

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

Criminal Appeal No.D-68 of 2018

Present:

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Muhammad Saleem Jessar

Date of hearing : 18.10.2022

Date of Judgment : 18.10.2022

Appellant Haresh
Kumar

S/o Naroo Meghwar : through Mr. Mian Taj Muhammad
Keerio, Advocate.

The State : through Mr. Abdul Waheed
Bijarani, Assistant P.G, Sindh.

J U D G M E N T

Muhammad Saleem Jessar, J.- Through instant criminal appeal, appellant has assailed judgment dated **29.06.2018** passed by learned Judge, Anti-Terrorism Court, Mirpurkhas Division @ Mirpurkhas in Special Case No.15/2017, (re: State v. Haresh Kumar), arising out of FIR No.155/2017 registered at P.S Town Mirpurkhas, under Sections 376, 114, 34 PPC r/w Sections 6/7 of Anti-Terrorism Act, 1997, whereby he was convicted and sentenced to suffer rigorous imprisonment for life with fine of Rs.50,000/-. In case of non-payment of fine, he was further directed to undergo rigorous imprisonment for six months more; however, benefit of Section 382-B Cr.P.C was extended to him.

2. The facts of the case are that complainant Mehboob Ali had lodged instant FIR on 13.10.2017 at 1900 hours, alleging therein that he alongwith his wife Mst. Hameeda and daughter Mst. Gulshan alias Gulnaz went to Civil Hospital, Mirpurkhas, for treatment of his daughter, where doctor admitted her in female

medical ward. On 12.10.2017 at about 05:00 a.m, a ward boy came and introduced himself as Haresh son of Naroo Menghwar, checked his daughter, asked that urinary bladder has been filled with water and advised to dispose of her urine and then he went away. His daughter herself went to washroom for disposal of urine. After sometime when she did not return, her mother Mst. Hameeda went towards washroom, where she saw that outside the washroom one person namely Rajesh was guarding, who on seeing her fled away when she went in the washroom. Then she saw that accused Haresh was forcibly committing rape with her daughter by removing her clothes in the washroom while she was raising cries in low voice and accused Haresh on seeing her worn clothes and ran away.

3. After usual investigation, police submitted challan against accused Haresh Kumar and Rajesh. A formal charge was framed against the accused persons as Ex.7 and pleas were recorded as Ex.8 and 9 in which they pleaded not guilty and claimed for trial.

4. In order to prove its case, prosecution examined as many as 08(eight) witnesses namely, PW-1 Mehboob Ali (complainant) as Ex-10, who produced copy of F.I.R at Ex-10/A. PW-2 Mst. Gulshan (victim) was examined as Ex-11 and P.W-3 Mst. Hameeda (eye witness) as Ex-12.

5. Thereafter, learned Defence Counsel for accused Rajesh filed an application under Section 265-K Cr.P.C for his acquittal, which was allowed and co-accused Rajesh was acquitted vide order dated 19.03.2018 while case against accused Haresh Kumar proceeded.

6. PW-4 Lady Doctor Tulsi was examined as Ex-13, who produced police letter No.1643 dated 12.10.2017 for medical examination and taking vaginal swab of victim Mst. Gulshan alias Gulnaz for chemical analysis as Ex-13/A, receipt of handing over clothes of victim Mst. Gulshan at Ex-13/B, provisional MLC of victim as Ex-13/C, police letter dated 26.10.2017 for taking blood samples of victim for DNA test as Ex-13/D, receipt of handing over blood samples of victim as Ex-13/E, report of chemical examiner

