

# Compensation Payable by Convicted Rapists to Their Illegitimate Children

*Nadeem Masood v The State*  
2015 LHC 4524

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## **Introduction**

The Lahore High Court's ('LHC') judgment in *Nadeem Masood v The State*<sup>1</sup> is a 'revolutionary decision' that has the potential to economically empower children born as a result of rape and clean the tainted lens through which society views them.<sup>2</sup> The LHC ordered the appellant, Nadeem Masood, to pay Rs.1,000,000 to his illegitimate daughter born as a result of rape for which he was convicted. By issuing such an order, the LHC invoked the right of appellate courts to order compensation to be paid under Sections 544 and 545 of the Criminal Procedure Code 1898 ('CrPC').

This note evaluates this historical judgment by first summarising the facts of the case, its procedural history, and ruling of the LHC. Next, the note presents a brief discussion of prior case-law on the subject to show how Sections 544 and 545 of the CrPC have been used by Pakistani courts in the past and how these cases apply to the judgment at hand. With this background firmly established, the judgment itself is analysed to both, highlight it as a socially beneficial, significant landmark decision, and point out some of its worrisome aspects. In conclusion, the ongoing relevance of the judgment is discussed and some recommendations are offered to improve the judgment. It is recommended that the legislature should play its part in protecting the children born to rape victims.

## **Facts and Ruling**

According to the facts disclosed in the judgment, one day Humaira Yasmeen was alone at her home in Sargodha when the appellant Nadeem Masood forcibly entered her home, armed with a pistol, and raped her. At the time of this incident she was

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<sup>1</sup> 2015 LHC 4524; Criminal appeal No. 2066 of 2012.

<sup>2</sup> Javaid Bashir, 'Lahore High Court's Landmark Decision' *The Lahore Times* (Lahore). <<http://www.lhrtimes.com/lahore-high-courts-landmark-decision/>> accessed 17 August 2015. Rana Tanveer, 'Heinous crime: LHC directs lower courts to order compensation for rape victims' *The Express Tribune* (August 10 2015).

already 32 weeks pregnant, due to the rape by the appellant many times before. An FIR was filed against the appellant under Section 376 of Pakistan Penal Code 1860 ('PPC'),<sup>3</sup> a week after the incident. The appellant pleaded not guilty and claimed that the case was fabricated against him. However, the trial court found him guilty after examining the evidence produced by the prosecution. Medical examination proved that Humaira and Nadeem were the biological parents of the foetus. Witness testimonies and evidence of Humaira being less than 16 years old when she got pregnant were also presented. The appellant argued that the case fell under the purview of Section 496-B of the PPC,<sup>4</sup> which provides punishment for fornication, but this was dismissed by the trial court due to complete lack of evidence produced by the defence and the appellant's refusal to make a statement on oath.<sup>5</sup> Subsequently, the trial court sentenced the appellant 20 years in prison and a fine of Rupees one lakh to be awarded to the victim.

After an appeal was filed before the LHC by Nadeem Masood, Justice Anwaarul Haq re-examined the evidence produced before the trial court and held the 'accused remained totally fail [sic] to bring his case within the scope of Section 496-B PPC by any stretch of imagination.'<sup>6</sup> He also observed that since Humaira was less than 16 years old when she became pregnant, this qualifies the criminal action as rape under Section 376 (v) of the PPC,<sup>7</sup> even if the sex was consensual.

The judge then expressed his concern over the trial court's failure to award any compensation, under Sections 544-A and 545(b) of the CrPC,<sup>8</sup> to the innocent

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<sup>3</sup> Section 376 (1) reads: 'Whoever commits rape shall be punished with death or imprisonment of 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.'

<sup>4</sup> According to Section 496 (B) of the PPC, if a man and a woman who are not married to each other willfully have sexual intercourse with one another, it qualifies as fornication. The maximum punishment for the offense of fornication is imprisonment of five years and fine of ten thousand rupees.

<sup>5</sup> (n 1) para [11].

<sup>6</sup> Ibid.

<sup>7</sup> According to Section 375 (v) of the PPC, a man is said to commit rape when he has sexual intercourse with a woman when she is less than sixteen years of age. This qualifies as rape irrespective of whether the woman gave her consent to sexual intercourse.

