Judgment Sheet
IN THE HIGH COURT OF SINDH, KARACHI
Criminal Appeal No.579 of 2025
(Owais Khan ***vs.*** The State)

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Syed Fiaz-ul-Hassan Shah

1. For hearing of main case
2. For hearing of MA No.13161/2025

Date of hearing: **13.01.2026**
Date of Judgment **28.01.2026**

Mr. Muhammad Abrar Arain, advocate for appellant
Mr. Ali Haider Salim, Addl: PG Sindh

J U D G M E N T

Muhammad Iqbal Kalhoro, J:- Appellant, Owais Khan, having been convicted and sentenced u/s 377-B PPC to suffer fourteen (14) years' rigorous imprisonment with a fine of Rs.1,000,000/-, in default, to further undergo three (03) years' simple imprisonment, through the impugned judgment dated 30.08.2025 passed by the learned II-Additional Sessions Judge Karachi Central/Designated Special Court Under Anti-Rape (Investigation & Trial) Act, 2021, in Sessions Case No.410/2024, has filed this appeal praying for acquittal.

2. Against appellant an FIR by complainant Ahmer Raza, u/s 376, 511, 509 & 377-B PPC was registered on 20.11.2023 at Police Station Taumuria stating therein that his daughter, Zainab Raza, aged 07 years, was admitted for education in Happy Home School, North Nazimabad, Karachi. On recommendation of school management, he had hired appellant, the van driver, for picking and dropping his daughter from home to school and vice versa. However, after some time, behavior of his daughter changed from bad to worse. She started getting irritated and stopped eating properly and speaking. Upon insistence by her mother, she disclosed about appellant's obscene behavior with her, groping her private parts, forcing her to touch his private part and then some time forcing her to suck it. After such disclosure, the complainant, on 20.11.2023 accompanied by other people came at school, complained against the appellant and when he spotted appellant present there started beating him. Meanwhile, police were called by the school management, who appeared at the spot, arrested the appellant, brought him at police station, and registered the FIR against him as stated above.

3. After that, police started investigation, examined witnesses u/s 161 Cr. PC including the victim u/s 164 Cr. PC and finally submitted the challan.

In the trial, charge against the appellant was framed but he pleaded innocence. Hence, the trial Court examined as many as 06 witnesses, who have produced the relevant documents. Thereafter, appellant's statement u/s 342 Cr.PC was recorded. He however did not examine himself on oath, nor led any evidence in defence. At the request of learned ADPP u/s 540 Cr. PC, a Psychiatrist, Dr. Hafsa was examined to bring on record the worst condition of the minor and her incapacity to come in the Court for evidence as a result of the incident. Thereafter, a fresh statement of appellant u/s 342 Cr. PC was recorded. After conclusion of the trial, the appellant has been convicted and sentenced in the terms as stated above, hence, this appeal.

4. Learned counsel for the appellant has argued that appellant is innocent and has been falsely implicated in this case; that the victim has not been examined in the trial, hence, it is a case of no evidence, that the appellant has been implicated in this case on account of a dispute over charges of van-hiring; that the charge has been wrongly framed, as section 337-B has been mentioned instead of Section 377-B; that there are material contradictions in the evidence of the prosecution witnesses; that no forensic evidence has been produced; that proper time and date of incident has not been mentioned; that the trial Court has wrongly relied upon Article 47 of the Qanun-e-Shahadat Order, 1984 and convicted the appellant in absence of evidence of victim; that FIR was registered with delay, hence false implication of the appellant cannot be ruled out.

5. On the other hand, learned Addl: PG Sindh has supported the impugned judgment and has further submitted that the learned trial Court while referring to Article 47 of the Qanun-e-Shahadat Order, 1984 and to 164 Cr. PC statement of the victim has rightly found appellant guilty of the offence.

