

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Appeal No.S-108 of 2022.

Abdul Rehman v. The State.

Appellant : Abdul Rehman through Mr. Imdad Ali Malik, Advocate.

Respondent : The State through Ms. Sobia Bhatti, A.P.G for the State.

Date of hearing : 07.03.2025.

Date of Decision : 07 .03.2025.

J U D G M E N T

Miran Muhammad Shah, J:- Through this Criminal Appeal, appellant Abdul Rehman s/o Muhammad Rizwan has called in question the Judgment dated 27.08.2022 passed by the learned Additional Sessions Judge-II, Tando Muhammad Khan, in Sessions Case No.186 of 2021 (Re: The State v. Abdul Rehman & another) arising out of crime / F.I.R No.83 of 2021, registered at P.S Tando Muhammad Khan, for an offence under Section 337-B, 34 PPC, whereby he was convicted U/s 265-H(2) Cr.P.C and sentenced to suffer R.I for 14 years and to pay fine of Rupees One Million, in case of nonpayment of fine, to suffer S.I for one (01) year more with benefit of Section 382-B Cr.P.C.

2. The brief facts of the prosecution case are that on 24.03.2021 complainant went outside of his house for work, while his uncle Nadeem & his brother Muhammad Ahmed were present at house. At about 12:30 p.m. when complainant returned back to home, his uncle Nadeem disclosed that accused Abdul Rehman Arain and Imran Malik took away his brother Muhammad Ahmed aged about 09 years on motorcycle. Therefore, complainant, his uncle Nadeem & Muhammad Javed Raho left house to search Muhammad Ahmed and meanwhile at about 1400 hours when they reached near Grid Station, they heard voice of complainant's brother. They entered in an empty house, where they saw trousers/shalwar of accused Abdul Rehman, Imran and his brother were put off, while brother of complainant was lying on the ground, whose hands were caught by accused Abdul Rehman while accused Imran Malik was committing sodomy (unnatural offence) with the brother of complainant (Muhammad Ahmed). Both accused on seeing complainant party, hurriedly worn their clothes and ran away on their motorcycle. Thereafter, Muhammad Ahmed (brother of complainant) narrated the facts to complainant that accused had taken him on the pretext to give *Bran* and then accused committed sodomy with him one by one.

Thereafter, they brought Muhammad Ahmed (brother of complainant) at home and such fact was narrated to the elders. On 28.03.2021 complainant party went to PS, obtained letter for medical and subsequently an FIR was lodged on 03.04.2021.

3. Based on the facts narrated in the FIR, the charge was framed against the appellant/accused before learned trial court as under;

“That on 24.03.2021 at 1400 hours, back side of the Main WAPDA Gird Station vacant place within the jurisdiction of PS Tando Muhammad Khan, you alongwith absconding accused cojointly committed offence of sexual abuse with Muhammad Ahmed aged about 09/10 years and thereby committed an offence punishable under section 377-B PPC and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the aforesaid charge.”

4. The appellant pleaded not guilty to the above charge, hence the prosecution in light of the charge against accused/appellant and in order to substantiate the charge against the accused/appellant examined the following nine (09) witnesses;

- i. PW-1 complainant Bilal Ahmed at Ex.6, who produced FIR at Ex.6/A.
- ii. PW-2 victim Muhammad Ahmed at Ex.7.
- iii. PW-3 (eye witness) Muhammad Nadeem at Ex.08.
- iv. PW-4 Dr. Awais Soomro at Ex.9, who produced Provisional MLC, Final M.C at Ex.09/A & Ex.09/B.
- v. PW-5 Dr. Naresh Kumar at Ex.10, who produced Provisional MLC of Muhammad Ahmed & Final MC of Muhammad Ahmed alongwith forensic & molecular report of LUMHS containing two pages at Ex.10/A & Ex.10/B respectively.
- vi. PW-6 (Mashir) Sajjad Ahmed Shaikh at Ex.11, who produced memo of place of incident, memo of cloth of victim at Ex.11/A & 11/B.
- vii. PW-7/IO SIP Muhammad Ismail Mashori at Ex.12, who produced letters for hospital, entry for departure and arrival at Ex.12/A to 12/D.
- viii. PW-8 ASI Mir Ahmed at Ex.13, who produced attested copy of entry at Ex.13/A.

ix. PW-9 WHC Syed Zaheer Shah at Ex.14, who produced maalkhana entry No.59 at Ex.14/A.

