

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Cr. Appeal No.S-232 of 2012

Appellant: Muhammad Ashraf alias Ashayo.
Mr. Hemandas Sanghani, Advocate for appellant.

Appellant is present on bail.

Respondent : The State through Syed Meeral Shah
A.P.G.

Date of Hearing : 16.02.2018

Date of Judgment : 16.02.2018

J U D G M E N T

ABDUL MAALIK GADDI, J – Through this appeal the appellant has assailed the legality and propriety of the judgment dated 10.07.2012, passed by the learned Sessions Judge, Badin in Sessions Case No.156 of 2011 (re-The State Versus Muhammad Ashraf alias Ashayo) arising out of crime No.34/2011 registered under sections 376 PPC at P.S Nindo, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in Point No.2 of the impugned judgment. For the sake of convenience, it would be proper to reproduce Point No.2 of the impugned judgment, which reads as under:-

Point No.2

“In view of my findings on above point, I have come to the conclusion that the prosecution has proved charge of committing rape against accused beyond reasonable shadow of doubt. Therefore, accused Muhammad Ashraf alias Ashayo son of Muhammad Siddique Panhwar is convicted under section 376 PPC and sentenced to suffer R.I for five years and also to pay fine of Rs.50,000/-. In default of payment of fine, to suffer S.I for one year. The fine if recovered be paid to victim Ameeran. The accused is also extended benefit of section 382-B, Cr.P.C. The accused is produced in custody from District Jail, Badin and he is remanded back to Central Prison Hyderabad through Superintendent District Jail Badin with warrant of conviction to serve out the sentence.”

2. Precisely, the facts of the prosecution case, as unfolded in the F.I.R., lodged by complainant Abdul Aziz Mallah at Police Station on 12.07.2011 at 1200 hours are that: he is hari of Allah Bux Bhurgri. He has got four daughters out of whom Ameeran aged about 9/10 years used to work along with him in the lands. It is stated by the complainant that on the day of report, he, his wife were working in the land whereas his daughter Ameeran was cutting the grass in the

nearby sugarcane crop. After some time, they heard cries of his daughter on which he, his relatives Mamoon son of Sulleman Mallah and Ahmed son of Allahdino Mallah went running towards sugarcane crop and at about 0900 hours they saw that Shalwar of his daughter Ameeran was put off and Ashraf alias Ashayo son of Siddique Panhwar was forcibly committing rape with his daughter and she was raising cries. They raised hakals and seeing them, the accused leaving Ameeran ran away. They saw that Ameeran was bleeding. On inquiry, she disclosed that she was cutting grass from sugarcane crop when accused Ashayo came, caught hold of her arm, fell her down, put off her shalwar and forcibly committed rape with her. She raised cries. Thereafter, complainant took his daughter, went to Police Station and lodged the above F.I.R.

3. After supplying case papers to the accused, charge Ex.3 was framed against the accused for the offence under section 376 PPC to which he pleaded not guilty and claimed to be tried vide his plea Ex.4.

4. In order to substantiate its case, the prosecution has examined PW-1 WMO Dr. Shabnam Bhurgri at Ex.6. She produced letter dated 12.07.2011 at Ex.6/A, Provisional medical certificate of victim Ameeran at Ex.6/B final medical certificate of Mst. Ameeran at Ex.6/C, letter addressed to the Chemical Examiner dated 13.07.2011 at Ex.6/D, Chemical Examiner's report at Ex.6/E, P.W-2 Dr. Abid Ali Memon at Ex.7, he produced letter dated 12.07.2011 at Ex.7/A, provisional medical certificate of accused Ashraf alias Ashayo at Ex.7/B, final medical certificate of accused at Ex.7/C and letter addressed to the director Laboratories and Chemical examiner to Govt. of Sindh Karachi dated 12.07.2012 at Ex.7/D, PW-3 complainant Abdul Aziz at Ex.8. He produced F.I.R. at Ex.8/A, PW-4 Mamoon at Ex.9, OPW-5 Victim Ameeran at Ex.11, PW-6 Muhammad Soomar at Ex.12. He produced memo of arrest at Ex.12/A, memo of place of incident at Ex.12/B, sketch of place of incident at Ex.12/C, PW-7 ASI Ali Nawaz at Ex.13. Thereafter, side of the prosecution was closed by learned DPP vide his statement Ex.15.

