IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.163/2017

Appellant : Ameer Afzal,
through Mr. Nazeer Ahmed Shar, advocate.

Respondent : The State,
through Mr. Abrar Ali Khichi, APG.

Date of hearing : 02.10.2018.

Date of order : 02.10.2018.

JUDGMENT

Salahuddin Panhwar, J: Appellant has impugned judgment dated 20.03.2017 passed by trial Court in S.C. No.939/2011 arising out of crime No.299/2011, u/s 365-B, 376, 344 PPC, PS Steel Town, whereby appellant was convicted and sentenced to suffer R.I. for 20 years for committing offence under section 365-B PPC and to suffer R.I. for 20 years for offence under section 376 PPC and to pay fine of Rs.50,000/- to victim, in case of default thereof to suffer S.I. for six months more; benefit of section 382-B CrPC was extended to him. Both sentenced were ordered to run concurrently.

2. Briefly, facts of the prosecution's case are that on 21.10.2011 at about 0015 hours, complainant Mohammed Aslam has lodged report at police station Steel Town, stating therein that he is residing alongwith his family members and working at Steel Mills, his daughter namely Sana aged about 17 years was taking tuition from Ameer Afzal son of Abdul Rehman. On 12.10.2011 at about

08:45 am, she had gone to tuition and did not return back to house and complainant went to rented house of accused bearing No.A-220, Phase-II, Gulshan-e-Hadeed, but same was locked. Thereafter, he searched his daughter from his relatives but failed to found her and he became sure that his daughter has been abducted by tuition teacher Ameer Afzal son of Abdul Rehman for committing zina hence lodged FIR.

3. During investigation, place of incident was visited by I.O. victim was recovered from possession of accused who was arrested, victim and accused were examined by medical officer at JPMC Karachi, statements u/s 161 Cr.P.C of prosecution witnesses was recorded followed by statement under section 164 Cr.P.C. of victim before concerned Judicial Magistrate and after completion of investigation challan was submitted. The charge was framed against the accused at exhibit 2 to which he pleaded not guilty and claimed trail vide his plea at exhibit 2/A. Prosecution examined PW-1 Complainant Mohammed Aslam at exhibit 3 who produced application to SHO, PS Steel Town for FIR, copy of FIR, memo of site inspection, memo of arrest and recovery of abductee as exhibits 3/A to 3/D respectively; PW-2/victim Sana Alam at exhibit 4 who produced medical examination report at exhibit 4/ A; PW-3 Waqas Aslam at exhibit 5; PW-4 ASI Shazia Jehan at exhibit 7 who produced FIR, medical certificate, chemical report and police letter at exhibits 7/A to 7/ D respectively; PW-5 ASI Hakum Ali exhibit 8; PW-6 Judicial Magistrate Mr. Abdul Qayyum Syed exhibit 9 who produced police letter, 161 Cr.P.C statement of victim, application, 164 Cr.P.C

statement at exhibits 9/A to 9/D respectively; PW-9 Dr. Mohammed Tarique, Sr. MLO at exhibit 11 who produced police letter to MLO and MLO report at exhibit 11/A and 11/B respectively; PW-10 I/O Inspector Nazar Mohammed Mangrio at exhibit 12 who produced departure and arrival entries, police letter to chemical examiner, chemical examiner's report at exhibits 12/A to 12/J respectively; PW-11 Dr. Ruhina Hassan, Additional Police Surgeon at exhibit 13 who produced letter to MLO and medical legal certificate at exhibits 13/A and 13/B. appellant/accused in his statement recorded under section 342 Cr.P.C at exhibit 15 denied the prosecution's allegations. He claims that he was arrested on 23.10.2011 at 7:00 pm, from outside of his house when he returned back from Punjab and says that he is innocent and not committed the alleged offence. However he examined himself on oath under section 340(2) Cr.P.C at exhibit 16 and also examined the witness Shahadat Ali at exhibit 17 on the point of alibi.

