

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Revision Application No.45 of 2022

Before:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Khalid Hussain Shahani

Applicant : Alam Sher son of Bahadur Sher
Through Mr. Khawaja Muhammad Azeem
Advocate.

Respondents 1&2: The State & another,
Through Mr. Muhammad Ali Noonari, DPG.

Respondent No.3 : Abdul Ghani son of Muhammad Yousuf
Through Mr. Abdul Haleem Jamali,
Advocate.

Date of short order: 24.09.2026.

Date of reasons : 29.09.2026.

REASONS

KHALID HUSSAIN SHAHANI, J. – Through this criminal revision, the applicant/complainant calls in question the legality of the sentence awarded to Respondent No. 3, Abdul Ghani, by the learned Additional Sessions Judge-X, West Karachi, in Sessions Case No. 1874 of 2019 arising out of F.I.R. No. 131 of 2019, P.S. Mochko. The Respondent was convicted for rape under Section 376, P.P.C. and sentenced to ten years' imprisonment with fine of Rs.200,000. The conviction as such is not sought to be replaced by conviction for any different offence. The grievance is confined to the punishment: according to the applicant, once the trial Court found rape proved and the victim to be a child of about nine years, the sentence had necessarily to conform to Section 376(3), P.P.C., as it stood on the date of occurrence.

2. The prosecution case, in brief, was that Respondent No. 3 committed rape upon baby Bakhtawar at the school where he was employed as a chowkidar. The victim and other prosecution witnesses were examined and medical evidence bearing, inter alia, upon her age and condition was brought on record. The respondent

denied the allegation and attributed his implication to hostility arising out of an incident at the school. The learned trial Court rejected the defence, returned a finding of guilt for rape and accepted the victim's minority, but awarded the determinate sentence noted above.

3. The record further shows that Respondent No. 3 had preferred Criminal Appeal No. 118 of 2022 against his conviction and sentence. In the present revision, when the question of enhancement came up on 13.04.2026, this Court expressly issued notice to Respondent No. 3 to appear and show cause why the sentence should not be enhanced, the order itself recording that the victim was a minor and that Section 376(3), P.P.C. prescribed life imprisonment or death. On 28.04.2026 Respondent No. 3 appeared through learned counsel, who sought time to submit a reply to the enhancement plea; the request was granted. Thus, the respondent was not confronted with enhancement without notice. He was placed on express notice of the precise statutory basis on which enhancement was sought and was afforded opportunity to resist it. To the extent required by Section 439(6), Cr.P.C., that opportunity necessarily extended to showing cause against the conviction as well.
4. Learned counsel for the applicant contended that the occurrence took place in 2019, after the Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016 (Act XLIV of 2016) had inserted sub-Section (3) in Section 376, P.P.C. Rape of a minor, it was argued, was thereby placed in a special statutory category carrying death or imprisonment for life and fine. A term of ten years was therefore not a permissible sentencing option. Reliance was placed, amongst others, upon PLD 2006 SC 365¹ and 2022 SCMR 544².
5. Learned counsel for Respondent No. 3 resisted the revision. Besides supporting the sentence originally awarded, he emphasized that the respondent had obtained the benefit of Section 382-B, Cr.P.C., had served the sentence as calculated under the trial Court's judgment, had paid the fine and had thereafter been released. His re-incarceration, it was submitted, would offend settled considerations

¹ *Abdul Malik and others v. The State and others*

² *Abdul Ghani v. The State through P.G. Balochistan and another*

of finality, accrued liberty and fairness. Learned DPG supported the applicant to the extent that the punishment must conform to the penal provision applicable on the date of occurrence.

6. The controversy, properly analyzed, raises four distinct questions: (i) what punishment Section 376, P.P.C. prescribed in 2019 for rape of a minor; (ii) whether, on the findings already recorded by the trial Court, sub-Section (3) governed the sentence; (iii) whether this Court, in revision, may correct or enhance the sentence notwithstanding that the respondent has served the sentence originally imposed and has been released; and (iv) if interference is called for, which of the punishments authorized by sub-Section (3) ought lawfully and justly to be imposed.
7. The first question admits of no ambiguity. Criminal punishment is governed by the law in force when the offence is committed. The occurrence in the present case is of 2019. By then Act XLIV of 2016 had already inserted Section 376(3), P.P.C., which provided that whoever commits rape of a minor or a person with mental or physical disability shall be punished with death or imprisonment for life and fine. Subsequent amendments to Section 376 do not govern this occurrence and are unnecessary for its determination. Application of sub-Section (3) as enacted in 2016 therefore involves no retrospective aggravation of punishment; it applies the very law that stood in force when the offence was committed.
8. Sub-Section (1) dealt with rape generally and permitted a determinate term of imprisonment, whereas sub-Section (3) dealt specifically with rape of a minor or a person with mental or physical disability. The familiar rule that a special provision controls the field specifically occupied by it applies with full force. Once the factual ingredient attracting sub-Section (3) regarding minority of the victim, stood judicially established along with the offence of rape, the sentencing Court was required to remain within the alternatives Parliament had prescribed for that aggravated category. It could not travel back to the general provision and select a determinate term which the special provision did not authorize.

