

From Survivor to Suspect: The Perils of Judicial Backsliding in Sexual Offence Cases

Muhammad Imran v. The State

2024 SCP 226

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Introduction

This case concerned an appeal against the decision of the Lahore High Court that affirmed the conviction of the accused under Section 376 of the Pakistan Penal Code ('PPC') for the offence of rape. The Supreme Court ('Court') set a unique precedent as it altered the initial charge framed by the trial judge to one under Section 496-B of the PPC (fornication), something which never came under consideration before the lower fora. Contrary to established precedent on the unassailable credibility of victims of sexual offences, the majority judgement marks a regressive shift by expecting rape victims to behave in a certain manner. The dissenting opinion correctly identifies the loopholes in the majority's reasoning, and lays a strong challenge to the majority's decision of converting the rape charge into that of fornication.

Facts

The complainant, Mumtaz Bibi, had been living with her brother, Muhammad Zaman, for one month prior to the occurrence of the alleged incident. During this time, the accused, Muhammad Imran, would visit her brother. On 11 July 2016, at around 8 pm in the evening, the complainant was alone at home when the accused entered the house, bolted the outer gate from the inside, and forcibly dragged the complainant into a room. Once inside, he removed her shalwar and raped her, after which he fled the scene of the crime.

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After the incident, the complainant's cries brought her brother to the place of the incident, along with another one of his friends. A First Information Report ('FIR') was filed almost two days later.

Procedural Posture

The case was filed following the FIR; the prosecution produced nine witnesses, and the statement of the accused under Section 342 of the Code of Criminal Procedure ('CrPC') was recorded. The accused's case before the trial Court was that the rape allegation was false, brought by the complainant as revenge for his refusal to marry her. Upon completion of the trial, the accused was convicted under Sections 376 and 449 of the PPC for rape and house trespass, respectively. He was collectively sentenced to ten years of rigorous imprisonment along with PKR 120,000/- in fine.

The accused's appeal against this sentence was dismissed by the Lahore High Court, after which a Criminal Petition for Leave to Appeal ('CrPLA') was filed before the Court alleging that the matter at hand was not that of rape, but of *zina* under Section 496-B of the PPC.

As the Court was hearing the CrPLA, the accused also filed an application for grant of permission to compound the offence because the complainant, who was also the sole eyewitness to the crime, had resiled from her statement. While dismissing the application on grounds that rape was a non-compoundable offence, the Court noted that the complainant had named the accused as the culprit in her statement before the trial Court.

There was no representation for the complainant since she had resiled from her accusation. The prosecutor general opposed the appeal, while the Court heard and delivered its judgement on the basis of arguments by the accused.

Arguments and Decision

A three-member bench of the Court heard the CrPLA, and the decision was split 2-1 in favour of the accused's claim of fornication. Justice Ayesha Malik recorded a strong dissent.

The majority judgement began by determining the establishment of ‘illicit intercourse’ having taken place between the parties. The primary issue framed by the Court was whether the case at hand was one of rape punishable under Section 376 of the PPC or of fornication punishable under Section 496-B of the PPC. The framing of this issue will be studied in greater detail below.

The findings of both sets of judgements (majority and dissent) of the Court have been discussed in *seriatim*.

I. Delay in Filing the FIR

The majority judges found that a delay of approximately two days had not been plausibly explained by the complainant, which brought into question the veracity of the FIR since the complainant party could have used this time to exaggerate their narrative ‘to make the offence graver’.¹ While noting that delay is not always fatal, the Court found that it ‘may’² be relevant in light of other particular facts of the case.

In her dissent, Justice Malik recorded a more detailed version of the facts, noting that the complainant had in fact reported the matter to the police soon after the incident, and was taken by the police for a medical examination later the same night at around 2:25 am. There, the complainant was examined physically. DNA swabs were taken for forensic testing, reports of which were positive for the defendant’s DNA. This narration indicates that the filing of the FIR was initiated quite soon after the incident, which was alleged to have taken place at 8 pm. This means that the majority judges considered a delay of perhaps two hours to be destructive of the complainant’s case, and deemed this to be enough time for the complainant to exaggerate her case.