4. I have heard learned counsel for the appellant and A.P.G. and perused the record.

5. Learned counsel for appellant contended that area from which the girl was allegedly shifted is a thickly populated area with houses therefore her removal from the house of accused where she allegedly went for tuition in bright day time is not possible; that victim was having terms with one boy Shafique, in such circumstances, she was obviously a person of dubious character, therefore her statement is not sufficient to prove the allegation of abduction and commission of illicit intercourse or rape with her; that

accused in his statement under section 342 Cr.P.C took a specific plea of alibi while stating that his wife Erum was residing with him at the premises, who had become ill and on 11.10.2011 he had taken her to District Attock, Punjab for her treatment and after leaving her wife there on 23.10.2011 he returned back to his house at Gulshan-e-Hadeed, Karachi from where he was arrested; there is unexplained delay in lodging the FIR which was lodged on the basis of suspicion, neither anyone saw alleged victim with appellant nor any eye witness was produced and as such under the standard of evidence as required in the cases of zina, four respectable tazqea-ul-shahood witnesses are required who have seen the penetration with their own eyes but prosecution has miserably failed to produce a single eye witness; that distance from house of appellant to the place from where victim was allegedly recovered is 20 KM but there is nothing on record that victim raised any resistance throughout; medical evidence does not suggest any mark of violence or injury or any fresh act of zina; per section 375 PPC if prosecution fails to prove any use of criminal force, then no offence is made out which means that offence was with permission of so-called victim; there is no DNA or chemical or semen matching test; in fact alleged victim herself left her house and gone with her boyfriend Safeer and after some days returned to her house; alleged arrested and recovery of victim from possession of appellant is managed; that no weapon or rope was recovered at the time of alleged arrest; there are material contradictions in prosecution evidence regarding time, date and place of incident; learned trial court has failed to appreciate the facts, evidence and record available.

6. Learned APG contended that accused is nominated in FIR with the allegation that accused who was tuition teacher of victim Sana aged about 17 years abducted her on 12.10.2011 from house of accused for the purpose of commit illicit intercourse by force on the point of pistol; she was abducted from house No.220 where accused was residing with his wife but on the day of incident his wife was not present and by taking the benefit of absence of his wife, he abducted the victim and shifted her to house No.R-25, Green Park City, in a car and on spy information on 23.10.2011, I/O on the identification of complainant, arrested the accused from that house and also recovered the victim from the room and secured cloths of accused and victim and sent them for chemical examination which report is in positive; that in her 164 Cr.P.C statement victim has implicated the accused, she was kept abducted for 12 days; that according to evidence of Dr. Mohammed Tarique and report produced at exhibit 11/B accused was found capable to perform sexual intercourse in a routine and there is evidence against accused adduced by Dr. Ruhina Hassan who examined the victim and there is also chemical examiner's report produced by the I/O at exhibit 12/J in positive in respect of articles No.1, 3, 4 & 6, further there is sufficient evidence against the accused for committing the offence under section 365-B and 376 PPC, hence conviction awarded to the appellant is in accordance with law.

7. To the points framed, trial court answered as under:-

Point No.1	Whether on 12.10.2011 at 0815 hours at house bearing No.A-220 at Gulshan-e-Hadeed, accused Ameer	Proved.

	Afzal son of Abdul Rehman have abducted Mst. Sana daughter of complainant Mohammed Aslam to commit illicit intercourse and committed rape with her by force at House No.R25, Green Park City, as alleged by the prosecution?	
Point No.2	What offence, if any, the accused has committed?	Accused is convicted u/s 265H(ii) Cr.P.C.

8. *Prima facie,* perusal of the case would show that per prosecution case appellant / convict along with his wife was giving tuition to different children at alleged place of incident i.e (rented house), including three children of the complainant but on alleged date of incident i.e **'12.10.2011'** victim Sana, aged 17 years, went for tuition but did not return; on search the place of incident was found locked so complainant made a *written* application to SHO PS Steel Town Maleer on **'19.10.2011'** and later lodged the FIR on **'21.10.2011'**. What from evidences of prosecution witnesses was deducible that:

> "appellant / convict along with his wife was giving tuition to different children not only in morning but in evening time too;
>
> 'such tuition was not limited to children of complainant only;"

The relevant portion (s) of admissions made by prosecution witnesses are reproduced hereunder:-

