

Status of Rape Victim in Pakistan and Islam: Judgments of Pakistani Superior Courts

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Abstract

The objective of this research is to highlight and identify the landmark decisions of Superior Courts regarding status of rape victims in Pakistan. The rape is an offence against the state which should be prosecuted by the state strictly in accordance with law and in this regard the laws should be specific and target oriented. During the trial proceedings; the trial courts face number of difficulties such as delay in lodging case, number of required witnesses to prove the case, medical and DNA evidence that too particularly the sole evidence of the victim. The character of the victim is also criticized and stigmatized by the accused party and the Superior Courts have, now, directed to immediately discontinue this practice because the character of the victim is not relevant. The Pakistani Courts have also restrained the investigating agencies and medical practitioners to stop the virginity test as such test has no relevancy and importance in rape case. The Supreme Court has also settled guidelines and principles as to DNA evidence; which is based on modern scientific knowledge; hence, same is admissible in courts.

Keywords: Rape, DNA, WHO, QSO, PFSA, PPC.

Introduction:

The prosecution in rape cases and the relevant laws has always been a crucial topic of discussions in the courts. At present; there are number of medical and prosecution implications which are being faced by the investigating agency and the courts, especially the trial courts. "Rape is a sexual intercourse by a male with a female against her will, without her consent, with consent if obtained due to fear of death or hurt, with consent when man knows that he is not her husband, with or without her consent when female is under 14 years"¹. In present administration of criminal justice system; implications and difficulties are such as; effects of delay in lodging criminal case, defects in investigation, nature of available oral evidence, character of rape victim, medical evidence in shape of DNA/chemical analysis report(s), and legal requirements of virginity test. In a recent case High Court observed that rape survivors immediately, after the misfortune, face an ill-disposed criminal justice system which encompasses rigors of medical examination, untrained investigation officer, less equipped prosecutorial system, scandalous/embarrassing cross-examination, agony of prolonged trial, threats to life and a social stigma². Supreme Court in two recent landmark judgments has settled principles and guidelines as to importance of DNA evidence³ and character of rape victim⁴. In the judgment on character of rape victim; it has also been directed to immediately stop the stigmatization of woman and exploitation of her character. The Supreme Court has also

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¹ Section 375 of Pakistan Penal Code, 1860 (PPC)

² Yasir vs. State, 2022 PLD 263, Lahore High Court.

³ Ali Haider vs. Jameel Hussain, 2021 PLD, p. 362, Supreme Court.

⁴ Atif Zareef etc. vs. State, Criminal appeal No. 251/2020 and criminal petition No. 667/2020. (A three member Bench, judgment authored by Honorable Mr. Justice Syed Mansoor Ali Shah)

brushed aside the virginity test declaring that it has no scientific justification and evidentiary value in rape cases⁵. Anti-rape (Investigation and Trial) Ordinance, 2020 has been promulgated under which Special Courts⁶ across the country have been established for trial of rape case and specific investigation⁷ process has been provided under the Act. Anti-Rape Crisis Cells have also been found throughout the country which shall perform the functions such as to conduct medico-legal examination, securing/collection of evidence, conduct forensic analysis, registration of FIR⁸. Victim and witness protection⁹ has been provided and investigation is to be conducted by an officer not below the rank of officer of 17-grade, preferably female officer¹⁰.

