

IN THE HIGH COURT OF SINDH KARACHI

CIMINAL JAIL APPEAL NO.109 OF 2023

Appellant : **Shoaib S/o Abdul Rasool Sangi**
,
through Mr. Moula Bux Bhutto
Advocate

Respondent : **The State**
through Mr. Zahoor Shah,
Additional Prosecutor General for
the State along with Complainant
Muhammad Javed and SIP Sheeral
Khosro, Additional SHO of P.S.
Memon Goth

Date of hearing : 7th November 2023

JUDGMENT

Omar Sial, J.: 21-year-old Shoaib Sangi was accused of raping a 55-year-old differently-abled lady (the survivor) on 09.08.2017. The chain of events, as put forward by the prosecution, was that in the early evening, Javed Ahmed (the survivor's younger brother) was informed that his sister had been raped. Javed reached the specified spot and found that Shoaib had been apprehended by the local people there. Police were summoned to the scene, and Shoaib was arrested. F.I.R. No. 161 of 2018 was registered under section 376 PPC at the Memon Goth police station on the same day.

2. Shoaib pleaded not guilty and claimed trial. **PW-1 Javed Ahmed** was the survivor's younger brother and the person on whose complaint the F.I.R. was registered. His testimony was limited to him being informed of the incident and then going to the spot from where Shoaib was arrested. **PW-2 S.I. Anwar Ali** was the scribe of the F.I.R. **PW-3 Dr. Zakia Khursheed** was the doctor who examined the survivor after the incident. She testified that the survivor was brought to her on

10.08.2018. The doctor found no marks of violence on her body and opined that the survivor had had sexual intercourse but that she could not opine the approximate time when she had last indulged in it. Vaginal swabs were, however, taken by the doctor and sent for DNA analysis. **PW-4 S.I. Mohammad Hanif** and **PW-6 Manzoor Ahmed** were two persons who reached the scene in its immediate aftermath. They saw that a mob of people had caught hold of Shoib and learned that Shoib had raped the survivor. **PW-5 Arbab Ali** was the investigation of the case.

3. In his defence, Shoib recorded in a section 342 Cr.P.C. statement that he was innocent and had been arrested by A.S.I. Talib from his cattle farm. He stated that the reason for the false implication was that he and PW-4 had a dispute over the use of a street. He also stated that the investigating officer had taken two blood samples – one sample was sealed while the other the investigating officer took with him.

4. The learned 5th Additional Sessions Judge, Malir, on 09.02.2023, convicted Shoib for an offence under section 376 P.P.C. and sentenced him to 25 years in prison and a fine of Rs. 50,000. It is this judgment which has been called into question through this appeal.

5. I have heard the learned counsels for the appellant and the learned Additional Prosecutor General. The complainant was present in person but did not engage a counsel. The individual arguments of the counsels are not being reproduced but are reflected in my findings and observations below.

6. There are no eyewitnesses, which in itself is not unusual in a rape case. It is for this reason that the courts of this country have repeatedly held that the sole testimony of a survivor is good enough for conviction if it is found trustworthy and inspiring in confidence. The difficulty in this case is that no statement of the survivor was recorded, let alone her being examined at trial. The prosecution has taken the stance that the survivor is a differently abled lady; she could not record her statement. That might very well have been true; however, the

investigating officer did not introduce any evidence at trial which would support the version of the prosecution. Apart from the prosecution's claim that the survivor was a "*jhooni*", which I understand is a local synonym for a differently abled person, there is nothing on record to confirm the same.

7. The survivor, when medically examined, had no signs of violence on her body. She was not a virgin; however, the doctor could not determine whether she had been exposed to a fresh act in the near past. Marks of violence are not a pre-requisite for the crime of rape to be committed. In the present case, while I find it odd that keeping in mind the fact that Shoaib was not armed and allegedly sexual intercourse was not consensual, there were no signs of a struggle, keeping in view that the survivor was of unsound mind, rape could still have been committed by playing on the understanding of the survivor. It is also pertinent to mention that the definition of rape in the Penal Code has been amplified, and now penetration doesn't need to be proved to convict a person successfully. As mentioned in the preceding paragraph, the difficulty is that there is no victim statement in the present case. Dr. Zakia Khursheed did, however, take a vaginal swab from the survivor when she was examined on 10.08.2018. The sample was sent for DNA analysis on 27.08.2018. The prosecution claimed that on 13.08.2018, a sample of Shoaib's blood was also taken and sent for DNA analysis. The record, however, is silent on who took the sample, where it was taken, when it was taken and who sealed it. No evidence also exists that a memo of seizure was prepared. This lapse on the part of the prosecution adds some weight to the defence taken by Shoaib. The laboratory, in its report, opined that Shoaib was a contributor of semen to the survivor's vaginal swab. Be that as it may, while this court does not claim to be an expert, it seems that the collection, preservation and transportation of DNA samples was not done correctly. The Punjab Forensic Science Agency, in response to a question: "Can a victim change clothes, wash clothes and body parts or urinate after the rape/sodomy incident before evidence collection?"

has opined that “No, the victim must not change clothes, wash clothes and body parts before evidence collection. She/he should urinate only if there is an urgent need; however, the genital area should not be washed after urination. Only dry tissue papers can be used to wipe the genital area, and this tissue is also preserved and collected as evidence. The Agency also opines that, generally, semen may be detectable on a vaginal swab collected within 72 hours of sexual intercourse (pfsa.punjab.gov.pk). The doctor, in this case, had noted that when the survivor had come to her for examination, she had changed her clothes and passed urine; however, her genitals had remained unwashed. The swab was taken within 24 hours but was not sent to the laboratory until seventeen days later. Similarly, Shoaib’s blood sample was sent for analysis after fourteen days. DNA can be extracted from blood samples stored at -70 degrees C for at least 2 months or at 23 degrees C for a week or more, but blood stored at these temperatures may yield less high-molecular-weight DNA.¹ How the samples were preserved during this time was not elaborated upon at trial. It would not be unreasonable to presume that police station maalkhanas would not have the requisite facilities.

8. Shoaib, in his section 342 Cr.P.C. statement, claimed that he had been arrested from his cattle farm yet could not produce even one witness to support his claim. Indeed, he would not be the only person at the cattle farm, and if the police had come to arrest him from there, there should have been somebody who witnessed his arrest. If there were a dispute on the street with prosecution witness Hanif, even then, the friction between the two would have been in the knowledge of many. I also find it difficult to believe that Shoaib would be blamed for rape due to a dispute over access to a street. I also see no reason for the complainant to maliciously involve Shoaib in this dispute at the expense of his sister's dignity.

¹ (Madisen L, Hoar DI, Holroyd CD, Crisp M, Hodes ME. DNA banking: the effects of storage of blood and isolated DNA on the integrity of DNA. *Am J Med Genet.* 1987 Jun;27(2):379-90. doi: 10.1002/ajmg.1320270216. PMID: 3605221.)

9. Given the above observations, I think the evidence collected and presented at trial left a lot to be desired. Yet, the prosecution story has a ring of truth to it. A differently-abled lady was raped, and this factor alone made the prosecution case a bit shaky. The ends of justice would be met in the present situation if the conviction is maintained but the sentence reduced to 10 years of rigorous imprisonment. Considering that the appellant did not seem to have any family member looking after his case and learned counsel appearing for him was also appointed at State expense, the quantum of the fine is reduced to Rs. 10,000 or two weeks of simple imprisonment in lieu.

10. Subject to the above modification in sentence, the appeal is dismissed.

JUDGE