6. We have heard the parties and perused material available on record. The first witness examined by the prosecution is father of the victim. He has reiterated the facts already stated by him in the FIR i.e how condition of his 07 years old daughter deteriorated after a short time of hiring appellant, the van driver, for pick and drop from home to school and vice versa. He has also narrated that on her wife's insistence, his daughter disclosed the entire episode as detailed above. His narration has been supported by his wife PW-4, Rehana Rizwan (mother of victim), Exhibit-8, who has disclosed that she perceived adverse change in the behavior of her daughter after joining the van for transport from home to school. She found her harassed etc. Hence, she repeatedly asked her about a reason, but out of fear she

remained mum. Finally, she gave away to her insistence and revealed the entire episode, how appellant was groping her private parts, caressing and fondling them, forcing her to hold his private part and suck it on the way home whenever she was alone with him in the van. She has also stated that appellant had threatened his daughter that if she disclosed such facts to any one, God would be annoyed with her. She then told such details to her husband and thereafter, she contacted the mothers of other kids to know about character of the driver, who also confirmed that he was of a bad character. Then, her husband went to the school and confronted the story to the van driver, he initially denied the allegations, but then people gathered there and beat him. Then police were called, who took him to the police station, where her husband registered the FIR as above.

7. The story so narrated by both the husband and the wife (the parents of victim) has stood the ground. Nothing, in their cross examination has come on record, which may suggest contrivance of a false story against the appellant. It is not denied that the appellant was the van driver, who was providing pick and drop services to the victim to and fro between home and school. The defence put up by the accused of a dispute over charges of van with parents of the victim is too simplistic to be true. On such a petty issue, the parents of a minor girl cannot reasonably be expected to embroil her kid in such an obnoxious episode, and put her and their honor at stake.

8. PW-2 Muhammad Rizwan Yousuf is Admin Officer of Happy Home School, he has confirmed that appellant was the van driver, that he had accompanied parents of the victim to the police station, where FIR was registered, appellant was duly arrested, and had handed over a USB of the entire incident covering arrest of the appellant at the spot to the police.

9. PW-3 is ASI Muhammad Pervaiz. His evidence shows that on 20.11.2023, he received information that the appellant was apprehended by the people at the school. He went there, gathered the relevant information, and arrested the appellant in presence of the witnesses. As the accused got injuries on his person due to beating by the people, he referred him to the hospital for medical treatment.

10. PW-5 ASIP Sajid Ali, is the Investigating Officer. In his evidence, he has narrated the entire course of investigation. According to him, appellant was produced before the learned Magistrate on 21.11.2023 for obtaining remand and for recording statement of the victim u/s 164 Cr. PC, the date of which was fixed on 24.11.2024. Under due notice, appellant was

produced before the learned Magistrate on that date 24.11.2024 but statement of the victim was not recorded due to some reason. Finally, it was recorded on 27.11.2024 in presence of the accused. Meanwhile, he had visited place of incident and prepared necessary memos, which he has produced in his evidence. He has revealed that before he could complete the investigation, it was transferred to SSIV Central Karachi.

11. The second IO is Mst. Aneela Inspector, SSOIU Unit Gulberg, District Central Karachi. According to her, she examined parents and the victim u/s 161 Cr. PC. She went through the entire record of admission of the victim in the school and other relevant papers showing van fee, etc. She also inspected the site and met with the management of the school to obtain information about fight between complainant and accused on the day of his arrest. She finally submitted the charge sheet u/s 377-B PPC against the appellant.

12. The last evidence is that of the Psychiatrist, Dr. Hafsa Tayyub, who in her deposition has confirmed that victim was suffering from severe anxiety and trauma. She conducted therapeutic sessions with the minor physically and over the telephone. She advised her mother not to expose the victim to any further inquiry, as her condition was not good enough to respond to any question any further. Appellant in his 342 Cr. PC statement has simply denied the incident, and has pleaded that he has been falsely implicated in the case. This is the entire prosecution evidence and the defence of the appellant, if any, and brief discussion over it.

