IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.10 of 2021

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Appellant	Zeeshan son of Abdul Jabbar through Mr. Khalid Hussain Chandio, Advocate.
Respondent	The State through Ms. Seema Zaidi, Addl. Prosecutor General, Sindh.
Date of hearing	**17.04.2025**
Date of Judgment	**28.04.2025**

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JUDGMENT

SHAMSUDDIN ABBASI, J. Zeeshan son of Abdul Jabbar, appellant, was tried by the learned Additional Sessions Judge-I [Model Criminal Trial Court (MCTC), Karachi (South)] in Sessions Case No.129 of 2018 (FIR No.146 of 2017) registered at Police Station Baloch Colony, District South, Karachi, for offences under Sections 302, 365-B, 376 and 34, PPC. By a judgment dated 14.12.2020 he was convicted and sentenced as follows:-

> *"1. He is convicted for committing offence punishable under section 302 PPC and sentenced to suffer Life Imprisonment and he is also directed to pay compensation under section 544-A Cr.P.C., in the sum of Rs.3,00,000/- to legal heirs of the deceased and in default thereof, he is also directed to suffer S.I for One(01) month more.*
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> *2. He is also convicted for committing offence punishable under section 365-B PPC and sentence to suffer Life Imprisonment and he is also directed to pay fine of Rs.1,00,000/- and in default thereof, the accused would have to undergo S.I for One (01) month more.*
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> *3. He is also convicted for committing offence punishable under section 376 PPC and sentence to suffer R.I. for Ten (10) years and he is also directed to pay fine of Rs.1,00,000/- and in default thereof, the accused would have to undergo S.I. for One (01) month more.*
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> *The sentences awarded to the accused would run concurrently, however, benefit of section 382-B Cr.P.C. is extended to him and the period for which he remained in custody would be deducted from the sentence awarded to him. The present accused, produced in custody, is remanded to the concerned jail along with the conviction warrants for compliance".*

2. Short but relevant facts of the case are that complainant Ghulam Nabi son of Jumma Khan is doing job of night watchman and lookafter the vehicles parked adjacent to Ghousia Masjid, Sector 6JI, Junejo Town, Karachi. He has one son namely Shahid, aged about 13/14 years, and a daughter namely, Shaheen, aged about 15/16 years, who reside with him in his house. On 02.08.2017 at about 2:00 am he went to his duty, leaving his son and daughter in the house, and on 03.08.2017 at about 8:00 am when he returned back from his duty, he found door of his house opened and as soon as he entered into the house he saw his son Shahid lying dead on bed of a room while his daughter Shaheen was missing. Mohallah people gathered and police also arrived at the crime scene and after completing legal formalities at spot shifted the dead body to Civil Hospital for post-mortem. At Civil Hospital, the police recorded the statement under Section 154, Cr.P.C. of complainant, which was later on incorporated in FIR Book. The complainant has claimed that some unknown person(s) has /have committed murder of his son Shahid by way of strangulation and abducted /kidnapped his daughter Shaheen with intention to commit Zina.

3. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction, whereby the appellant was sent-up to face the trial.

4. A charge in respect of offences under Sections 302, 365-B and 34, PPC, was framed against appellant. He pleaded not guilty to the charged offence and claimed a trial.

5. At trial, the prosecution has examined as many as eight witnesses. The gist of evidence, adduced by the prosecution in support of its case, is as under:-

6. Dr. Summaiya Syed appeared as witness No.1 Ex.9, Dr. Noor Ahmed as witness No.2 Ex.10, ASI Aijaz Ali as witness No.3 Ex.11, Dr. Abdul Ghaffar Shaikh as witness No.4 Ex.12, Mst. Shaheen (alleged abductee) as witness No.5 Ex.14, Ghulam Nabi (complainant as witness No.6 Ex.15, Dad Khan as witness No.6

Ex.17, Makhdoom Faiq Hussain (Judicial Magistrate) as witness No.7 Ex.20 and SIP Raja Masood Akhtar (investigating officer) as witness No.8 Ex.21. They have exhibited certain documents in their evidence and also subjected to cross-examination by the defence. Thereafter, the prosecution closed its side vide statement Ex.22.