There is ample case law on the point of delay in filing of FIR in rape cases. Courts have consistently held that delay, if properly explained and accounted for,

¹ *Muhammad Imran v. The State* 2024 SCP 226 [6].

² *Ibid.*

does not defeat a rape allegation. In *Zahid v. the State*³, a two-member bench of the Court reiterated this long-standing principle by pointing out the nature of a rape allegation, its impact on a survivor's reputation and honour, and the survivor's natural reluctance in reporting such a crime. In addition, the *Zahid* Court noted that the reason behind the delay in that case was the initiation of medical treatment, making the *Zahid* judgement a precedent that applies squarely upon these facts. It is a dangerous step away from established precedent to raise a concern about delay without clearly elaborating upon the facts of the case. Such a trend only reinforces the apprehension of stigma on the part of rape survivors and their families; surely, one cannot hasten the process of filing an FIR more than approaching the police station within hours of the incident. If courts begin to look at this as delay, it effectively translates into a rape victim being required to behave like an automaton, brushing herself (or himself) off before going straight to the police station without even pausing to take a calming breath.

II. Marks of Violence and Solitary Statement of a Rape Survivor

The majority judgement notes that despite a claim of being forcibly dragged by the defendant to an inner room and forcibly removing her shalwar in order to commit rape, there is no sign of dragging mentioned on the site plan, and no bruise, or laceration due to this dragging. It goes on to mention that the FIR did not allege the presence of any kind of weapon, such as a *churri*, *danda*, or a firearm, which would have frightened the victim into compliance. The Court finds that the allegation of having her clothes forcibly removed is not corroborated since her clothes were not torn. It uses the lack of torn clothes and the absence of signs of being dragged to conclude that the rape survivor was, in fact, a consenting party, since a female who does not wish to be raped would, the judges held, offer very strong resistance to the rape attempt. The majority judges thus found the complainant guilty of fornication under Section 496-B of the PPC. However, since she was not even present before the Court, she was not penalized for the offence.

It is noteworthy that the defendant's case before the lower Courts was that he was not present at the scene of the crime. It appears that the allegation of

³ *Zahid v. The State* 2020 SCMR 590. Other recent judgements include *Nasreen Bibi v. Farrukh Shahzad* 2015 SCMR 825, where the Court held that a delay in filing an FIR is immaterial as people naturally avoid rushing to the police because of family honour.

fornication had been made for the first time before the Court. It is unclear from the judgement of the Court how a new defence may legally be raised at the appellate stage of the proceedings. As a judgement of the country's apex Court, this decision forms binding precedent for all lower courts. It has established that unless a rape victim is able to show signs of being dragged on the floor, and unless her clothes are torn and she is beaten up such that she has marks of violence on her body, her allegation of rape may be used to *find her guilty of a crime*. The impact of this judgement for survivors of rape is that during the commission of a crime, a victim must respond such that her person and clothing bear some brunt of physical trauma, lest her case be overturned in second appeal (despite the double presumption in her favour) and she transformed from a complainant for rape to a defendant with a conviction for fornication.

In her powerful dissent, Justice Ayesha Malik relied on domestic case law, principles of international law and common sense to note that the presence of DNA evidence is deemed the 'gold standard' to establish the identity of an accused in a rape case. Having established the identity, which was not under contest in this case (especially since the defendant was now claiming fornication), the question became one of determining the commission of rape. Justice Malik noted that the sole testimony of a survivor is commonly accepted as sufficient to award a conviction. This is backed up by multiple precedents, as recent as 2023, where the Court held that 'it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to solely rely on the testimony of the victim of a sexual assault to convict the accused.'⁴ It is when the sole testimony suffers from contradictions or otherwise does not inspire the confidence of the Court that the Court seeks to corroborate the victim's testimony with other evidence.⁵

Justice Malik noted that the complainant's statement was without any discrepancy. For the majority Court, however, the absence of marks of violence raised a question regarding the veracity of the complainant's account. Justice Malik addressed this concern by pointing out that physical resistance need not be established in a rape case as different people react differently when confronted with

⁴ *Atta Ul Mustafa v. The State* 2023 SCMR 1698 [7].