<sup>8</sup> Section 544-A reads: '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

girl born because of the actions of the appellant.<sup>9</sup> Nadeem Masood was therefore directed to pay a compensation of Rupees one million to the child for the ‘mental anguish and psychological damage’ caused by his actions, in addition to the Rupees one lakh payable to Humaira.<sup>10</sup>

### **Background and Prior Law**

Now that it has been established that the judgment of the LHC was passed after examination of relevant clauses of Sections 544 and 545 the CrPC, it is important to see how these provisions have been applied in previous cases. There have been many past instances where appellate courts have noted the failure of trial courts to pay heed to Section 544 of the CrPC and have themselves ordered compensation to be paid. In *Mokha v Zulfiqar*,<sup>11</sup> section 544(A) was declared as a ‘mandatory provision’ and the appellant was ordered to pay compensation to the legal heirs of the deceased since the trial court had failed to give any such directive.<sup>12</sup> Similarly in *Muhammad Shakeel v The State*,<sup>13</sup> the fine imposed by the trial court was converted into compensation under section 544(A) that was awarded to the legal heirs of the deceased.<sup>14</sup> In another case, compensation given to legal heirs was increased by the appellate court from Rs. 70,000 to Rs. 250,000 in spirit of truly upholding the principles of equity and justice.<sup>15</sup> In *Shehzad Ahmed alias Mithu v The State*,<sup>16</sup> the accused was asked to deposit compensation in the form of installments as he did not

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or destroyed, as the case may be, such compensation as the Court may determine having regard to the circumstances of the case. (5) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.’ (Underlines provided). Section 545 reads: ‘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 (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...’

<sup>9</sup> (n 1) para [13].

<sup>10</sup> (n 1) para [16].

<sup>11</sup> PLJ 1978 SC 19.

<sup>12</sup> See *Safdar Ali v The State* PLD 2015 Lahore 512; *Tariq Mehmood v The State* SCMR 2002 SC 1602; *Riaz Ahmad v The State* PCRLJ 2006 FSC 694; *Amir Zaman Khan v The State* PLD 2005 Peshawar 243; *The State v Muhammad Aslam* PCRLJ 2002 Lahore 113.

<sup>13</sup> SCMR 2006 SC 1791.

<sup>14</sup> *Muhammad Yousuf v The State* PLD 2005 Karachi 449; *Saeed Shah v The State* MLD 2005 Karachi 389.

<sup>15</sup> *Muhammad Younis v The State* 2002 SCMR 1308.

<sup>16</sup> PCrLJ 2005 FSC 1316.

have the means to pay all of it at once. In this way, the Court has ensured that the mandatory compensation to aggrieved parties is paid. Furthermore, in all of the above cases, the underlying principle has been the compulsory adherence to the Section 544(A) of the CrPC, by the trial courts or if they fail to observe it, by a higher court. They also illustrate the discretionary power given to the courts as regards the amount of compensation and the issuance of any additional order that would facilitate the process.

Thus, there are significant legal precedents, which establish that Section 544 of the CrPC is a compulsory provision, for courts to follow according to the circumstances of each case. It is a critical point to be noted however that in all of the cases cited above, Section 544 has been applied to compensate either the legal heirs of the deceased or the victims themselves. The illegitimate children born as a result of rape have never been considered to suffer from ‘mental anguish and psychological damage’, and thus have never been specifically compensated by the Pakistani courts before. It is in this background that the LHC judgment should be seen where Justice Anwaarul Haq establishes that such children have a legal right to be compensated for the trauma they suffer.

The judgment of the LHC justifies this right to compensation in two ways. Firstly, the judgment looks at precedents set by the Supreme Court of Bangladesh and the Supreme Court of India to conclude that ‘[A] child has an undeniable right of life [that has] to be protected by the biological parents and the State’.<sup>17</sup> This right extends to children born as a result of rape and cannot be repudiated due to the unfortunate circumstances of their birth that they had no sway over. According to the observation made by the Federal Shariat Court in *Mst. Nusrat v The State*,<sup>18</sup> this right has also been safeguarded by Islam as highlighted in the famous case of *Ghamidiyyah*, where:

The Holy Prophet Muhammad (P.B.U.H)... suspended the [death] sentence on pregnant-woman [for committing Zina], 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).<sup>19</sup>

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<sup>17</sup> (n 1) para [14].

<sup>18</sup> PLJ 1997 FSC 61.

<sup>19</sup> (n 1), para [14].

Secondly, the judgment explicates Sections 544 and 545 of the CrPC to conclude that an appellate court can pass an order in favour of a child given birth as a ‘result of the crime committed by the accused’.<sup>20</sup> This is because an analysis of Section 545 would make it clear that court-ordered compensation is not restricted to the victim or legal heirs of the victim, but can be extended to ‘any person’ who has suffered from ‘mental anguish or psychological damage caused by the offense’.<sup>21</sup> Furthermore, Section 544-A (5) vests in appellate courts the right to modify judgments regarding the compensation payable to all eligible parties.<sup>22</sup> Thus, appellate courts can use these provisions to modify the trial court’s judgment and order compensation to be paid to any person i.e. the child born due to rape.