as Ex-13/F, report of Forensic & Molecular Laboratory as Ex-13/G and final MLC of victim as Ex-13/H. PW-5 Shafi Muhammad (Mashir) was examined as Ex-15, who produced mashirnama of securing sealed clothes of victim Mst. Gulshan as Ex-15/A, mashirnama of arrest of both accused as Ex-15/B, mashirnama of place of wardat as Ex-15/C and mashirnama of securing clothes of accused Haresh Kumar as Ex-15/D. PW-6 Doctor Muhammad Ayoub Rai was examined as Ex-16, who produced police letter dated 14.10.2017 for medical examination, taking semen and blood samples for chemical analysis and D.N.A test and issuance of MLC of accused Haresh Kumar and Rajesh, provisional MLC of accused Haresh Kumar as Ex-16/B, provisional MLC of accused Rajesh as Ex-16/C, final MLC of accused Haresh Kumar as Ex-16/D, final MLC of accused Rajesh as Ex-16/E. PW-7 Inspector Kanwar Singh (first I.O) was examined as Ex-17, who produced entry No.36 dated 12.10.2017 and police letter No.1643 addressed to Woman Medical Officer, Civil Hospital, Mirpurkhas dated 12.10.2017, entries No.37 & 40 dated 12.10.2017 as Ex-17/B & 17/C respectively, entries Nos.24, 28, 29 and 40 dated 13.10.2017 as Ex-17/D and letter No.CB/R/2601 dated 13.10.2017 of SSP Mirpurkhas regarding entrusting investigation of this case to Inspector Pervaiz Akhtar Ex-17/E respectively. PW-8 Inspector Pervaiz Akhtar (second I.O) was examined as Ex-18, who produced attested photostat copies of roznamcha entries No.24, 28, 29, 30 and 33 as Ex-18/A, attested copies of roznamcha entries No.4, 5, 10, 11, 12 and 13 dated 14.10.2017 as Ex-18/B, police letter dated 14.10.2017 addressed to Medical Officer, Civil Hospital, Mirpurkhas for medical checkup, taking semen and blood samples of accused Haresh Kumar and Rajesh and issuance of their medical certificates as Ex-18/C, attested photostat copies of roznamcha entries No.17 and 18 dated 14.10.2017 as Ex-18/D, attested photostat copies of roznamcha entries No.10 and 11 dated 15.10.2017 as Ex-18/E, OPD slip of victim Mst. Gulshan as Ex-18/F, police letter addressed to chemical examiner, Karachi at Ex-18/G, police letter addressed to Forensic & Molecular Biology Laboratory, Jamshoro as Ex-18/H, attested photostat copies of

roznamcha entries No.11 and 13 dated 21.10.2017 as Ex-18/I, attested photostat copy of entry No.21 dated 21.10.2017 as Ex-18/J, police letter dated 15.10.2017 addressed to Civil Surgeon for giving information about the service of accused Haresh Kumar in Civil Hospital, Mirpurkhas as Ex-18/K and its reply given by Civil Surgeon, Civil Hospital Mirpurkhas vide letter No.CHM/MPS/-8772 as Ex-18/L, letter No.2602 dated 13.10.2017 of SSP Mirpurkhas regarding constituting of joint investigation team in respect of investigation of this case as Ex-18/M, entry No.41 dated 01.11.2017 regarding sending of blood sample of victim for DNA test as Ex-18/N, attested photostat copies of roznamcha entries No.10 and 11 dated 01.11.2017 as Ex-18/O. Thereafter, prosecution closed its side vide statement as Ex-19.

7. Statement of accused was recorded under Section 342 Cr.P.C as Ex.21, in which he denied prosecution allegations and claimed to be innocent; however, he neither examined himself on oath nor produced any witness in his defense.

8. After hearing learned Counsel for the parties, learned trial Court convicted and sentenced accused Haresh Kumar in the terms as stated in the foregoing paragraph. Hence, he has filed instant appeal.

9. Learned Counsel for the appellant has argued that no concrete evidence has been adduced by the prosecution through which it could be deduced that appellant has committed the alleged rape with force nor alleged victim had raised any objection or resistance, even she did not cry to save herself from the act allegedly committed by the appellant; therefore, he further submitted that no case for *zina-bil-jabr* has been made out and lastly prayed for allowing the appeal. On a query being asked by the Court regarding any animosity or ill-will against the complainant party that on what basis he had been implicated in this case, learned Counsel for the appellant very candidly conceded that there is no enmity between the parties and submitted that this is the case which could fall within the ambit of

Section 496-B PPC. Hence, he proposed that appellant would not press instant appeal on merits if the conviction and sentence awarded to him in terms of Section 376, 114, 34 PPC may be altered and he may be convicted for the offence under Section 496-B PPC. As far as application of Sections 6 & 7 of Anti-Terrorism Act, 1997 is concerned, learned Counsel submitted that no evidence or any one of the ingredients attracting provisions of ATA has been brought on record showing that the offence allegedly committed by the appellant does attract the ingredients of terrorism; therefore, the case was wrongly tried by the Special Court; hence, the appellant may be acquitted from the charges of Sections 6 & 7 of ATA, 1997.