Implication of Medical Evidence:

Revolutionary judgments on DNA Evidence ... Setting a new Beginning:

The modern scientific techniques and devices have played a major contribution in the development of every field of life including the administration of justice. In today's technically complex society, for the law to serve, the courts need to understand the science, its basic principles, techniques, tools, and the decisions of the courts must be covered with scientifically sound knowledge¹¹. The Courts must be acquainted with the developments in forensic science with new techniques to settle the disputes¹². The most important advancement in the criminal investigation since the beginning of fingerprint identification is the use of DNA technology to facilitate convict or exonerate the suspected person¹³. The report of DNA like any other expert opinion under article 59 of QSO is relevant and admissible under article 164 of QSO¹⁴. The DNA analysis report is mandatory for determination of actual accused, especially when the victim is a married lady¹⁵. The Court has elaborated the circumstances where DNA test becomes imperative requirement; where report of commission of offence and detection of human semen are positive, in such like situation the DNA test becomes the mandatory requirement¹⁶. On the contrary; in another judgment the Court ruled that DNA testing and matching the grouping profile is not a legal requirement because where through other evidence the rape is established^{17 18}. Chemical analysis report is evidence of strong nature which could help the prosecution to prove its case and same be relied upon¹⁹. The semen detected on vaginal swabs of the victim will be of no use if there is no DNA profile grouping²⁰.

⁵ Atif Zareef etc. case, Criminal appeal No. 251/2020 and criminal petition No. 667/2020

⁶ Section 3 of Anti-rape (Investigation and Trial) Ordinance, 2020.

⁷ Section 22 of ibid Act.

⁸ Section 5 of Ibid Act

⁹ Section 8 of ibid Act.

¹⁰ Section 9 of ibid Act.

¹¹ Ali Haider vs. State, 2021 PLD, p. 362, Supreme Court.

¹² Ibid.

¹³ Ali Haider vs. State, 2021 PLD, p. 362, Supreme Court.

¹⁴ Ibid.

¹⁵ Muhammad Amir vs. State, 2018 YLR, p. 2592, Lahore High Court.

¹⁶ Muhammad Javed vs. State, 2019 SCMR, p. 1920, Supreme Court. Also Shabbir Ahmad vs. State, 2020 MLD, p. 995, Karachi High Court.

¹⁷ Farooq Ahmad vs. State, 2020 PLD, p. 313, Supreme Court

¹⁸ Muhammad Amir case, 2018 YLR, p. 2592.

¹⁹ Wishal Masih vs. State, 2017 YLR, p. 2031, Islamabad. Also 2011 PCRLJ 1443

²⁰ Parvaiz vs. State, 2014 PCRLJ, p. 599, Lahore High Court.

The Supreme Court has settled the principles for evaluating and admitting the DNA report as part of prosecution evidence; that expert opinion is already recognized in QSO, 1984 read with section 510 Cr.P.C which provides that certain scientific reports are admissible without calling the Government Chemical Examiner²¹. Resultantly, the DNA test report prepared by an expert is per se admissible²². In the present judgment; the Court has remarked that DNA evidence is considered as a gold standard to establish the identity of an accused, this test due to its accuracy and conclusiveness is one of the strongest corroborative pieces of evidence; however, depended upon skill, ability and integrity of investigation officer to utilize it²³.

There are numerous medical implications to the rape victims which most of the times affect health, behavior, and other personal issues of the victim. In the year 2003 WHO has issued guidelines in relation to medico-legal care of rape victim which stresses upon the psychological and physical care of the victim²⁴. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been signed by Pakistan, according to which it is obligatory to take all possible measures to eliminate the violence against the women. In this context; it is the government which has to recognize the associated and important factors to curb the situation with planning and implementation of related laws²⁵.

Virginity Test is Violation of Fundamental Rights of Rape Victim:

The virginity test of the victim has always been considered as touchstone for determination of commission or non-happening of rape. Lahore High Court in a recent historical judgment has observed that the right to life, dignity, and equal treatment ensure that life to be led with dignified existence, protected from degradation, accessibility to a decent physical, social, and cultural environment²⁶. The Court further ruled that such rights also protect from structural stigmatization in a stereotype discrimination adversely affects dignity of a person; such rights ensure the right to receive a high standard health-care²⁷. On virginity test; the court held that virginity test by its nature is invasive and an infringement on privacy of women, to her body and is blatant of dignity of a woman²⁸. Further observed; the results obtained from such tests about a woman's sexual history and character is an attack on her dignity and right of privacy, also damages the woman's social and cultural standing²⁹. This test is discriminatory because it is conducted, primarily, to determine whether or not the victim is sexually active or not and the same

²¹ Ali Haider case, 2021 PLD, p. 362, Supreme Court

²² Ibid.

