04

CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Criminal Jail Appeal NO. 117 of 2021
confirmation case No. 04 of 2021.

Zain-ul-Aabidin
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: 10-08-2022

Decided on : 15-08-2022

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.

4(9)

IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Jail Appeal No. 117 Of 2021.

Zain-ul-Aabdin s/o Fazal Karim
Muslim, adult, presently
confined in Central Prison,
Karachi.....Appellant in person.

Versus

The state. .....Respondent.

Sessions Case NO.2446/2015
FIR No.396/2015
Sections.376 PPC.
PS. Saeedabad, Karachi.

APPEAL UNDER SECTION 410 CR.P.C.

Honourable Sir,

Being aggrieved and dis-satisfied with the impugned judgement dated 01.02.2021, passed by Mr. Gada Hussain Abro, Learned Xth Additional Sessions Judge Karachi, West, in Sessions Case number mentioned above re: The State Vs. Zain-ul-Aabdin s/o Fazal Karim, being outcome of FIR number mentioned above , Police Station Saeedabad, Karachi, under sections 376 PPC.

Whereby convicting and sentencing the Appellant/ accused by awarding him under Section 376 PPC **DEATH SENTENCE** and to pay fine of Rs.500,000/-, to the victim in view of section 545 subsection (a) & (b) Cr.P.C. in case of default in payment of fine, the appellant shall further undergo rigorous imprisonment for a period of (06) six months.

The Appellant/accused in person have come in appeal before this Honourable Court with a prayer that this Honourable Court may be pleased to call for the R&Ps of aforesaid Sessions case, peruse the same, so also the impugned judgement and may further be pleased after hearing and satisfying itself as to the legality, propriety and maintainability of the impugned judgement be pleased to accept this appeal and may further be pleased as a consequence to set-aside the impugned judgement and the conviction awarded to the appellant and this Honourable Court

4(5)

IN THE COURT OF ADDITIONAL SESSIONS JUDGE-X
KARACHI WEST

No: X/ADJ/W/ 24 /2021, Karachi, 01st February 2021

To,

The Honorable
Registrar
High Court of Sindh
Karachi

INWARD TO 130 CPL
BRANCH
DATE 04/2/2021
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.2446/2015 (THE STATE VS. ZAIN-UL-ABDIN @ JALAL, FIR NO.396/2015, U/S. 376 PPC, P.S. SAEEDABAD, KARACHI)**

Respected Sir

I have the honour to submit that vide judgment dated 01.02.2021 passed by the undersigned in the above noted Sessions Case, whereby accused Zain-ul-Abdin @ Jalal S/o Fazal Karim 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 [illegible] judgment alongwith R&Ps of S.C No. 2446/2015 are submitted herewith under section 374 Cr.P.C for confirmation of death sentence as required by law.

(GADA HUSSAIN [illegible])
ADDL. SESSIONS [illegible]
KARACHI WEST

Enclosed:

R&Ps of SC No.2446/2015 (02-parts)
Part I
Diary sheet A to 9
Page No. 01 to 88
Part-II
Page No. 01 to 252

OFFICE OF THE DISTRICT AND SESSIONS JUDGE KARACHI [illegible]
No. A / W / 383 /2021, Karachi Dated: [illegible]

Submitted with compliments to the Learned [illegible] Honorable High Court of Sindh, Karachi.

(ABDUL NAEEM MEMON)
District & Sessions Judge
Karachi West

05

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Jail Appeal No.117 of 2021.
Conf. Case No.04 of 2021.

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

Appellant:	Zain-ul-Aabdin S/o. Fazal Karim through Mr. Muhammad Farooq, Advocate.
Respondent:	The State through Mr. Saleem Akhtar Buriro, Additional Prosecutor General Sindh.
Date of hearing:	10.08.2022.
Date of Announcement:	15.08.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Zain-ul-Aabdin S/o. Fazal Karim has preferred the instant appeal against the judgment dated 01.02.2021 passed by Learned Additional Sessions Judge-Xth Karachi West in Special Case No.2446 of 2015 arising out of Crime No.396 of 2015 U/s. 376 PPC registered at P.S. Saeedabad, Karachi whereby the appellant was convicted and sentenced to death subject to confirmation by this court and to pay fine of Rs.500,000/- (Rupees five hundred thousand only) 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.

