(55)

ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Crl. Appeal No. S- 89 of 2017.

Date of hearing	Order with signature of Judge
18.02.2019.	

1. For orders on M.A. No. 3591/2017.
2. For hearing of main case.

Mr. Noor Hassan Khoso, Advocate for appellant.
Mr. Aitbar Ali Bullo, Deputy Prosecutor General.

1. Learned counsel for the appellant does not press instant application, which is dismissed as not pressed.

2. Complainant Muhammad Nawaz having CNIC bearing No.41203-8775321-3 is present alongwith alleged victim Mst. Saira and P.W Riaz Hussain having CNIC bearing No.41203-6955192-5. All of them state that, the appellant/ accused Deedar had only attempted to commit the alleged offence; however they have pardoned him and extend no objection for his acquittal, as according to them the appellant being in jail since long has sufficiently been punished.

Heard learned counsel for the appellant, as well as learned D.P.G.

For the reasons, to be recorded later-on, instant appeal stands allowed. The conviction and sentence awarded to appellant Deedar son of Muhammad Qasim Khoso vide impugned judgment dated 15.09.2017 passed by learned 2nd Additional Sessions Judge, Mehar, in Sessions case No.295/2016, Re; State v. Deedar, arisen out of F.I.R No.16/2016 of P.S Radhan Station, is hereby set-aside. Consequently, appellant is acquitted of the charge; he is reportedly confined in jail; he shall be released forthwith, if his custody is not required in any other case.

JUDGE

(53)

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO.

Crl. Appeal No.S-89 of 2017.

Appellant	Deedar Khoso, through Mr. Noor Hassan Khoso, Advocate.
The State	through Mr. Aitbar Ali Bullo, Deputy Prosecutor General, Sindh
Date of hearing	18.02.2019
Date of judgment	18.02.2019

JUDGMENT

Muhammad Saleem Jessar, J.- Through instant criminal appeal, the appellant has assailed judgment dated 15.09.2017 passed by learned 2nd Additional Sessions Judge, Mehar, in Sessions case No.295/2016, (State v. Deedar), arising out of F.I.R No.16/2016 of P.S Radhan Station, dated 22.7.2017, whereby the appellant Deedar Khoso was convicted and sentenced under sections 376, PPC read with section 511, PPC to suffer RI for 10 years and also to pay fine of Rs. 30000/-, in case of non-payment of fine amount, accused shall further undergo SI for 3 months more. Accused is given benefit of section 382-B PPC for the period he remained in Jail during trial.

2. Facts of the case, are that Complainant Hafiz Muhammad Nawaz lodged FIR on 19.03.2016 at 3.00 pm about a crime which allegedly took place on 18.03.2016 at 1200 hours stating that he has land near his village. On 18.03.2016, he alongwith his maternal uncle Riaz Hussain and relative Muhammad Ibrahim, was doing work in the said land when, at about 1200

hours, he heard cries of his sister Mst. Saira aged about 9 to 10 years coming from Kasee (a minor for supply of water) hence they rushed to the place of incident and noticed that his sister was lying in the Kasee, her trouser was in removed condition and accused Deedar was trying to commit Zina with her, whose shalwar was also in removed condition. As soon as accused saw complainant and witnesses he took his shalwar and ran towards village. Thereafter, complainant was informed by his sister that she was on her way while bringing meal when the accused caught hold of her from her arm and dragged her and she was made to lay in Kasee, and the accused tried to commit zina with her, but on seeing the complainant he fled away. Accordingly, FIR was lodged, and after usual investigation challan was submitted in the Court. Necessary documents were supplied to accused under such receipt as Ex.4. Charge was framed against the accused as Ex.5, for offence under section 376 PPC r/w 511 PPC to which accused pleaded not guilty, vide his plea at Ex.6.