7. The appellant was examined under Section 342, Cr.P.C. at Ex.23. He has denied the allegations imputed upon him by the prosecution, professed his innocence and stated his false implication in this case. He opted not to make a statement on Oath under Section 340(2), Cr.P.C. and did not adduce any evidence in his defence. He, however, has taken a specific plea that alleged abductee has contracted marriage with him with her free consent and has relied on Nikahnama exhibited by him while recording his statement under Section 342, Cr.P.C.

8. Upon completion of the trial, the learned trial Court found the appellant guilty of the offences charged with and, thus, convicted and sentenced him as detailed in para-1 (supra), which necessitated the filing of the listed appeal.

9. It is contended on behalf of the appellant that he is innocent and has falsely been implicated in this case by the complainant with malafide intention and ulterior motives; that the alleged abductee was in love with the appellant and she voluntarily left her house and went with the appellant and contracted marriage with him by exercising her right of freewill; that the incident is unseen and FIR has been lodged against unknown person(s); that on 05.08.2017 the police recorded the statement under Section 161, Cr.P.C. of Zaar Khan, brother-in-law of complainant, who for the first time nominated the appellant in the commission of offence, but neither he appeared before the learned trial Court for recording his evidence nor the police produced him before a Magistrate for recording his 164, Cr.P.C. statement; that the witnesses examined by the prosecution are interested and inimical to the appellant as such they have falsely deposed against him; that they were inconsistent with each other rather contradicted on crucial points benefit whereof

must go to the appellant; that no incriminating evidence has been collected against the appellant that could substantiate his involvement in the commission of offence; that no iota of evidence has been brought on record to substantiate that the deceased was done to death by the appellant; that the investigating officer has conducted dishonest investigation and failed to dig out the truth; that no independent witness has been produced by the prosecution to corroborate the evidence of the interested witnesses, who being inimical to the appellant have falsely involved him in the commission of offence; that the FIR has been lodged after more than 06 hours and 15 minutes of the incident that alleged to have taken place from 2:00 am to 8:00 am, without furnishing any plausible explanation, hence the possibility of consultations and due deliberations cannot be ruled out; that the learned trial Court has awarded conviction on the basis of surmises and conjectures without appreciating the neutral appreciation of prosecution evidence as well as the defence taken by the appellant; that the impugned judgment is the result of misreading and non-reading of evidence and without application of a conscious judicial mind, hence the conviction and sentences awarded to the appellant, based on such findings, are not sustainable in law and liable to be set-aside and the appellant deserve to be acquitted of the charge and prayed accordingly. He, however, drawn attention of this Court to the fact that the complainant of this case has died.

10. In contra, the learned Additional Prosecutor General while controverting the submissions of learned counsel for the appellant has submitted that the FIR has been lodged promptly on the basis of 154, Cr.P.C. statement of complainant recorded in mortuary of Civil Hospital, Karachi, as such the delay, if any, is not fatal to the prosecution case; that the witnesses including complainant and alleged abductee have supported the case of the prosecution and remained consistent on each and every material point; that they were subjected to lengthy cross-examination by the defence but nothing adverse to the prosecution story has been extracted which can provide any help to the appellants; that the prosecution has brought on record sufficient material in shape of ocular evidence, duly supported by the medical and circumstantial evidence and the same

has rightly been relied upon; that the prosecution has successfully proved its case against the appellant beyond shadow of any reasonable doubt, thus, the appeal filed by the appellant deserves to be dismissed and the convictions and sentences awarded to the appellant are liable to be maintained and prayed accordingly.

11. Heard learned counsel for both the sides, given my anxious consideration to their submissions, and also scanned the record carefully with their able assistance.

12. The prosecution machinery came into motion when complainant Ghulam Nabi reported an incident of commission of murder of his son namely, Shahid and abduction of his daughter namely, Shaheen with intention to commit Zina against unknown person(s). Admittedly, the complainant is not an eye-witness of the incident. On the day of occurrence he was on his duty and when he returned to home, he found his son Shahid dead, lying on bed, while his daughter Mst. Shaheen was missing. The police reached at the scene of offence and after completing legal formalities at spot shifted the dead body to Jinnah Hospital for post-mortem, where statement under Section 154, Cr.P.C. of complainant was recorded, which was later on incorporated in FIR Book. Admittedly, the FIR has been lodged after 06 hours and 15 minutes of the incident alleged to have taken place between 2:00 to 8:00 on 03.08.2017 am and that too without furnishing any plausible explanation.