5. However, in order to make more clarification, the deposition of material witnesses is reproduced as under;

PW-1 Complainant (Bilal Ahmed)

MR. MEHBOOB ALAM, ADPP FOR THE STATE.

I am complainant in the present case. On 24-03-2021 I had gone in connection with my work outside my house, my uncle Nadeem & Muhammad Ahmed were present at my house. At about 12:30 P.M. I had come to my house after free from work, my uncle Nadeem disclosed to me that Abdul Rehman Arain and Imran Malik took my brother Muhammad Ahmed aged about 09 year on motorcycle. I and my uncle suspected and then left our house for search. We came to know about house of above named accused near Grid Station, therefore we reached there and came backside of Grid Station, we heard voice of my brother, it was 02:00 P.M. time. We entered in house and cattle pond and saw towsters of accused Abdul Rehman, Imran and my brother put off/removed and my brother was fallen on the ground, accused Rehman Arain caught hold of my brother from his arms while accused Imran Malik was committing sodomy with my brother. Accused named above seeing us worn their clothes and ran away on motorcycle. My brother narrated the entire facts to us, expressing that accused had taken to him on the pretext to give Bhoosa and then accused Imran committed sodomy with him while accused Abdul Rehman caught hold of him from his arms. Further stated that first accused Abdul Rehman committed sodomy with him while accused Imran caught hold of him at that time. Thereafter we brought my brother at our house, narrated the facts to our elders. On 28.03.2021 we went to PS, obtained letter for medical and got my brother checked up and treated from Civil Hospital T.M. Khan. On 03.04.2021 I lodged FIR at PS T.M.Khan. I produce copy of FIR at Exh.06/A and say it is same correct and bears my signature/LTI. On 04.04.2021 I had shown the place of Wardat to the police. Police prepared such mashirnama in presence of Sajjad and Imdad Ali. On 05.04.2021 I had produced pant of my brother before police. I.O. prepared such memo in presence of said mashirs. Accused Abdul Rehman present in court is same while other accused Imran is still absconding.

Note:- Case property viz. pant present in court is duly sealed which is de-sealed to show the witness).

Property viz. pan present in court is same.

CROSS TO MR. IMRAN MALIK, ADVOCATE FOR ACCUSED ABDUL REHMAN.

I working at painter. I do not remember the day on which incident had taken place. Imran Malik accused is friend of accused Abdul Rehman. It is correct to suggest that accused Imran Malik is employee of father of accused Abdul Rehman. There may be distance of 1 ½ KM between my house and house of accused Abdul Rehman. Accused Abdul Rehman studied with me, therefore I know him. After 2013/2014 our relations with Abdul Rehman became strained. I cannot say as prior to this incident how many times my brother went with accused. I had not gone on work of painting on the day of incident. I myself narrated the facts of incident to the police and my FIR was reduced in writing. It is correct to suggest that in the FIR there is mentioned that on the day of incident I had gone in connection with my work. My uncle Nadeem reside me on my rented house. I cannot give work in connection with I had gone on the day of incident. No FIR of like nature was registered against accused prior to this case. It is correct to suggest that in the FIR there is no mentioned cattle pond. Within 15/20 minutes of my arrival I left my house in search of my brother. I cannot give the names of those people through which I came to know about house of accused at near Grid Station. It is correct to suggest that there is no mentioned about Mohallah People in the FIR who disclosed the place of situation of house of accused near Grid Station. The cattle pond is owned by accused Abdul Rehman. It is correct to suggest that such fact is not mentioned in the FIR.