⁵ *Ibid* [10].

trauma and it is counterintuitive to subject all women to a stereotypical presumption that they must resist in a particular form to prove the occurrence of rape.⁶ She goes on to list the various reactions that a victim may exhibit to a situation of trauma, including the fight, flight, or freeze responses. Referencing research in the field, Justice Malik noted the patriarchal understanding of rape that only accepts a single state of affairs, and any other sequence of events is rejected as not constituting rape at all. She concludes by expressing strong disagreement with the majority judges' expectation of a woman offering a particular type of resistance to assault for the purposes of rape.

Analysis

Despite the male-centric definition of rape that has historically occupied our statute books, courts have recognised that there is no correct way to respond to the threat of rape. Women have been raped at gunpoint, where no physical violence has been recorded.⁷ The absence of a weapon or physical marks of violence does not preclude the possibility of rape, and that a hue and cry was not raised does not hamper a complainant's case.⁸

The psychological impacts of sexual assault are academically recognised by various research studies in the field of medicine. In an article by Carolyn Crist, published in the global news agency Reuters, data from the Stockholm Rape Clinic trial indicates that about 70% of women report a state of 'paralysis' and an involuntary inability to resist, shout, or even move during assault. Dr Anna Moller, a Research Professor at the Stockholm South General Hospital, states that this inability to resist the aggressor is known as 'tonic immobility', which continues long after the incident and culminates into long term Post Traumatic Stress Disorder. The immediate impact of tonic immobility on victims of sexual assault includes inability to talk and feeling paralysed and disassociated with the surroundings. Based on her research, Dr Moller concludes that rape victims should

⁶ *Imran* (n 1) [7], Ayesha Malik J., dissenting.

⁷ *Mst. Yasmin Butt v. Majid Baig alias Bobby Pehlwan* 2008 SCMR 1602.

⁸ *Aijaz Hussain v. State* 2018 MLD Kar 1164.

not be blamed for not resisting, and that their inability to react is rather a normal biological reaction when exposed to an extreme threat.⁹

In 2014, the Federal Shariat Court clarified this point by referring to an earlier Court judgement holding that ‘mere absence of marks of injury or violence on a victim’s body would not imply non-commission of rape.’¹⁰ The Federal Shariat Court went on to say that even if no weapon is shown to have been used to threaten the victim into compliance, it is not fatal to the case of the prosecution:

the recovery of weapon of offence is a corroborative piece of evidence, which is not essential in a case of ‘zina-bil-jabr’. In such-like cases, the most important witness is the victim, and if her statement is trustworthy and reliable, then conviction can safely be recorded on her evidence.¹¹

It is noteworthy that the trial Court and the High Court both found the victim’s testimony to be trustworthy and reliable enough to convict the accused. In addition to being confidence inspiring and supported by medical evidence, Justice Malik noted that the complainant successfully refuted the accused’s claim of her having filed a false case against him as revenge for refusing her hand in marriage.

Finally, it is worth noting that the lack of marks of violence seems to have played a major role in the majority Court’s decision to convert a rape case into one of fornication under Section 496-B of the PPC. This was despite the complainant having won the case at trial, where the evidence was scrutinized and witnesses examined in detail, and the High Court having added a double presumption of truth to the matter by rejecting the appeal filed by the defendant. This line of thought disregards the principle reiterated by the Court in the case of *Atif Zareef v. The State*, where it reiterated the principle that courts do not insist on corroboration of the victim’s testimony if it is found to inspire confidence.

⁹ Christ Carolyn, ‘Many rape victims experience “paralysis” during assault’ *Reuters* (Washington, 15 June 2017) <<https://www.reuters.com/article/business/healthcare-pharmaceuticals/many-rape-victims-experience-paralysis-during-assault-idUSKBN19626V/>> accessed 18 November 2024.

¹⁰ *Mst. Lal Khatoon v. The State* 2014 YLR 1717 FSC [14].