5. The statement of accused was recorded under section 342 Cr.P.C at Ex.16. In his statement, he has denied the allegations of the prosecution and claimed his innocence. However, he neither examined himself on oath nor offered any evidence in his defence.

6. Trial Court after hearing the learned counsel for the parties, by impugned judgment, convicted and sentenced the appellant under section 376 PPC, as stated in Point No.1 above.

7. It is contended by the learned Counsel for the appellant that the case against the appellant has been registered due to enmity; that the evidence so brought on record is contradictory on material particulars of the case, therefore, the same cannot be safely relied upon for maintaining conviction. During course of arguments he has also relied upon the grounds of memo of appeal, which are as under:-

- i. That the impugned judgment of the learned trial court passed on the basis of surmises, conjectures, it is perverse and against the natural norms of justice so also against the principles of criminal justice.
- ii. That, learned trial court while passing impugned judgment travelled beyond his jurisdiction and failed to apply the judicial mind and prudent mind and passed judgment against the appellant by not applying the judicial mind, that the PWs are interested who deposed falsely against the appellant.
- iii. That, impugned judgment is opposed to law, facts and as such cannot be upheld. The impugned judgment is not passed in accordance with law, facts and equity.
- iv. That, it was the case of acquittal but learned trial court wrongly discussed the points for determination and convicted to the appellant. Material points and issue involved in the case were not discussed by learned trial court.
- v. That, all the PWs and eye witnesses are closed relatives to each other and false implication of the appellant was not ruled out.
- vi. That, learned trial court has misread and non-read the evidence of witnesses and as such has not appreciated the same and passed impugned judgment. Evidence of prosecution is not trustworthy, insufficient, based on interested witnesses.
- vii. That, the learned trial court while passing the impugned judgment has ignored the material contradictions in the prosecution evidence which have made entire prosecution case as doubtful and consideration was given to the evidence of prosecution

and passed the impugned judgment without application of judicial mind.

8. Conversely, Syed Meeral Shah learned Additional Prosecutor General Sindh while opposing the aforesaid contentions submitted that the prosecution has fully established its case against the appellant beyond reasonable doubt by producing consistent / convincing and reliable evidence and the impugned conviction and sentence awarded to the appellant is the result of proper appreciation of evidence brought on record, which needs no interference. Lastly, he prayed that the appeal may be dismissed.

9. I have heard the learned Counsel for the appellant and learned A.P.G. After going through the record I have come to the conclusion that the prosecution has proved its case against the appellant for the reasons that in this matter complainant Abdul Aziz, who is father of victim Mst. Ameeran has registered the F.I.R. on 12.7.2011 at 1200 hours stating therein that on the said date at 900 hours in the sugar cane cultivation of Siddique Panhwar, Deh Phambhki, appellant forcibly committed rape upon Mst. Ameeran and this incident was witnessed by P.W Mamoon, whose evidence is on record at Ex.9 of the R & Ps.

10. In order to prove the allegation the prosecution has examined P.W-1 Dr. Shabnam Bhurgri, Woman Medical Officer, Civil Hospital Badin, at Ex.6, who in her evidence has stated that when Mst. Ameeran aged about 9 years was produced before her for medical examination and she found that the rape has been committed upon Mst. Ameeran. For the sake of convenience it would be proper to reproduce the examination in chief of Dr. Shabnam Bhurgri, which reads as under:-

“I have issued final medical certificate and as per the Chemical Examiner’s report, I am of the opinion that the rape has been committed with victim Mst. Amirzadi. I produce final medical certificate at Exh. 6-C and letter dated 13.07.2011 at Exh.6-D, it is same, correct and bears my signature. I also produce chemical examiners report 8029/30 dated 26.07.2011 at Exh.6-E. It is same, correct.”