I cannot give the distance between Grid Station and house of accused Abdul Rehman. There may be same distance as 01 ½ KM between my house and Grid Station. The outer door of house was opened at that time. We did not try to catch hold of accused at that time. I intimated to 15 emergency police at the house of accused. It is correct to suggest that such fact is not mentioned in the FIR. I do not know the colour of motorcycle on which accused ran away. We consulted with our elders first and then on the advice of them I lodged FIR with such delay. My brother was not bath on return before arrival at police due to reason of his illness. It is incorrect to suggest that accused Abdul Rehman is falsely implicated in this case due to son of father where accused Imran is employee. It is incorrect to suggest that after one week delay this false FIR has been registered.

PW-2 Victim (Muhammad Ahmed).

MR. MEHBOOB ALAM, ADPP FOR THE STATE.

(Note:- This witness is minor but gave correct answers to the questions put to him, stating that he is standing in the court, under signed is judge of the court and advocates present in court. He is fit for recording his evidence. Let his statement be recorded accordingly).

On 24.03.2021 my brother had gone in connection with his private work. Near to 12:00 Noon time accused Imran and Abdul Rehman had come on motorcycle at our house, they asked me to accompany them for getting Boosa from somewhere. Both accused took me in vacant house near Grid Station. Accused Abdul Rehman caught hold of my arms while accused Imran Malik committed sodomy. Thereafter, accused Imran caught hold of my arms and accused Abdul Rehman committed sodomy. I raised cries on which my brother Bilal and my uncle Nadeem responded and came there. Thereafter both accused ran away on motorcycle. I narrated all the facts to my brother and uncle. On 04.04.2021 SIP Ismail Mashori recorded my statement. My medical treatment and checkup was conducted at Hospital. Thereafter FIR was lodged. Accused Abdul Rehman present in court is same while accused Imran is absconder. Property viz. pant present in court is same which was worn by me at the time of incident.

CROSS TO MR. IMRAN MALIM, ADVOCATE FOR ACCUSED ABDUL REHMAN.

I do not know the name of Grid Station prior to this. Accused had come on motorcycle to my house and at that time I was out of my house. Accused Imran Malik was driving the motorcycle. Accused Imran had worn sky colour cloth while other accused worn black colour cloth. Motorcycle was of blue and Surmai (Gray) Colour. I had disclosed such facts to the police and my brother. Prior to this I had not gone with accused. Accused are my Mohallah people, therefore, I know them prior to this incident. There were no visiting terms of accused with us prior to this incident. After incident I was suffering from fever for 03/04 days. I had gone to Doctor Ghulam Nabi for treatment of my fever, at Civil Hospital T.M.Khan. I was taken to hospital T.M. Khan for my checkup at 07:00 P.M. My brother Bilal and uncle Nadeem were with me at that time. About half an hour time consumed in my checkup by doctor. Accused Rehman and Imran are friends to each other. I do not know whether accused Imran is employee of father of accused Abdul Rehman. Vacant house was owned by accused Abdul Rehman.

PW-3 eye witness (Muhammad Nadeem).

MR. MEHBOOB ALAM, ADPP FOR THE STATE.

I am eye witness of the incident. On 24.03.2021 I and Muhammad Ahmed were present at our house. Accused Abdul Rehman and Imran had come at our house and they took to victim Muhammad Ahmed on the pretext of Bhoosa. Bilal was out of house due to some his personal work, who had come at 12:30 Noon time. I narrated the facts to complainant Bilal and due to late we suspected. I had Bilal left house for search of victim when we reached near Power House/Grid Station, we heard cries of victim. We entered into house and saw accused Abdul Rehman catching hold the arms of victim while accused Imran was committing sodomy with him. Trousers of both accused were removed. Accused ran away on

motorcycle. We secured victim from the ground, worn pant to him and inquired him who disclosed all the fact to us and further stated that first accused Abdul Rehman committed sodomy with him and then accused Imran did so. We brought victim at our house and narrated the facts to Mohalla people and police. After 03/04 days we approached the police who directed us to get medical for boy. On 28.03.2021 letter for treatment was given by the police. On 04.03.2021 FIR was lodged, again says on 03.04.2021 FIR was lodged. My statement was also recorded by the police on 04.04.2021. Accused Abdul Rehman present in court is same while Imran is absconder.