²³ Ali Haider case, 2021 PLD, p. 362, Supreme Court.

²⁴ Cook RJ, Dickens B, Thapa S. Caring for victims of sexual abuse. *International Journal Gynecol Obstet*, 2005; 91:194-9.

²⁵ The Muslim women. Alarming Increase in rape cases in Pakistan. [updated 2005 Oct 10].

Available from:

<http://www.themuslimwoman.org/entry/alarming-increase-in-rape-cases-in-pakistan/>

²⁶ Sadaf Aziz vs. Federation of Pakistan, 2021 PCRLJ, p. 205, Lahore High Court.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

has nothing to do with the rape incident³⁰. The Court has remarked that virginity test is highly invasive having no medical or scientific requirement and is only conducted in the name of medical protocol in rape cases which casts suspicion on victim instead of accused³¹. In the rape case; issue should be whether accused committed rape or not instead that determination of habitually of victim as to sexual intercourse; therefore, it is gender based discrimination³². The Supreme Court has also observed that virginity test has no scientific justification or evidentiary relevance in the commission of sexual assault of rape³³. In fact it is totally discrimination of the victim because it is neither medical condition that requires treatment nor it provides any clinical benefit to the victim³⁴. Conducting virginity test places the victim on trial rather the accused; therefore, it is not allowed³⁵. Globally; it is an admitted position that virginity test does not establish commission of sexual abuse³⁶. Section 13 of Anti-Rape (Investigation and Trial) Ordinance, 2020 has also banned two-finger test.

Decisions of Superior Courts as to Previous Character of Rape Victim:

The Supreme Court in a recent judgment in Zareef's case has thoroughly examined, elaborated, and settled principles regarding the character of the victim in a rape case. Briefly mentioning the facts of the case, that a female forcibly abducted and raped by five persons, case was registered, after trial; three of them were convicted. The High court maintained the conviction and matter reached to the Supreme Court. In this judgment the Supreme Court has made the following observations:

1. Rape is a crime which is typically committed in lonely places where there is no witness to facilitate direct testimony as to commission of crime. The courts, therefore, do not maintain to produce direct evidence to substantiate the statement of the victim if the same is inspirational in overall meticulous facts of a case, and evaluates such an evidence of the victim adequate for conviction of the accused person³⁷.
2. A rape victim carries a higher plinth as compare to injured witness; the injured witness receives injury on body while the rape victim sustains psychologically and emotionally³⁸.
3. The Court from the book of Lynn Enright quoted that generally people are communicated that hymen is known for the purity of virginity of female and same is incorrect presumption because the hymen has no biological characteristics³⁹.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Atif Zareef etc. case, Criminal appeal No. 251/2020 and criminal petition No. 667/2020.

³⁴ Sadaf Aziz case, 2021 PCRLJ, p. 205, Lahore High Court.

³⁵ Ibid.

³⁶ Sadaf Aziz case, 2021 PCRLJ, p. 205, Lahore High Court.

³⁷ Atif Zareef case, Criminal appeal No. 251/2020 and criminal petition No. 667/2020.

³⁸ Ibid. The Court relied upon; State of U.P. vs. Munshi, AIR 2009 SC 370.