This witness was cross examined by the Counsel for appellant but her evidence was not shattered. No question was put to her even with regard to committing rape with Mst. Ameeran. Medical Certificates and Chemical Reports are available on record at Ex.6/A to 6/E, which, prima facie show the involvement of the appellant in the case.

11. I have also gone through the evidence of P.W-2 Dr. Abid Ali Memon available on record at Ex.7, who also examined appellant on 12.07.2011 and during his evidence it appears that the appellant was aged about 19 years and was capable to perform intercourse / commit zina. This witness has also been cross examined by the Counsel for the appellant but the same remained unshaken.

12. The evidence of complainant P.W-3 Abdul Aziz, who is father of victim Mst. Ameeran, is available on record at Ex.8, who in his examination in chief has stated as under:-

“On 12.07.2011, I along with my wife Mst. Hajani and daughter Ameeran aged about 9/10 years left our house and went to work in the field. I and my wife were working in the cotton crop in the land of Allah Bux Bhurgri and my daughter went to cut grass from sugar cane crop beside the cotton crop. When at about 9-00 A.M we have heard cries of my daughter from the sugar cane crop. PW Ahmed and Mamoon were also working near by, then I along with my wife and above named PWs rushed towards sugar cane crop, where we saw accused Ashraf alias Ashayo while committing zina with my daughter and so also found shalwar of my daughter lying beside. We made hakals and on our arrival and the accused ran away. We saw the blood was oozing from vagina of my daughter. My daughter disclosed that she was cutting grass then accused came and forcibly put of her shalwar and committed zina with her as such, she raised cries. Thereafter we brought our daughter at P.S where I have lodged F.I.R. and obtain letter for examination of my daughter and then we brought her at civil hospital Badin in ambulance. I left my daughter at hospital and came along with police to place of incident where police inspected place of incident in presence of mashirs Muhammad Soomar and Ahmed Ali Lund. Accused present in court is same, who was already seen by me and working in the land of his father Muhammad Siddique Panhwar. I produce F.I.R. at Exh.8-A, it is same, correct.”

This witness though cross examined by the Counsel for the appellant but his evidence was not shattered.

13. P.W Abdul Aziz, who is complainant / eye witness of the incident in his evidence has stated that the appellant has committed zina with his daughter forcibly and this incident was witnessed by him as well as P.Ws Mamoo and Ahmed. The evidence of P.W-4 Mamoon is available at Ex.9, who in his evidence has stated as under:-

“On 12.07.2011, I was working in my field along with Ahmed Mallah. Complainant Abdul Aziz and his wife were also working in the cotton crop of their landlord Allah Bux Bhurgri. We heard cries in the sugar cane crop of Siddique Panhwar, when we rushed towards sugar cane crop where we saw accused Ashraf alias Ashayo was committing zina with daughter of complainant Abdul Aziz namely Ameeran. The

Shalwar of Ameeran was also lying on the ground. We also found blood was oozing from vagina and accused ran away towards south. She also disclosed that while she was cutting grass the accused came and forcibly put off her shalwar and committed zina with her. Thereafter, complainant took away Mst. Hameeran to Nindo. My statement was recorded by police. Accused present in Court is same.”

