Rape victim disbelieved

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CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Criminal Jail Appeal NO. 74 of 2021
Conf. Case NO. 05 of 2021

Wali Muhammad

Vs

The State

HIGH COURT OF SINDH

Composition of Bench. ***D.B.***

Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

Date(s) of hearing: 25-08-2022

Decided on : 30-08-2022

Judgment approved for Reporting *Yes*

CERTIFICATE.

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/. Over-rules/ reverses/explains a previous decision.

* Strike out whichever is not applicable.

NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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IN THE HIGH COURT OF SINDH AT KARACHI

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Criminal Jail Appeal No. 74 /2021

Wali Muammad S/o
Haji Jatoi at present confined in
Central Prison at
Karachi _____Appellant

Versus

The State _____ Respondent

Crime No: 62/2018
PS Manghopir, Karachi
US: 376 PPC

CRIMINAL APPEAL UNDER SECTION 410 Cr.P.C.

Being aggrieved and dissatisfied by the Judgment dated 27.01.2021 passed by the Court of Learned XTH Additional Sessions Judge, West at Karachi in Sessions Case No. 538/2018, the Appellant approached this Hon'ble Court with the prayer to call for record and proceedings of Sessions Case No. 538/2018 from the Court of Learned XTH Additional Sessions Judge, West at Karachi, and after hearing the case of the Appellant be pleased to set-aside the impugned Judgment, on consideration of the following facts and grounds:

FACTS

Brief facts of the prosecution case as narrated in the FIR are that on 24.02.2018 Complainant Mudasir Hussain S/O Chaudhary Abdul Hameed approached at P.S Manghopir, Karachi West and verbally supported the matter that on 16.02.2018, at about 08:00 p.m, his daughter namely Aqsa went to the house of her neighbors namely Wali Muhammad for doing school home work, wherefrom she was returned back at about 12:00 p.m and seems frightened but she did not

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IN THE COURT OF ADDITIONAL SESSIONS JUDGE-X KARACHI WEST

No: X/ADJ/W/70 /2021, Karachi, 27th January, 2021

To,

The Honorable
Registrar
High Court of Sindh
Karachi

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INWARD TO CRL
BRANCH
DATE 02/02/2021
HIGH COURT OF SINDH AT KARACHI

Through the Honorable District and Sessions Judge, Karachi West

SUBJECT:- **REFERENCE U/S. 374 CR.P.C FOR CONFIRMATION OF DEATH SENTENCE AWARDED IN SESSIONS CASE NO. 538/2018 (THE STATE VS. WALI MUHAMMAD, FIR NO. 62/2018, U/S. 376 PPC , P.S. MANGHOPIR, KARACHI)**

Respected Sir

I have the honour to submit that vide judgment dated 27.01.2021 passed by the undersigned in the above noted Sessions Case, whereby accused Wali Muhammad S/o Haji Jatoi convicted U/S 376(3) PPC and awarded death sentence as well as pay fine of Rs. 5,00,000/- (Rupees Five Hundred Thousand), therefore; the subject judgment alongwith R&Ps of S.C No. 538/2018 are submitted herewith under section 374 Cr.P.C for confirmation of death sentence as required by law.

(GADA HUSSAIN ABRO)
ADDL. SESSIONS JUDGE-X
KARACHI WEST

Enclosed:

R&Ps of SC No.538/2018 (02-parts)
Part I
Diary sheet A to J
Page No. 01 to 176
Part-II
Page No. 01 to 608

OFFICE OF THE DISTRICT AND SESSIONS JUDGE KARACHI WEST
No. A / W / 321 /2021, Karachi **Dated: 28.01.2021**

Submitted with compliments to the Learned Registrar, Honorable High Court of Sindh, Karachi.

28.01.21

(ABDUL NAEEM MEMON)
District & Sessions Judge,
Karachi West

Rape victim disbelieved

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IN THE HIGH COURT OF SINDH, KARACHI

Criminal Jail Appeal No.74 of 2021.
Conf. Case No.05 of 2021.

