

JUDGMENT SHEET
PESHAWAR HIGH COURT,
MINGORA BENCH.

JUDICIAL DEPARTMENT

J U D G M E N T

Cr. Appeal No. 216-M of 2018.

Date of hearing: 27.06.2019 at Mingora Bench
Announced on: 19.07.2019 at Principal Seat.
Appellant: *(Abdul Qayyum) By Mr. Aziz Ahmad Hashmi, Advocate.*
Respondent: *(State) By Mr. Wilayat Ali Khan, A.A.G.*
Mst. Rabia Bibi *By Mr. Muhammad Yar*
Complainant. *Malezai, Advocate.*

ISHTIAQ IBRAHIM, J.- This single judgment shall dispose of Criminal Appeal No. 216-M/2018 filed by appellant Abdul Qayum son of Amir Khan against his conviction and sentence and Criminal Revision No.50-M/2018 filed by petitioner Mst. Rabia Bibi against Abdul Qayum (accused-respondent) for enhancement of his sentence, as both are the offshoots of the same impugned judgment dated 05.09.2018 rendered by the learned Additional Sessions Judge/IZQ, Dir (Upper) at Wari, in case FIR No.293 dated 11.07.2017 under sections-

354/376/511 PPC registered at Police Station Wari, District Dir (Upper), whereby the appellant was convicted under section-511 PPC and sentenced to ten years rigorous imprisonment with a fine of Rs.200,000/- or in default of payment of fine, he shall suffer further six months S.I. The appellant was also convicted under section-354 PPC and was sentenced to two years Rigorous Imprisonment. Both the substantive sentences were ordered to run concurrently. Benefit of section-382-B Cr.PC was extended to the appellant.

2. Precise facts of the prosecution case are that on 03.07.2017 Mst. Rabia Bibi (complainant) submitted a written application/complaint to DSP Circle Wari against Qayum Khan son of Amir Khan (her real father), wherein the complainant averred that her father has made several attempts to commit rape upon her; that on 11.06.2017 at 12.00 hours her father had attempted again to rape her but due to her resistance the string of her shalwar/trouser was torn and got half naked; that due to her hue and cries, her mother and other neighbors came to the place of occurrence and the accused decamped from the scene. The

DSP referred the complaint to the SHO for necessary action, who further referred the matter to Muhammad Afzal HC for conducting proper inquiry and proceedings in accordance with law. After conducting inquiry, the inquiry report was submitted and the present case FIR was registered against the convict-appellant, who was arrested in the case and after conducting investigation, he was sent to Judicial Lockup.

3. After completion of investigation, complete challan was put in Court. Formal charge was framed against the accused to which he did not plead guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as six (06) PWs. **Rahim Baig SHO (PW-1)** registered case FIR against the accused and after completion of investigation submitted complete challan in the case. **Mst. Rabia**, the complainant (**PW-2**) reiterated the same facts mentioned in the complaint. **Mst. Bibi Nishta, (the mother of complainant and wife of accused)**, appeared before the Court and her statement was recorded as (PW-3), and supported the version of the complainant. **Riaz Khan SI (PW-4)** deposed that after

registration of case FIR, the investigation was entrusted to him. He raided the house of the accused, but he was not present in the house, prepared the house search memo (EX PW 4/1), vide applications (EX PW 4/2 & EX PW 4/3) obtained warrant under section 204 Cr.PC and proclamation notices u/s 87 Cr.PC respectively and entrusted the same to the DFC for execution. On 20.07.2017 the accused was arrested by Wazir Muhammad ASI and he vide application (EX PW 4/4) produced the accused before the Court and obtained his police custody for three days, he interrogated the accused, recorded statements of the PWs as well as accused u/s-161 Cr.PC and after completion of investigation, handed over the case file to the SHO for onward submission. **Afzal Khan IHC (PW-5)** deposed that he prepared the site plan (EX PW 5/1) at the instance of complainant and eye witnesses, recorded statement of the complainant and eye witnesses under section-161 Cr.PC. On 11.07.2017 he vide application (EX PW 5/2) produced the complainant and Mst. Bibi Nishta before the Court of Judicial Magistrate Wari, for recording their statements under section-164

Cr.PC and as such their statements were recorded. He vide application (EX PW 5/3) obtained the opinion of the APP.

Shah Faisal Khan SI (PW-6) deposed that in light of the opinion of the learned APP (EX PW 5/3) drafted murasila (EX PW 6/1) and sent to police station for registration of case FIR against the accused.

5. After closure of prosecution evidence, statement of accused was recorded under Section 342 Cr.P.C wherein he negated the prosecution story. He professed innocence and alleged false involvement in the present case. However, he neither wished to be examined on Oath within the meaning of Section 340(2) Cr.P.C nor desired to produce evidence in his defence.

6. On completion of trial, after hearing the arguments of the learned counsel for the parties and appraising of evidence on the file, the learned Additional Sessions Judge/Izafi Zilla Qazi, Dir (Upper) at Wari, vide impugned judgment dated 05.09.2018, convicted the appellant Abdul Qayyum and sentenced him as mentioned herein above. Feeling aggrieved from his conviction and sentence, the

appellant has approached this Court by filing the instant appeal.

7. Valuable arguments of learned counsel for the parties heard and available record gone through.

8. Before advertng to the merits of the case, the issue before this Court is to see as to whether the charges of attempt to rape and outraging modesty of a women has been brought home by the prosecution and the appellant has been rightly convicted and sentenced for the offences under sections-354 PPC as well as 376/511 PPC.