> Complainant:- "*It is correct to suggest that I have mentioned in my application that my three children were taking tuition from accused Ameer Afzal. It is correct to suggest that* I have mentioned in my FIR that my daughter Sana was taking tuition from accused Ameer Afzal. Vol. says my two children were going to the house of accused for tuition in the evening

> while Sana was going for tuition in the morning. It is correct to suggest that I have not mentioned in the FIR about the timings of tuition.
>
> PW-Waqas Aslam: *"It is correct to suggest that my brother and sisters was getting tuition from accused Ameer Afzal from evening time. Vol says my sister Sana was getting tuition from accused Ameer Afzal in the morning time because she was preparation of supplementary examination of class 10th. It is correct to suggest that in my above statement is not mentioned in my statement under section 161 Cr.P.C.*

but surprisingly no other *student* came for tuition except the victim *Sana* though it was never claim of the prosecution that she *(victim Sana)* went for tuition before timing. It was never claimed by the complainant or even by PW Waqas that they inquired from neighbourers or other students about coming of victim at house of accused or otherwise; they even did not claim to make any quarry from neighbourers or owner of such place when they allegedly found the house locked. Such attitude of the complainant party was not in conformity with the one which a normal person would react. Reference in this regard is made to the case of *Javed Iqbal & another v. State* (2018 SCM 1380) wherein while finding *abnormal* behaviour of complainant the prosecution story was not found worth holding a conviction.

Further, the complainant himself had admitted about taking tuition by his three children therefore, he tried to justify *lonely* going of his daughter victim Sana on fateful day by saying that his other children were taking tuition in evening time.

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Even such attempt was never worth believing unless the prosecution justifies reasonable explanation for absence of other students on fateful day but this was never attempted. This aspect, being entirely illogical, was always to be taken as a *cloud* over prosecution story but same even was never investigated though certain factual position (s) were categorically admitted by complainant and PW-Waqas Aslam as:-

> Complainant: *"It is correct to suggest that the around the place of incident many houses was situated"*
>
> PW-Waqas Aslam: "It is correct to suggest that the Mohalla people was never disclosed me that they had saw Sana along with accused Ameer Afzal.'
>
> "It is correct to suggest that house of accused is situated at populated area".

Therefore, manner in which the victim claimed to have been abducted was always requiring to be examined by investigating officer, being his indispensable duty as was reaffirmed in the case of *Sughran Bibi* PLD 2018 SC 595 as:

"27. As a result of the discussion made above we declare the legal position as follows:

(i) ..;

(ii) ...If the information received by the local police about commission of a cognizable offence also contains a version as to how the relevant offence was committed, by whom it was committed and in which background it was committed then that version of the incident is only the version of the informant and nothing more **and such version is not to be unreservedly accepted by the investigating officer as the truth or the whole truth;**

(iii) ..

(iv) During the investigation conducted after the registration of an FIR the investigating officer may record any number of versions of the same incident brought to his notice by different persons which versions are to be recorded by him under section 161 Cr.PC in the same case. **No separate FIR is to be recorded for any new version of the same incident brought to the notice of the investigating officer during the investigation of the case;**

(v) During the investigation the investigating officer is obliged **to investigate the matter from all possible angles while keeping in view all the versions of the incident brought to his notice and, as required by Rule 25.2(3) of the** Police Rules 1934 "It is the duty of an investigating officer to .....He shall not commit himself prematurely to any view of the facts for or against any person."

(vi) ...

(vii) Upon conclusion of the investigation the report to be submitted under section 173 Cr.PC is to be based upon the actual facts discovered during the investigation irrespective of the version of the incident , advanced by the first informant or **any other version brought to the notice of the investigating officer by any other person**.

Here reference to certain admissions, made by the investigating officer shall make it clear that investigating was never done properly which are:-

PW Nazar Muhammad I.O:

"It is fact that adjoining to house of accused A-220 Gulshan-e-Hadeed Phase-II there were other houses. It is fact that I have not recorded the statements of adjoining house owners nor they were asked to act as mashirs of incident... It is fact that accused was residing in the above house as tenant alongwith is wife. It is fact that I also not recorded the statement of owner of the house. Vol says he was not available at that time. It is fact that in the mashirnama of place of incident nowhere it is mentioned that owner of the house was not available."

