

02-2-2018  
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IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Appeal No. 5 - 20 of 2018

1. Nadir S/O Muhammad Alam Moosani,
2. Sudheer S/O Muhammad Alam Moosani,

Both presently confined in Central  
Prison, Sukkur.

.....Appellants

VERSUS

The State. .... Respondent

Offence U/S 452, 365-B, 376(2),  
147, 148, 149 PPC.  
Crime No.231/2016 of PS  
Daharki.



CRIMINAL APPEAL UNDER SECTION 410 CR.P.C.

ORDER SHEET  
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR  
Cr. Appeal No.S-20 of 2018

Date	Order with signature of Judge
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For hearing of main case

Date of hearing      07.05.2018  
Date of Judgment   25.05.2018

Mr. Shabir Ali Bozdar Advocate for appellant  
Mr. Sardar Ali Shah Rizvi DPG

IRSHAD ALI SHAH, J - The appellants have preferred the instant appeal against the Judgment dated 24-1-2018 of learned Additional Sessions Judge Ubauro whereby they for having committed an offence punishable u/s 376(2) PPC, were convicted and sentenced to undergo imprisonment for life and to pay fine of Rs.100,000/- each to victim Mst. Shazia.

2. The narration of the facts made by complainant Molvi Muhammad Hassan in his FIR is as under:

"Complaint is that Mst. Shazia daughter of Abdul Razaq Leghari, aged about 19/20 years is my paternal niece. She is virgin. Abdul Razaq is having a house in deh Wahi Gul Khan and he is Pesh Imam of Masjid with Hazoor Bux Mazari. Nadir Moosani is having his house by the side of house of Abdul Razaq. He is a Loafer type person. He was prevented by us from standing in front of house of Abdul Razaq for number of time. On that he was annoyed and was oftenly was found saying that we would get its result. On last night when me, my brother Muhammad Muavia, cousin Pahalwan son of Niaz Leghari, Mst. Shazia daughter of Abdul Razaq and other members of family were available in the house. Abdul Razaq did not return from Masjid. Bulbs were lightening. There at about 10.00 pm, we found and identified accused Nadir, Sudheer both sons of Muhammad Alam Moosani, 3. Shah Muhammad @ Shahoo son of unknown Moosani, residents of deh Wahi Gul Khan, 4. Abdul Khaliq son of Muhammad Malook Dayo, resident of Daharki and one unknown culprit. All armed with pistols. They committed trespass in my house; drag my paternal niece Mst. Shazia out from our house by holding her arms. We and other members of family attempted to resist but the accused kept us silent by pointing their weapon at us. Then all the said accused took away Mst Shazia by making her to sit in white colour 2D car. We did not go out of our house because of night time. Now I am lodging of the FIR above said incident by stating that the



*fw*



above said accused by committing trespass in my house have abducted Mst. Shazia daughter of Abdul Razaq with intention to get her marry with Nadir Moosani by force or to subject her to rape. Unknown culprit is seen by us properly, he could be identified if is seen again."

3. On investigation, Mst. Shazia appeared at P.S. Daharki voluntarily. She was subject to medical examination and after usual investigation the challan was submitted by the police against appellants, co-accused Abdul Khaliq (since acquitted), absconding accused Shah Muhammad @ Shahoo and one unknown culprit, before the court having jurisdiction.

4. At the trial, the appellants and co-accused Abdul Khaliq (since acquitted) pleaded not guilty to the charge and prosecution to prove it examined PW-1 complainant Muhammad Hassan, produced through him FIR of the present case, PW-2 Ameer Muavia, PW-3 victim/Mst. Shazia, PW-4 Sultan Ahmed, produced through him mashirnama of place of incident, PW-5 ASI Nazir Ahmed, produced through him mashirnama of recovery of Mst. Shazia, PW-6 Dr. Zaibunissa, produced through her provisional and final medical certificates in respect of examination of victim/Mst. Shazia and report of chemical examiner and then closed the side.

5. The appellants and co-accused Abdul Khaliq (since acquitted) denied the prosecutions' allegation by pleading innocence. They, however, did not examine themselves on oath nor anyone in defence.

