# IN THE HIGH COURT OF SINDH AT KARACHI

**Criminal Appeal No.56/2017**

Appellant : Muhammad Khan,
through Mr. Muhammad Farooq and
Ms. Farah Khan Yousuf Zai, advocates.

Respondent : The State,
through Mr. Abrar Ali Khichi, APG,
Mr. Raees Ahmed Khan advocate for complainant.

Date of hearing : 24.04.2018.
Date of announcement : 10.05.2018.

## JUDGMENT

**Salahuddin Panhwar, J**: This appeal assails judgment dated 30.01.2017 whereby appellant was convicted and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.50,000/- and in case of default thereof, to suffer S.I. for one year more; he was directed to pay compensation of Rs.500.000/- to victim girl and her daughter; benefit of section 382-B Cr.P.C was extended to appellant.

2. Concise facts, leading to this appeal, are that on 01.09.2012 complainant Nabi Bux reported that he was driver by profession; 14/15 days before his daughter Tania aged about 14/15 years got ill, his wife took her to hospital; his wife informed him on phone that doctors declared Tania to be pregnant; on their return to home his daughter Tania told him that 5/6 months ago accused

Khan Muhammad had called her to his home and committed rape upon her; Tania further told him that when she rose commotion, accused extended threats to her that he would kill her family.

3. Followed by usual investigation, charge sheet was submitted before concerned Judicial Magistrate who, having supplied case papers to accused, sent up the case to learned Sessions Judge from where it was assigned to learned Addl. Sessions Judge. Charge was framed against accused/appellant who pleaded not guilty.

4. Prosecution examined complainant PW-1 Nabi Bux Samo at exhibit-3 who produced FIR at exhibit 3-A, memo of site inspection at exhibit 3-B; PW-2 Miss Tania was examined at exhibit 4 who produced her statement recorded u/s 164 Cr.P.C. at exhibit 4-A; PW-3 Mrs. Feroza at exhibit 5 who produced inspection memo of pointed place of incident at exhibit 5-A; PW-4 Khuda Bux Samo at exhibit 6, PW-5 SIP Shabbir Ahmed at exhibit 7 who produced roznamcha entry No.44 for appearance of complainant and his daughter at PS at exhibit 7-A; PW-6 Dr. Summaiya Syed Tariq at exhibit 8 who produced police letter for examination of victim girl at exhibit 8-A, provisional MLO of the victim at exhibit 8-B, final MLO of victim at exhibit 8-C, her age certificate at exhibit 8-D, MLR for DNA sampling at exhibit 8-E and DNA report No.01A0330 dated 19.04.2013 at exhibit 8-F; PW-7 Mr. Mumtaz Ali Solangi, former Magistrate at exhibit 9, PW-8 Dr. Jagdesh Kumar at exhibit 10 who produced police letter for DNA sampling at exhibit 10-A and MLR for DNA sampling at exhibit 10-B; PW-9 SIP Khalid Hussain Awan at exhibit 11 who produced memo of receiving of sealed DNA sample at

exhibit 11-A and photograph of Baby Khushi daughter of victim girl Miss Tania at exhibit 11-B; prosecution closed their side.

5. The statement of accused was recorded at exhibit 13 wherein he pleaded not guilty while stating that alleged victim had never served as maid in his house and DNA report had exonerated him of the charge; that due to matrimonial dispute over house with complainant (who is his cousin) latter had managed false case against him through his daughter; that he, being professional driver, remained away from his home for two weeks in a month and could not commit alleged heinous offence in presence of his family at home; accused was afforded with opportunity to examine himself on oath and also to examine any witness in his defense but he did not avail that opportunity.

6. I have heard learned counsel for appellant and that for complainant as well learned APG.

7. Learned counsel for appellant has mainly emphasized on four grounds, that is; that appellant is innocent and booked in alleged offence due to matrimonial enmity with complainant; that no explanation has been given for 5/6 moths delay in lodging the FIR; per DNA report appellant has been excluded from being biological father of baby Khushi; that the contents of FIR, challan and the statements recorded do not support DNA report; and that he is not involved in any other offence. Learned counsel relied upon 2017 SCMR 203, 2013 PCrLJ 1014, 2015 MLD 850 and 2016 SCMR 274.

8. In contra, learned counsel for complainant has argued that complainant and appellant/accused are cousins *inter-se* and wife of appellant being bed-ridden, victim girl Tania served in the house of accused to help his wife, that after the incident accused admitted his guilt in private *faisla* between the parties and was directed to marry the victim but afterwards he went back from that settlement and for this reason FIR was delayed; that accused failed to examine his wife in his defense and sampling for DNA was improperly done therefore DNA report cannot be relied upon; he placed reliance on 2017 PCrLJ 848 and 2017 YLR 1270.