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,

Appellant:	Wali Muhammad S/o. Haji Jatoi through Mr. Muhammad Rahib, Advocate.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.
Date of hearing:	25.08.2022.
Date of Announcement:	30.08.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Wali Muhammad S/o. Haji Jatoi has preferred the instant appeal against the judgment dated 27.01.2021 passed by Learned Additional District & Sessions Judge-Xth Karachi West in Special Case No.538 of 2018 arising out of Crime No.62 of 2018 U/s. 376 PPC registered at P.S. Manghopir, Karachi West whereby the appellant was sentenced to death subject to confirmation by this court and pay fine of Rs.500,000/- (Rupees five hundred thousand) to the victim in view of section 545 sub-section (a) and (b) Cr.P.C. In case of default in payment of fine, the accused was ordered to undergo R.I. for a period of six months more.

2. The brief facts of the prosecution case as per F.I.R. are that on 24.02.2018, complainant Mudasir Hussain S/o. Chaudhary Abdul Hameed approached at PS Manghopir, Karachi West and verbally reported that on 16.02.2018 at about 08:00 p.m. his daughter namely Aqsa went to the house of his neighbour namely Wali Muhammad for doing school homework, wherefrom she returned at about 12:00 p.m. and seemed frightened but she did not disclose anything to anyone. On

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21.02.2018, he had taken his daughter to Peer Baba at Surjani Town for dam (insufflate), where Peer Baba told him that his daughter had nothing and advised him to take her home and enquire from her whether some incident has befallen her. Then, he had taken his daughter home, where his daughter Aqsa disclosed to her mother that when she went at the house of Wali Muhammad for doing school work, at about 11:45 p.m. the said Wali Muhammad caught hold of her and put his hand on her mouth and took her in room, where he removed her Shalwar and had committed Zina with her and issued threats to her that not to tell anyone about the present incident, otherwise, he would commit her murder. It is further narrated by complainant that he went to meet with Wadera (landlord) of his village namely Bashir, who told him that he would get information but he did nothing, hence he lodged FIR.

3. After completion of investigation I.O. submitted charge sheet against the accused person to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 09 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed false implication on account of a property dispute with the complainant. He did not give evidence on oath and did not call any DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as mentioned earlier in this judgment, hence, the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 27.01.2021 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the complainant in order to usurp his property; that there was an 8 day delay

in lodging the FIR which allowed the complainant to cook up a false case against him; that the eye witness victim's evidence has been contradicted by other witnesses evidence and cannot be safely relied upon; that important witnesses who could have corroborated the victim's story were not called by the prosecution; that the appellant's DNA test was negative and that for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on the case of **Ashiq Ali and 6 others v. The State and another** (2018 P Cr.LJ 1084).

8. On the other hand learned APG appearing on behalf of the State and who also represented the interests of the complainant has fully supported the impugned judgment. He has contended that in rape cases a delay in the filing of an FIR is not fatal to the prosecution case; that the victim's eye witness evidence is reliable and confidence inspiring and that she has correctly identified the accused as the person who raped/sexually assaulted her and that we can convict on her evidence alone; that the victim's evidence of rape has been corroborated by the medical evidence; that DNA evidence is not essential to lead to a conviction in rape cases and as such the appeal should be dismissed and due to the heinous nature of the crime the confirmation reference should be answered in the affirmative. In support of his contentions he has placed reliance on the cases of **Mst. Dur Naz and another v. Yousuf and another** (2005 SCMR 1906), **Mobashar Ahmad v. The State** (2009 SCMR 1133), **Farooq Ahmad v. The State** (PLD 2020 Supreme Court 313), **Zahid and another v. The State** (2020 SCMR 590) and **Shahzad alias Shaddu and others v. The State** (2002 SCMR 1009).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the learned counsel for the appellant, and the impugned judgment with the able assistance of the parties and have considered the relevant law including the case law cited at the bar.