3. To prove the charge against the accused, prosecution examined complainant PW-1, Hafiz Muhammad Nawaz at Ex.7, he produced FIR at Ex.7/A, PW-Riaz at Ex.8, ASI Muhammad Afzal Solangi at Ex.9, he produced memorandum of place of wardat at Ex.9/A and departure entry No. 13 at Ex.9/B, PW-04 ASI Abdul Majeed at Ex.10, he produced memorandum of arrest at Ex.10/A, PW-5 Mashir Muhammad Moosa at Ex.13, and PW-6 alleged victim Miss Saira at Ex.14. Thereafter, ADPP for state closed prosecution side through statement at Ex.15.

4. The statement of accused under section 342 Cr.P.C was recorded at Ex.16, wherein he denied allegations of prosecution in depositions and pleaded his innocence, accused neither led evidence in defense nor examined himself on oath to disprove the charge, under section 340 (2) Cr.P.C.

5. The learned trial Court, formulated points for determination, and after hearing learned counsel for the appellant / accused and the ADPP for the State, convicted and sentenced the appellant as above, hence instant criminal appeal.

6. I have heard learned counsel for the appellant and learned DPG for the State. Complainant Muhammad Nawaz and alleged victim Ms Saira were also present in Court and they were also heard.

7. Learned counsel for the appellant referred to the evidence of the PWs in the instant case and submitted that there are numerous contradictions therein which create doubt in prosecution case. He submitted that the victim was not medically examined in order to prove that any force was used on her for some ulterior purpose nor her clothes were sent for chemical examination. Learned counsel submitted that the appellant has been falsely implicated in the case as no such incident took place at all. He prayed for setting aside the impugned judgment and further prayed for acquittal of the appellant.

8. Learned DPG supported the impugned judgment and stated that the appellant has been named in the FIR and specific role has been assigned to him. He, therefore, prayed for dismissal of the instant appeal.

9. Complainant Muhammad Nawaz having CNIC bearing No.41203-8775321-3 appeared alongwith alleged victim Mst. Saira and P.W Riaz and the complainant stated that, the appellant/ accused Deedar had only attempted to commit the alleged offence; however, they have pardoned him and extend no objection for his acquittal, as according to them the appellant, being in jail since long, has sufficiently been punished.

10. First I will take up the impact of the statement made by the complainant, as noted above, on the instant case. In case the offence attributed to the appellant is compoundable, then the matter would end there and then as no further proceedings would be required in view of the fact that the victim / complainant

are ready to forgive the appellant. However, in case the offence is not compoundable, then the statement of the complainant would be of no help to the appellant and instant appeal would have to be decided on its own merits.

11. The allegation against the appellant is that he attempted to commit rape of Mst. Saira. Section 375 of the PPC defines rape and section 376 PPC deals with the punishment for offence of rape. Section 375 PPC stipulates that "*A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:*" and thereafter the five circumstances have been described as under:

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. In view of the above definition of the term "rape", it is an admitted fact that the actual offence of rape has not taken place as even according to the complainant, the appellant did not commit sexual intercourse with the victim. Therefore, he has been convicted and sentenced under section 376 read with section 511 PPC for attempt to commit rape. Section 511 of the PPC reads as under:

> ***511. Punishment for attempting to commit offences punishable with imprisonment for life or for a shorter term.*** *Whoever attempts to commit an offence punishable by this Code with imprisonment for life, or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt be punished with imprisonment of any description provided for*

the offence, for a term which may extend to one half of the longest term of imprisonment provided for that offence or with such fine [daman] as is provided for the offence, or with both.

13. In view of the above, the only offence attributable to the appellant is that of attempt to rape the victim and it is to be examined now whether the attempt to commit rape is a compoundable offence or not.

14. In order to ascertain whether the offence of rape is compoundable or not, reference may be made to the second schedule to the Cr.P.C. wherein offence of rape under section 376 PPC has been stated to be not compoundable. However, since actual offence of rape as envisaged under section 375 PPC, and punishable under section 376 PPC, has not been committed, therefore, it would be advisable to examine whether the offence of attempt to commit rape, falling under section 511 PPC, is compoundable or not. Section 511 PPC has been mentioned in Chapter XXIII of the Second Schedule to Cr.P.C., which is titled "Attempts to Commit Offences" and under Column No.6 of the said Schedule, it has been mentioned as under:

"Compoundable when the offence attempted is compoundable."