CROSS TO MR. IMRAN MALIK, ADVOCATE FOR ACCUSED ABDUL REHMAN.

We returned back to our house at 02:00 P.M. due to lunch. There may be distance of 10 minutes on foot between house of victim and house of accused Abdul Rehman. Accused Abdul Rehman is not my neighborer. Accused Imran called victim at that time. I had not seen whether victim had gone with accused prior to this incident. I had not seen accused Imran taken away to victim. Voluntarily says on call of accused Imran, victim disclosed to me that accused Imran taking to him. Mohallah people had knowledge that house of accused Abdul Rehman is situated near Grid Station, therefore, we went there. We had gone on motorcycle in search of victim. It is correct to suggest that there is no mention about our motorcycle in my examination in chief and in my statement before police. We entered into house by pushing the outer door of house. Victim was available in courtyard of house. Outer door of house of accused was open. There was one room in the house of accused. It is correct to suggest that in my statement before police there no mention that we pushed the outer door of house of accused and there was one room in his house. I first saw accused from a distance of 04/05 Feet inside the house. We did not try to catch hold of accused but tried to secure the boy. Accused Abdul Rehman had worn black colour clothes while accused Imran had worn sky colour clothes. It is correct to suggest that these colours are not mentioned in my statement before police in examination in chief. Victim worn back pant and so also black shirt. I have not stated so before police and in examination in chief. We had not intimated to 15 emergency police but directly reached at our house. It is correct to suggest that I have not mentioned the names of notables of Mohallah to whom we complained. I do not know whether accused Imran is employee of father of accused Abdul Rehman. Accused Imran is my neighborer. Occasionally I met with Imran. Accused Imran pet goats and hens. Accused pet the same at his house and so also goats and hens were available at the house where incident has taken. On 04.04.2021 my statement was recorded. It is incorrect to suggest that false FIR is registered against accused Abdul Rehman and accused Imran is employee of father of accused Abdul Rehman and due to none payment of money this false FIR is registered against the accused Abdul Rehman and I deposed falsely in court.

PW-5 (Dr. Naresh Kumar).

"MR. MEHBOOB ALAM, ADPP FOR THE STATE.

On 28.03.2021 I was posted as Medical Officer at DHQ Tando Muhammad Khan. It was 08:15 P.M. when victim Muhammad Ahmed aged about 09/10 years was referred through police for checkup and report. On examination of perineal region the anal orifice looked slightly swelled and a bruise measuring 0.4 cm x 0.4 with mild redness present on 06 O'clock position. No any obvious blood or semen stain is noted due to victim used toilet multiple times before reporting to me. External and internal swabs were taken and sent to DNA analysis to LUMHS. Bottle number No.01 contains external anal swab and bottle No.02 contains internal anal swab. Duration of injury was more than 24 hours I issued provisional medical certificate which I produce on record at Exh-10/A and say it is same correct and bears my signature. After receipt of report from LUMHS sperms were available on the clothes of victim but were not matched with the sample of accused Abdul Rehman. I am therefore of the opinion that act of sodomy was performed on the victim. I issued such final medical certificate. I produce such final medical certificate with reports of LUMHS consisting of two

leaves and seal sample at Exh-10/B and say it is same correct and bears my signature.

CROSS TO MR. IMRAN MALIK, ADVOCATE FOR ACCUSED ABDUL REHMAN.

There was simple swelling on the anal due to late coming of victim after three days. Whole body of victim was checked up. No mark of any violence or assault was present on the body of victim. Victim was normal condition at that time and he was well oriented and with time and space.”