10. Before proceeding further we are acutely aware that this is a very heinous offence whereby a minor girl has been raped in a most brutal manner which crime offends the very core of society and humanity.

however, as Judges we have to put such aspects aside and decide the guilt or innocence of the appellant by dispassionately assessing the evidence before us and coming to a decision which is supported by the evidence on record and the governing law and not by our emotions or own personal feelings. We can only be guided by the evidence and the law and nothing else. In this respect we refer to the case of **Azeem Khan** V **Mujahid Khan** (2016 SCMR 274) which held at P.290 Para 32 as under;

> *"Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty".*

11. This position was reiterated in the later case of **Naveed Asghar** v **State** (PLD 2021P.600) in the following terms;

> *"The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow. It may be pertinent to underline here that the principles of fair trial*

have now been guaranteed as a Fundamental Right under Article 10A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person.".

12. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

(a) In rape cases usually a few days delay in lodging an FIR is not fatal to the prosecution case especially if the delay has been explained as in our society often on account of honor and modesty such slight delay does occur in reporting such crime to the police. In this respect reliance is placed on **Zahid V State** (2022 SCMR 50). In this case however the FIR was lodged after a delay of 8 days and although the complainant has attempted to explain this long delay no witness which he mentioned who could support his explanation such as the Peer Baba who he took his daughter to or the landlord Bashir gave evidence to corroborate his story which in our view puts us on caution regarding the prosecution case especially when he registered his NC at the PS he did not even name the accused as the person who committed the crime.

(b) In this case the star prosecution witness is **PW 3 Aqsa Mudassar Hussain** (Aqsa) who was 11 years of age at the time of the incident and is the victim. According to her evidence she and her sister Afshan were studying together with the daughter of the accused Saima at the accused's house on 16.02.2018. Her brother and mother had also accompanied her and her sister to the accused house whilst she studied in the court yard whilst the elders were in the room. Study was completed at 12 midnight and thereafter her mother and the wife of the accused had tea whilst she Saima and other children started cleaning the court yard and the kitchen. Whilst Saima and her sister were cleaning the kitchen the accused put his hand on her mouth and dragged her to a dark place and also put a cloth in her mouth. The accused then tied her hands and untied her shalwar. Thereafter he pressed her chest and later on he put his male organ at her private parts. Meanwhile her sister and Saima also came and the accused released her and she tied her shalwar but did not tell any body about the incident. The day after the incident she told Saima and Saima's mother who told her to keep quiet. She then became ill and was taken to Peer Baba who told her parents that something was wrong with her. The next day she told her mother who then told her father who approached the wadera of the village (Bashir) for help who failed to do anything whereafter she approached the police, she was medically examined and then an FIR was lodged. She also states in her evidence that the house where she was raped/sexually assaulted had 2 rooms. PW 4 Saamia the Dr. who medically examined Aqsa opined Aqsa had been raped/sexually assaulted as did an exhibited report of a special medical board. The chemical report also found that the shalwar worn by Aqsa contained semen although this shalwar was

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recovered much later after the incident. Taking the above evidence into account we find that Aqsa was subject to sexual assault.

The question however arises who assaulted Aqsa and where she was assaulted.

If we find the evidence of Aqsa to be reliable, trust worthy and confidence inspiring as to who sexually assaulted her and where the sexual assault took place we can convict on her evidence coupled with the medical evidence alone even without matching DNA. In this respect reliance is placed on the case of **Farooq Ahmed** (Supra).

We however have doubts as to the evidence of Aqsa in respect of who raped her and where she was raped as follows especially keeping in view the delay of 8 days in lodging the FIR;

(a) PW 4 Dr. Saamia who was the WMLO who as discussed above found that Aqsa had been sexually assaulted stated as under in her evidence;

"As per history of the girl some unknown person entered in her home and assaulted her"

On the aspect by whom and where Aqsa was sexually assaulted this PW who had no axe to grind with Aqsa and supported her allegation of rape/sexual assault and who had no enmity or ill will towards Aqsa and had no reason to give false evidence against Aqsa contradicts Aqsa's own evidence of who and where she was raped/sexually assaulted which tends to caste some doubt on her evidence on this aspect of the case.

(b) It was the complainant who took the police to the wardat where the memo of wardat and photo's were taken but as per the evidence of Aqsa and his wife he was not even there on that fateful evening so how could he know where the alleged rape/sexual assault had taken place.

(c) The cloth shoved down Aqsa's throat and the material used to tie her hands was not recovered at the wardat.