This witness has also been cross examined but his evidence remained unshaken

14. Now I come to the evidence of P.W-5 Mst. Ameeran available at Ex.11 in the R & Ps, who is the victim of the incident, who in her examination in chief has stated as under:-

“This incident took place about 8/9 months back. On the day of incident, I along with my father Aziz and my mother Mst. Hajani went to the land of Siddique Panhwar for cutting grass for our cattle. It was morning time when I was cutting grass from sugar cane crop. Accused Ashayo son of Siddique Panhwar came there and put off my shalwar and forcibly committed zina with me. At that time, my father and mother were cleaning the crop of cotton at the distance of one acre’s land. Due to act of the accused, there was bleeding from my private part. I raised cries, on which my mother, father, one Mamoon son of Sulleman and Ahmed came running there. On seeing them accused ran away. My mother then put my shalwar to me and they took me to P.S Nindo. My father lodged F.I.R. and police recorded my statement. Thereafter, I was taken in ambulance to civil hospital Badin. A police constable was also accompanied us, where lady doctor examined me and gave me treatment. My clothes were also taken by lady doctor. Accused Ashayo alias Ashraf present in court is same. I see my clothes present in court are same.”

Despite of lengthy cross examination nothing adverse brought on record that the appellant has not committed zina with her.

15. I have also perused the evidence of I.O of the case ASI Ali Nawaz available at Ex.13 in the R & Ps with the able assistance of learned Counsel for the appellant as well as learned A.P.G and come to the conclusion that this witness has conducted the investigation as well as he is author of F.I.R. and according to him he recorded statements of P.Ws Abdul Aziz, Mamoon, Ahmed and Mst. Ameeran under section 161, Cr.P.C and all the witnesses in their statements have implicated the appellant in the commission of the offence.

16. From the perusal of above evidence, it prima facie appears that the appellant has committed zina with the minor girl namely Ameeran aged about 9 years. The ocular account is supported by medical evidence.

17. It is stated by the Counsel for the appellant that the appellant is innocent and F.I.R. is delayed by 3 hours. Reverting to the contention of the learned Counsel for the appellant, it is suffice to say that the F.I.R. has been registered on 12.07.2011 at 1200 hours, whereas, the incident took place on the said date at 0900 hours. It has also come on record that there is distance of 9/10 kilometers in between the place of incident and Police Station, therefore, delay in criminal cases, by itself, in lodging the F.I.R. was immaterial. Factors to be considered by the courts, were; firstly, that delay stood reasonably explained; and secondly, that the prosecution had not derived any undue advantage through the delay involved. The delay in lodging of report was material only when there was doubt regarding identity of culprits; or there existed enmity between the parties. Here in this case though enmity has been claimed but it has not been proved through any evidence. The delay has also been explained satisfactorily. Nothing is on record that the complainant / eye witnesses have any inimical terms with the appellant.

18. I have considered the evidence available on record. Perusal of record shows that all the witnesses, who have appeared in the trial from prosecution side, were subjected to cross examination but nothing has come on record to discredit their evidence. The private witnesses are natural and independent witnesses. They have no enmity whatsoever with the appellant. The appellant though alleged in his statement recorded under section 342, Cr.P.C that the case against him is false and has been registered due to enmity with complainant but in this regard appellant has neither examined himself on oath nor led any evidence in support of his claim. Merely, claiming enmity with complainant without bringing on record any evidence in proof of such claim is not sufficient to believe the plea of appellant. Under the circumstances, I am of the opinion that the number of witnesses is not required to prove a particular fact and conviction in a criminal case rather it can be recorded on the basis of sole eye-witness if rings true.

19. As observed above, the evidence led proved beyond reasonable doubt that the appellant had committed zina and the testimony of ocular witnesses, mashir of the arrest and recovery, is found confidence inspiring and unimpeachable. There could not be any reason on their part to falsely implicate the appellant in connection of such heinous crime.

20. In view of above discussion, I see no error or illegality in the impugned judgment warranting interference by this court, which is maintained. Accordingly, the appeal being devoid of any force is dismissed. The appellant is present on bail, his bail bond is cancelled and surety discharged. He is taken into custody and remanded to jail to serve out the sentence as awarded by the trial court. However, the appellant would be entitled for benefit of section 382-B, Cr.P.C.

JUDGE

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