6. The statement of appellant/accused was recorded U/S 342 Cr.P.C at Ex.16, in which he denied the prosecution allegation and claimed his innocence. He did not examine himself on oath nor led any defence evidence. The statement of accused/appellant Abdul Rehman recorded U/s 342 Cr.P.C is reproduced as under;

“Q.No.1. *It has come on record that you on 24.03.2021 at 1400 hours along with absconding accused conjointly committed offence sexual abuse with Muhammad Ahmed aged about 09/10 years in backside of the main WAPDA Gird Station vacant place within the jurisdiction of PS Tando Muhammad Khan. What have you to say?*

Ans. *It is false.*

Q.No.2. *It has come on record during evidence that police referred you for medical examination under police letter, Medical Officer examined you, collected blood samples for DNA, issued such provisional MLC at Exh.9/A, produced final MC at Exh.9/B. What have you to say?*

Ans. *Nothing is connecting me with the offence.*

Q.No.3. *It has come on record that I.O sent after receiving samples from Medical Officer sent the same under letter and entry Exh.12/A and 12/B, sent clothes of victim under letter at Exh.11/B and receipt of forensic lab at Exh.12/D. What have you to say?*

Ans. *I have no concern with the above record.*

Q.No.4. *It has come on record that police recovered pant of light black of victim and prepared such memo in presence of mashirs vide Exh.11/B. What have you to say?*

Ans. *I do not know.*

Q.No.5. *Why the P.Ws have deposed against you?*

Ans. *No one deposed against me.*

Q.No.6. *Do you want to examine yourself on oath to disprove the allegations leveled against you?*

Ans. *No Sir.*

Q.No.7. *Do you want to lead evidence in your defence?*

Ans. *No Sir.*

Q.No.8. *Do you want to say anything else?*

Ans. *Neither I have committed any offence nor I was ever present at the place of incident co-accused Imran Malik who is absconding in the case was servant of my father and because of him have been implicated falsely. I am innocent and falsely implicated in this case. I pray for justice.”*

7. Learned trial Court after hearing the respective parties convicted and sentenced the appellant as stated in the preceding paragraph; hence, this appeal.

8. Mr. Imdad Ali Malik, learned counsel for appellant submits that the appellant is innocent and has falsely been involved in this case; that the evidence of PWs is contradictory and highly doubtful but despite this, the learned trial court without applying judicial mind convicted the appellant, who is innocent and has no connection with the alleged offence. He further argued that the DNA report is not matching which clearly indicate that the appellant has not committed an alleged offence and he has been falsely implicated in this case; that the learned trial court did not appreciate the cross-examination as there were so many contradictions in the evidence of PWs and such benefit of doubt must be given to the appellant, but the learned trial court without considering material contradictions convicted the appellant. At the fag end of his arguments, the counsel for the appellant has brought to the attention of the court that no objection certificates have already been filed by the complainant, victim and the mother of the victim which were already brought on the record. The affidavit of complainant is reproduced as under;

"I, Bilal Ahmed s/o Aftab Ahmed, Muslim, Adult, R/O H.No.A-1037, Muhalla Qasai Tando Muhammad Khan. Do hereby state on oath as under:-

- 1. That I am the complainant as well as eye witness and elder brother of victim Muhammad Ahmed.*
- 2. That I say that I have no objection to acquit the Appellant/accused Abdul Rehman from this case, as I have given the evidence during trial against the appellant due to mis-understanding otherwise present appellant is not real accused in this case.*
- 3. That above no objections affidavit has been drafted by my Advocate under my instructions and the contents thereof are true and correct to the best of my knowledge and belief.*
- 4. That whatever stated herein above is true and correct to the best of my knowledge and belief."*

9. The counsel further states that these three affidavits clearly state that the appellant/accused is not the real accused in this case and evidence given in the trial against the appellant was due to misunderstanding and the appellant may be acquitted in light of the no-objection affidavits filed by the complainant, victim & the mother of victim.