9. The question whether a certain act is merely a preparation or is committed in the course of attempt is a question of fact and that is to be seen in light of the evidence produced by the prosecution. No hard and fast rule can be laid down to define attempt. More so, the word attempt has not been defined in the Pakistan Penal Code. Attempt is the direct movement towards the commission after the preparation has been made and it must be something more than mere preparation. It is sufficient that if there is present an intent with some overt act in execution thereof for the purpose of criminal liability, if

the attempt had gone so far that the crime would have been completed but for extraneous intention, which frustrated its consummation. In case of *Abdul Majid..vs..The State* (1973 SCMR-108), wherein it was held that;

- “i. The intent to commit the crime.*
- ii. Performance of some act towards the commission of the crime, and*
- iii. Failure to consummate its commission on account of the circumstances beyond the control of the offender.”*

10. Facts of the present case are that complainant Mst. Bibi Rabia (PW-2) is the real daughter of the appellant. She has categorically charged her real father for attempt to commit rape upon her and in this respect she has also stated in her Court statement that her trouser was also removed by the appellant, after raising hue and cries, and upon the arrival of Mst. Bibi Nishta (mother of complainant) (PW-3) the appellant made his escape good from the scene of occurrence. The statements of the complainant (PW-2) and her mother (PW-4) are unanimous on all material points and nothing has been brought on record to tarnish their credibility. They have

been extensively cross examined but nothing was elicited from them which could benefit the appellant.

11. The contention of the learned for the appellant that there is inordinate delay in reporting the matter, is inconsequential in the circumstances of the case and the nature of offence, where charge is being brought by the daughter against her real father. More so in cases of alike nature delay by itself alone would not be sufficient to discard the case of prosecution. From the above mentioned discussion it is eminently clear that the charge has been brought home by the prosecution against the appellant and he has been rightly held guilty by the learned trial Court, however the question of quantum of sentence needs interference by this Court for the reasons being discussed in the subsequent paragraph.

12. The complainant has also filed Criminal Revision No.50-M/2018 for enhancement of sentence and prayed for revisiting the sentence and enhancing the same to half of the maximum sentence (imprisonment for life) i.e 12 years and 06 months. The learned trial court has already awarded

ten years sentence to the appellant. For convenience, the contents of section-376(1) PPC is reproduced as under;

“376 PPC Punishment for rape.

(1) Whoever commits rape shall be punished with death or imprisonment for either description for a term which shall not be less than ten years or more than twenty five years and shall also be liable to fine.”

(emphasis provided)

Section-376(1) PPC provides for three alternate punishment i.e death, imprisonment for life and also ten years. This Court will not subscribe to the contention of the learned counsel for the complainant/petitioner in Criminal Revision that the punishment shall not be less than half of 25 years as prayed in the Revision that the sentence be enhanced to twelve years and six months for the reason that section-511 PPC provides imprisonment of any description for the offence for a term which may extend to one-half of the longest term of imprisonment. For convenience, the provision of section-511 PPC is reproduced as under;

“511 PPC. Punishment for attempting to commit offences punishable with imprisonment for life or a shorter terms.”

Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment,

*or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which **MAY** extend to one-half of the longest term of imprisonment provided for that offence, or with such fine (daman) as is provided for the offence, or with.*

(Emphasis provided)

13. The plain reading of Section-511 PPC provides maximum sentence, which **may** extend to one-half of the longest term of imprisonment. The word may clearly manifest the intention of legislature that this is for the Court to award appropriate punishment which may extend to one half of the imprisonment provided. In other words the maximum thrash hold has been laid down in section-511 PPC, but the minimum limit has not been prescribed rather the same has been left to the discretion of the Court by considering the facts and circumstances of the case.

14. Record reveals that there are some negligible and minor inconsistencies, which would not be sufficient enough to discard the entire prosecution case, but the same can be considered as mitigating circumstances while deciding the quantum of sentence. More so, litigation is also pending adjudication before the Family Court between

the appellant, Mst. Bibi Nishta (wife) and complainant Mst. Bibi Rabia, (daughter) of appellant. Reliance is placed on the judgments rendered by the Apex Court in *Ansar Ahmad Khan Barki's case* (1993 SCMR 1660) and *Falak Sher's case* (NLR 2000 Criminal 188), wherein it was held that;

“Inconsistencies of a minor dimension in prosecution evidence throw up doubts about prosecution version but do not qualify for acquittal. They present merely a mitigating circumstance capable of affecting no more than quantum of sentence. Such inconsistencies may create dilution of prosecution version but not its complete negation.”

15. In view of the above, this Criminal Appeal is partly allowed, the conviction of the appellant under section-354 PPC is maintained while his conviction under section-511 PPC is reduced from ten years to five years, would meet the ends of justice in circumstances of the case. The amount of fine of Rs.200,000/- is also reduced to Rs.50,000/- or in default to suffer three months S.I. All the substantive sentences shall run concurrently. Benefit under section-382-B Cr.PC has already been extended by the trial Court.

16. As the Criminal Appeal filed by the convict-appellant has partly been allowed and the sentence awarded to him under section-511 PPC has been reduced to five years, therefore, the Criminal Revision No.50-M/2018 filed by Mst. Rabia Bibi for enhancement of sentence has become infructuous, stands dismissed. The office is directed to remit the present appeal alongwith the record to Mingora Bench, at the earliest.

Announced on
19.07.2019
at Principal Seat.

J U D G E

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

(K.Ali,PS)