6. Learned trial court, on evaluation of the evidence acquitted co-accused Abdul Khaliq while convicted and sentenced the appellants by way of impugned judgment, as stated above.

7. It is contended by learned counsel for the appellants that they, being innocents, have been involved in this case falsely by the complainant party and there was no evidence against them warranting their conviction. By contending so, he sought for their acquittal. In support of his contention he relied upon case of **Nadeem Shah and others vs. The State & others** which is reported at **PLD 2005 SC 181**, 2. Case of **Aijaz Ahmed and others vs. The State**, which is reported at **2010 SCMR 141**, 3. Case of **Muhammad Zubair vs. The State**, which is reported at **2007 SCMR 437**, 4. Case of **Azhar & others vs. The State**, which is reported at **2013 PCrLJ 1716**, 5. Case of **Touqeer Abass vs. The State**, which is reported at **2017 PCrLJ 848** and





6. Case of **Nadeem Bhatti @ Sunny v/s The State**, which is reported at 2016 PCrL J 558.

8. Learned DPG has supported the impugned judgment while complainant Molvi Muhammad Hassan and victim/Mst. Shazia have raised no objection to acquittal of the appellants by filing of their affidavits.

9. I have considered the arguments and perused the record.

10. As stated above, it was alleged against the appellants and others that on 23.9.2016 at about 2200 hours they after having formed an unlawful assembly and in prosecution of their common object, being armed with deadly weapons, committed trespass into the house of complainant Molvi Muhammad Hassan and abducted Mst. Shazia with intention to compel her to marry with person against her wishes or to subject her to rape. Such case, on appearance of *victim* before police at PS Daharki was claimed to have resulted into forcible *Zina* upon her too.

The points for determination, which were framed by learned trial Court, were to the following effect;

i) Whether on 23-09-2016 at about 2200 hours accused Nasir Sudheer, Abdul Khaliq armed with pistols alongwith pistols along with absconding accused Shah Muhammad @ Shahoo, duly armed with pistols, by forming an unlawful assembly, in prosecution of their common object committing rioting and trespassed into the house of Complainant?

ii) Whether above named accused persons forcibly entered into the house of complainant and abducted Mst. Shazia aged about 19/20 years with intention to compel her to marry any person against her will or to commit rape with her?

iii) Whether all or any of accused committed ZINA-BILL-JABAR (gang rape with Mst. Shazia against her consent?

iv) What offence if any committed by the accused?

The above points *prima facie* were framed, as per case (*allegations*) of prosecution, hence were controlling each other *least* each *part* was necessary for linking other *part*. I would state here that it was never a case of prosecution that *victim* was missing or was abducted from an *isolated* place but it was *categorical* claim of the prosecution that there was *trespass* and forcible abduction of the *victim*. Both of such sections, needless to say, are also *independent* offences yet continuing parts of prosecution story. Since,





*prima facie* all these parts (*framed points*) were describing a separate part of prosecution claim therefore, it is observed that failure of the prosecution, to prove any of said parts was sure to bring element of *doubt* into play. The perusal of the *impugned* judgment of conviction shows that while discussing the evidence of complainant Molvi Muhammad Hassan, PW Ameer Muavia and victim/Mst Shazia, the learned trial court answered points No. 1 and 2 as "*not proved*".

12. The evidence of the prosecution so far trespass into the house of complainant Molvi Muhammad Hassan and abduction of victim/Mst, Shazia there-from was disbelieved by learned trial court yet the learned trial court recorded conviction against the appellants for point No.3 which *again* was not believed for acquitted accused Abdul Khalique. I would come to this *later*. I am surprised that when learned trial court disbelieved allegations of *trespass* and *abduction* of victim on a particular date, time and place then what had prevailed in convincing the trial court in convicting the appellants for *zina* (376 PPC) when there came no *separate* story to effect of reaching of victim/Mst. Shazia into hands of appellants. A *failure* to explain such material aspect of the case was sufficient for acquittal of the appellants because a *reasonable* doubt is always sufficient for acquittal. No reason on that point is assigned by learned trial court.