10. On the other hand, learned A.P.G for the State has vehemently opposed and argued that the appellant/accused is convicted in a heinous offence and there are no material contradictions in the evidence of PWs, however, there are some minor contradictions which must be ignored. Lastly, she prayed that the appeal filed by the appellant may be dismissed and conviction as awarded by the learned trial court is very much justified. However, the learned A.P.G for the State requests that let the complainant, victim and mother of the victim be called in person for verification of these affidavits, and upon her request a short date was given and time was fixed. On

the next date of hearing all the three persons i.e. complainant, victim & his mother were present before this court and had verified in person that these affidavits were filed by them and that only due to misunderstanding the evidence was given against the appellant and present appellant is not the real accused in this case. Learned counsel after this verification had submitted a case law of Honourable Supreme Court of Pakistan **Re; Zulfiqaruddin v. State etc** reported as PLJ 2022 S.C (Cr.C) 40, wherein based on such affidavits the appellants were acquitted from the charges, therefore, the learned counsel for the appellant made a plea that in the light of above case law produced by him passed by the Honourable Supreme Court of Pakistan, the present appellant/accused may be acquitted from the charges. The learned A.P.G for the State when confronted with this case law, could not rebut.

11. I have gone through all the three affidavits filed by complainant, victim and mother of victim as well as case law of Honourable Apex Court cited by the counsel for appellant. For brevity of this Judgment, I hereby re-produce the concluding para of the (Supra) Judgment of Honourable Supreme Court of Pakistan as under;

“3. With the assistance of the learned Additional Prosecutor-General, Punjab appearing for the State we have gone through the memorandum of this appeal, the impugned judgments passed by the Courts below and the record of the case and have found that the criminal case in hand had originated in the year 2009. The Appellant happens to be a cousin of the alleged victim of rape namely Mst. Alia Bibi (PW-5) besides being a nephew of the complainant namely Umer Ahsan (PW-4). The record shows that the appellant wanted to marry the alleged victims namely Mst. Alia Bibi (PW-5) and upon refusal of that matrimonial proposal the appellant had allegedly committed the offences which are the subject matter of the present criminal case. During the pendency of the appellant's appeal before the High Court the complainant namely Umer Ahsan (PW-4) as well as the alleged victims namely Mst. Alia Bibi (PW-5) and Mst. Haleema Bibi (PW-6) had sworn affidavits maintaining therein that the present appellant had been implicated in the present criminal case on account of some misunderstanding, the appellant had not abducted anybody and the allegation of rape leveled against him was also a result of some misunderstanding. The complainant had personally appeared before the High Court at the time of hearing of the appellant's appeal and he had owned the affidavits sworn by him and the two victims. It is important to notice here that the said stand taken by the complainant and the alleged victims had been accepted by the High Court and resultantly the appellant had been acquitted of all the charges pertaining to the compoundable offences and his sentences vis-a-vis the non-compoundable offences were reduced by the High Court. We are of the opinion that if the High Court was minded to accept the affidavits sworn by the complainant and the alleged victims, in which affidavits it had been maintained that the allegations leveled against the appellant were factually incorrect, then instead of reducing the sentences of the appellant vis-a-vis the non-compoundable offences the High Court ought to have rejected the prosecution's case as a whole entailing acquittal of the appellant, but unfortunately that course was not adopted by the High Court.

4. For what has been discussed above this appeal is allowed, the outstanding convictions and sentences of the appellant are set aside and he is acquitted of the charge by extending the benefit of doubt to him. The

appellant shall be released from the jail forthwith if not required to be detained in connection with any other case”.

12. It would be fair to state that the case law produced is very much relevant to the present circumstances and the present case in hand except the offences here is of sodomy, while in the case law referred above, the case is of rape, however, the circumstances seems to be same and the affidavits sworn after the trial/evidence is also same and even the affidavits filed at belated stage of appeal of the High Court, which seems to be the case here, whereas the Honourable High Court had reduced the sentence due to affidavits in non-compoundable offences, whereas the Honourable Supreme Court had set-aside even that part of the case and had completely allowed the appeals in light of the affidavits and given the benefit of doubt to the appellant.

13. In such circumstances, I am also of the view as prescribed by the Honourable Apex Court of Pakistan, that in the light of the affidavits filed by the complainant party, the appellant is to be given benefit of doubt. Therefore, the appellant/accused **(Abdul Rehman s/o Muhammad Rizwan)** is hereby **acquitted** from all charges and the concerned Jail Superintendent is directed to release the appellant/accused forthwith if not required in any other custody case.

JUDGE

Ali.