IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.S-98 of 2021

Appellant	:	Nazim through Mr. Ghulamullah Chang, advocate.
Respondent	:	The State through Ms. Rameshan Oad, Asst. PG Sindh.
Date of hearing	:	08.12.2023.
Date of decision	:	15.12.2023

JUDGMENT

KHADIM HUSSAIN TUNIO, J.- The captioned appeal challenges the vires of the judgment dated 19.06.2021 ("impugned judgment") passed by the learned IInd Additional Sessions Judge (Gender Based Violence Court) Hyderabad in Sessions Cases No. 623/2020 which culminated from FIR No. 11/2020 registered with Police Station SITE, Hyderabad for the offences punishable u/s 376 of the Pakistan Penal Code ("PPC") whereby the appellant was convicted and sentenced to suffer rigorous imprisonment for twenty five years with a fine of Rs.100,000/- (Rupees one lac) and in case of failure to pay fine amount, he was further undergo simple imprisonment for six months. He was extended the benefit of S. 382-B of the Code of Criminal Procedure ("CrPC").

2. Relevant background to the instant appeal is that one Subhan Zadi was allegedly raped by the appellant Nazim on an eve. The incident was left undisclosed and in that duration, the victim Subhan, got pregnant. Admittedly, the victim compelled the appellant to marry her and on his refusal, the victim got the FIR lodged on 23.02.2020.

3. After registration of the FIR, the investigation was conducted and on its conclusion, the Investigating Officer

submitted challan against the accused. Charge was framed on and the trial commenced after Nazim pleaded not guilty.

4. In order to substantiate the charge, prosecution examined Dr. Samina who confirmed that the victim was pregnant at the time of her medical examination, the victim Mst. Subhan Zadi who denied the prosecution case in *toto*, mashir Muhammad Issa who signed over the mashirnama of recovery of victim's clothes, Sara who is the mother of the victim and stated that her daughter had been raped by some unknown person, mashir of arrest Bakht Ali and Inspector Mazhar Ali who conducted investigation in the case and also presented various documents and artefacts in his evidence.

5. Statement of accused u/s 342 CrPC was recorded in which he denied the allegations leveled against him and claimed to have been falsely implicated.

6. After hearing learned counsel for the respective parties, learned trial court convicted and sentenced the appellant as provided in para 1, supra.

7. Learned counsel for the appellant has argued that victim did not support the prosecution case; that none of the prosecution witnesses have seen the alleged incident occur; that nothing is available on the record to prove that the appellant Nazim raped the victim besides DNA evidence which can only corroborate primary evidence, but cannot be primary evidence itself. In support of his contentions, he cited the case of "Saleem and others v. The State and others" (2021 MLD 1184).

8. Conversely learned Assistant Prosecutor General contended that DNA test of the child born out of the pregnancy of the victim was conducted and matched with the DNA of the

appellant who was declared the biological father, as such she contended that sufficient material is available to connect the appellant with the offence. In support of her contentions, she cited the case of "Abdul Ghani v. The State through PG Balochistan and another" (2022 SCMR 544).

9. Learned counsel for the appellant and the learned Assistant Prosecutor General were heard and the record was perused carefully with their assistance.

10. Admittedly, the only piece of evidence available with the prosecution to connect the appellant with the offence is the positive DNA report which found the appellant to be the father of the victim's child, therefore it would be proper to deal with the same first. There is no cavil to the proposition that DNA alone, in such cases, would not be sufficient to establish the commission of a crime. Supreme Court, vide judgment dated 11.08.2023 in an unreported case titled "Atta Ul Mustafa v. The State and another" (Crl. Petition No. 596-L of 2022) observed that: -

> "Even otherwise, *the DNA report cannot be treated as primary evidence and can only be relied upon for the purposes of corroboration and as stated above the evidence of the victim is not of such character, which can solely be relied upon to sustain conviction of the petitioner.* When all the above-narrated circumstances are juxtaposed i.e. the implausible stance of the victim, her lodging of similar kind of case against another person and then patching up the matter after receiving hefty amount and the dubious DNA test report, it makes the prosecution case not free from doubt. These are the dents, which are so grave and sensational that they are squarely hampering the authenticity of the prosecution case. Therefore, it can safely be concluded that the prosecution has miserably failed to substantiate its case."
>
> *(emphasis supplied)*

11. As for the ocular account, the victim herself has not supported the prosecution case while falsifying the FIR. The offence under section 376 PPC is an offence against a person. Section 375 PPC defines rape as sexual intercourse with a woman under the following five situations:-

(i) against her will;
(ii) without her consent;
(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;
(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
(v) with or without her consent when she is under sixteen years of age.

12. Taking everything into consideration including the stance of the victim by first implicating the appellant, forcing him to marry her and on his refusal lodging the FIR, it appears that the intercourse was not against her will, nor without her consent, nor did she suggest that she was threatened into consenting nor did she raise the plea that she believed the perpetrator to be her husband and she is also of age. The implausible stance of the victim suggests that this is not a case of rape and even if it were, the parties have patched up with each other. There is a mark of distinction between the offence of rape and the offence of zina. Rape under S. 376 PPC is only attracted if one of the above noted five conditions attracts. Undoubtedly, the DNA report showing the appellant to be the biological father of the child borne by the victim proves that there had been an intercourse, however it does not prove the commission of rape rather zina which neither the appellant nor the victim i.e. Subhan Zadi are charged with. The reliance of the learned Assistant Prosecutor General on the case of *Abdul Ghani* (supra) is immaterial as the same pertained to an incident of rape with a minor, the gravity of which offence is on a higher pedestal than the present case where not even the victim has supported the prosecution case. The depositions of the other witnesses are also of no help to the prosecution case as none of them have specifically implicated the appellant of rape.

13. The above aspects have led me to believe that the prosecution has failed to establish its case against the appellant for the offence punishable u/s 376 PPC beyond a reasonable

shadow of doubt. All the circumstances discussed above have created serious doubts in the prosecution case which go to the roots of the prosecution case and according to the golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. In this respect, reliance is placed on the case of "Naveed Asghar and 2 others v. The State" (PLD 2021 SC 600). If cases were to be decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of giving "benefit of doubt" to an accused person would be reduced to a naught. Prosecution is under an obligation to prove its case against the accused person at the standard of proof required in criminal cases, that being beyond reasonable doubt. Moreover, the benefit of any doubt is to be given to the accused person as of right, not as of concession. In this respect, reliance is placed on the case of "Tariq Pervez v. The State" (1995 SCMR 1345).

14. For what has been discussed above, captioned criminal appeal is allowed. Consequently, conviction and sentence awarded to the appellant is set aside along with the impugned judgment and the appellant is acquitted of the charge. He is set to be released forthwith if not required in any other custody case.

JUDGE