15. Thus, in order to ascertain whether an offence falling under the ambit of section 511 PPC is compoundable or not, it would have to be seen whether the actual offence itself is compoundable or not. In case the offence itself is compoundable then the offence of attempt to commit such an offence will also be compoundable. However, if the offence itself is not compoundable, then the attempt to commit such offence will also not be compoundable. In the present case, the offence allegedly attempted by the appellant was rape falling under section 376 PPC for the purpose of punishment and as per Second Schedule to the Cr.P.C., rape is not compoundable, therefore, in view of the above quoted provision of Second Schedule to Cr.P.C. in respect of offences falling under

section 511 PPC, the offence of attempt to commit rape is also not compoundable.

16. In view of the above position, the statement of the complainant as well as that of the victim cannot be taken into consideration for exonerating the appellant as the offence to commit rape is not compoundable. Thus, instant appeal would have to be decided on its own merits.

17. The appearance of the complainant as well as the alleged victim, Mst. Saira and the eye witness Riaz, and the statement of the complainant Muhammad Nawaz, to the effect that they have pardoned the appellant in view of the fact that he [the appellant] only attempted to commit rape and did not commit actual rape of the victim Mst. Saira, has a lot of significance. Usually, there are two reasons for appearance of a complainant / alleged victim before the Court, after conviction of an accused, with the plea of pardon or praying for exoneration of the accused on any compassionate ground, namely, (i) coercion on the part of the accused and (ii) guilty conscious. In case the accused is an influential person then it comes to mind that the accused party may have used force to compel the victim / complainant to come to the court and make such favourable statement. In this case the influential position of the accused is a sine qua non for such statement because a poor and helpless person is not in a position to use coercive force for obtaining such favour from the victim / complainant. The influential position of the accused means either he is a rich person or he is a powerful person like a person involved in criminal activities. This condition is not present in the case in hand as, it has come in the evidence of PW-1, complainant Muhammad Nawaz (page 30 [back side of page 29] of the paper book) that appellant Deedar Khoso used to come to their village for grinding the wheat grain / flour and other necessary work. Therefore, it cannot

be said that he is a landlord / wadera or a desperado who can exert undue pressure on the complainant / victim to give statement in his favour.

18. The other reason for giving statement by a complainant / victim in favour of the accused is guilty conscious. Sometimes, on account of some spur of the moment decision, a complainant makes a false complaint about some person; however, after passage of time when the emotions are cool down, he/she realizes his/her mistake and in order to repent makes such statement. However, even then he/she is not in a position to make an outright statement of innocence of the accused, as this will expose him/her to legal repercussions of lodging false FIR, therefore, he/she makes a vague statement about pardon of the accused.

19. In the case in hand, the allegation against the appellant is that he attempted to commit rape of complainant's sister, Mst. Saira, who was aged about 9-10 years. As per the statement of the complainant before the police, the complainant saw his sister in a position where her shalwar was alleged to have been removed by the appellant and she was lying in a naked position at the place of wardat when the complainant reached their alongwith some other persons. This is a very serious allegation and no one, particularly a brother of the victim, will pardon the perpetrator of such an offence against a minor girl of 9-10 years. Therefore, there is doubt whether such an act did take place on the date, time and place as stated by the complainant in the FIR or it was a cock and bull story. Therefore, although the statement of pardon of the accused by the complainant, though the same cannot be made basis of acquittal of the appellant for the reasons stated above, but it can be taken into consideration for deciding the case on merits. Therefore, the above statement creates a doubt in the prosecution case.