- 9.** The learned trial Court found rape proved and the victim's age, on the evidence accepted by it, to be about nine years. Her minority was therefore not a collateral circumstance merely relevant to aggravation; it was the jurisdictional fact that identified the applicable sentencing subsection. Nor does the omission, if any, to mention the numeral '(3)' in the formal charge alter the substance where the respondent was tried throughout on the allegation of rape of a child, knew the age allegation he had to meet, the evidence concerning minority was produced in his presence and tested at trial, and no failure of justice on that account is shown. The conviction for rape read with the proved minority thus attracted Section 376(3), P.P.C.
- 10.** The present matter is not an ordinary request that an appellate or revisional Court substitute its subjective preference for a sentence lawfully chosen by the trial Judge. Sentencing discretion exists only within the limits fixed by statute. Where Parliament has supplied two substantive alternatives, a Court may choose between those alternatives upon judicially relevant considerations; it has no discretion to create a third. The ten years term was consequently not merely lenient or inadequate. On the findings recorded, it was a sentence not authorized by the governing subsection.
- 11.** Section 435, Cr.P.C. empowers the High Court to call for and examine the record of a subordinate criminal Court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order. Section 439(1), Cr.P.C. expressly includes the power to enhance sentence. That power is, however, conditioned by procedural fairness. Under Section 439(2), no order prejudicial to the accused may be made without an opportunity of being heard, while sub-Section (6) specifically entitles a convicted person called upon to show cause against enhancement also to show cause against his conviction. The orders dated 13.04.2026 and 28.04.2026 demonstrate that notice of enhancement was expressly issued, the respondent appeared through counsel and time was afforded for reply. The statutory safeguard was therefore engaged in substance, not treated as an empty formality.
- 12.** The fact that respondent No. 3 had pursued an appeal against conviction does not denude sub-Section (6) of its operation in these

enhancement proceedings. The right conferred by Section 439(6) attaches because the convict is exposed to a prejudicial enhancement order. It ensures that, before a heavier sentence is imposed in revision, he is not confined to the quantum of punishment but may resist the foundation of the conviction itself. The present determination proceeds after affording that statutory opportunity; nothing in these reasons treats enhancement as automatic merely because the applicant invoked Section 439.

13. The more substantial objection arises from the Respondent having served the sentence originally awarded and having regained his liberty. The governing principle is settled by the larger Bench decision in PLD 2006 SC 365³: an appeal or revision is a continuation of the original criminal proceedings; alteration or enhancement of sentence therein is not, for that reason alone, a fresh prosecution or a second punishment; and serving out the sentence during pendency of the competent appellate or revisional process does not constitute an absolute bar to enhancement. At the same time, completion of sentence is not legally irrelevant. It is a weighty circumstance to be considered, with all other factors, in deciding whether and to what extent the power of enhancement should be exercised.
14. The subsequent exposition in PLD 2013 SC 793⁴ and PLD 2015 SC 50⁵ reinforces that distinction. The constitutional protection against double jeopardy does not convert a pending appeal or revision concerning sentence into a second prosecution. Nevertheless, where a convict has already undergone a lawful alternative sentence and enhancement to a graver alternative is sought at a late stage, the fact of completed punishment and regained liberty may properly weigh against such enhancement. The principle therefore regulates judicial discretion; it does not erase revisional jurisdiction.
15. Cases in which a convict has fully undergone one lawful alternative punishment and the Court is later asked to substitute another, graver lawful alternative stand on a materially different footing from a case

³ *Abdul Malik and others v. The State and others.*

⁴ *Hassan and others v. The State and others.*

⁵ *Khalid Iqbal and 2 others v. Mirza Khan and others.*

where the sentence imposed below was outside the statutory range applicable to the facts found. In the former situation, finality, expectancy and regained liberty may strongly counsel restraint in moving from one lawful punishment to another. In the present case, however, the ten-year term was not one of the punishments which Section 376(3) permitted. Completion of an unauthorized sentence is an important equitable and sentencing circumstance, but it cannot retrospectively supply statutory authority which the sentencing Court never possessed.