¹¹ *Ibid.*

A rape victim stands on a higher pedestal than an injured witness...the rape victim suffers psychologically and emotionally.¹²

I. Conversion of Charge

On a reading of the judgement, it appears that the line of argument presented by the accused before the High Court was that he was not present at the scene of the crime, that the complainant wished to marry him, and spurned by his refusal, had orchestrated this false case against him as revenge. In his appeal to the Court, the accused had instead argued that the case was not of rape but of fornication, thereby acknowledging his presence at the scene of the crime and the commission of sexual activity. This claim has been granted by the Court.

What the majority Court has essentially established is that a woman who complained of rape could instead be convicted of fornication without a case being filed or without being given a chance to proffer her defence on the charge of fornication. This kind of jurisprudential backsliding sets us decades back to the time of the Hudood Ordinances, which did not preclude the possibility of conversion of a *zina bil jabr* charge into that of consensual *zina*. Courts at that time used instances of pregnancy or the absence of medical evidence of resistance as proof of commission of *zina*.¹³ Even during the time of the Hudood Ordinances, the Federal Shariat Court clarified that a woman who files a case of *zina bil jabar* could not be convicted for *zina* on the basis of proof sexual activity. In the infamous case of *Safia Bibi v. The State*, for instance, the trial Court had relied on the fact of the complainant's pregnancy to convert her claim of *zina bil jabr* into a conviction for *zina*. While setting aside this conviction, the Federal Shariat Court, relying on ample religious authority, concluded that there was 'no difference on the main point between Fiqh, the Common Law of England or the Law in Pakistan, that the appellant [rape victim] also cannot be convicted [of *zina*] on the evidence on record.'¹⁴

¹² *Atif Zareef v. The State* PLD 2021 SC 550 [5].

¹³ Moeen Cheema and Mustafa Abdul Rahman, 'From the Hudood Ordinances to the Protection of Women Act: Islamic Critiques of the Hudood Laws of Pakistan' (2009) 2 UCLA-JNEIL 16.

¹⁴ *Mst. Safia Bibi v. The State* PLD 1985 FSC [29].

The majority judgement noted that the complainant had applied for a compounding of the offence and had resiled from her statement, declaring that she had been subject to a misunderstanding which had led her to name the accused as her rapist. However, the Court did not choose to delve deeper into why the complainant would suddenly change her mind after being steadfast before two Courts. In her chapter on The Law on Rape, Sahar Bandial notes the procedural flaws that permeate the criminal justice system in the specific context of rape. She notes that most rape cases result in an acquittal. One of the main reasons for this is that many complainants renege from their statements possibly due to intimidation and threats, pressure from families, or monetary settlements.¹⁵ In the absence of the victim's testimony, which is often the only testimony available in a rape case, a conviction becomes difficult to sustain. Therefore, the judiciary, especially at the apex level, should be cognizant of these challenges faced by rape victims, and the victim rescinding their allegation of rape should be independently inquired into by courts.

II. Consent

In 2016, when the alleged incident occurred, rape was defined in relevant part as, *inter alia*, sexual intercourse with a woman against her will, without her consent, or with her consent when the consent was obtained by putting her in fear of death or hurt. Fornication is defined in relevant part as occurring when a man and woman who are not married to each other wilfully have sexual intercourse with one another. In *Imran v. The State*, the Sindh High Court elaborated upon the difference between 'will' and 'consent' holding that per Section 375, even if there is will but no consent, rape will have occurred. In the said judgement, 'will' is explained to be a person's ability to reason that determines whether to engage in an act or not. It is a state of mind, as opposed to consent, which the Sindh High Court found relates more to a person's actions. A wilful act is a voluntary act. The Sindh High Court held that 'an act done with consent always means the act done with free will or done voluntary [*sic*].'¹⁶ In her dissent, Justice Malik referred to jurisprudence by the Federal Shariat Court which defined consent as being of the same mind, to agree, or to comply as a free agent with free will.

¹⁵ Sahar Bandial, 'The Law on Rape, Conceptual Limits, Procedural Indifference and Questions of Reform' in Neelam Hussain (eds), *Disputed Legacies* (Zubaan 2019) 87–88.