9. Learned APG relied upon submissions made by counsel for complainant.

10. The summary of the above detail would show that the prosecution *mainly* possessed the following pieces of evidence because rest of the *evidences* are nothing short of *hear-say* or mashirnama (s) etc only:-

i) evidence of the *victim;*

ii) medical evidence;

I would not seek an exception to legally established position that a *conviction* could well be recorded on sole evidence of the *victim* in such like case (s) because *normally* the *guilty mind* would never prefer a place visible to naked eye or where the people could come on a *little* commotion particularly when the *victim*, after such offence, is intended to move *freely.* However, I would be completely safe in saying that before recording conviction on *sole* evidence of victim, the

Court must satisfy itself that such evidence, *beyond any doubt,* passes the test of being *natural* and *confidence* inspiring one. Any deviation to this, shall result in bringing the base of **Criminal Administration of Justice** in serious *jeopardy* which never relieves a Judge from following well settled principles of law i.e:-

> i) mere seriousness of an offence would never be a ground to detract the Court of law from due course to judge and make the appraisal of evidence, as required by law;
>
> ii) no conviction could be recorded except on direct, natural and confidence inspiring evidence;
>
> iii) acceptability of evidence is never dependant upon person or personality;
>
> iv) the benefit of doubt shall always be extended to accused;

To examine whether the evidence of the *victim* passes above said test, it would be appropriate to refer the relevant portion of *examination-in-chief* directly which reads as follows:

> "I do not remember the date of commission of offence, however the incident has been taken place about more than a year back. I am residing at Gizri. I used to work in the house of accused Muhammad Khan whose house is situated adjacent to our house. **It was Sunday when I went to the house of accused Muhammad Khan at 8.30** who called me that his wife is needed me. Accused directed me to get clean up the adjacent room which was vacant **and in another room his wife was sleeping** by directing me unless the wife woke up clean the room pointed out by him, I went inside the room to make it clear, the accused came behind from me locked the same room and **on my raising cries he put his hand over my mouth**. He showed me **knife and pistol** as well by directing not to disclose any body and in case I disclose he will cause murder of me and my inmates. The accused on show of knife and pistol got me sleep on the bed and committed rape with me by force. However, afterwards as and when he met me inside and outside the house he inquired from me time and again that I must not disclose to anybody. I did not disclose the fact of commission of offence to anybody, however, suddenly I felt my position worst having pain in my stomach and belly besides vomiting. I disclosed the fact to my father who directed my mother to get me check through the doctor at

> hospital. After examination the Doctor disclosed to my mother that I am pregnant…

The above suggests that for committing a *forcible* rape/zina, the appellant chooses a room of his house while in very next room his wife and children were *allegedly* sleeping. Such *story* is always hard to believe that appellant / convict would dare to commit the offence of *forcible* rape / zina in presence of his own *wife* and *children* in very next room when there was always a possibility of his wife and *children* come to such place and *victim* was sure to offer resistance unless she is brought under fear of the alleged weapon (s). Thus, such story was never safe to be taken as *natural* & *confidence inspiring* and was never strong enough to hold the conviction. In a case of *Mst. Shamim & 2 others v. State & another* 2003 SCMR 1466, finding the prosecution story improbable, it was held that no conviction could sustain on such like story.

Further, the victim was also confronted with such question which she responded as:

> "It is incorrect to suggest that no such like offence as alleged by me can take place in presence of wife and his four children in a flat of three rooms by the accused. I may clarify that on the day of occurrence the **wife of accused and his four children** were sleeping in a room and **accused committed the offence with me in another room**."

The explanation offered by the victim does not change the position that such attitude and behaviour is not expected from a *prudent mind.*

*11.* I am conscious of the legal position that presumption of truth is *normally* attached to words of victims and their parents as

*normally* no body would own such allegation but this presumption alone would never be sufficient for conviction unless the evidence of such set of witnesses passes the required test, as discussed above, for judging the evidence *judicially.* While continuing, it further appears that the manner in which the victim remained silent and never uttered a single word unless, after detection of her *pregnancy,* she was subjected to maltreatment for name of *culprit* also appears to be abnormal. The mother of the victim i.e PW Mst. Feroza stated in her examination-in-chief as:-

> "The doctor after checking my daughter disclosed that Tania is a pregnant. I rang a phone to the father of Tania and informed him for the pregnancy of Tania. I and my husband maltreated Tania to disclose the name of person who has committed such crime of causing her pregnant. She disclosed the name of accused Mohammad Khan."