"It is fact that accused was not owner of the house R-25 Green Park City. It is incorrect to suggest that he was not tenant of the said house. It is fact that I have also not recorded the statement of owner of said house. Vol says that he was not available. It is fact that I have also not collected the rent agreement. It is fact that I also not examined any mohalla people of adjoining house owner of Green Park City."

From above, it is quite clear and obvious that investigating into the case was never done properly and number of material aspects which could have made the *picture* clear were never attempted therefore, benefit thereof was always to be extended particularly when manner in which the appellant / convict was arrested alongwith victim from a rented house was not established *safely* by examining / producing independent persons when admittedly :

i) such place of recovery was situated in populated area;

ii) it was surrounded by number of houses;

iii) though it was allegedly on rent with appellant but no such thing was produced

which otherwise necessary to establish such availability at such place;

iv) not a single person from such populated place was taken so as to make compliance of section 103 Cr.P.C;

9. Be that as it may, since I am quite conscious of legal position that in such like case (s), the conviction can safely be recorded *solely* on basis of the statement of ***'victim'*** but if same is found by the Court to be **'confidence inspiring',** as held in the case of *Ibrar Hussain v. State* (2007 SCMR 605) that:

> *"8. .... It is a settled law that in rape / Hudood cases conviction can be recorded on the sole testimony of the victim subject to the condition that the statement of victim must inspire confidence..."*

therefore, I would proceed to examine the evidence of the victim , if same provides explanation (s) / answers to said **inferences.** The examination-in-chief of victim is reproduced hereunder:-

> "On **12.10.2011** I was going for tuition at about 1.45 pm at the house of Ameer Afzal. I used to take tuition of Physic. **On that day, accused Ameer Afzal was alone and his wife was not present**. I was sitting in his house, accused Ameer Afzal came to me and asked me to do as per his direction. **He threatened me badly I was very much afraid at that time.** A**fter some time a car came outside the house he had taken me in the car**. He was also with me in the car. Thereafter he was taken me in a house and confined me in a room and threatened me and also committed Zina with me forcibly. **Whenever accused went outside the house, he locked the room.** I remained in custody of the accu**sed for 12 days and during these days he tied my hand with ropes and he daily committed zina with me.** After **12 days police raided at the house at about 12.30 p.m. my father was also with police and recovered me**. Lady police was also present at the time of raid. Police had taking me to the P.S. and recorded my statement. **On the next day, police had taken me to the hospital for conducting my medical examination. On 24.10.2011**, my medical

> examination was conducted by the doctor. I produced the same at Exh. 4/A and say it is same correct and bears my signature. Thereafter I was shifted to Woman P.S. On 25.10.2011 my statement was recorded in the Court. After recording my statement I came back to my house with my father. Accused Ameer Afzal present in court is same."

From above, it appears that the victim, 17 years old girl, was made by the appellant / convict to accompany him outside the house; sit in the car; travel with him to another place; entering therein and staying therein for about 12 days without making any hue and cry during such whole process / period. This cannot be believed particularly when following admissions came on record during cross examination of witnesses i.e:-

> Nazar Muhammad I.O:
>
> "It is fact that there is no eyewitness of the place of incident who saw the accused while taking the abductee in a car to Green Park City. ... It is fact that place of recovery is about 15 Km away from Gulshan-e-Hadeed / place of abduction. It is fact that the said distant is a ***busy road."***

Needless to add that earlier references of evidences of prosecution witnesses have also made it clear that both place of alleged abduction and recovery were / are surrounded by houses, therefore, the manner the alleged victim accompanied the appellant / convict without making any complaint was / is always against human conduct.

10. Be that as it may, the victim in her evidence tried to justify by improving her statement while claiming that appellant / convict had pistol with him and even claimed that at time of recovery

the appellant / convict had pistol with him. The relevant portion reads as:-

> "**I did not made hue and cry due to fear as accused put his pistol on my neck. When I reached at that house accused open the lock at that time no body was present in the house.** On the **day of my recovery the pistol was with the accused"**

but it is a matter of record that at time of arrest of the appellant / convict no such thing was recovered from possession of the appellant. This was categorically admitted by the I.O in his cross examination as:-

> "It is fact that no weapon was recovered from the accused. It is fact that rope was also not secured".