2. The brief facts of the prosecution case as per F.I.R. are that on 14.10.2015 at about 1900 hours complainant Arbab Ali S/o. Ali Muhammad approached P.S. Saeedabad and verbally reported that on 13.10.2015 at 0700 hours, he went to work and at about 2130 hours, he received phone call of his son Waseem who disclosed him that their neighbour's boy namely Zain-ul-Aabdin alias Jalal had committed rape with his daughter Kainat in a vacant plot No.574. On such information he reached at home, where his daughter

Kainat aged about 06/07 years was present at home. He enquired from his daughter who affirmed that Zain-ul-Aabdin had committed rape with her. It is further narrated by complainant that his wife washed the clothes of his daughter and also gave her bath. After that he came at P.S. to report the matter, hence present FIR.

3. After completion of usual 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 08 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. He did not give evidence on oath and did not call any witness 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 to death along with fine, 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 01.02.2021 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 there was over a days delay in lodging the FIR which gave the complainant the chance to cook up a false case against the appellant in collusion with the police; that the star eye witness Bilawal who allegedly witnessed the rape of the victim did not give evidence without any explanation; that the other so called eye witness Ghulam Akbar was not actually an eye witness as his evidence was based on hearsay and that they were planted witnesses; that the medical evidence did not implicate the appellant as there was no DNA matching his sperms with the sperm allegedly found on the tip of the vagina of the victim and thus 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 has placed reliance on the cases of **Saleem and others v. The State** (2021 MLD 1184), **Muhammad Afzaal v. The State** (2019 MLD 1707),

Muhammad Siddique v. The State (2019 SCMR 1048), Najeeb Ullah v. The State (2022 YLR 838), **Syed Altaf Hussain Shah v. The State** (2021 YLR 2107), **Muhammad Javed v. The State** (2019 SCMR 1920) and **Tanvir v. The State** (PLD 2020 Lahore 774).

8. On the other hand learned Additional Prosecutor General Sindh appearing on behalf of the State and the representing the interests of the complainant service upon whom was held good by this court has fully supported the impugned judgment based on the evidence on record and submitted that the appeal is without merit and should be dismissed and the confirmation reference answered in the affirmative.

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 appellant, and the impugned judgment with their able assistance 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) At the outset we do not find the delay of one day in lodging the FIR to be fatal to the prosecution case as in our society often on account of honour 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).The failure however to mention the names of the eye witnesses in the FIR after such delay does put us on caution as to their reliability.

(b) In this case the victim who was 6/7 years of age at the time of the offence and was 13/14 years of age before the prosecution closed its side did not give evidence as to who raped her. This was the best possible evidence against the appellant however her statement was not even recorded especially as the alleged rapist was her neighbor and she would easily have been able to recognize him as she even

mentions him by name in the FIR dents to a certain extent the prosecution's case as to the identity of the rapist. In this respect reliance is placed on the case of **Saleem** (Supra)

(c) Allegedly the victim had been abducted whilst she was with her brother whilst going to buy sweets. According to PW 6 Dr.Summaiya Tariq who medically examined the victim after the rape she stated that the victim's younger brother was also with her at the time of the rape as he explained to this witness the act of rape by making pelvic thrusting movements who was aged 5 at the time and would have been about 11 to 12 years of age prior to the prosecution closing its side however he was also not called as an eye witness to identify the rapist which again dents to a certain extent the prosecution's case as to the identity of the rapist.

(d) Bilawal who claimed to be an eye witness to the rape and was on the prosecution list of witnesses however was not called to give evidence and was in effect given up by the prosecution as such the inference may be drawn under Article 129 (g) Quannon-e-Shahdat Ordinance 1984 that he would not have supported the prosecution case. We find the failure to call this star witness in the absence of any other eye witness to the rape who could have identified the rapist to be inexplicable.

