

THE HIGH COURT OF SINDH, CIRCUIT COURT AT HYDERABAD

Criminal Appeal No.S-82 of 2020

Appellant: Niaz Ali alias Najoo through Mr. Shah
Muhammad Khaskheli, Advocate.

Respondent: The State through Mr. Shawak Rathore,
D.P.G. Sindh.

Date of Hearing: **26.05.2025**

Date of Judgment: **26.05.2025**

J U D G M E N T

RIAZAT ALI SAHAR, J. The appellant namely, Niaz Ali @ Najoo has assailed the legality and propriety of the judgment dated 09.03.2020, passed by the learned Additional Sessions Judge-II, Jamshoro @ Kotri in Sessions Case No.236 of 2019, arising out of Crime No.197 of 2019, registered at Police Station Jamshoro, for the offence punishable under sections 376, 511, 354-A, 506/2, 34 PPC whereby, the learned trial Court after full-fledged trial, convicted for the offence under section 376 read with section 511 PPC and sentenced the appellant to suffer R.I. for three years and to pay fine of Rs.30,000/- and in case of default whereof, to suffer S.I. for one month more.

2. As per the prosecution, on 01.08.2020, the complainant, Mst. Sanam daughter of Khadim Hussain lodged an FIR at Police Station Jamshoro, alleging that on 10.07.2019, her paternal Aunt Mst. Salma wife of Khair Muhammad Khaskheli took her to LUMHS Jamshoro for medical treatment in a

rickshaw driven by Niaz Ali @ Najo son of Haji Umed Ali Khaskheli. It is alleged that instead of taking her to the hospital, the complainant was taken to an abandoned quarter situated at Sandoz Road near the clinic of Dr. Taqi Soomro, at around 1100 hours, where the said accused Niaz Ali @ Najo forcibly attempted to commit rape with her. He allegedly stripped her clothes and threatened her with a pistol to remain silent. The complainant claimed to have resisted and later disclosed the incident to her parents. Subsequently, she filed a Criminal Miscellaneous Application before the learned Sessions Judge Jamshoro for the registration of FIR, which was registered pursuant to court directions.

3. After usual investigation and completion of necessary legal formalities, case was challaned that the learned Magistrate sent up the case to the Court of learned Sessions Judge, Jamshoro @ Kotri, from where it was transferred to the Court of learned Additional Sessions Judge-II, Jamshoro @ Kotri, for disposal according to law. During pendency of the proceedings, the bail application of the appellant was dismissed by this Court, where after he was arrested and produced before the concerned Magistrate and was remanded to judicial custody.

4. Learned trial Court framed the charge against the appellant with the accusation under Sections 376, 511, 354-A, 506/2, and 34 PPC to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined the following witnesses:

- **PW-1 Mst. Sanam (Complainant/Victim)** was examined at Exh.06. She produced in evidence the FIR at Exh.06/A, her application dated 01.08.2019 at Exh.06/B, and a memory card allegedly containing a video clip at Exh.06/C.
- **PW-2 Khadim Hussain** (father of the complainant) was examined at Exh.07.
- **PW-3 Naveed (Mashir)** was examined at Exh.08. He produced the mashirnama of the place of incident at Exh.08/A and the mashirnama regarding production of the memory card at Exh.08/B.
- **PW-4 ASI Ghulam Hussain (Investigating Officer)** was examined at Exh.09. He produced departure entry No.28 at Exh.09/A and the police station copy of mashirnama of arrest at Exh.09/B.

Thereafter, the learned Deputy District Public Prosecutor for the State closed the prosecution side by submitting a statement at Exh.10.

5. The statement of the accused was recorded under Section 342 Cr.P.C., wherein he denied the allegations leveled against him. He also declined to examine himself on oath under Section 340(2) Cr.P.C. and did not opt to produce any evidence in his defence. The accused stated that he had been falsely implicated due to personal enmity and that the video produced by the complainant was fabricated. He professed his innocence and sought justice from the Court.

6. After hearing the learned counsel for the parties and examination of the case file, learned trial Court convicted and sentenced the appellant in the manner as stated above.