13. The appellant has been charged mainly on two counts, primarily under Section 302, PPC for committing murder of complainant's son namely, Shahid and secondly under Section 365-B, PPC for kidnapping /abducting his daughter Mst. Shaheen with intention to commit Zina. No direct evidence has been brought on record against the appellant to substantiate his involvement in the commission of both offences except the alleged abductee /victim PW.5 (Ex.14) and being a star witness of the prosecution, I deem it conducive to first reappraise the testimony of PW.5 Mst. Shaheen. This witness has deposed that on the day of incident she alongwith his brother Shahid was present in the house while her father was on his duty. It was night time, the accused knocked the door of the

house and on query informed that her father is unwell and as soon as she opened the door, the accused pushed her and entered into the house forcibly. According to this witness, her father suffers from epileptic fits and the accused used to provide medical treatment to him as well as her grandmother. She further deposed that the accused injected something on her right arm and then caught hold of her brother Shahid and committed his murder by pressing his neck, who fell down on the ground, and thereafter she became unconscious and when she regained senses she found her in a house, where one lady and a man were available, who informed her that she is in Sadiqabad (Punjab). She also deposed that during her stay there, the accused used to commit Zina (rape) with her and also recorded her objectionable video and he (accused), his father, brothers and wife got obtained her signatures on some papers extending threats that they will kill her father and upload the videos on internet and thereafter the accused brought her at Karachi and on 24.08.2017 he was arrested by police of P.S. Junejo Town, Saddar in presence of her father and a police constable and on 25.08.2017 the police recorded her statement and also produced her before a Magistrate for recording her statement under Section 164 Cr.P.C.

14. I have undertaken an exercise of looking the statement under Section 164, Cr.P.C. of Mst. Shaheen, recorded by a Magistrate, and her deposition adduced at trial from various aspects such as their legality and admissibility, based on voluntariness and truthfulness, within the parameters drawn by the Hon'ble apex Court reveals that she has made certain improvements while appearing before the learned trial Court and contradicted herself on crucial points. In her statement under Section 164, Cr.P.C. she has stated that on the day of incident the accused came to her house and knocked the door and when she opened the door he entered into the house and injected something as a result of which her hand and feet became quiet and meanwhile her brother woke up and made query from the accused as to why he has come there whereupon the accused pressed the neck of her brother, who fell down, and thereafter she lost her senses. On the other hand, in her deposition she has narrated a different story. Per her deposition, as soon as she opened the door the accused pushed her and entered into the house

forcibly, injected something on her right hand and then killed her brother holding him from his neck and thereafter she became unconscious. Surprising to note that in her deposition she claimed that her brother was done to death by strangulation, meaning thereby that the deceased died well before the time she went unconscious, but in her statement under Section 164, Cr.P.C. she has stated that as soon as the accused put injection, her brother woke up and enquired from the accused the reason of his arrival on which the accused pressed his neck, who fell down, and thereafter she became unconscious. On one hand, she has stated that her brother was done to death by accused through strangulation, but on the other hand she has stated that after the incident the accused took her to Sadiqabad and after some days brought her back to Karachi and till such time she was not aware about the death of her brother. In her examination-in-chief, she has deposed that after the incident, the accused took her to Sadiqabad and after some days brought her back to Karachi and it was 24.08.2017 when police of P.S. Junejo Town, Saddar arrested the accused in presence of her father and one police constable, however, per memo of arrest, available at page 209 of paper book, the accused is shown to be arrested on 26.08.2017. On the other hand, in her 164, Cr.P.C. she has stated that police arrested accused from Sahiwal. In her deposition, she has deposed that when she became conscious, she found herself in a house at Sadiqabad whereas in her 164, Cr.P.C. statement she has stated that she was in a bus at Sadiqabad when she regained her senses. On one hand, she in her deposition has denied the arrest of accused from Sahiwal, but on the other hand, she has stated in her 164, Cr.P.C. statement that police brought her as well as accused from Sahiwal to Karachi in a car, accompanied by a person and one policeman. In her examination-in-chief, she has deposed that on 25.08.2017 the police recorded her statement and thereafter produced her before a Magistrate for recording her statement under Section 164, Cr.P.C. but admitted in her cross-examination that she went to the Court of Magistrate from her house alongwith her father. Per the case of the prosecution itself, the police arrested the accused on 26.08.2017 and recovered the abductee from his possession on the pointation of her father, who is complainant, then how the statement of the abductee is presumed to be correct