13. In case of **Faheem Ahmed Farooq vs. The State**, which is reported at **2008 SCMR 1572**, it was held as under;

"Single infirmity creating reasonable doubt regarding truth of the charge makes the whole case doubtful.

14. Be that as it may, the reason which prevailed with learned trial court for convicting the appellants for an offence punishable u/s 376 P.P.C was that there is evidence of Mst. Shazia which is supported by Woman Medical Officer Dr. Zaibunissa. Here, I would insist that there can be no dispute to well established principle of law that in such like cases the status of a *victim* is always that of a '**star witness**'. The evidence of such a witness controls the *fate* of case. If such a witness does not support prosecution case, it would suffice to be taken as *reasonable* doubt to acquit the accused without waiting for *corroborative* evidences even. But when *victim* supports prosecution case then it is always necessary that her / his evidence must





always pass test of being natural and convincing, else no conviction could be recorded. Reference in that respect may be made to the case of *Shahzado @ Shaddu & Ors v. State*, which is reported at 2002 SCMR 1009 wherein it is observed as under;

"6. We would like to mention here at this juncture that corroboration is not a rule of law but that of prudence. There is no denying the fact that acid test of the veracity of the prosecutrix's statement is the **inherent merit of her statement** because corroborative evidence alone could not be made a base to award conviction. It is well settled by now that "the extent and the nature of corroboration required may, no doubt, vary from witness to witness and corroboration in every particular, all that is necessary is that the corroboration must be such as to effect the accused by connecting or rendering to connect him with the crime. ..

7. We have..... Generally speaking the statement of prosecutrix if considered trustworthy no corroboration would be needed and such need only arise in the circumstances indicating the possibility of her being consenting party to sexual intercourse which is a rare phenomena in cases of Zina-bil-Jabr. ...

15. In another case of *Atlas Khan alias Attasi v. State & another* which is reported at 2014 P Cr. L J 1280, at relevant page 1288, it is observed as under;

... It is pertinent to mention that even a solitary statement of a victim is sufficient, for conviction under Ta'zir, if it inspires confidence and finds necessary corroboration from an independent source...

16. At this, it would be pertinent to add that a *distinction* should always be kept in mind while dealing with a case of *forcible zina* by abducting the *victim* from isolated place and the one *like* instant one. The former would *entirely* rest on statement of *prosecutrix* but *later* would require proof on *each* part or if some *parts* of prosecution case are disbelieved then before convicting the accused for *zina* (376 PPC) alone strong corroboration would always be requirement for safe Criminal Administration of Justice. Reference in that respect may be made to the case of *Ghulam Mohay-ud-Din alias Baoo v. State & Ors* which is reported at 2012 P Cr.L.J 1903 wherein at relevant page-1906 it is observed as under;

....It is true that the such offences are committed in **loneliness** so the absence of the eye-witnesses is not material and statement of the victim corroborated by the medical evidence is sufficient to prove the charge but if **the statement of victim does not inspire confidence** on her own character appears to be doubtful, then her solitary statement cannot be deemed to be sufficient to prove the allegation of commission of rape punishable under section 376 PPC ....

17. Having said so, germane to examine the evidence of *victim/Mst. Shazia*. It was stated by her during course of examination that "*the present appellants and others kept her confined at unknown place and there they*





*committed rape with her and after four days accused persons forgot to lock the door of the said place and she got a chance to run out and straight away went at PS Daharki and informed the police about the incident".* Such narration appears to be not logical as before believing such narration number of question (s) beg for answers. If the victim was able to search for the PS Daharki then she ought to have pointed out the place of her confinement to police too which she never *did?*; was she not under any watch? as *normally* is expected from a prudent mind. She during course of her examination identified both of the appellants to be Nadir and Sudheer and for 3<sup>rd</sup> accused who was Abdul Khaliq she stated that she could not identify him. By stating so, she belies her 161 Cr PC statement wherein it was stated by her that 3<sup>rd</sup> accused with appellants was Abdul Khaliq. Only a known person can be referred with '*name*'. During course of her examination, no explanation was given by her that why *Abdul Khaliq* was named by her in her earlier statement or was it some other *Abdul Khaliq?* Further, during course of her cross examination she was fair enough to state that "*after her marriage she lived with her husband for about four years. Such marriage came to an end and thereafter since 7/8 years she was residing with her parents*". By stating so, she belies the complainant (FIR) to the effect that victim/Mst Shazia was a virgin lady. I would add that a positive report of *victim*, being used for sexual intercourse, *alone* would not be of much significance if the *victim* is a married woman. In such eventuality, a *little* more corroboration from *medical evidence* would be required from *mere* positive report of her being used for *sexual intercourse*. Such *glaring* contradictions were never appreciated properly by learned trial court which *otherwise* had made evidence of the victim/Mst.Shazia to be of doubtful character thereby becoming not strong enough to hold conviction.

