

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 387 of 2018

Appellants : Muhammad Aijaz and Zafar
through Ms. Faryal Alvi, Advocate

Respondent : The State
through Mr. Talib Ali Memon, APG

Date of hearing : 12th December, 2022

JUDGMENT

Omar Sial, J.: A man by the name of Ghulam Akbar on 16.05.2015 at 1:00 a.m. went to the Shah Faisal police station and lodged F.I.R. No. 135 of 2015. He recorded that on 12.05.2015 he was sleeping at home and his 13 year old daughter, Saira, was sitting at the door of the house. He alleged that 2 boys of the neighborhood, Aijaz and Zafar, had raped Saira for 4 days, taken her ear rings, and threatened her not to tell anybody. It was only on 16.05.2015 that she disclosed to her parents what had happened. F.I.R. No. 135 of 2015 was registered under sections 376 and 34 P.P.C.

2. Aijaz was arrested on 16.05.2015 while Zafar was arrested on 18.05.2015. Both pleaded not guilty and claimed trial. At trial the prosecution examined 8 witnesses. **PW-1 Ghulam Akbar** was Saira's father and the complainant. **PW-2 Saira Bibi**, the victim. **PW-3 Dr. Summaiya Syed** assessed the age of Saira Bibi. **PW-4 Dr. Tasneem Malik** had medically examined Saira Bibi. **PW-5 S.I. Mohammad Khalid Arain** was the investigating officer of the case. **PW-6 Kaniz Fatima** was the learned magistrate who recorded Saira's statement under section 164 Cr.P.C. **PW-7 Dr. Farkhanda Qureshi** took a blood sample from Saira for analysis. **PW-8 A.S.I. Javed Iqbal** registered the F.I.R. on the verbal complaint of PW-1.

3. In their respective section 342 Cr.P.C. statements both the accused denied wrong doing. They said that they lived in the same building, (in fact according to PW-5 S.I. Mohammad Khalid Arain lived on the same floor)

and that Saira had been complaining that her father PW-1 Ghulam Akbar and an adopted son of her father, named Muzamil, had been raping her and that the landlord of the building also knew this fact. When Ghulam Akbar got to know about Saira's revelation he had demanded money from the accused failing which he would get them involved in the case. To support their defence, **DW-1 Sultan Mehmood Niazi**, was examined.

4. The learned 2nd Additional Sessions Judge, Karachi East on 05.06.2018 convicted the accused for an offence under section 376 P.P.C. and sentenced them to a life in prison as well as pay a fine of Rs. 50,000 or spend another 6 months in prison.

5. I have heard the learned counsel for the appellants who has argued that there was no evidence in this case and the conviction was based on the solitary statement of the alleged victim, a testimony that was unreliable. She also argued that the medical evidence did not reconcile with the ocular version. To the contrary, the learned APG supported the impugned judgment. None appeared on behalf of the complainant despite notice.

6. Ghulam Akbar was sleeping when Saira had disappeared (according to him kidnapped by Aijaz and Zafar at gun point). As he was sleeping he could not have known whether Saira was kidnapped, whether she went off on her own and whether Aijaz and Zafar were the 2 boys who took out a pistol and kidnapped her. His testimony, at least to this extent was meaningless. Ghulam Akbar's testimony was also sketchy and vague as to what happened between 12.05.2015 and 16.05.2015. In the F.I.R. he made it appear as if Saira had not come home for 4 days; in his testimony he seemed to have changed the stance and said that she had come back on 12.05.2015 and had complained of a stomach ache while on 16.05.2015 she was once again taken by the same boys and raped again. That was the day when Saira revealed the past occurrence to her parents. Ghulam Akbar acknowledged that he and his wife were both sleeping when Saira left and that he was not an eye witness to what allegedly happened to Saira.

However, PW-3 Dr. Summaiya Syed's testimony revealed that Saira was not 13 years old but between 16 and 17 years.