7. Learned counsel for the appellant contended that the prosecution case is fraught with material contradictions, unexplained delay and glaring lapses in investigation. He

contended that the FIR was lodged after a delay of 21 days without any justification and the memory card was produced nine days after registration of FIR, casting serious doubt on its authenticity and admissibility. He contended that the alleged incident occurred in a public area during daytime, yet no independent witness was examined, and no one responded to the alleged cries of the complainant. The complainant's own testimony is inconsistent regarding the place of incident, presence of a pistol, and her conduct after the incident. He further contended that the memory card was neither sealed nor sent for forensic analysis, and the I.O. himself opined that the video suggested mutual consent rather than assault. According to learned counsel for the appellant, the rickshaw used for alleged transportation was never identified or verified and moreover, all mashirs were closely related to the complainant. In these circumstances, the learned counsel contended that the prosecution failed to prove its case beyond reasonable doubt, and the appellant is entitled to acquittal.

8. Conversely, the learned D.P.G. for the State supported the conviction and submitted that the complainant has consistently implicated the appellant in a serious offence. He contended that mere delay in lodging the FIR or producing the memory card is not fatal, as the complainant was under threat and mental pressure. The memory card was produced and seen in Court, and although no medical evidence was presented, the ocular account is sufficient. He prayed for dismissal of the appeal.

9. Heard and perused the record very carefully.

10. Upon careful appraisal of the evidence of prosecution witnesses, several material contradictions, omissions and procedural lapses emerge, which materially dent the veracity of the prosecution case and shake confidence in the truthfulness of the version advanced. These inconsistencies, supported by direct excerpts from the record, are discussed hereunder.

11. The case suffers from an unexplained and substantial delay of 21 days in lodging the FIR and a further delay of 9 days in the production of the memory card, which the prosecution claims contains key visual evidence. PW-1, the complainant Sanam, admitted in her cross-examination: ***"It is correct that we lodged the FIR after delay of 21 days and we consulted and then complained in the court. It is correct that the reason of delay has not been mentioned in the FIR."*** This delay was confirmed by the I.O. ASI Ghulam Hussain (PW-4) who stated: ***"It is correct that there is delay of about nine days in FIR and producing of memory card."*** In a case involving a grave offence such as attempted rape, the unexplained delay is fatal, as it suggests deliberation and creates doubt regarding the authenticity of the complaint.

12. The memory card, allegedly containing a video clip relevant to the offence, suffers from a questionable chain of custody and lack of proper handling. PW-1 complainant Sanam admitted:

"My father received the memory card from the neighbor and I do not know from whom my father received the same memory card." PW-4 ASI Ghulam Hussain (I.O.) corroborated this failure of identification by stating: *"It is correct that it is not mentioned in the seizure memo of memory card that how the memory card was obtained by the victim and from whom she obtained."* Furthermore, PW-3 Naveed (Mashir) deposed: *"It is correct that the memory card was not sealed by the police officer."* and PW-4 confirmed: *"It is correct that I had not sent the memory card to the forensics laboratory."* These omissions render the memory card highly unreliable and inadmissible for the purposes of supporting conviction.

13. The identification of the place of incident is riddled with inconsistencies. PW-1 complainant Sanam mentioned in her FIR that the incident occurred at **"Sandoz Road"** while in her court application she stated the incident occurred in **"village Abdullah Chawra."** She admitted: *"I have mentioned the place of incident in my FIR as Sandoz Road. Voluntarily says that Abdul Chawra village is on Sandoz Road. There is track of railway in mid of Abdul Chawra village and Sandoz Road."* In contradiction, the I.O. ASI Ghulam Hussain (PW-4) deposed: *"It is correct that village Abdullah Chawra is not situated on Sandoz Road... there is railway track in mid."* Such discrepancy in the location not only reflects poorly on the consistency of the complainant's narrative but also calls into question whether the alleged offence occurred at all.

14. Another material contradiction pertains to the complainant's claim regarding the use of a weapon. In the FIR and oral testimony, PW-1 complainant Sanam alleged the appellant of pointing a pistol at her; however, she admitted: ***"It is correct that I have not stated about the pistol in my application filed in the court of Sessions. It is correct that the pistol is not seen in the video produced by me."*** The I.O. ASI Ghulam Hussain confirmed this as well: ***"It is correct that nothing was recovered from the possession of accused."*** The contradiction between the oral claim and lack of physical or visual proof significantly weakens the allegation of criminal intimidation.