### **Analysis**

This note will now analyse the above judgment in the context of societal treatment of rape victims and their illegitimate offspring to understand the impact of the decision of the LHC. This would be followed by the analyses of some troubling aspects of the judgment.

Firstly, from a societal welfare perspective, getting monetary compensation for illegitimate children helps in financially empowering women who raise them and removing some of the social stigma attached to their birth. The harrowing life they lead is explained a little by the findings of two NGOs, War against Rape, and Aurat Foundation:

A substantial percentage of victims and affected families are forced to relocate due to tremendous social pressures and ostracisation. The Government does not provide for alternate [sic] housing and often, families shift deliberately to disappear into anonymity and escape persecution.<sup>23</sup>

This small glimpse in the psychological torment that blights the life of a rape victim and any child born as a result is only exacerbated by the fact that rape is not

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<sup>20</sup> Ibid, para [15].

<sup>21</sup> Ibid, para [16].

<sup>22</sup> Ibid.

<sup>23</sup> Sarah Zaman and Maliha Zia, ‘Women’s access to Justice in Pakistan’ 54<sup>th</sup> CEDAW Session <<http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/AuratFoundationAndWarAgainstRapePakistan.pdf>> accessed 13 August 2015.

a ground on which Pakistani law allows abortion.<sup>24</sup> While that doesn't prevent those who seek out the option, granting monetary compensation is only humane for women and children trapped in such situations, especially when the State doesn't even provide rape victims the option of abortion. Furthermore, society usually vilifies children born due to rape and views their mothers as hating their unborn children and 'viewing their rape pregnancies as continuing their rape experience.'<sup>25</sup> However, the reality is often different as found in a study by Shauna R. Prewitt:

Perhaps surprisingly, the only study to ever analyse the effects of pregnancy upon raped women found that raped women are, above all, victims of rape, not pregnancy. Thus, contrary to the pregnant-raped-woman prototype, which depicts the pregnant woman as suffering to a greater extent because of the "rapist's child" growing inside her, "it appears that the pregnant victim's problems stem more from the trauma of rape rather than from the pregnancy itself."<sup>26</sup>

This doesn't mean that pregnancy does not have any negative effect on rape victims but rather that just like psychological responses to rape varies in victims from 'lack of concern' to 'major emotional disturbances', responses to rape induced pregnancies also varies.<sup>27</sup> The simplistic portrayal of rape victims therefore makes matters worse for women who choose to stray from this socially constructed 'prototype' of rape victims that depicts them as individuals who hate their rape-conceived children.<sup>28</sup> Female rape victims who therefore raise and actually love their children are viewed as being unnatural and treated with suspicion and hostility.<sup>29</sup> Therefore, this judgment has established a precedent for other courts to follow that can financially and socially help individuals trapped in a situation similar to Humaira Yasmeen and her daughter's.

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<sup>24</sup> Sections 338 and 338B of the PPC make it punishable by law if anyone causes a pregnant woman to miscarry. The law further states that abortion is only acceptable if caused in good faith for the purpose of saving the life of the woman, or providing necessary treatment to her. Sections 338A and 338C provide punishments for people who commit this offense and these punishments extend to a woman who gets an abortion. Xari Jalil, 'Choosing to remain silent on abortion' *DAWN* (28 February 2014) <<http://www.dawn.com/news/1090050>> accessed 17 August 2015.

<sup>25</sup> Shauna R. Prewitt, 'Giving Birth to a 'Rapist's Child': A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape' (2010) 98 *The Georgetown Law Journal* 827.

<sup>26</sup> *Ibid.*, 848-49.

<sup>27</sup> Sedelle Katz and Mary Ann Mazur, *Understanding the Rape Victim: A Synthesis of Research Findings* (New York, Wiley 1979) 216.

<sup>28</sup> (n 26).