The evidence of the *victim* was never of such a character to hold the conviction in absence of the strong corroboration from medical evidence. Though the victim of was medically examined but since, it has been a matter of record that alleged incident was reported after considerable period when it had become improbable to make any *definite* opinion about commission of zina / rape, so admitted by Dr. Summaiya Syed Tariq, Ex-WMLO, Civil Hospital, Karachi in her evidence as:-

> "On the basis of clinical examination I opined my opinion that she was found "Not virgo intacta". **Nothing could be suggested or contracted for the same act of rape because of lapse of time**."

In such eventuality, the answer towards identity of the culprit was dependant upon **DNA** only which could have linked the appellant /

accused with commission of the offence when *admittedly* the victim became pregnant in result of alleged rape / zina by the appellant / accused. The importance of the DNA in such like cases can never be denied. At this juncture, I would refer the relevant portion of the case of *Salman Akram Raja v. Govt. of Punjab* (2013 SCMR 203) wherein importance of **DNA** in such like cases was discussed:

> At relevant page-210
>
> "…. In the case of *Muhammad Azhar v. The State* (PLD 2005 Lahore 589) the Court has accepted the admissibility of DNA test results in the following words:-
>
> > "18. The DNA test may be an important piece of evidence for a husband to establish an allegation of Zina against his wife and use this as a support justifying the taking of the oath as ordained by Surah Al-Noor, which leads to the consequences of breaking the marriage. **The DNA test may further help in establishing the legitimacy of a child for several other purposes**. Therefore, its utility and evidentiary value is acceptable but not in a case falling under the penal provisions of Zina punishable under the Hudood Laws having its own standard of proof."
> >
> > In *Muhammad Shahid Sahil's case* (supra) the Federal Shariat Court has laid great emphasis **on the administration of DNA test in rape cases**. The Court has also overruled the finding of the High Curt in *Muhammad Azhar's case* to the effect **that DNA test has no evidentiary value in a case falling under the penal provisions of Zina punishable** under the *Hudood Laws* having its own standard of proof. Relevant Paras from the said case are reproduced hereinbelow….."

In the said case it was finally concluded as:-

> "16. In view of the above proposals, the petitioner as prayed that following points may be approved and the concerned public authorities be directed to enforce them through the course of investigation and prosecution of all rape matters in Pakistan:--
>
> a) Every police station that receives rape complaints should involve reputable civil society .....
>
> b) **Administration of DNA tests and preservation of DNA evidence should be made mandatory in rape case**.
>
> c) ..
>
> d) ..
>
> e) ...

In view of the binding effects of above directive (s), the **DNA** is to be taken in such like case (s). In the instant case, the DNA was also taken and report thereof excluded the appellant from being **biological father** of the baby, claimed to be in consequence of alleged rape / zina by the appellant / accused. It was admitted by WMO as:

> "I see DNA report and its opinion discloses that Muhammad Khan has been **excluded from the biological father of baby Khushi**. I may add that whatever the documents speaks I have brought on record its contents and cannot say for its truthfulness."

Though it was a claim of complainant party that **DNA** was *improperly* conducted but since it is also a matter of record that no such challenge was made at trial nor any effort was made by prosecution to get the **DNA** done again therefore, such *plea* alone would not be sufficient to with-hold the benefit which the appellant / accused earned through such document, exhibited by the prosecution itself. A court could never escape the well settled principle of law that a *slightest* but *reasonable* benefit of doubt is always sufficient to grant

acquittal to an accused which otherwise is indefeasible and inalienable right of an accused. This old and deep rooted principle of Criminal Administration of Justice has again been reaffirmed in the case of *Azeem Khan* (2016 SCMR 274).

12. Though, the above discussion is sufficient for acquittal of appellant / accused by extending benefit of doubt however, I would also add that accused had taken plea of dispute over property which *however* was denied by complainant party but it was admitted by the mother of the victim Mst. Feroza in her evidence as "***The accused also disposed [dispossessed] us from the house by force***." Such admission suggests disputes between parties over property thereby shouldering the defence plea of the appellant / convict.

13. In view of what has been discussed above, I am of the clear view that the prosecution never established the charge against the appellant / accused beyond reasonable doubt hence the conviction, so recorded by the learned trial court, cannot be maintained. Accordingly, the appeal is accepted; judgment is set-aside and appellant is acquitted by extending him benefit of doubts. He is directed to be released forthwith if not required in any other custody case.

IK **J U D G E**