15. It is worthwhile to note here that the video clip presented by the complainant, which was not verified by forensic means, was assessed by the I.O. ASI Ghulam Hussain (PW-4), who stated in his cross-examination: ***"After watching the video, found that as per narration of complainant that her clothes were removed, but her clothes were not removed in the recorded video clip but the accused and was seen visible. As per my opinion there was mutual consent of the complainant with the accused."*** This testimony from the Investigating Officer himself contradicts the core allegation and renders the foundation of the prosecution case unstable.

16. The prosecution failed to associate any independent witness in either the recovery of the video clip or inspection of the

scene of the incident, despite the proximity of the alleged location to a public road. PW-1 complainant Sanam admitted: ***"It is correct that nobody came at the place of incident on my cries... No violent injuries were found on my body... my worn clothes were not torn."*** Furthermore, PW-4 ASI Ghulam Hussain stated: ***"There are houses in surrounding of the place of incident. It is correct that Sandoz Road is busy road by traffic and public."*** The silence of the surroundings and absence of any public intervention or eye-witness further weakens the claim of a daytime offence in a busy area.

17. Moreover, no forensic or corroborative technical evidence was obtained. PW-4 ASI Ghulam Hussain admitted: ***"It is correct that I had not obtained the CDR record of the mobile data of the accused from the cellular company. It is correct that memory card is a modern device. It is correct that forensic laboratories are established to examine the video clips for affirmation of the recorded films."*** These admissions reflect serious deficiencies in the investigation and a failure to meet the evidentiary standard required in sexual offence cases.

18. The rickshaw allegedly used to transport the victim to the location was never identified, nor was any effort made to trace it. PW-1 complainant Sanam acknowledged: ***"It is correct that I have not given the number and color of rickshaw in my FIR or in my statement."*** PW-4 ASI Ghulam Hussain further admitted: ***"I had not made inquiry about the rickshaw and***

who is its owner." This gap renders the prosecution's version of how the victim was brought to the place of incident unsubstantiated.

19. The testimonies of the mashirs are also tainted by relationship bias. PW-1 complainant Sanam stated: *"Mashir Naveed is my uncle while Mushtaque is son of my paternal aunt."* PW-4 ASI Ghulam Hussain admitted: *"From mashirs, one is uncle and the other is cousin of complainant... mashirs were called by the complainant."* This clearly demonstrates that the so-called independent witnesses are in fact closely related to the complainant and no neutral evidence was procured despite availability of public witnesses.

20. All the above-stated contradictions, factual gaps and deficiencies in the investigation, when viewed collectively, create serious doubt about the truthfulness of the prosecution story. The prosecution has failed to establish its case beyond reasonable doubt. It is a settled principle of criminal law that suspicion, however strong, cannot take the place of proof. The material contradictions and investigative lapses entitle the accused to the benefit of doubt.

21. In view of these glaring contradictions, omissions and investigative deficiencies, the prosecution's case appears doubtful. It is a well-settled proposition of law that in order to extend the benefit of doubt to an accused, it is not necessary for multiple circumstances to exist that create uncertainty. Rather, if a single

circumstance gives rise to a reasonable doubt regarding the guilt of the accused, then such doubt must be resolved in favour of the accused, entitling him to the benefit thereof. In this respect, reliance can be placed upon case of ***Muhammad Hassan and Another v. The State*** [2024 SCMR 1427] wherein the Honourable Supreme Court has held that:

“According to these principles, once a single loophole/lacuna is observed in a case presented by the prosecution, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused.”¹

22. For what has been discussed above and in reliance upon the established judicial precedent, as well as considering that even a single material loophole in the prosecution is sufficient to entitle the accused to acquittal and the instant case suffers from multiple inconsistencies both factual and procedural, which collectively shake the foundation of the prosecution version, the instant appeal was **allowed** through my short order dated 26.05.2025. Consequently, the impugned judgment dated 09.03.2020, passed by the learned Additional Sessions Judge-II, Jamshoro @ Kotri,

¹ See also; *MUHAMMAD MANSHA v. The STATE* 2018 SCMR 772- "4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to be benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of *Tarique Parvez v. The State* (1995 SCMR 1345), *Ghulam Qadir and 2 others v. The State* (2008 SCMR 1221), *Mohammad Akram v, The State* 2009 SCMR 230) and *Mohammad Zaman v. The State* (2014 SCMR 749)."

was set aside, and the appellant was acquitted of the charge. Since the appellant was present on bail, as such, his bail bonds stood cancelled and surety was discharged. **The foregoing constitutes the detailed reasons for the short order dated 26.05.2025.**

J U D G E

Abdullahchanna/PS