending before the appellate Court in case of death of the appellant during the pendency of the appeal, then the same can be heard on merits and even the Court can pass any order i.e. to maintain the conviction or acquit the appellant. In this regard reliance is also placed on the judgment reported in ***AIR 1962 MYSORE 275 (V 49 C 83)*** titled ***Govindrajalu and others Vs State of Mysore***, wisdom is derived from the judgment which is reproduced as below:

> ***"In the result, Criminal Appeals Nos.393, 404 and 410 of 1958 are dismissed subject to the modification suggested above. But it must be noted that the appeal filed by A-3 (P. A. Shan-mugha Sundaram Mudaliar) in so far as it relates to the substantive sentence imposed on him abated because of his death during the pendency of these***

> ***appeals. His appeal only survives as regards the sentence of fine."***

Similarly reliance is placed on the judgment of Apex Court of Allahabad cited as ***AIR 1957 Allahabad 20 (V 44 C 2 Jan.***) titled as ***Sm. Vidya Devi Vs State***, wherein it was held that:

> ***(2) The first question that falls for our consideration is whether the appeal filed by Jai Narain abated as a whole on the death of the convict. To answer this question it is necessary to refer to S.431. Criminal P.C., which is as follows:-***
>
> ***"Every appeal under S.411-A, sub-s. (2) , or S. 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant."***
>
> ***In a case where there is only a sentence of imprisonment, no difficulty arises because the sentence of imprisonment lapse with the death of the accused. In a case where the accused has been sentenced to a fine, the section makes it clear that the appeal, as it relates to a sentence of fine, does not abate.***
>
> ***In our opinion S.431 makes it clear that the intention of the Legislature is that where an appeal is directed against a sentence of imprisonment only, the appeal abates as soon as the accused dies. It is also manifested from the section that where the sentence is one of fine, the appeal does not abate and the reason for this is obvious. Where a sentence of fine is imposed, the State can realise the fine from the assets left by the deceased in the hands of his legal representatives.***
>
> ***We see no reason why the same principle should not be applied to an appeal where an accused person appeals both against the sentence of imprisonment, and the sentence of fine. As far as the sentence of imprisonment is concerned, the appeal shall abate, but with regard to the sentence of fine, the same appeal will not abate. The argument that in appeal could not be split up in two portions is not***

sound. Where an appeal is filed both against the sentence of imprisonment and fine, it is always open to the appellate Court to accept the appeal in part.

For example, if a person is sentenced to imprisonment and also to a fine, it is open to the Court of appeal to accept that portion of the appeal which relates to the sentence of fine and reject the other portion which is against the sentence of imprisonment. Where an accused has appealed against the sentence of imprisonment and fine, and before the appeal comes for hearing he dies, S. 431, Criminal P.C. will come into play.

Under the provisions of S. 431 that part of the appeal which relates to the sentence of imprisonment shall abate on the death of the appellant but the other part which relates to the sentence of fine shall not abate on the death of the appellant. In the case of Lalla Singh v. State 1958 All LJ 451 (A), the appellant Lallah Singh had been sentenced to imprisonment as well as to a fine of Rs.200/-, Lallah Singh filed an appeal but he died during the pendency of appeal.

Oak J. held that the appeal had abated in part so far as it related to the sentence of imprisonment but as regards the sentence of fine it did not abate. We are in agreement with the observations made in that case. We are of the opinion that the appeal of Jai Narain abated in respect of the sentence of imprisonment; and that it did not abate with regard to the sentence of fine. We, therefore, overrule the contention that the entire appeal abated on the death of jai Narain.