³⁹ Atif Zareef case, Criminal appeal No. 251/2020. The Court relied upon; Allen & Unwin, 2019

4. Today's modern forensic science rejects the virginity test as not relevant to the sexual attack. That only testimony can be narrated by a medical officer that whether or not there is an evidence of fresh sexual activity and injury⁴⁰.
5. It is an insult that the sexual history of the victim is to be dragged into the case such as "the vagina admits two fingers easily" or "old ruptured hymen", the same destroys the respect and reputation of the victim and also against the Article 4(2) (a) of the Constitution, which requires that no detrimental action as to body and character of person ought to be taken except in accordance with law⁴¹.
6. Human self-esteem hovers over our laws such as a guardian angel; it motivates every standard of a just legal system and gives a definitive rationalization for every legal rule⁴².
7. Every woman is entitled for equal protection of law; irrespective of her reputation and sexual character, no one has authority to attack on her person and violate her privacy on the allegation of her alleged immoral character. During a trial; it is to be determined whether the commission of rape committed by the accused or not instead of determination of sexual character of the rape victim⁴³.
8. It should be a settled principle that even if the woman has lost her virginity; no one has the right to commit rape with her⁴⁴.
9. The courts must also put an end the use of painfully disturbing terminologies, like "habituated to sex", "woman of easy virtue", "woman of loose moral character", and "non-virgin", for the suspect rape sufferers even though rape has not been proved against the accused person. These observations are unconstitutional and unlawful⁴⁵.
10. WHO, the Office of the High Commissioner of the United Nations and the United Nations Entity for Gender Equality and the Empowerment of Women in "Eliminating Virginity Testing: An Interagency Statement" proclaim, "the practice is an infringement of the victim's human rights and is related with both direct and long term aftermaths that are harmful to her physical, psychological and social welfare⁴⁶.

Implications in Prosecution of Rape Cases:

As to Quantum of Witness(s) and Solitary Statement of Victim:

During the trial in rape cases; the major question before a court is the number of witnesses and this question has been resolved by the Superior Court through different judgments. The evidence is the mode to prove or disprove any allegation against a person

⁴⁰ Ibid. The Court relied upon; Modi's Textbook of Medical Jurisprudence and Toxicology, 26th Edition. Lexis Nexis publications. P.766.

⁴¹ Ibid.

⁴² Ibid. The Court relied upon; Denise G. Reaume, Indignities: Making a Place for Human Dignity in Modern Legal Thought, 28 Queen's L.J. 62 (2002)

⁴³ Ibid. The Court relied upon; Shakeel vs. State, PLD 2010 SC 47.

⁴⁵ Atif Zareef case, Criminal appeal No. 251/2020.

⁴⁶ Ibid.

and the testimony of the victim is always vital. On the sole testimony of the victim; the Superior courts have observed that sole testimony of the victim is sufficient for awarding conviction⁴⁷. Conviction can be recorded on sole testimony of the victim⁴⁸ in cases of rape because, normally, the guilty mind would never prefer a public place to commit such crime⁴⁹. Sole statement of victim must qualify to be convincing, natural, and confidence inspiring^{50 51}. It often happens that victim is a minor and the courts has to access her evidence; in a case the Supreme Court observed that before recording statement of minor victim the trial court must ask some questions to satisfy himself as to understanding of minor victim and if so satisfied the statement of minor victim can be relied upon for conviction⁵².

As to Delay in Lodging Case:

In criminal administration of justice; there is a problem whether the delay in lodging a case against the accused is fatal or not? The Courts have resolved this issue with the observation that the delay in lodging the case is understandable because an offence involving a person's honor and reputation in a society which may view unsympathetically can prey on the minds of the victim and her family⁵³. The trauma faced by the victim and her family having perception of shame and dishonor in having invasively examined by the doctor always restrains her to approach for registering crime⁵⁴. In the cases of rape; the victim and her family always reluctant to lodge a criminal case because of embarrassment and disrespect, hence, delay in such like cases is not detrimental for the prosecution case⁵⁵.