13. It is clear that there is nothing in defence, the appellant could offer to rebut the prosecution case except his thrust upon non-examination of the victim in the trial. A perusal of the impugned judgment shows that trial Court has adequately dealt with this issue in para-25 onwards. It has referred to Article 47 of the Qanun-e-Shahadat Order, 1984, to conclude that law provides for the scheme to rely upon evidence recorded in earlier judicial proceedings to prove the truth of the facts stated therein in subsequent proceedings when earlier proceedings were between the same parties or their representatives in interest, the adverse party in the first proceedings had the right and opportunity to cross examine the witness, and the questions and issues were substantially the same in the first as in the second proceedings.

14. This provision expressly lays down an arrangement whereby the evidence recorded in earlier proceedings are treated as relevant and

applied under certain conditions, as enumerated above, to subsequent proceedings. The case in hand shows that the statement of victim u/s 164 Cr. PC was recorded in the investigation of this very case, it was recorded in presence of appellant, the due notice of which he was given in advance, and he had cross examined her. The issues and questions were almost substantially the same i.e. the allegations of indecent behaviour by the appellant towards the victim and the efforts to find out the truth behind such allegations.

15. The victim was 07 years old and has disclosed in her 164 Cr.PC statement all the material facts constituting the offence u/s 377-B PPC. Nothing in rebuttal has been brought on record by the appellant to neutralize overwhelming truth in her statement. In his 342 Cr. PC statement, appellant was confronted with minor's 164 Cr. PC statement in which she has alleged that he was touching her private parts, asking her to suck his private part and showed her bad videos. The appellant has simply said that the allegations are false. He noticeably, however, has not disputed the fact of recording of statement of the victim u/s 164 Cr. PC in his presence or that he did not have any notice of which or that he did not cross examine her.

16. The reason why the victim was not brought in the trial for evidence has been adequately explained by the Psychiatrist by stating that she had found the victim under sever anxiety and suffering from bouts of trauma. She has also confirmed that further exposure of the victim to any inquiry would have been harmful to her. Her opinion has reasonably and justifiably explained that non-examination of the victim was because she was scared, stressed, and harassed, and therefore suffering from anxiety and trauma.

17. From her evidence, it is easily deducible that victim's condition was so fragile that further inquiry from her regarding the incident would have aggravated her physical and mental condition. Meaning thereby, the victim due to traumatizing episode suffered by her at the hands of appellant was too shocked to come to the Court and give evidence recalling the same harrowing incident, which had damaged her tender mind and put her in perpetual insecurity. It is exactly the same situation, which has been catered to under Article 47 of Qauna-e-Shahdat when it says that if a witnesses is incapable of giving evidence in the trial, then his/her evidence given in previous judicial proceedings is relevant in subsequent judicial proceedings under certain conditions. The record shows that all those stipulations stand fulfilled in the present case. The earlier proceedings i.e. 164 Cr. PC statement of the victim are part of the same case; the accused had notice

thereof and had availed opportunity to cross examine her. The issues and questions in the earlier proceedings were substantially the same as in the second proceedings.

18. In these circumstances, the Court will not hesitate in accepting relevancy of statement recorded u/s 164 Cr.PC, of the victim under Article 47 of Qaunan-e-Shahdat, and apply it accordingly. Not the least, when it is confirmed by the doctor that to insist on examination of the minor in the trial would further dampen chance of her recovery from agonizing situation and perpetual fear and vulnerability. When the victim has convincingly recalled the necessary details of the incident in her statement u/s 164 Cr. PC and was cross examined by the appellant, the general rule of evidence i.e to bring on record the details of incident from the mouth of the victim would give away to exception set out under Article 47 Qanun-e-Shahadat Order, 1984. Therefore, non-examination of her in the trial would not be considered a material departure undermining the prosecution's case on this point.