that police recorded her statement on 25.08.2017 before her recovery and how she was allowed to go with her father at the same time of recovery as admitted by her in cross-examination. She also admitted that after about three or four days of her recovery, she went to P.S. and recorded her statement and at that time only police officials were available there and later on she was produced before the Magistrate for recording her statement under Section 164, Cr.P.C. This statement of the abductee /victim negates the case of the prosecution and also casts a serious doubt on the prosecution case with regard to arrest of accused on 26.08.2017 from Karachi and recording of statement under Section 164, Cr.P.C. of abductee /victim on 29.08.2017, before PW.8 Makhdooq Faiq Hussain (Ex.20), more particularly when she herself stated that police recorded her statement after three or four days of her recovery viz 26.08.2017 and later on she was produced before the Magistrate. These aspects of the matter have not only broken the chain of investigation, but also cast a serious doubt as to recovery of alleged abductee from the possession of appellant as well as arrest of the appellant as claimed by the prosecution.

15. A keen look of the testimony of abductee /victim Mst. Shaheen in line with her statement under Section 164, Cr.P.C. confronted to her during her evidence reveals that she has made dishonest and blatant improvements in her deposition and also contradicted her own statement under Section 164, Cr.P.C. in her deposition on crucial points. This reason alone is sufficient to cull her statement under Section 164, Cr.P.C. from consideration. Furthermore, she being a girl of young age remained with her father for three or four days after recovery and not produced before the police to get her statement recorded before a Magistrate at the earliest, therefore, the element of pressure and inducement from her father and other family members as well as concocting a false story against the appellant cannot be ruled out.

16. The another intriguing aspect of the matter is that the complainant in his deposition has stated that on 26.08.2017 he was sitting at Mansoor Hotel, situated near his house in Junejo Town, Karachi, and it was about 3:00 pm when police called him to

reach P.S. and when he reached at the gate of P.S. the police took him in a police mobile and when they reached at a Hardware shop, near Shayan Electric shop, Junejo Town, Karachi, he saw the accused going alongwith his daughter and on his pointation the police arrested the accused and recovered the abductee from the possession of accused. Surprising to note that the abductee is a girl of 16 years and if she was abducted and kept against her will and wishes why she kept mum and did not raise any hue and cry thought it was a daytime and so many people were available there. The another thing which is to be noted that she in her cross-examination has stated that *"I do not remember as to whether or not on the night of incident I kept on moving along with accused on motorcycle for whole night, but we cannot find any place to stay".* This statement, on the face of it, reflects that she was with the accused on motorcycle, otherwise she could have denied the suggestion without any hesitation. These aspects of the matter not only gives rise to a presumption that she herself left the house and voluntarily went with the accused, but also shaken her testimony, which in my humble view is neither trustworthy nor inspiring confidence.

17. Insofar as recording statement under Section 164, Cr.P.C. of abductee /victim Mst. Shaheen in the light of guidelines articulated by the Hon'ble apex Court is concerned, suffice it to say that the same has been recorded on 29.08.2017 after three days of her recovery. No doubt, in her statement before the Magistrate, she has involved the appellant in the commission of offence, but made certain improvements in her deposition before the learned trial Court and also contradicted on material points, referred herein above, which are not only vital in nature but also shattered the entire fabric of her testimony creating serious doubt on the prosecution case. Even otherwise, the inordinate delay of three days in recording statement under Section 164, Cr.P.C. without furnishing any plausible explanation, in the light of peculiar facts and circumstances of the case casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story and unsafe to rely upon.