10. On the other hand, Mr. Abdul Waheed Bijarani, learned Assistant Prosecution General Sindh very candidly admitted that no case under Sections 6/7 of ATA, 1997 was made out; therefore, he has no objection for acquittal of appellant from the charges of Sections 6/7 of ATA, 1997. As far as proposal advanced by learned Counsel for the appellant is concerned, learned A.P.G has opposed the appeal on the ground that it is the case of *zina-bil-jabr*; therefore, appellant has rightly been convicted and sentenced for the offence mentioned in FIR. Learned A.P.G; however, could not controvert the fact that alleged victim had not resisted herself to prevent the appellant from commission of alleged offence, even none from the co-patients had been made witness of the offence. Learned A.P.G when confronted with the fact that the door of washroom was not bolted, which shows either the offence had not been committed or it was the consent act and would fall within the ambit of fornication. He was also not in a position to show us from the evidence whether the appellant was having any weapon at the time of offence and had shown such weapon or force before committing the *zina-bil-jabr* with alleged victim nor alleged victim had raised any hue and cry. Under these circumstances, learned A.P.G conceded the proposal so advanced by learned Counsel for the appellant.

11. We have heard learned Counsel for the appellant as well as learned Assistant Prosecutor General and have gone through the evidence available on the record.

12. Admittedly, the only eye-witness of the incident is the victim herself and her mother Mst. Hameeda. The alleged victim Mst. Gulshan alias Gulnaz has deposed in her evidence that while she was discharging the urine the appellant allegedly entered in the washroom and committed rape with her when her mother Mst. Hameeda (PW-3) came and while seeing her the appellant decamped from the scene. The evidence of victim as well as her mother Mst. Hameeda do not show that appellant had caused any injury or force upon the victim nor the victim as well as her mother or any other inmate of the ward / hospital raised hue and cry through which it could be deduced that due to act of the appellant, any insecurity or panic atmosphere was created or the act of *zina-bil-jabr* was committed. As far as complainant of this case, who is father of victim, is concerned, he was not an eye-witness. It is astonishing to note that at the time of passing urine the victim had not bolted the door of washroom then the question here arises as to how the appellant being outsider had entered in the hospital and thereby went to washroom at particular time in early hours of the morning. All these factors suggest that either the offence as alleged was not committed or the victim herself had called the appellant for the alleged act and latter she implicated him in this case. The plea of the appellant that the victim's family are habitual in making and filing criminal cases against others and this fact has gotten support from the evidence of the victim where she while replying to a question in cross has admitted that prior to this incident same type of allegation was leveled against one co-villager namely, Abdullah. We have also gone through the evidence and find that clothes allegedly worn by the victim at the time of the offence were not torn nor she sustained any scratch on her body; therefore, we are persuaded to believe that it was a case of fornication and no offence of *zina-bil-jabr* was committed. Therefore, we after going through the evidence and considering the

request made by learned Counsel for the appellant regarding alteration of conviction and sentence from Sections 376, 114, 34 PPC to Section 496-B PPC accept the proposal so advanced by learned Counsel for the appellant. Accordingly, the appellant is hereby convicted under Section 496-B PPC and sentenced to suffer R.I for 05 years, which term of sentence the appellant has already served out in jail. We also reduce the fine amount from Rs.50,000/- to Rs.10,000/- and in case of default in payment of fine, he shall further undergo imprisonment of two months more. As none of the ingredients of terrorism as set out in ATA, 1997 are established in this case against the appellant; therefore, he is acquitted from the charges of Sections 6 & 7 of Anti-Terrorism Act, 1997. Since the appellant is in custody right from the date of arrest; therefore, he shall be released forthwith if his custody is no longer required by the jail authorities in any other custody case. These are the reasons for our short order of even dated 18.10.2022, whereby appellant was ordered to be released after payment of fine amount, which is reproduced hereunder:-

“For reasons to be recorded later on, this appeal is dismissed. However, the conviction and sentence awarded to the appellant under Section 6 / 7 of Anti-Terrorism Act, 1997 by learned Judge, Anti-Terrorism Court, Mirpurkhas Division @ Mirpurkhas in Special Case No.15 of 2017 emanating from Crime No.155 of 2017 of P.S Town Mirpurkhas, are set aside. The conviction and sentence awarded to him in terms of Section 376, 114, 34 PPC are altered and appellant is convicted under Section 496-B PPC and sentenced to suffer R.I for 05 years, which the appellant has already undergone. The fine amount is reduced from Rs.50,000/- to Rs.10,000/-, in default whereof, he shall remain in jail for 02 months more. Accordingly, appellant is ordered to be released after payment of fine amount, if he is not required in any other custody case. The appeal is accordingly disposed of.”

JUDGE

JUDGE