<sup>29</sup> *Ibid.*

The second point of significance is that in accordance with Section 544-A (2), if the accused doesn't pay the court-ordered compensation, he has to suffer a period of no more than six months in imprisonment in addition to his original sentencing.<sup>30</sup> The rigor with which this legal principle has been upheld is demonstrated in *Bahadur Ali v The State*<sup>31</sup> where the previous sentencing of the accused to two years of rigorous imprisonment 'in default of payment of compensation [was declared] patently illegal and against the statute', leading to the accused's imprisonment period being reduced to six months.<sup>32</sup> This would lead to the question of whether the child would actually get the Rupees one million awarded to her by the LHC in case the appellant decides to stay in jail for another six months rather than pay up. However this worry is eased because of two reasons. Firstly, in *Muhammad Tufail v Sessions Judge Attock*,<sup>33</sup> it was held that 'under S.544 CrPC even if the accused undergoes imprisonment in default of payment of compensation, then also the amount of compensation would be recovered as an arrear of land revenue.'<sup>34</sup> Similar viewpoints have been expressed in a number of judgments<sup>35</sup> and such precedents can ensure that the child is paid the Rupees one million. Secondly, this compensation does not deprive the victims from suing the appellant and seeking compensation from Civil Courts.<sup>36</sup> Still, some might criticise the judgment for being slightly lacking because it does not specify the kind of civil suit that can be successfully pursued by the complainant, thus shifting the burden on a civil court. However, this criticism is unjustified because specifying civil remedies to the complainant in a criminal case is something best left to the complainants and their lawyers. Despite this, the LHC judgment makes it abundantly clear that a compensation awarded by a criminal court would not prejudice any claims made for a similar compensation in a civil court. All of the above ensures that Humaira's daughter would receive the compensation awarded to her.

## **Conclusion**

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<sup>30</sup> Section 544(A) (2) reads: 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.

<sup>31</sup> SCMR 2002 SC 93.

<sup>32</sup> Ibid, para [8].

<sup>33</sup> PLD 2004 SC 89.

<sup>34</sup> Ibid, para [1].

<sup>35</sup> *Muhammad Nawaz v The State* PCrLJ 1984 1696; *Farid Bakhsh v Saeed Ahmad* SCMR 1992 SC 549; *Umar Hayat v The State* PCrLJ 1990 125; *Mst. Sarwar Jan v Ayub* SCMR 1995 SC 1679.

<sup>36</sup> (n 1) para [16].

The judgment in *Nadeem Masood v The State* is a welcome decision because it acknowledges the psychological scars that are inherited by children born due to rape, and it is this recognition that is crucial in building a foundation to a more accepting society for such children. Therefore, it has opened gates for both victims and their illegitimate children to get compensation. Moreover, it has clarified an interpretation of Sections 544 and 545 of the CrPC that is sometimes ignored by lower courts. This judgment would also encourage pregnant victims of rape, who intend to keep the child, to demand civil redress for the financial burden associated with the maintenance of the child.

Though the judgment is no doubt a welcome one, it could be improved by taking into account two points. Firstly, courts should specify the criteria for determining the amount of compensation payable to the illegitimate child to make the process less arbitrary. Such criterion must take into account the financial conditions of the convict and the requirements of the child. Secondly, courts can order the compensation payable by the appellant to be in form of monthly or yearly instalments. This could be done by using the precedent set by *Shehzad Ahmed alias Mithu v The State*<sup>37</sup> so that in case urgent money is required for the child before s/he attains majority, there is always some available for the guardian to cash out. However protecting the rights of children born due to rape is not an exclusive obligation to be undertaken by only the courts or civil society. This judgment needs to be followed by progressive legislation that facilitates the process of rehabilitating rape victims and their children.

No legislative action has yet been taken in Pakistan to specifically protect the rights of children born due to rape. Sections 488-490 of the CrPC allowed an illegitimate child to get a monthly allowance from the biological father under certain circumstances.<sup>38</sup> But these sections were repealed in 1981<sup>39</sup> and in any case the maximum allowance awarded to the child per month was Rs. 400 which is too insignificant to make a material difference. While these sections were repealed during the period of Islamisation of laws because under Islamic law illegitimate

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<sup>37</sup> (n 16).

<sup>38</sup> Section 488 reads: Order for maintenance of wives and children. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable maintain itself, [...] a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding four hundred rupees in the whole, as such Magistrate thinks fit and to pay the same to such person as the Magistrate from time to time directs.

<sup>39</sup> They were omitted under Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

children have no right of maintenance and inheritance from their fathers, no alternative legislation was introduced to protect the interests of illegitimate children. This is ironical because Islam stresses on the duty of lawmakers to protect the rights of children to ‘name, identity, property and inheritance, sponsorship in a family, healthcare and education’ as well as to protect them ‘from physical and moral humiliation’.<sup>40</sup> The *Qur’an* in this regard lays down the principle, ‘Nor can a bearer of burdens bear another burdens,’<sup>41</sup> stating that an illegitimate child in Islam bears no stigma for the sin of one or both parents. Therefore, there is a need for both the judiciary and the legislature to protect the rights and interests of children who are born as a result of rape.

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<sup>40</sup> ‘Children in Islam Their Care, Development and Protection’ (Al-Azhar University International Islamic Center for Population Studies and Research, UNICEF 2005).

<sup>41</sup> Al-Qur’ān, Sura al-Fatir: 17.