

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.91 of 2023

Appellant : UmairQadeer s/o Qadeer Ahmed

Respondent : 1.Muhammad Nasir s/o Noor Muhammad
2. The State

For the appellant : Mr. Shahid Nawaz Khan Niazi Advocate

For the state : Mr. Siraj Ahmed Chandio,
Additional Prosecutor General.

Dates of hearing : 04.05.2023

Date of Judgment : 15.05.2023

J U D G M E N T

AMJAD ALI BOHIO. J-The appellant has preferred this appeal impugning judgment dated 18.01.2023 passed by the Court of VIIth Additional Sessions Judge/ Gender Based Violence Court Karachi (East) in Sessions Case No. 2743 of 2022 arising out of crime No. 288 of 2022 of police station Landhi, Karachi whereby, appellant has been convicted for offence under Section 377-BPPC and sentenced to suffer rigorous imprisonment for five (05) years.

2. The facts in brief are that on May 3rd, 2022, an FIR No. 288 of 2022 u/s 294 P.P.C. was lodged at Landhi Police Station by complainant Muhammad Nasir whereby, he alleged that on 02-05-2023 at 7:30 PM he had left his house for buying milk and at about 8:50 PM he received phone call from his wife who asked him to immediately return as something had happened to their minor daughter baby Aisha. As he returned, people who had gathered in the *Mohallah* (neighborhood) informed him that the appellant Umair Qadeer had committed immoral act with his daughter. Upon further inquiry the victim baby Ayesha disclosed him that when she went to the appellant's shop for buying something, she was molested inappropriately and immoral act was committed by the appellant. In the meanwhile *madadgar/15* police was informed about incident by complainant's brother namely Muhammad Tahir but the appellant managed to escape before the arrival of said Police. Complainant further disclosed the names of Adnan Ahmed and Tauqeer Khan as eyewitnesses of occurrence.

3. After necessary investigation, challan was submitted under Section 173 Cr.P.C. before concerned Judicial Magistrate for offences under sections 294, 354 and 377-B PPC, which was sent up to Sessions Judge and the case was assigned to trial court.

4. Charge was framed by the trial court under the section 377-B P.P.C, to which, the appellant pleaded not guilty and claimed for trial at Ex. 2 and Ex. 2-A respectively.

5. The prosecution in order to prove the charge examined complainant Muhammad Nasir at Ex.03, PW Adnan Ahmed as Ex.04, victim baby Ayesha as Ex.05, PW Muhammad Tauqeer Khan as Ex.06, PW SIP Raja Riaz as Ex.07 and I.O. ASI Muhammad Shamim as Ex.08. Thereafter statement of appellant was recorded under Section 342 Cr.P.C.who did not accept the prosecution case and neither examined himself on oath u/s 340 (2) Cr.P.C. nor, produced any witness in his defence.

6. After hearing the counsel for both parties and examination of evidence, trial Court has passed the impugned judgment convicting and sentencing the appellant as mentioned supra.

7. During pendency of this appeal, complainant Muhammad Nasir has submitted an affidavit in support of application under Section 426 Cr.P.C. filed by the appellant. In the said affidavit, complainant himself with the consent of his family members has expressed no objection to the acquittal or granting of bail in favor of the appellant. However, the complainant was unable to produce the victim baby Aisha, to confirm her consent in favor of the appellant. As a result, the authenticity of the complainant's affidavit was not verified. Furthermore, it has also been observed that appellant has been convicted for an offence under Section 377-B PPC, which is non-compoundable as per Schedule II of the Code of Criminal Procedure, 1898. The main appeal was therefore, heard.

8. Learned counsel for the appellant has contended that appellant has been falsely implicated because of demanding of Rs.50/- at grocery shop. He has argued that, there is no independent eyewitness of the incident, and the evidence of the victim keeping in view her tender age should have been evaluated with proper application of established principles of prudence. He has referred to contradictions in the testimonies of the prosecution witnesses regarding availability of people at the tailor shop adjacent to the appellant's shop. Furthermore, it is agitated that no witness from the helpline "15" was examined. The counsel further argues that the victim was not examined by a Medico Legal Officer (MLO), and no signs of violence were found on her face and body. Therefore he prayed for acquittal of the appellant from the charge and in support of his stance he has relied on the cases laws reported as BABAR v. THE STATE (2020 SCMR 760), STATE through Advocate-General, Sindh,

Karachi v. FARMAN HUSSAIN and others (PLD 1995 SC 1), and ZAHID v. THE STATE (2022 SCMR 50).

9. Learned Additional Prosecutor General, Sindh has supported and has defended the impugned judgment. He has argued that appellant is involved in a heinous offence and the evidence brought on record is sufficient to prove the charge against him. He has further maintained that trial Court after examination of evidence has concluded that the prosecution has proved its case for offence punishable under section 377-B PPC. However, he has pointed out that after the amendment made in section 377-B PPC the punishment for the offence under section 377-B PPC shall not be less than Fourteen (14) years, whereas, the trial Court has wrongly awarded the sentence for five years without assigning any reason, therefore, the case be remanded to the trial Court to rewrite the judgment after hearing the parties.

10. After considering the arguments, it is observed that the appellant has been charged with serious allegation that he sexually harassed a minor girl aged about 8 years old. The trial Court after conclusion of the trial has reached to the conclusion that the appellant has committed the offence u/s 377-B PPC but while convicting the appellant for such charge, trial court fell in error while awarding the sentence of five years rigorous imprisonment only perhaps without considering the minimum quantum of sentence as fixed by the law. It may not be out of place that through Act XXVII of 2018, dated 22.05.2018, section 377-B was amended in the following manner:

“Amendment of section 377B, Act XLV of 1860.—In the Penal Code, in the section 377B, for the expression, “may extend to seven years and liable to fine which shall not be less than five hundred thousand rupees or with both”, the expression “shall not be less than fourteen years and may extend upto twenty years and with fine which shall not be less than one million rupees”, shall be substituted.

11. It is settled principle of law that when any statutory provisions require a particular act to be done in some particular manner or within limited bounds, then the same have to be performed in such manner. Reference may be made to the case of Muhammad Ismail v. State (2017 SCMR 713) whereby the Honorable Supreme Court of Pakistan has held that:--

“It is a bedrock principle of law that, once a Statute or rule directs that a particular act must be performed and shall be construed in a particular way then, acting contrary to that is impliedly prohibited. That means, doing of something contrary to the requirements of law and rules, is impliedly prohibited.”

12. It is an admitted fact that the incident occurred on 02.05.2022 i.e after necessary **amendment of punishment under section 377-B PPC through the Amendment of Act XXVII** of 2018 dated 22.05.2018, as such, on such aspect only the judgment of the trial **court is erroneous and illegal for which, reference may also be made to case of Azmat Khan v. the State (2022 YLR Page 1158) [Federal Shariat Court]**.

13. In view of the above stated reasons, without further going into the merits of the case, the impugned judgment passed by the trial court being illegal and unlawful is set aside and the case is remanded to trial court with directions to hear the appellant's counsel, as well as, the concerned prosecutor and after providing due opportunity, decide the case in accordance with law within two months from the date of receiving a copy of this judgment. As it is indicated in the judgment that the appellant at the time of conviction was on bail as such subject to furnishing the required surety to be fixed by the trial court in view of changed circumstances, the benefit of his release on bail shall be extended by the trial court so as to ensure his appearance to face the conclusion of trial.

J U D G E