

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 23 of 2023

Appellant: Jahanzaib Ali @ Ali Baba through Mr. Javaid Ahmed Chhatari and Ms. Farah Awan, advocates

The State: Mr. Zafar Ahmed Khan, Additional Prosecutor General Sindh

Date of hearing: 09.08.2023

Date of judgment: 09.08.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is the case of prosecution that the appellant with rest of the culprits went over to the place of incident, kept Mst. Kalsoom and her witnesses under wrongful restraint, subjected her to rape and then went away by snatching her cell phone and cash worth Rs.3000/-, for that the present case was registered. Appellant, co-accused Muhammad Ramzan @ Ramzan Bangali and Muhammad Farooq @ Tara Mian on being challaned, were charged for the said offence which they denied, the prosecution in order to prove the same examined complainant Mst. Kalsoom and her witnesses and then closed its side. On conclusion of trial, co-accused Muhammad Ramzan @ Ramzan Bangali and Muhammad Farooq @ Tara Mian were acquitted while appellant was convicted under Section 376 PPC and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.25,000/- and in default whereof to undergo simple imprisonment for 02 months; he was further convicted under Section 342 PPC and sentenced to undergo rigorous imprisonment for one year, both the sentences were directed to run concurrently without passing of an order under Section 382(b) Cr.P.C being mandatory by learned II-Additional Sessions Judge, Karachi Central vide judgment dated 14.12.2022, which he has impugned before this Court by preferring the instant Criminal Appeal.

2. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant; the FIR of the incident has been lodged with unexplained delay of about 05 days; DNA report has not been brought on record by the prosecution knowingly and evidence of the PWs being doubtful in its character has been believed by the learned trial Court without assigning cogent reasons, therefore, the appellant is entitled to be acquitted by extending him benefit of doubt.

3. Learned Addl. PG for the State by supporting the impugned judgment has sought for dismissal of the instant appeal by contending that the prosecution has been able to prove its case against the appellant beyond shadow of doubt.

4. Heard arguments and perused the record.

5. It was stated by complainant Mst. Kalsoom that on 01.01.2017 when she was having a meeting with his boyfriend PW-Yaseen at house of Tara Mian there came 05 persons, out of them appellant dragged her inside of the room and subjected her to Zina and then went away by snatching her cell phone, she narrated the incident to her family members and then to police. No family member of the complainant however is examined by the prosecution. The incident however was reported by the complainant to police with delay of about 05 days; no explanation to such delay is offered by her which reflects deliberation and consultation. On examination as per Medical Officer Dr. Zakia Khursheed hymen of the complainant was found torn and healed with no mark of violence. If it was found torn and healed with no mark of violence, then prima facie it was not suggesting the occurrence of fresh rape. DNA report has not been brought on record by such omission valuable piece of evidence has been withheld against the appellant by the prosecution which has prejudiced the appellant in his defence. The report of chemical examiner suggests that no human

sperm was detected in vaginal swabs of the complainant; such report could not be overlooked; PW Babul was not able to identify the appellant during course of his examination, therefore, his evidence could hardly lend support to the case of prosecution. It was stated by PW Yaseen that appellant forcibly took the complainant inside of the room and committed Zina with her. If he would have been present at the place of incident, then he would have resisted such act; His tolerance prima facie suggests that he was not present at the time of alleged incident. On the basis of same evidence, co-accused Muhammad Ramzan @ Ramzan Bangali and Muhammad Farooq @ Tara Mian being accomplice have been acquitted by the learned trial Court. The appellant has pleaded innocence. In these circumstances, it would be safe to conclude that the prosecution has not been able to prove its case against the appellant beyond shadow of reasonable doubt.

6. In case of *Mehmood Ahmed & others vs. the State & another (1995 SCMR-127)*, it was observed by the Apex Court that;

“Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate”.

7. In the case of *Muhammad Mansha vs. The State (2018 SCMR 772)*, it has been held by the Hon'ble Apex court that;

“4....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted”.

8. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant by way of impugned judgment are set aside, consequently, he is acquitted of the offence for which he was charged, tried, convicted and sentenced by learned trial Court and shall be released forthwith, if not required to be detained in any other custody case.

9. The instant Criminal Appeal is disposed of accordingly.

JUDGE