19. Research shows that in the case of *Arbab Tasleem*[1]*,* the Supreme Court has dilated upon Article 46, 47 and 131 of the Qanun-e-Shahadat Order, 1984 together, and accepted examination-in-chief of two important witnesses, who had meanwhile died, as evidence in terms of aforesaid provision of law. Likewise, in the case of *Amir Zad*[2]*,* the Peshawar High Court has accepted the statement of a doctor, who had conducted post-mortem of the deceased, and who had later on died, as evidence in terms of Article 47 of the Qanun-e-Shahadat Order, 1984. Lastly, the Lahore High Court in the case of *Sharaaf Khan*[3] has upheld transportation of statements of late witnesses recorded u/s 512 Cr. PC during the time when the accused was absconder, and has relied upon them in terms of Article 47of the Qanun-e-Shahadat Order, 1984.

20. These case laws show that in different situations, duly enumerated under Article 47 of the Qanun-e-Shahadat Order, 1984, the earlier statements/evidence of witnesses recorded in same judicial proceedings were considered, made relevant, transported, etc. and relied upon in the subsequent proceedings when all the conditions were fully met. In referred cases, however, the evidence was transported or made relevant when the witnesses were dead, the question therefore, would be whether only in those circumstances, when the disability or incapacity to produce the

[1] Arbab Tasleem vs The State (PLD 2010 SC 642)
[2] Amir Zad vs. the State and another (2013 MLD 723)
[3] Sharaaf Khan vs. The State (2021 P Cr. LJ 1664)

witnesses is permanent on account of his/her death, etc., Article 47 of the Qanun-e-Shahadat Order, 1984 would be relevant?. This question has been answered by the High Court of *Calcutta*[4]. It has held in para-2 of the judgment that *"a case has been cited to us, that of Pyari Lall Petitioner (4 C. L. R. 504) in which it was held that the incapacity to give evidence mentioned in Section 33 (new Article 47) must be a permanent incapacity. In our opinion, that is not a necessary construction. We are inclined to think, on the construction of the entire section, and from reference also to Section 32 of the Evidence Act, which precedes it, that something short of permanent incapacity might satisfy the words of the section incapable of giving evidence"*. The High Court in the same case has however observed that precise evidence as to the nature of the illness and incapacity of the witness to attend the Court as a necessary requirement of the law must be brought on record.

21. Further, in another case titled as *Chainchal Singh*[5] the Privy Council has laid down that where it is desired to have a recourse to section 33 of the Evidence Act on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. Notwithstanding, the Council has then observed that it is not necessary, in every case, there must be evidence of medical practitioner, when an excuse is sought on the grounds of physical incapacity. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness.

22. In the present case such criteria is fully observed, the prosecution has examined an expert witness, namely, Psychiatrist, Dr. Hafsa, who has confirmed in her evidence that she found the minor Zainab was having anxiety attacks and was going into trauma, if asked about the incident. Therefore, she advised her mother not to expose her to any further inquiry on the said issue. This proves sufficiently the incapacity of the minor to come in the Court and recall the same bitter incident. After her evidence, when statement of the appellant u/s 342 Cr. PC was recorded afresh, he has simply denied the incident and pleaded that the doctor has deposed falsely at the instance of complainant. There is, however, nothing on record to suggest that the doctor was influenced by the complainant to give such evidence.

23. Insofar as mentioning of wrong section, i.e. 337-B PPC, instead of 377-B PPC, in the charge, taken as a ground in defence, is concerned, suffice it to say that it is a typographical error and is curable u/s 537 Cr. PC.

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[4] MANU/WB/0034/1881=(1881)ILR 6 Cal 774 (The Empress vs. Asgur Hossein and others)
[5] MANU/PR/0093/1945=(1945) L.R. 72 I.A. 270 (Chainchal Singh vs. King-Emperor)

This provision says that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission, or irregularity in, among other, charge, which includes even any misjoinder of charges, unless such error, etc. has in fact occasioned a failure of justice. In this case, there is no evidence to show that the appellant did not understand the charge against him, or was misled in putting up his defence on account of such error in the charge, or his misunderstanding of the charge has occasioned a failure of justice. We, therefore, find no merit in this appeal and accordingly dismiss it.

The appeal is disposed of in above terms.

JUDGE

JUDGE

Rafiq/PA.