Such position also makes the justification, so pleaded by the victim, quite unbelievable least doubtful.

11. Further, the evidence of the victim would show that even per her claim it was the appellant / convict *alone* who not only abducted her; kept her under confinement at such rented place without coming into notice of any body, but also remained performing other duties i.e going out of such place of confinement while leaving the victim alone. These were *prima facie* improvements on part of the victim which were always sufficient to hold such a witness (victim) not **honest** hence conviction on such evidence legally cannot sustain. Reference may be made to case of *Sardar Bibi and another v. Munir Ahmed and others* (2017 SCMR 344) wherein it is observed as:

> "2. ..... So the improvements and omissions were made by the witnesses in order to bring the case of

> prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made them **unreliable and they are not trustworthy witnesses.** It is held in the case of *Amir Zaman v. Mahboob and others (1985 SCMR 685)* that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in *Akhtar Ali's case (2008 SCMR 6) it was held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, cast serious doubt on the veracity of such witness."*

Even otherwise, it is a matter of record that there was found no such thing such as **'rope'** etc with which the victim was kept tied during such period; nor the victim, at time of her recovery, was found to be tied nor her mouth was found closed. Absence of any such article was also sufficient to indicate that the victim, if believed to be confined there, then such was not **confinement.** Further, even as per medical evidence there were found no mark of violence on her body which negates allegations of **forcible zina.** Further, the statement of the victim would show that the appellant / convict was an ***aged*** person, having age of **57 years** yet he not only succeeded in making abduction of the victim (17 years old girl) but took the victim near place of abduction i.e another place situated at 15 km away which too by taking it on rent which *normally* is not possible without disclosing identity. This also shows that appellant / convict himself had left possibility of his being arrested on resistance or on little effort by police. Such attitude, being not in conformity with normal human behaviour, is not expected from an educated person. All the above circumstances as well possibility of other view, being possibly true, were always sufficient to bring the gold rule of **'benefit of**

doubt' into play because it is by now well established that if two views are possible in a given situation then the one favourable to the accused is to be taken. Reference may be made to the case of *Ibrar Hussain & others v. State & another* (2007 SCMR 605) wherein it is observed as:-

> "9. It is a settled law that in a criminal case when two explanations are equally possible in a given situation the one in favour of the accused should normally be accepted meaning thereby benefit of doubt is always given to the accused but in the present case as mentioned above benefit of doubt was given to the prosecution.."

In the case of *Muhammad Akram v. State* (2012 SCMR 440), the above principle was further detailed while holding that if there is *possibility* of defence, put forth by accused, being **might** be true even then benefit thereof has to be given to the accused. The operative part thereof reads as:-

> "It is cardinal principle of law that in such like cases of two versions, one is to be believed in toto and not in piecemeal. This proposition of law is well settled by now as reflected in the case of Safdar Ali v Crown (PLD 1953 FC 93) wherein it has been held that in a criminal case it is duty of the court to review the entire evidence that has been produced by the prosecution and the defence. If, after examination of whole evidence the, court is of the opinion that there is reasonable possibility that the defence put forth by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt not as a matter of grace but as of right because the prosecution has not provided is case beyond reasonable doubt. The aforesaid principle has been further elaborated in the case of 'Nadeem-ul- Haq Khan & others v The State (1985 SCMR 510).'"

The learned trial court judge not only ignored above principles but also never discussed the *prima facie* lacunas in prosecution case

rather seems to have given much weight to presumptions / conjectures though legally no conviction could be recorded unless direct and confidence inspiring evidence is available against the accused. Thus, I am sure that legally conviction, so awarded by the learned trial court judge, cannot sustain as same shall be against settled principle of criminal administration of justice that **'prosecution shall establish its case beyond any reasonable doubts'.**

12. These are the reasons for short order dated 02.10.2018 whereby appeal was allowed. Appellant shall be released forthwith if not required in any other custody case.

IK **J U D G E**