16. 2022 SCMR 544⁶ is instructive, though it must be used for the proposition it actually decides. There a juvenile convicted under Section 376(1), P.P.C. for violating a nine-year-old child had been sentenced to ten years' rigorous imprisonment; the High Court enhanced the sentence to imprisonment for life and the Supreme Court declined interference, holding that, given the violence inflicted upon the child, the enhancement could not be regarded as excessive or harsh. That case is not treated as authority for rewriting the statutory basis of the present conviction; it demonstrates, rather, that enhancement from a ten-year term to life imprisonment in a case of sexual violence against a child is not, by its nature, beyond lawful appellate correction.
17. We are also mindful of 2009 SCMR 502⁷, where enhancement from a fully served sentence of imprisonment for life to death was declined. Read with the larger-Bench rule in *Abdul Malik* and the later clarification in *Hassan*, that authority does not establish an inflexible jurisdictional bar whenever the original sentence has been served. It illustrates the caution demanded when a Court is asked, after completion of one lawful punishment, to impose the ultimate penalty. The present case is distinguishable both because the sentence completed by Respondent No. 3 was not a punishment authorized by Section 376(3) on the findings recorded and because the enhancement sought can be confined to the lesser of the two punishments which that sub-Section itself prescribed.

⁶ *Abdul Ghani v. The State through P.G. Balochistan and another.*

⁷ *Iftikhar Ahmed Khan v. Asghar Khan and another.*

- 18.** The Respondent's release nevertheless deserves real, not merely verbal, consideration. He acted upon a subsisting judicial sentence, received such statutory credit and remissions as were administratively admissible, paid the fine and regained liberty. Those circumstances, the lapse of time since the 2019 occurrence, and the fact that the trial Court itself did not select the maximum punishment weigh decisively against choosing death at this stage. They cannot justify perpetuating a sentence outside the statute, but they bear directly upon the choice between the two lawful alternatives now open to the Court.
- 19.** On the other side of the balance stand the age of the victim and the nature of the offence as found proved. A child of about nine years was subjected to rape by an adult at the school where he was employed as a chowkidar. His employment is not invoked to attract any separate statutory category, nor do we proceed on an unproved assumption that he was a public servant. It is relevant only as part of the proved setting in which the offence occurred. The victim's extreme youth is already the fact bringing sub-Section (3) into operation and therefore should not be counted twice as though it independently compelled the maximum penalty. The task remains to select, proportionately and lawfully, between death and imprisonment for life.
- 20.** Upon that assessment, imprisonment for life is the appropriate sentence. It restores conformity with Section 376(3), gives effect to Parliament's special treatment of rape of a minor, and at the same time accommodates the substantial considerations arising from the respondent's completion of the sentence originally imposed, his release, the passage of time and the settled caution attending any later substitution of the ultimate punishment. Nothing in the record before us makes it necessary, for correction of the illegality under review, to choose death. The lesser statutory alternative of imprisonment for life is sufficient and just.
- 21.** Section 382-B, Cr.P.C. operates at the stage of computation and execution of imprisonment; it does not enlarge the range of punishments authorized by the Penal Code. Respondent No. 3 shall therefore receive all credit for custody already undergone in this

case to the extent legally admissible. Any question concerning remission or the manner in which the sentence is to be executed shall be governed by the law applicable to execution of the substituted sentence and is not to be confused with the antecedent question whether the trial Court had authority to award ten years.

- 22.** For the foregoing reasons, the revision was allowed by our short order dated 24.09.2026. In exercise of jurisdiction under Sections 435 and 439, Cr.P.C., the sentence of ten years' imprisonment awarded to Respondent No. 3, Abdul Ghani, is/was converted to imprisonment for life under Section 376(3), P.P.C. The conviction and the fine of Rs.200,000, already paid, remain undisturbed. Benefit under Section 382-B, Cr.P.C., and credit for custody already undergone shall be extended strictly in accordance with law.
- 23.** Respondent No. 3, who had been released after the sentence originally awarded was treated as served, was taken into custody pursuant to the short order and committed to prison to undergo the substituted sentence, subject to the lawful credit stated above. The office shall transmit a copy of the order to the learned trial Court and the concerned prison authorities for compliance. These are the reasons for our short order dated 24.09.2026.

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