(d) According to Aqsa's own evidence she, Saima and other children started cleaning the court yard and the kitchen. Whilst Saima and her sister (Afshan) were cleaning the kitchen the accused put his hand on her mouth and dragged her to a dark place and also put a cloth in her mouth. This begs the question as to how Saima and her sister Afshan did not see her being dragged off especially as they were all in the kitchen which was not very big.

(e) The memo of inspection of the wardat and photo's of the house along with the evidence reveal that the accused house was only 120 square feet, consisting of a court yard and two rooms one of which was a kitchen/cum washroom. Since Aqsa and Saima's mother were having tea in one room and the wardat is shown to be the kitchen/cum wash room where Saima and her sister

Afshan were also cleaning it is hard to believe that Aqsa could had been raped/sexually assaulted in the same place where the other two girls were cleaning.

(f) Again according to Aqsa's own evidence the accused pressed her chest and later on he put his male organ at her private parts. Meanwhile her sister and Saima also came and the accused released her and she tied her shalwar. From her own evidence it is quite apparent that her sister Afshan was at least a partial an eye witness to the incident who saw the accused with Aqsa in a compromising position but Afshan was not called to give evidence without explanation and as such some of the potentially best evidence in this case was withheld/ not produced by the prosecution to its detriment.This begs the question whether her own sister would have supported the prosecution case? Understandably Saima the daughter of the accused would be unlikely to give evidence against her father if the allegation were true.

(g) PW 5 Asia Mudassar who was Aqsa's mother stated in her evidence that on the fateful evening she and all of her children including Aqsa went to the accused house for Aqsa to study. At that house Saima was present along with her mother, brother and 3 sisters. Thus, on that fateful evening there were 10 to 12 persons including the accused in a small 2 room house with a court yard. It does not appeal to logic, commonsense or reason that the accused would attempt to rape/sexually assault Aqsa with so many people in such close proximity who could have caught him in the act at any moment. Even if Aqsa had made a slight scream before the cloth was allegedly placed in her mouth the rest of the persons in the small house would have been alerted to the incident. Even the accused's own wife and Aqsa's mother were in the next room drinking tea. PW 5 Asia Mudassar, Aqsa's mothers evidence also does not appear to square up with the evidence of Aqsa as she states that Aqsa and the other children were in the court yard and not in the kitchen yet Aqsa in her own evidence states that she, Saima and her sister Afshan were in the kitchen. It also seems odd that any one would be cleaning the courtyard at 12 midnight and that the Aqsa's mother and Saima's mother would be sipping tea at 12 midnight when the young children had to go to school the next day. Aqsa's mother also states in her evidence that the next day Aqsa went to school and then they took her to a doctor. Who was this doctor? why was he not examined? and why did Aqsa not tell him about the sexual assault and where she was feeling discomfort?

(h) No semen was found on the vaginal swabs of Aqsa. Semen was only found on her shalwar which was handed to the police days after the incident by her mother. The DNA report did not link the accused to the sexual assault of Aqsa. Even the chemical and DNA reports were sent after a delay of three days without any explanation and there is no evidence of safe custody during this period.

(i) Aqsa had a motive to falsely implicate the appellant at the behest of her father the complainant. The appellant has maintained in his defence throughout in his cross examination of the complainant and his S.342 Cr.PC statement that there was a dispute between himself and the complainant over the property in which the accused was residing which aspect was never investigated by the IO and as such this defence cannot be dismissed out of hand especially as according to the accused other people have now moved into his property. In addition an alternate theory of where and who raped/sexually assaulted Aqsa has also come on record through PW 4 Dr.Saamia who was an independent witness whose evidence cannot be dismissed out of hand.

(j) Thus, for the reasons mentioned above we find that there are doubts as to the identity of the person who raped/sexually assaulted Aqsa and where the actual rape/sexual assault took place and even the date of the rape/sexual assault.

13. It is a well settled principle of law that the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Supreme Court has observed as follows:-

> *"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."*

14. For the reasons discussed above we find doubt in the prosecution case and by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, his appeal is allowed and the appellant shall be released unless wanted in any other custody case and the confirmation reference is answered in the negative.

15. The appeal and confirmation reference stand disposed of in the above terms.