Reliance is also placed on the judgment of Hon'ble High Court ***NLR 1998 Criminal 112*** titled as ***Dhaular Sher etc Vs The State***, principal enunciated from the judgment is reproduced as below:

"***Before making comments on the evidence an important***

> ***development has taken place. Dhaular Sher who is the main accused and whose shot hit the deceased has admittedly died during the pendency of his appeal. According to the learned counsel for the appellant he was murdered at the instance of the complainant party. How and in what manner and by whom he was murdered is not relevant for disposal of this appeal. However, on account of admitted fact that he is dead his case covered by Section 431, Cr.PC. His appeal, therefore, stands abated. The sentence of imprisonment, therefore, becomes inconsequential. However his sentence of fine does not stand abated. The counsel for the appellant has informed that one of the legal heirs has contacted him nor he is n a position to submit if any of the legal heirs intend to pursue the appeal in respect of imposition of fine on him. His sentence of fine, therefore, remains unabated unless his appeal is accepted and he earns a clean acquittal.***

15. By now it is settled that on the death of the appellant whether he is convicted and sentenced for payment of fine with imprisonment or without imprisonment, his appeal will not abate to the extent of fine as provided by Section 431 Cr.PC in view of the above the appeal of the appellant is to be heard

on merits and the case with regard to the sentence of fine is to be appraised in accordance with the settled principle of the criminal justice.

So in view of this Court, the appeal to the extent of fine is maintainable and has not been abated.

16. Now adverting to the merits of the case, the prosecution relied on the statement of victim child Mst. Malaika appeared as (PW-7). It is pertinent to mention here that at the time of her examination before the Court, her age was recorded as 07/08 years by the learned trial Court. Her cross-examination only is in the form of suggestion which has been denied by this witness. She was never cross-examined by the defence on the material aspect of the case. No doubt, the Court can take into consideration the suggestions but suggestions are to be considered in light of the other material elicited from the particular witness. In this case, the testimony of the victim Mst. Malaika (PW-7) remains un-shattered and unchallenged, so the same cannot be brushed aside. In addition to the statement of PW-7, mother of the victim Mst. Haleema also supports the case of the prosecution. She was the person who took her to the Police Station on the very first day and she lodged the report vide Daily Diary No.32 dated 20.02.2015, though she is not an

eyewitness but her statement can be considered as admissible within the meaning of Article 19 of the Qanoon-e-Shahadat as **Res Gestae** because the mother was the person who took her to the Police Station, prior to that she reached to the place of occurrence and there the victim Mst. Malaika was found weeping. The defence has tried to shatter the credibility by referring to her previous disputes of which one was with her in laws prior to the occurrence which she described as domestic matter between them, while the second incident is with regard to the quarrel with the son of the appellant but that was after the present occurrence when they trespassed her house and threatened her that their father is in Jail, because of complainant and they will not spare her.

17. In view of this Court, the above referred incidents would not damage the credibility of the complainant Mst. Haleema (PW-8). Both these witnesses had with stood the test of cross-examination and their credibility remains un-rebutted. The victim was examined by PW-4 Dr. Irum Habib DHQ Hospital, Nowshera and she observed that there was periurethereal tear with bleeding at 10 O'clock position on her right side showing that her vagina was disturbed though the

hymen and urethra were intact. No other bruises or abrasions are seen in the body. Perurethereal and rectal swabs are taken which were sent to the histopathology Ex.Pz and according to his opinion the suspected seminal stains on the articles in question were subjected to chemical serological and microscopic analysis which reveals that semen of human origin was detected on the swab. The medical evidence and the serological analysis support the statement of the victim (PW-7) Mst. Malika and complainant.

18. Though the learned trial Court has convicted the appellant under section 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 falls under the definition of sexual abuse Section 2(1) (y) is reproduced as under:

> ***"Sexual abuse means employing, using, forcing, persuading, inducing, enticing or coercing any child to engage in, or assisting any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or stimulation of such conduct either independently or in conjunction with other acts, with or without consent."***

The definition of the child abuse is squarely attracted to the facts and circumstances of the case due to the reason that Mst. Malaika victim deposed in her Court statement that accused inserted his

finger in her private part and the appellant has been rightly convicted by the learned trial Court for the above mentioned offence. The appeal to the extent of sentence of imprisonment has already been abated while his conviction and sentence of fine is maintained.

Accordingly, this appeal is dismissed in above terms.

Announced:
13.04.2018

JUDGE

(S.B.) Hon'ble Mr. Justice Ishtiaq Ibrahim

Ihsan