As to Oral and Medical Evidence:

The oral and medical evidence are equally important in a criminal case and most importantly both are considered as corroborative piece of evidence for each other. The Lahore High Court has observed that the oral evidence of the victim which is corroborated by medical evidence is sufficient to record the conviction accused⁵⁶. In another case; the victim in her statement specifically nominated the accused, medical evidence showed multiple bruises on her body, hymen of the victim was torn, the court observed that ocular testimonies has been corroborated by medical evidence⁵⁷. Where the statement of the victim is not corroborated by medical evidence qua DNA profile; the evidence of the victim is termed as un-corroborated and cannot be relied upon for conviction⁵⁸.

⁴⁷ Qari Muhammad Arif vs. State, 2021 YLR, p. 234, High Court Azad Kashmir.

⁴⁸ Naimat Ullah Khan vs. State, 2017 PCRLJN, p. 92, Lahore High Court.

⁴⁹ Muhammad Khan vs. State, 2020 PCRLJN, p. 10, Karachi High Court.

⁵⁰ Muhammad Shakeel vs. State, 2019 YLRN, p. 112, Karachi High Court.

⁵¹ Abdul Haq vs. State, 2018 PCRLJ, p. 12, Peshawar High Court.

⁵² Farooq Ahmad vs. State, 2020 PLD, p. 313, Supreme Court.

⁵³ Zahid vs. State, 2020 SCMR, p. 590, Supreme Court.

⁵⁴ Irfan Ali Sher vs. State, 2020 PLD, p. 295, Karachi High Court.

⁵⁵ Aijaz Hussain vs. State, 2018 MLD, p. 1164, Karachi High Court.

⁵⁶ Asghar Ali vs. State, 2016 YLR, p. 2601, Lahore High Court.

⁵⁷ Wishal Masih vs. State, 2017 YLR, p. 2031, Islamabad.

⁵⁸ Tauqeer Abbas vs. State, 2017 PCRLJ, p. 848, Lahore High Court.

Islamic Perspective of Rape Victim:

In Islam; the rape is considered as sub-category of *Zina* and general term applied to describe it is *zina bil jabr* or *at-watt bil ikrah* (forced penetration). This analogy has been driven because the Quran has not directly dealt with the situation of rape rather it deals with consensual intercourse. Since, the rape is committed with force, without consent or consent with force or fraud; therefore, most of the Muslim Jurists are opined that victim is not liable to any punishment. Quranic verse also provides foundation for this analogy that “... But he who is driven by necessity, being neither disobedient nor exceeding the limit, it shall be no sin for him. Surely, Allah is Most Forgiving, Merciful”⁵⁹. In this context a tradition of Prophet Muhammad (PBUH) has been narrated that “Allah has pardoned, for me, my Ummah: (their) mistakes, (their) forgetfulness, and what they have done under duress⁶⁰” which means any act or omission committed under duress or force is not liable to be punished⁶¹. In Islamic history there are instances where the forcibly raped female has not been punished and victim has been penalized. In the era of the Prophet Muhammad (PBUH), a female claimed to be raped by some male and the Prophet Muhammad (PBUH) ordered to punish the accused and cleared the female victim⁶². Another example is from the period of Hazrat Umar (R.A) where a female slave was subjected to rape by a male slave and the male slave was punished⁶³.

Rape under Hudood Ordinance, 1979:

In 1979; the government of Pakistan has enacted some laws to bring them in-conformity with the injunctions of Islam. In these laws, the ordinance relating to offence of *zina* has also been promulgated wherein *zina* and *zina bil jabr* has been mentioned along with proof of offence and punishments. This law was silent on the point that if the proof/requirements of *zina* is not fulfilled then how the case is to be decided; whether it could be presumed that it was a consensual sexual intercourse and female would also be liable to be punished. Since, there has been no distinction between the *zina* and *zina bil jabr*; therefore, this law had become a tool for exploitation⁶⁴. Most of the time, the case of Muhammad Sadiq⁶⁵ is presented as an example of exploitation of woman being not trusted by the Court in a case of *zina bil jabr*. In the said case; it was the female who had asserted that she was subjected to *zina bil jabr* and during trial and appeal proceedings it appeared that she was not a reliable witness being dishonest witness; moreover, there has been no corroboration in the shape of medical evidence. The Supreme Court used words “dishonest” and “un-dependable” and these are common words which are used in number of decisions of courts. Even otherwise; under the criminal administration of justice it is always the duty of the prosecution to prove the case and in that case prosecution had

⁵⁹ Al-Quran, Chapter II, verse 174.