18. It was stated by ASI Nadir Ahmed during course of his examination before learned trial court that on 27.9.2016 when he was on his duty, at PS Daharki, there at about 1000 hours came Mst. Shazia voluntarily and disclosed the commission of the incident. Her statement was recorded and she then was referred to Hospital for her medical examination. As per Medical Officer Dr. Zaibunissa, Mst. Shazia came at hospital on 28.9.2016 for her medical examination. Here arises a question that as to where Mst. Shazia gone for intervening period of one day? No explanation to such delay is offered by





the prosecution, which could not be lost sight of as it smells of something wrong and/or foul play. No mark of violence was found on the body of victim/Mst. Shazia on her medical examination by Dr. Zaibunissa. The swabs, taken from her vagina allegedly on 28.9.2016, were delivered to the chemical examiner for chemical analysis on 3.10.2016 with approximate delay of five days. What was done with those vaginal swabs for five days? No explanation to it is offered by the prosecution. No DNA test was conducted to connect the appellants with those vaginal swabs. In these circumstances to record conviction against the appellants solely on the basis of evidence of Mst. Shazia and that of Medical Officer Dr. Zaibunissa was not called for.

19. It is observed here that the *procedure* in dealing with an appeal nowhere leaves a room for diminishing value of a *evidence* by filing of affidavits. Therefore, affidavits, so filed by complainant Molvi Muhammad Hassan and victim/Mst. Shazia needs no consideration, particularly when offence for which the appellants are convicted is not *compoundable* one.

20. In the last, I would attend to question, left to be attended later, i.e acquittal of accused Abdul Khalique and conviction of appellants on same set of evidence. For this, it would suffice to say that it stood, *by now*, a well settled principle of law that if the Court disbelieves evidence for one of accused then no conviction could be recorded on same set of evidence without availability of independent corroboration to the extent of such other person. Reference in that respect, if needed may be made to the case of *Sardar Bibi & another v. Munir Ahmed & Ors* which is reported at 2017 SCMR 344 wherein at relevant page 350 it is held as under;

... This Court had already settled the law on the point that if the eye-witnesses produced by the prosecution are disbelieved to the extent of some accused person attributed effective role, then the said eye witnesses cannot be relied upon for the purpose of convicting another accused person attributed a similar role, without availability of independent corroboration to the extent of such other person. Reference in this respect may be made to the cases of *Ghulam Sikandar v. Mamaraz Khson* (PLD 1985 SC 11), *Sarfriz alias Sappi v. The State* (2000 SCMR 1758), *Iftikhar Hussain and others v. The State* (2004 SCMR 1185), *Farman Ahmed v. Muhammad Inayat and others* (2007 SCMR 1825), *Irfan Ali v. The State* (2015 SCMR 840) and *Shahbaz v. The State* (2016 SCMR 1763) and *Akhtar Ali and others V. The State* (2008 SCMR 6).

21. In view of the facts and reasons discussed above, the impugned judgment of learned trial court could not be sustained, it is set aside. Consequently both the appellants are acquitted of the offence for which they





were charged, tried and convicted. They shall be released forthwith in the present case.

22. The instant appeal is disposed of in the above terms.

CERTIFIED TO BE TRUE COPY

TYPED BY 

COMPARED BY 

AND BY 

19/12/18 REGISTRAR.

Sd/-  
IRSHAD ALI SHAH,  
JUDGE.



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