

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Criminal Appeal No.S-52 of 2022

Appellant : Asghar son of Ashfaque Gill through Mr. Abdul Hameed Bajwa, Advocate.

Complainant : Majid Ali through Ms. Samina Ajmari, Advocate.

Respondent : The State through Mr. Imran Ahmed Abbasi, A.P.G Sindh.

Date of hearing : 17.02.2023
Date of decision : 27.02.2023

JUDGMENT

KHADIM HUSSAIN TUNIO, J.- Appellant/accused has challenged the judgment dated 08.04.2022, passed by learned Additional Sessions Judge-II/GBV Court Mirpurkhas in Sessions Case No.249 of 2021 arising out of FIR No.17/2021, registered under sections 376 and 511, PPC at PS Women, Mirpurkhas whereby the appellant was convicted under Section 265-H(ii) Cr.P.C and sentenced to five (05) years with fine of Rs.100,000/- (Rupees One Hundred Thousand Only) and in case of default thereof he was ordered to suffer imprisonment for one more month. Appellant was extended benefit of Section 382-B, Cr.P.C.

2. Facts pertaining to the prosecution case are that the complainant's sister Nosheen was married with appellant Asghar and from the said wedlock, she had one daughter (the victim) and a younger son. After her death, the appellant contracted a second marriage. On 18.06.2021, Asghar came to drop by his 14 year old daughter at the house of the complainant where she revealed that her father had ill intentions towards her for some time. She also disclosed that on 12.06.2021, at 0100 hours she woke up to find her shirt pulled up and shalwar removed while her father was touching her lower body indecently and making attempts to commit zina with her. The complainant brought the victim/baby Muskan to the police station where she got her statement recorded and consequently, the FIR was registered.

3. After usual investigation, challan was submitted and accused was sent up to face the trial. Charge was framed to which accused did not plead guilty and claimed to be tried.

4. In order to prove its case, prosecution examined in all five (05) witnesses namely PW-1 complainant Majid Ali, PW-2 victim Muskan, PW-3 Sobia, PW-4 mashir Muhammad Siddique and PW-5 investigating officer SHO Moomal Shaheen. Thereafter, prosecution side was closed vide statement at Ex. 8.

5. Statement of appellant/accused under section 342, Cr.P.C. was recorded wherein he denied the allegations leveled against him by the prosecution while stating that the alleged victim is his daughter who used to secretly speak to someone on the phone and on the appellant's restraining, she colluded with her uncle to usurp the property owned by the appellant. However, he neither examined himself on oath under Section 340(2) Cr.P.C nor adduced any other evidence in his defence.

6. Thereafter, learned trial Court after hearing the learned counsel for respective parties, convicted and sentenced appellant as mentioned above. Appellant being aggrieved and dissatisfied with the judgment has filed the instant appeal.

7. Learned counsel for the appellant, *inter alia*, contends that impugned judgment is bad in law and facts inasmuch as the learned trial Court did not appreciate the evidence on record in line with the applicable law and surrounding circumstances and based its findings as a result of misreading and non-reading of evidence as well arrived at a wrong conclusion in convicting the appellant; that no direct or confidence inspiring evidence is available on the record against the appellant; that the learned trial Court failed to consider that there are material contradictions between the FIR and the 164 Cr.P.C statement of the victim; that there is a delay of 11 days in the lodging of FIR; that the prosecution witnesses have admitted that the FIR was lodged after deliberation and consultation; that the prosecution has failed to examine other house inhabitants that live with the victim; that the victim Muskan has gotten the false FIR lodged on the instigation of her maternal uncle; that 161 Cr.P.C statement of the appellant's mother,

grandmother of the victim who raised her after the death of her mother, was recorded who confirmed the version as stated in the defence plea by the appellant; that in the 161 Cr.P.C statement of the step-mother of the victim was recorded who also stated that during the night, she did not hear any movement of the cot while sleeping; that the appellant has served in the military in the past and is of good character which is a relevant consideration in a criminal case in terms of R. 67 of the QSO, 1984. In support of his contentions, he has cited the case law reported as *Muhammad Rafiq v. The State (2009 YLR 1279)*, *Rizwan alias Abu-Bakar v. The State (2010 PCrLJ 1296)*, *Ejaz-ul-Haq v. The State and another (2013 YLR 2563)*, *Naseer Ahmad v. The State (2016 MLD 1352)* and *Muhammad Nawaz and others v. The State and others (2016 SCMR 267)*.

8. In contrast, learned Assistant Prosecutor General Sindh assisted by the learned counsel for the complainant has contended that prosecution has fully proved the guilt of the appellant up to the hilt through overwhelming evidence which remained unshaken, as such the learned trial Court has rightly held him guilty of the offence.

9. I have heard the learned counsel for the appellant, counsel for the complainant, learned Assistant Prosecutor General and perused the record available before me.