⁶⁰ Ibn Maajah and al-Bayhaque. <http://hadithaday.org/40-hadith-an-nawawi/pardoning-of-mistakes>

⁶¹ Au’dah, “*At-Tashree’ Al-Jinai Al-Islami*”, 1:573, and Charles Hamilton, “*The Hedaya*” (Lahore: Premier Book House, 1987).

⁶² “*Jami Tirmidhi*”, Book of Hudood, Chapter 22, Hadith 1458.

⁶³ Au’dah, “*At-Tashree’ Al-Jinai Al-Islami*”, 1:573, and Karamah “Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan.

⁶⁴ Omar Farooq, “Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam”, *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, MPG Books, 2011.

⁶⁵ Muhammad Sadiq vs. State, 1995 SCMR, 1403, Supreme Court of Pakistan.

failed to prove the same. However, in the case of Muhammad *Yaqub*⁶⁶; the Court had used the words of “woman of easy virtue” which are not proper and the Supreme Court⁶⁷ in its latest decision has ordered that no such word or phrase should be used because the character of the victim is not relevant to observe upon. Some critics quote the example of *Nighat Sultana* case as a discriminatory decision against the female, where alleged rape has been converted into consensual *zina*. Interestingly; the facts of the case were that the accused and victim travelled together for many districts through buses and train but as they caught by the family of the female, *Nighat Sultana* was kept in police station for two days and thereafter, her statement before the concerned Magistrate was recorded⁶⁸. The Supreme Court has disbelieved the story of the victim as to rape, acquitted the accused. *Safia Bibi*’s case is also presented as a harsh application of *Hudood* laws but facts of the case are entirely different, in this case the female accused confessed her guilt; she remained pregnant and gave birth to a child being un-married female⁶⁹. The Court exonerated her from charge of *Hadd* and punished her in *Tazir*.

Conclusion:

Nutshell of the discussion is that conducting of virginity test(s) is violation of fundamental right of privacy of the rape victim and according to directions of the Supreme Court and Lahore High Court this practice should immediately be discontinued for future times. This practice, based on illogical myth, has also been discouraged by the international institutions such as W.H.O. The Supreme Court, in its recent decision, has also directed the trial courts to discontinue practice as to questioning the character of the rape victim because it has serious implications upon the victim and has further directed that focus must be on whether accused has committed rape with the victim or not. In *Ali Haider* case; the Supreme Court has also settled principles as to DNA report and has observed that the trial court must be well acquainted with the modern scientific knowledge, especially the modern medical developments. The Court has further ruled that DNA report is developed from modern scientific techniques; therefore, same is admissible under article 164 of QSO, 1984. It is unanimous view of the Superior Courts that sole testimony of the victim is sufficient for recording conviction because the accused will choose a place away from general public. The delay in lodging case of rape is, most of the times, not detrimental because of sudden trauma faced by victim and her family, the family honor, and stigmatization of the victim in the society. In Islamic law; the rape victim is always protected, on this point there are number of *Ahadiths*, and the traditions of Caliphs of the Holy Prophet (PBUM).

⁶⁶ Muhammad Yaqub vs. State, 1996 SCMR, 1807, Supreme Court of Pakistan.

⁶⁷ Ali Haider case, 2021 PLD, p. 362, Supreme Court

⁶⁸ Ihsan Ahmad vs. State, 1980 PCRLJ, 1037, Lahore High Court, Lahore.

⁶⁹ Quyyum Khan vs. State, 1998 MLD, 244, Federal Shariat Court.