18. The learned trial Court while convicting the appellant has also relied upon the evidence adduced by the other witnesses. It is, however, a well settled that all other evidence always considered to be a corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against accused more particularly when the ocular account in shape of direct evidence and other material put-forward by the prosecution in respect of guilt of the appellant has already been disbelieved. Reliance in this behalf may well be made to the case of *Dr. Israr-ul-Haq v. Muhammad Fayyaz and another* (2007 SCMR 1427). In the case in hand, when direct evidence has already been disbelieved, the evidence of the other prosecution witnesses, if discussed, would not advance the case of the prosecution.

19. The manner in which the abductee /victim has recorded her statement under Section 164, Cr.P.C. before a Magistrate and what has been deposed by her while appearing before the learned trial Court finds support the specific plea taken by the appellant in his defence that she was in love with him and since her father was going to marry her with one Zakir, who was already a married man having seven children from his first wife, against huge money, therefore, she herself left the house and voluntarily went with the appellant insisting him to marry with her, otherwise she would commit suicide, therefore, under compelling circumstances, he (appellant) completed all legal formalities and performed Nikah with her and since he has no place at Karachi took her to Punjab. In support of his defence, the appellant has produced affidavit of free-will, Nikahnama, newspaper clipping and Marriage Registration Certificate and exhibited the same while recording his statement under Section 342, Cr.P.C. If both the version, one put forward by the prosecution and the other one taken by the appellant in his defence, are considered in juxtaposition, the version of the appellant seems to be more plausible and convincing and near to truth while the story narrated by the prosecution appears to be doubtful in the light of peculiar facts and circumstances of the case, discussed herein above. Even otherwise, the defence plea is always to be considered in juxta position with the prosecution case and in the final analysis if the defence plea is proved or accepted,

then the prosecution case would stand discredited and if the defence is substantiated to the extent of creating doubt in the credibility of the prosecution case then in that case it would be enough but it may be mentioned here that in case the defence is not established at all, no benefit would occur to the prosecution on that account and its duty of proving its case beyond reasonable doubt would not diminish even if the defence plea is not proved or is found to be false.

20. In like cases, the evidence produced by the prosecution should be so strong or solid that it should start right from the toe of the deceased on one hand and the same should encircle a dense grip around the neck of the accused on the other hand and if the chain is not complete or any doubt which occurred in the prosecution's case that is sufficient to demolish the structure of evidence the benefit thereof must go to the accused especially when the same has been built up on the basis of feeble or shaky evidence.

21. It is well-established principle of safe administration of justice in criminal cases that finding of guilt against an accused cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case is decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of giving *"benefit of doubt"* to an accused, which has been a dominant feature of the administration of criminal justice. The prosecution is under obligation to prove its case against the accused at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and cannot be said to have discharged this obligation by producing evidence that merely meets the preponderance of probability standard applied in civil cases. If the prosecution fails to discharge its said obligation and there remains a reasonable doubt, not an imaginary or artificial doubt, as to the guilt of the accused, the benefit of that doubt is to be given to the accused as of right, not as of concession. The rule of giving benefit of doubt to

an accused is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. In common law, it is based on the maxim, *"It is better that ten guilty persons be acquitted rather than one innocent person be convicted".* As per saying of the Holy Prophet (P.B.U.H), the mistake in releasing a criminal is better than punishing an innocent person. Same principle was also followed by the Hon'ble Supreme Court of Pakistan in the case of *Ayub Masih v. The State* (PLD 2002 SC 1048), wherein at page 1056, it was observed as under:-

> *"....It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (P.B.U.H) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".*

In supra mentioned case of *Ayub Masih*, the Hon'ble Supreme Court also pleased to observe as under:-

> *"...The rule of benefit of doubt, which is described as the golden rule, is essentially as rule of prudence which cannot be ignored while dispensing justice in accordance with the law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted"..."*

22. The epitome of whole discussion gives rise to a situation that the appellant has been convicted without appreciating the evidence in its true perspective, rather the prosecution case is packed with various discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellant not as a matter of grace but as a matter of right. Accordingly, the conviction and sentences awarded to the appellant through impugned judgment dated 14.12.2020, passed by the learned Additional Sessions Judge-I (MCTC), Karachi South are set-aside and the appellant is acquitted of the charges by extending him the benefit of doubt. He shall be released forthwith if not required to be detained in connection with any other case.

23. The Criminal Appeal No.10 of 2021 stands allowed in the foregoing terms.

JUDGE

Naeem /PA