10. The instant case involves a grave allegation against a father for attempting to deflower his own daughter. It is an understood principle of law that in such like cases, generally, the statement of a victim could very well be the sole evidence on which conviction can be awarded. However, before recording conviction solely on the evidence of a victim, the Court must satisfy itself that such evidence, beyond any doubt, passes the test of being natural and confidence inspiring. The principles of Criminal Administration of Justice are settled, in that:-

- i) mere seriousness of an offence would never be a ground to distract 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 dependent upon person or personality;
- iv) the benefit of doubt shall always be extended to

accused;

11. The most crucial test of any evidence is that it must appear to be **'confidence inspiring'** which could be none, but the one believable to a prudent mind. Suffice it to say that the incident was not witnessed by anyone and the only material available on the record is the statement of the victim herself. In her examination-in-chief recorded before the trial Court, the victim deposed that *"Accused is my real father. The incident took place on 12-06-2021 between 12.00/1.00 of night hours. Accused tried to remove my clothes and he touched me indecently at the lower part of my body. I immediately disclosed the incident to my step-mother. She guided me that I could face such incident severity, therefore, I should go to my maternal or paternal grandparents. I disclosed the incident to my grandmother (father's mother) and then to my maternal aunt (complainant's wife) who disclosed it to all."* The complainant, on the other hand, in his examination-in-chief deposed that *"Accused is my brother-in-law and victim is daughter of accused and my niece. On 12-06-2021 I was at Kot Ghulam Muhammad. I have been disclosed by my wife that accused had attempted to commit sexual harassment to the victim as communicated by victim to my wife. When victim raised hue and cry, she was harassed and threatened by the accused for not disclosing the incident to anyone."* It is a notable aspect of the case that the victim Muskan herself did not disclose anything about being harassed or threatened to stay silent. The victim Muskan, in her statement recorded before the Magistrate, disclosed that *"On 12.06.2021, my father tried to overpower himself over me (ziyadti)." PW-3 Sobia, complainant's wife, deposed in her examination-in-chief that "The incident pertains to 12-06-2021 but the victim was left by the accused at our house on 18-06-2021. On arrival, victim did not disclose anything..."* The complainant and his wife have contradicted each other on the said aspect; in that when was the information disclosed to them.

12. The defence plea raised by the appellant is that his daughter had started talking to someone secretly on her phone and such disclosure was made by the grandmother of the victim (mother of the appellant) whereafter the appellant had restrained her. Being unhappy afterwards, the victim joined hands with the complainant and his wife in order to take over the showroom and plot owned by the appellant. Police had recorded

161 Cr.P.C statement of the complainant's mother who was the victim's grandmother who had raised the victim after her mother's death. She disclosed that she was residing with the younger sons on the ground floor and Muskan was residing with her at first, but then when she prevented her from secretly speaking on the phone, she started residing in the upper portion and she also stopped going to school. 161 Cr.P.C statement of Mst. Nadia, wife of appellant Asghar, was also recorded who deposed that the victim Muskan and her brother were sleeping besides her on the cot and she had not heard any movement of the cot. 161 Cr.P.C statement of the Ashfaq Ali, brother of the complainant, was also recorded who deposed that he had not heard any cries or commotion on the night of the alleged incident and that Muskan had allegedly got the FIR lodged on the instigation of her maternal uncle. Needless to add that rape, or even an attempt at such commission, upon a girl of minor age would, *normally*, be heard in a household where the house mates live so closely with each other, especially since the appellant has a joint family with his mother, brother, children from the first wife and the second wife. Undeniably, the step-mother and grandmother of the victim were residing in the same house as the victim. The grandmother, who had raised the victim after her mother's death for 11 years, would be expected to develop a maternal instinct for the victim which is also why she had allegedly restrained the victim from secretly speaking with someone over the phone. Had such an incident taken place and had such disclosure been made to her, her maternal instinct would undoubtedly have moved her to support the victim for having raised her as her own daughter. The story as set out by the victim also appears to be improbably because this has been made out as a one off incident and no previous complaints were made in such regard. For having lived with her father for fourteen years, it appears extremely improbable that a father would so easily seek to deflower his own daughter, his own blood. As such, the statement of the victim is to be taken with a grain of salt. Prosecution has also failed to examine the house mates of the appellant and victim who would have undoubtedly noticed a change in behavior of the victim towards her father, but their 161 Cr.P.C statements seem to controvert any suggestion of an attempt to rape by the appellant. Non-examination of such natural witnesses was also negatively reflecting upon the prosecution story. Even the brother of

the victim who was besides her at night was not made a witness in the case. These aspects were required to be appreciated by the learned trial Court because an *improper* story cannot be held the basis of conviction, especially on a capital charge. In this respect, reliance is placed on the case of Mst. Shamim & 2 others v. The State & another (2003 SCMR 1466) wherein it is held as under:-

7. The prosecution story being the foundation on which edifice of the prosecution case is raised occupies a pivotal position in a criminal case. It should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability. It is neither safe to believe a prosecution story which does not meet these requirements nor a prosecution case based on an improbable prosecution story can sustain conviction.

13. It appears that the gravity of the offence, which likely never occurred, was what took the focus of the learned trial Court rather than ascertaining the actual facts of the case. The victim Muskan never disclosed whether she raised any cries at night after allegedly noticing her father trying to overpower her and touch her. She did not disclose what she was told by her grandmother while dismissing her claims against her father. A father who had spent 14 years of his life working for his children and his own daughter could not, so easily, be held liable of such a grave offence especially when the counter claim suggested that everything was done at the behest of the complainant who was using the victim to seek proprietary benefits and was manipulating her by using her father's restraining as an excuse. The defence plea appears to be a plausible one and is prevalent in the eyes of the Court. The victim's evidence is not of sterling quality and many aspects raise serious doubt as to why she has deposed against her own father, therefore the same cannot be the sole basis of conviction of the appellant.

14. It is a settled law that single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable, trustworthy and reliable evidence. Any doubt arising in prosecution's case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable shadow of doubt. However, as discussed above, in the present case the prosecution has failed to prove its case

beyond any reasonable shadow of doubt and legally the same cannot sustain when there exists reasonable doubt.

15. For what has been discussed above, the prosecution having failed to prove its case against the appellant beyond reasonable doubt, the impugned judgment is set aside and resultantly the conviction and sentence awarded to the appellant is also set aside. Consequently instant appeal is allowed. The appellant shall be released forthwith if not required in any other custody case.

JUDGE