20. The whole incident, which allegedly took place in broad day light at 12-00 noon, is a very short incident spread over a few minutes i.e. the complainant

alleged to have heard cries of his sister, ran towards the place of wardat with his colleagues and saw that accused was attempting to commit zina with her sister. The impact of the incident, if it is true, will be long lasting and will never be erased from the memory of the person who saw it with his own eyes. As per the contents of the FIR No.16/2016 lodged by the complainant Muhammad Nawaz at PS Radhan Station, District Dadu on 19.03.2016 at 1500 hours, the complainant is a zamindar and has agricultural land near his village. On the said date, he alongwith his uncle Riaz and relative Muhammad Ibrahim, were working on his land when he heard cries of his sister Mst. Saira, aged about 9/10 years. They rushed towards the place from where the cries were coming and noticed that his sister was lying in the 'mauk' (Minor) and her trouser [shalwar] was removed and accused Deedar s/o Muhammad Qasim Khoso r/o Village Rawan Khoso, was attempting to have zina with her and his shalwar was also removed. As per the complainant, "As soon as accused Deedar saw us, he took his shalwar in his hand and ran away towards village." Apart from the contradiction in this statement, which I will discuss at appropriate place in this judgment, the most important point which comes to mind very naturally is as to why none of the three persons of the complainant party i.e. complainant Muhammad Nawaz, his uncle Riaz and his relative Muhammad Ibrahim, did not follow the accused / appellant Deedar Khoso when he was in such a precarious condition that his shalwar was in his hands and he was naked and was running towards the village. From the deposition sheets of PW-1 Muhammad Nawaz and PW-2 Riaz it transpires that the complainant was 25 years old while PW-Riaz Ahmed was 28 years old which means that they were not old men who could not chase the accused / appellant. In such a situation the first reaction of a person is to get hold of the accused. However, surprisingly, none of the three persons tried to nab the appellant / accused and allowed him to escape.

21. The other important point to ponder is that the time of the incident is shown as 12.00 noon, which is the peak working hours in the fields / agricultural lands. Although the entire area consists of agricultural lands wherein crops were standing as per evidence of the complainant himself; however, it is surprising that, as per statement of the complainant, no one was present there at the time of incident except the said three persons. This is highly improbable that no one was present in nearby area at 12-00 noon who might have seen the accused / appellant running in such a questionable condition. Thus, the prosecution case suffers another blow which causes serious dent in its case.

22. Apart from the above infirmities in the prosecution case, there are also clear contradictions in the evidence of the complainant. While in the FIR and his examination in chief he states that he states that he is a zamindar and owns land near his village and was working therein at the time of the incident alongwith Riaz and Muhammad Ibrahim. Same statement was made by PW-2 Riaz Ahmed who stated that on the date of occurrence he was doing work alongwith complainant and PW Muhammad Ibrahim **on the land owned by the complainant.** However, during cross examination, when he was asked about survey of the land in which he was working he stated "I do not remember S.No. where we were doing work on the day of occurrence. Voluntarily says my father would be in better position to tell about it because that land is of our relative under our harapship. We were not doing work in my own land, owned by me or my father. He also admits that in the FIR he has mentioned that he was working in his own land.

23. There is also a very grave contradiction in the evidence of complainant with regard to the condition in which they saw the alleged incident. As per the contents of the FIR, when they were attracted by the cries of the victim Mst. Saira, they rushed towards the place from where the cries were coming and