(e) PW 7 Ghulam Akhbar who is allegedly another eye witness is in fact a witness of hearsay evidence only. In his evidence he states that:

> *"On 13.10.2015, I was going on motorcycle towards cattle form of Roshan Jatoi from Sector No.12/A, Street No.2. When I pressed break, one person namely Bilawal came out with one baby girl and* ***I saw one person running in the same street wearing red shirt and black pent.*** *I enquired from Bilawal who was holding the baby girl as to whose girl was the same,* ***who disclosed that the baby girl was the daughter of his neighbour*** *Arbab. The* ***clothes of the baby girl were stained with blood. I enquired from the running away accused whose name he disclosed as Zainul Abideen Bengali. He further disclosed that the same accused had committed rape with the baby girl who was just aged about seven years and her name was disclosed as Kainat. Thereafter I went away to my work and in the evening I came back and met with Arbab and informed him what I saw earlier".***

In his cross examination he states that, *"I had not seen the face of the accused at the time when I had seen him running, voluntarily says that I had seen his face at the police station.....Bilawal had disclosed to him the name of the accused"*

He is clearly **NOT** an eye witness, his evidence is hearsay and he cannot even be regarded as a last seen witness as he did not recognize or know who the person he saw running way was. His evidence is also doubtful as it does not appeal to logic, commonsense or reason that after coming to know about such a brutal act on a child he simply left for work as usual and did not even bother to report what he had

seen to the father of the victim until the following evening let alone to the police.

(f) As such no PW identified the appellant as the rapist of the victim and neither did the victim herself who in our view would have been quite capable of giving evidence but was not even put to the test in this regard by the learned trial judge.

(g) Other witnesses who are mentioned in the evidence and were an important part of the prosecution case such as the mother of the victim who washed her clothes and his son who called the complainant from work to inform him about the incident were also not called to give evidence which makes the chain of evidence some what broken if the case was to be based on circumstantial evidence alone which in the end it is.

The question is what evidence therefore is on record to connect the appellant to the rape of the victim.

(h) In this respect the medical evidence is of importance. PW 6 Dr.Summaya Tariq medically examined the victim about a day after the incident. In her evidence she states that, *"She had changed clothes of incident, passed urine and washed her private parts"*. She then collected one swab from the victim's vagina through tip of her little finger and opined that the victim had been subject to an act of sexual intercourse. The chemical report found human semen on the swab. We very much doubt this conclusion as the victim's private parts had been washed and the swab only came from the tip of the vagina.

(i) Further doubt concerning the semen obtained from the appellant's trousers is raised by the evidence of PW 3 Dr.Noor Ahmed who examined the appellant who stated in his evidence, "Bath was taken clothes were not changed (**blue jeans** with semen marks present) urine passed. When the **blue jeans** were sent for chemical examination the chemical report found **black pants** stained with semen which is a major discrepancy. If the appellant was guilty it does not also appeal to logic, common sense and reason that he would take a bath and then put back on his semen stained trousers if he had committed such a serious offence which carried the death penalty.

(j) It is correct that according to the evidence of PW 6 Dr.Summaya Tariq the victim had been subject to sexual intercourse and that on the swab she took semen was found however without a DNA test (which was not carried out in this case) the best which can be said is that the victim was raped but we cannot tell whether it was by the appellant or some other person especially as there is no eye witness evidence of who the rapist was. In this respect reliance is placed on the cases of **Muhammed Javed** (Supra) and **Muhammed Siddique** (Supra)

Significantly in answer to question No.6 in the appellants S.342 Cr.PC statement he states as under;

> *"Sir the other two accused namely Bilawal and his two brothers had committed zina with the victim whilst I was at home. Again says I was coming from work"*

6

Is this perhaps the reason why the star witness Bilawal was dropped by the prosecution as he would not have been able to withstand cross examination and even by his own evidence he would have been the person last seen with the victim? And why the victim herself did not give evidence especially as it is the case of the appellant during cross examination that the father had falsely implicated him in this case so that he could grab some of his property?

(k) The evidence of PW 8 Aashiq Ali who was the IO of the case we find contains material contradictions and as such we place no reliance on it. For example, he starts his evidence by stating that on 14.10.2015 the FIR, arrested accused and memo of arrest and recovery were handed over to him but later says in the same breath that he was busy searching for the accused who on 15.10.2015 at about 0010 hours he arrested and prepared the memo of arrest and recovery. He did not attend the medical examination of the victim. According to the evidence of PW 6 Dr.Summaya Tariq after she obtained the vaginal swab she called the IO ASI Jaifoor Khan to collect it from her office but he refused however the sample was collected on the same date by a person with an illegible signature whose identity is unknown which also brings the chain of safe custody of the victims vaginal swab into doubt.

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.