¹⁶ *Imran v. The State* 2016 PCrLJ 1888.

As noted previously, the offence of fornication requires a wilful act by both parties. A failure to prove lack of consent does not translate into a presence of consent or will. Despite two earlier Courts having established a lack of consent, even if the Court found that prosecution had been unable to prove a lack of consent, this, at best, amounts to a failure to prove rape. It does not equate to the presence of a wilful act. For fornication, the party alleging fornication must independently establish a wilful act. It is only when a crime is proven beyond reasonable doubt that a party may be convicted for it. The lack of evidence for rape cannot become the reasoning for a fornication conviction of the complainant. Justice Malik concluded her discussion on this point by noting that arriving at a finding of fornication against the complainant after two Courts had confirmed it to be rape on the basis of evidence was a denial of due process and fair trial.¹⁷

III. Extraneous Information about the Complainant

The majority judgement notes, not once but twice, the fact that the victim was recently divorced and had returned to her brother's home. The majority judgement also mentioned that the complainant and the accused were previously nominated in an FIR for committing obscene acts, and that both parties were later released on bail. These details bear no relation to the current charge, that of rape, but find detailed mention in the majority judgement. Justice Malik notes this in her dissent as being 'totally irrelevant' and finds that in no manner does it suggest that the parties were sexually involved.

Since none of these events are part of the rape incident, the relevance of these details is unclear at best. This is particularly so in light of the fact that in 2009, the Federal Shariat Court struck down—on the touchstone of Islamic principles—Clause 4 of Article 151 of the Qanun-e-Shahadat Order, 1984, which had allowed for the impeachment of a rape victim's character to show that she was 'of generally immoral character'.¹⁸

The association of rape with a woman's character is unfortunately reminiscent of darker times in Pakistan, where personal histories were allowed to be dragged through courts to establish the 'rapeability' of a woman. Two-finger testing is another historical oppression that has been used to close the door to justice

¹⁷ *Imran* (n 1) [15], Ayesha Malik J., dissenting.

¹⁸ *Capt. (Retd) Mukhtar Ahmad Shaikh v. Government of Pakistan* PLD 2009 FSC 65.

to many women, including those who have been married in the past. A similar exercise appears to have been conducted by the majority judges, where the complainant's recent divorce has been noted alongside her arrest (not even conviction) in an unrelated matter.

Overall, the majority judgement marks a major deviation from the available legal corpus on rape cases wherein the sole testimony of a victim has been held in high regard, unhindered by the victim's past conduct and their physical inability to resist the offender. This places an onerous burden of proof on complainants in a society where judicial proceedings are already hostile to rape victims.

Conclusion

Based on her findings of DNA evidence, solid witness testimony, and firm precedent, Justice Ayesha Malik concludes in agreement with the concurrent findings of the earlier Courts. On a detailed reading of the majority judgement, the approach taken to the various issues identified and the jurisprudence adopted therein, a clear trend of backsliding from the hard-earned guarantees won by women over decades emerges. In a manner reminiscent of the Hudood Ordinances and the blurring of distinction between rape and fornication, the majority judgement set about, in violation of established precedent, in a search for a finding of fornication.

Perhaps the most concerning aspect of this judgement is the senior judiciary's decision to try a woman for a crime in the first instance in an appellate forum. There is no ambiguity over the fact that this appeal was against an allegation of rape. No charge for fornication was framed at trial, nor was it raised as a defence before the trial and High Courts.

Despite going directly to the police station and providing DNA evidence with a coherent account, a rape victim was prevented from establishing the occurrence of a crime against her person. In a case as grave as a rape matter, one wonders what evidence could possibly have been led to convince a court to allow a defendant to successfully switch his narrative—from one of not being present at the scene of the crime to that of fornication—at the appellate stage.

Stating her marital history and noting the absence of a particular type of resistance, it appears that the Court believes that the complainant does not fit the dimensions of a perfect ‘rape victim’. This is an extremely dangerous precedent and sends a strong message to all women of an unwelcoming criminal justice system.