"noticed that his sister was lying in the 'mauk' and her trouser [shalwar] was removed and accused Deedar s/o Muhammad Qasim Khoso r/o Village Rawan Khoso, was attempting to have zina with her and his shalwar was also removed. He further states, "As soon as accused Deedar saw us, he took his shalwar in his hand and ran away towards village." However, during his examination in chief he tells a completely different story wherein he states that on hearing the cries of his sister Mst. Saira they went running to Mst. Saira and when they arrived at distance of 5 to 6 jareb from his sister they saw "*accused Deedar S/O Qasim by caste Khoso running away from the 'Kasi' (small minor for supply of water/Moad near land of Ghulam Rasool Solangi.. Accused Deedar was having only his shirt on his boldy, he was without his trouser and he ran awary torwards southern side...*" This is a huge contradiction in the evidence of the complainant as in the FIR he states that on hearing cries of his sister he rushed to place of incident and there notice that his sister was lying in the mauk and her shalwar was removed and accused Deedar Khoso was attempting to commit zina with her and as soon as he saw the complainant party he took his shalwar in his hand and ran away. Thus, in the FIR he states that his sister was lying in the moak and accused was attempting to commit zina with her and on seeing them he ran away while taking his shalwar in his hand. However, a completely different statement is made by him in his examination in chief wherein he states that when they arrived at a distance of five to six jareb from the place of wardat, they saw accused Deedar Khoso running away from Kasi (small minor for supply of water) and he was without his trouser. Even he does not say that his shalwar was in his hands. However, later on in his examination in chief, while realizing that he had made an omission, he states that his shalwar was in his hands. This is a serious contradiction which cannot be reconciled in any manner and the contradiction cannot be ignored by terming it a minor contradiction.

24. There is also contradiction between the statement of the complainant and the alleged victim with regard to presence of other persons in the adjoining fields. While the complainant had stated in his evidence (Page 30 of paper book) that no other farmer / zamindar was available on the land except the three witnesses; however, the victim, PW-6, Mst. Saira (Exh.14) clearly stated in her deposition that other haries were also doing work in the adjoining areas when occurrence took place. This statement of the victim further weakens the case of the prosecution as no prudent person will attempt to do such an act in presence of other persons. It is also surprising that on the cries of the victim nobody came near her except her brother and his two companions.

25. There is also unexplained delay in lodging of the FIR in the present case as the alleged incident took place on 18.3.2016 at 12-00 noon while the FIR was lodged on 19.03.2016 at 3-00 p.m. As per the complainant himself, after the alleged incident he took the victim to the village and after consultation he lodged the FIR at the police station Radhan Station.

26. In the case of Ayub Masih v. The State (PLD 2002 SC 1048) Honourable Supreme Court, with regard to delay in lodging FIR, has held as under:-

> *"The unexplained delay in lodging the F.I.R. coupled with the presence of the elders of the area at the time of recording of F.I.R. leads to the inescapable conclusion that the F.I.R. was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether.* ***Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of the F.I.R., casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence.*** *It is true that unexplained delay in lodging the F.I.R. is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused."*

27. In view of unexplained delay in lodging of the F.I.R. in the instant case, possibility of false implication of the accused could not be excluded from consideration.

28. It may also be pointed out that the third person allegedly present at the place of incident alongwith complainant and PW-2 Riaz, namely, Muhammad Ibrahim, was not examined. This also creates a dent in the prosecution case. Honourable Supreme Court in the case of Riaz vs. The State reported in 2010 SCMR 846, in somewhat similar circumstance held as under:

> *"One of the eye-witnesses Manzoor Hussain was available in the Court on 29-7-2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahdat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution."*

29. In the instant case also, the inference would be that if Muhammad Ibrahim would have been examined by the prosecution his evidence would have been unfavourable to the prosecution.

30. In view of the above contradictions in the evidence of prosecution witnesses and infirmities, serious doubts have been created in the prosecution case. In view of aforesaid defects / contradictions and lacunas, it can safely be held that the prosecution has not succeeded in discharging its obligation with regard to proving a case beyond reasonable doubt. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create doubts in the prosecution case. In the case reported as Tariq

Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

> "The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

31. Instant criminal appeal was allowed vide short order dated 18.02.2019. The conviction and sentence awarded to appellant Deedar son of Muhammad Qasim Khoso vide impugned judgment dated 15.09.2017 passed by 2nd Additional Sessions Judge, Mehar, in Sessions case No.295/2016, Re; State v. Deedar, arising out of F.I.R No.16/2016 of P.S Radhan Station, was set-aside and the appellant was acquitted of the charge; he eas confined in jail; therefore, he was ordered to be released forthwith, if his custody is not required in any other case.

32. Above are the reasons for my short order dated 18.2.2019.

Judge