

Gender Stereotyping and Consent in Rape Cases in Pakistan

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The twin problems of gender stereotyping and misconstruing consent of the victim of a rape often recur in the criminal justice system. As a thumb rule, the actors of the criminal justice system, use socially informed gender lens to deal with offences of rape and sexual assault. In a recent case (*Muhammad Imran vs. the State*¹) before a three member bench of the Supreme Court of Pakistan, once again the issues of gender stereotyping and construing consent to the disadvantage of a victim of rape came under consideration. The bench handed over a split decision that sparked lot of interest. Before looking at the reasons of the disagreement amongst the members of the bench, it will be appropriate to state brief facts of the case. On 11-07-2016, at 8 pm, the victim was in the house of her brother when the accused (who happened to be a friend of her brother) entered the house, locked it, and took her to a room where he raped her. The case was promptly reported to police and a criminal case was duly registered. The evidence comprised two ‘*wajtakar*’ witnesses (witnesses who testify accused escaping from the crime scene), the medico-legal evidence and positive DNA report. On the basis of the evidence, the trial court convicted the accused of rape (under section 376 Pakistan Penal Code) and of house trespass. The sentencing was done accordingly. The appellate court (Lahore High Court) upheld the conviction and the sentences passed by the trial court. With these facts and convictions, the matter came before the Supreme Court of Pakistan. While two judges (Justice Jamal Khan and Justice Malik Shahzad) of the Supreme Court overruled the findings of the trial and appellate court (High Court) and ‘*converted*’ the conviction of rape into conviction of fornication (under section 496-B of the Pakistan Penal Code) and as a result acquitted the accused for house trespass, one judge (Justice Ayesha A. Malik) disagreed.

Justice Ayesha articulated her dissent in a reasoned manner. She relied on the jurisprudence developed by Pakistan’s courts and also utilized academic material to highlight her points. Her points warrant appreciation and can be summarized as:

1. Bringing in science and law closer, she observed that the forensic evidence of DNA must be given its due place. Relying on dicta of the Supreme Court of Pakistan in *Ali Haider Case*² and *Salman Akram Raja Case*³, she noted that the DNA test ‘*cannot be ruled out or ignored when*

¹Criminal Petition No. 725/2023 available at http://www.supremecourt.gov.pk/downloads_judgements/crl.p._725_2023.pdf

² PLD 2021 SC 362

³ 2013 SCMR 203

the test becomes corroborative evidence in support of the allegation of rape'. She boldly relied on academic research to highlight the point that in case of a positive DNA, *'the odds of conviction are substantially greater than in cases with ordinary evidence'*;

2. A rape victim's sole testimony is often questioned in the trials; she took an exception to the approach. She opined that *'the solitary statement of the victim is sufficient to award conviction in a rape case if that statement is trustworthy, consistent and reliable'*. She backed the view by relying on *Habibullah Case*⁴ and *Shakeel Case*⁵ of the Supreme Court of Pakistan. Using regional experience of India, she relied on the *Gurmit Singh Case*⁶ that held *'corroborative evidence is not an imperative component of judicial credence in every rape case'*;
3. The dissenting note forcefully highlighted gender stereotyping of GBV justice issues that *'expect'* special type of behavior from victims of rape. The *'expectation'* of this gender stereotyping would always look for evidence of peculiar behavior from the rape victims. For example, the gender stereotyping would only infer absence of consent if there were *'signs of resistance'* or *'struggle marks'* corroborating the statement of the victim. Relying on academic writings of Professor Catherine Mackinnon of the Michigan Law School, she questioned the assumption of law that the rape victim must have *'single, objective state of affairs'*. Justice Ayesha noted that the consequences of gender stereotyping were serious and resulted in subjecting victims of rape to *'a higher burden of proof'*. The higher burden of proof requirement had inflated into presumptions in the minds of the police officers, prosecutors and judges. These presumptions, as noted in the dissenting note, were: women usually lie, widowed and divorced women were more likely to consent to intercourse, and that a victim would resist. All these gender stereotypes created legal barriers for the victims of rape;
4. The legal contextualization of the dissent was rich as it pegged the whole discourse to the fundamental rights of right to life⁷ and to the right to dignity⁸ as enshrined in the Constitution of Pakistan. The international human rights law was also referred especially article 5 of the Convention on the Elimination of All Forms of Discrimination against Women

⁴ 2011 SCMR 1665

⁵ 2023 SCMR 397

⁶ AIR 1996 SC 1393

⁷ Article 9 of the Constitution of Pakistan

⁸ Article 14 of the Constitution of Pakistan

(CEDAW) that specifically required elimination of customary and stereotypical roles of men and women. Besides, the latest legislative trends in Pakistan and India were examined: India added a new legal provision⁹ to its law of evidence presuming absence of consent in cases of proved sexual intercourse, Pakistan, on its part, expanded the definition of consent¹⁰.

The dissenting note echoed very many important matters; the following points, however, need consideration for furtherance of discourse on the subject:

1. The criminal law related to consent based sexual relationships (adultery and fornication) has not been fully discussed. It may be noted that the original Indian Penal Code (that was adapted by Pakistan in form of Pakistan Penal Code) provided for an offence of adultery¹¹. This law, however, was struck down as unconstitutional in India¹² on the ground that it was discriminatory and that it violated the fundamental rights of women. On the other hand, in Pakistan, it appears that the law of adultery was repealed through Hudood Ordinance¹³, which was later substituted partially by the Women Protection Act¹⁴ (WPA). The WPA brought in far reaching changes in the law. Without repealing the Hudood Ordinance on Zina, it omitted some parts of the Ordinance and inserted some new provisions to the law. On the substantive side, it inserted a new offence of fornication¹⁵ and on procedural side, it held the offence non-cognizable and provided a special procedure for its prosecution¹⁶. The law specifically prohibited that any 'conversion' the offences from one category to another¹⁷. The facts of non-cognizability of offence of fornication and prohibition of its conversion should be examined more

⁹ Section 114-A of the Indian Evidence Act, 1872 (through Indian Criminal Law (Amendment) Act, 2013))

¹⁰ Explanation 2 to Article 375 of the Pakistan Penal Code, 1860 (through the Criminal Law (Amendment) Act, 2021))

¹¹ Section 497 of the Indian Penal Code, 1860

¹² AIR 2018 SC 4898

¹³ The Offence of Zina (Enforcement of Hudood) Ordinance, 1979

¹⁴ The Protection of Women (Criminal Law Amendment) Act, 2006

¹⁵ Section 7 of the Protection of Women (Criminal Law Amendment) Act, 2006 inserted a new offence of fornication under section 498-B to the Pakistan Penal Code, 1860

¹⁶ Section 8 of the Protection of Women (Criminal Law Amendment) Act, 2006 inserted a new procedure for prosecuting offence of fornication under section 203-C to the Code of Criminal Procedure, 1898

¹⁷ Section 12-A of the Protection of Women (Criminal Law Amendment) Act, 2006 inserted a new provision 5-A to the Offence against Zina (Enforcement of Hudood) Ordinance, 1979

deeply in future court decisions to see more authoritative judgements on the subject;

2. At the level of public policy, it may be noted that the actors of criminal justice system including judiciary should strictly follow the legal framework of the law of fornication as it exposes the women to criminal liability.