7. Saira was examined as the second prosecution witness. It is her testimony which I have closely looked at. She said that Zafar and Aijaz had snatched her ear rings from her while she was sitting outside her house on 12.05.2015 and then Zafar (with a pistol) and Aijaz (with a knife) had forcibly taken her to their home and raped her. She did not tell her parents what had transpired but did go to the mother of an accused (who she did not identify) and told her what had happened. However, the mother of the unidentified accused, told one Niazi about the episode. She very categorically stated at trial that it was true that she had first implicated her father i.e. Ghulam Akbar of raping her; however, she justified it by saying that the accused had told her to implicate him. She also told the court that she had herself gone to one Niazi and told him that her father and mother were maltreating her but that was because the accused told her to say so. Saira had also earlier recorded a section 164 Cr.P.C. statement before a learned magistrate on 21.05.2015. In that statement she had narrated more or less the same details; however the entire details she narrated were of an occurrence on 12.05.2015. She did not say anything, as her father claimed, that there was a repeat occurrence on 16.05.2015. She further stated, contrary to what she had said earlier, that when she was being beaten by the 2 accused there were a number of men present there but none of them intervened. She said that the incident occurred at 9:00 a.m. on 12.05.2015. It does not reconcile with the prosecution version, which claimed that she had gone missing between 2:00 p.m. and 4:00 p.m. on 12.05.2015. In her earlier 164 Cr.P.C. she had said that she was raped in Aijaz's house where his parents and sisters also lived.

8. PW-4 Dr. Tasneem Malik testified that she had examined Saira Bibi on 16.05.2015 and found that she was not a virgin but that the tear of her hymen was old and healed and that there were no signs of tenderness or inflammation. Saira also appeared calm and had no violence marks on her body.

9. PW-5 S.I. Mohammad Khalid Arain acknowledged at trial that Niazi, the owner of the building, had told him that he knew the true facts of the case, however Niazi did not appear before Arain to record his statement. Similarly, there was another person in the neighborhood by the name of Sagheer who had given a statement exonerating the 2 accused. Sagheer was dropped as a witness by the prosecution vide a statement filed by the learned DDPP on 26.11.2015.

10. The record of proceedings shows that apart from the testimony given by Saira, there was no other evidence produced at trial against the 2 accused. There is no cavil to the proposition that a solitary witness statement is sufficient in certain case, in particular rape cases, to form the basis of conviction. The caveat however is the court should find such a statement convincing, trust worthy and confidence inspiring. Unfortunately, I do not find Saira's testimony to be of such quality and standard. My reasons are that there is too much of a conflict in what she recorded. The day when she disappeared, how she disappeared, for how long had she disappeared were not clearly established, in a shanty part of the city congested with houses and people nobody heard her alleged cries and shrieks, her much before the case against the 2 accused alleging that her father and her adopted brother Muzamil were violating her, in spite of her claim that she was beaten and maltreated by the 2 accused, the doctor finding no marks of violence on her, in spite of her claiming that she had been raped by 2 men 4 days ago, the doctor finding the hymen tear to be old and healed, her going to the mother of the accused to tell her what happened but not going to her parents even at that stage, her telling the landlord Niazi what had happened but not telling her parents even then what had transpired, her claiming that she was being beaten in front of many people but none saved her, she claiming to be raped in a one room house where admittedly the parents and sisters of one of the accused lived, the house being next door, are all aspects which I find very difficult to believe. To the contrary, they create massive doubt in her statement. As in most cases, the investigation was not at par. None of the guidelines given

by this Court and the Supreme Court of Pakistan to handle rape cases were complied with. DNA reports were not sought. Forensics was not deployed. No female police officer was assigned the case. Niazi, the landlord, who claimed he knew the truth behind the case was not included as a witness. Sagheer, who also claimed he knew what had happened, was dropped by the prosecution as a witness.

11. In light of the above observations I am of the view that the evidence produced at trial was not of such nature that had proved beyond reasonable doubt that it was the 2 appellants who had raped Saira. The appeal is therefore allowed and the appellants are acquitted of the charge. They may be released forthwith if not required in any other custody case.

JUDGE