

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR
Criminal Jail Appeal No.S-06 OF 2024

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| Date | Order with signature of Judge |
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| Appellant: | Wazeer Ali son of Muhammad Nawaz by caste Vistro (Now confined at Central Prison Khairpur) |
| | Through Mr. Rukhsar Ahmed Junejo, advocate. |
| The State: | Through Syed Sardar Ali Shah Rizvi Additional Prosecutor General. |
| Date of hearing. | 06-03-2025 |
| Date of decision. | 06-03-2025. |
| Date of Reason. | 20-03-2025. |

J U D G M E N T

Ali Haider ‘Ada’,J:- Through the instant appeal, the appellant named above impugned the judgment Dated 17-01-2024 passed by learned IVth Additional Sessions Judge/Gender Based Violence Court, Khairpur in Sessions Case No. 598/2020 Re. The State Vs. Wazeer Ali Vistro, bearing Crime No. 20/2020, for offence punishable u/s 376 (i) Pakistan Penal Code PPC registered at Police Station Ahmepur, whereby the appellant was convicted for an offence punishable under section 376 (3) PPC for committing rape with minor girl Rukhsarand sentenced to suffer rigorous imprisonment (R.I) for life and to pay compensation amount of Rs.100,000/- (one lac) to victim. In case of default in payment of compensation amount, he shall suffers simple imprisonment for six months more with benefit of section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that complainant Ikram Ali Vistro lodged the FIR on 27-02-2020 alleging therein that one Sanaullah has got constructed his house in village Vistro and such house was being colored by Wazeer Ali Vistro. On 27-02-2020 Miss Rukhsar D/o Fayaz Hussain alias Insaf Ali Vistro aged about 10/11 years (niece of complainant) left her house to purchase edible items from the shop but she did not return for the significant time, therefore, complainant along with his cousins namely Ghulam Rasool and

Rahmatullah Vistro went for her search. At about 1600 hours, they reached near the house of said Sanaullah Vistro where they heard cries of Rukhsar, therefore, they went inside the said empty house of Sanaullah Vistro, where they saw that accused Wazeer Ali was committing rape with Miss Rukhsar in a room. The accused seeing witnesses fled away after wearing his shalwar. Victim disclosed that she was going from the street to the shop for buying edible items/things but accused Wazeer Ali forcibly dragged her to the empty house where he forcibly removed her shalwar committed rape with her. Ultimately complainant party appeared at Police Station and lodged the above said FIR.

3. After registration of FIR, the investigation was entrusted to SIP Gulzar Ali Lashari, who after conducting investigation recommended the case for its disposal under "A" class and the appellant was declared innocent during the first phase of investigation. Subsequently, the investigation was entrusted to a second Investigating Officer, who conducted further investigation and reaffirmed the findings of the first Investigating Officer; however, the learned Magistrate disagreed with the opinion of the police and took cognizance of the matter. As a result, the accused was sent up for trial. The case papers were supplied to accused under receipt. The charge against accused was framed at Ex.2, to which he pleaded not guilty and claimed to be tried.

4. In order to prove the case against the accused, the prosecution has examined PW/1 complainant Ikram Ali Vistro at Exh.4, who produced FIR, PW/2 Ghulam Rasool Vistro at Exh.5, PW/3 Rehmatullah Vistro at Exh.6, PW/4 Dr. Afshan Unar at Exh.7; she examined the victim and issued relevant MLCs. She produced relevant police letters dated 27-02-2020, 02-03-2020, 02-04-2020 and 18-09-2020, copy of letter issued to Medical Superintendent Civil Hospital, Khairpur for Psychological opinion of victim, another letter referred the victim for better treatment and expert opinion to Civil Hospital, Khairpur, letter issued for Chemical Examination and DNA testing, the report of Chemical Examiner as well provisional MLC and final MLC of victim, PW/5 ASI Allah Dino Narejo at Exh.8, he produced relevant roznamcha entries, PW/6 Dr. Cheetan Mal at Exh.9; he examined the accused Wazeer Ali with regard to his capability of performing sexual intercourse and he also took his blood samples for DNA test and produced relevant police letter, provisional MLC, DNA report and final MLC, PW/7 Inspector Gulzar Ali Lashari at Exh.10; he is Investigation

Officer of this case and produced relevant roznamcha entries, mashirnama of site inspection, mashirnama of arrest of accused, copy of notice, copy of letter issued to SSP seeking permission for DNA test, copy of notice issued to accused, copies of letters issued to WMO, and copy of letter issued to M.O, PW/8 Muhammad Ibrahim Shaikh, mashir of supra mashirnama/s, at Exh.11, PW/9 Rukhsar Vistro (victim) at Exh.12. Thereafter, learned ADPP for the State given up the 2nd mashir namely Sadaruddin vide his statement at Exh.13. Ultimately the side of Prosecution was closed by learned ADPP vide his statement at Exh.14. Thereafter, learned counsel for the accused filed an application u/s 540, 94 Cr.PC (Exh.15) for calling the Inspector Rehmatullah Jalbani, the Second Investigation Officer, to record his evidence, which was allowed by the trial Court vide order dated 23-10-2023 lying at Exh.16 and the said witness Inspector Rehmatullah was called and examined being PW/10 at Exh.17, he conducted the further investigation of case, who produced copy of order dated 10-09-2020 passed by learned Judicial Magistrate, Kingri, copy of letter of DIGP Sukkur and letter of concerned doctor regarding mental health of victim. Thereafter learned ADPP for the State closed the side of prosecution vide his statement at Ex.18.

5. Statement of accused as provided U/S 342 Cr.PC was recorded at Ex.19, wherein he has denied the allegations of prosecution and prayed for justice. Neither accused examined himself on oath nor produced any witness in his defense and finally prayed for justice.

6. On 08-01-2025, the complainant was appeared before this Court and submitted that he would not engage his counsel as being confident with State counsel.

7. Heard Arguments and perused the material available on record. Upon careful perusal of the record, major discrepancies are found in the prosecution's case, which are discussed in the following paragraphs.

8. The prosecution case originates from the claim that the house of Sanaullah was the place of occurrence and that the accused was engaged in painting/coloring work at said house. In such circumstances, it was essential for Sanaullah to be produced as a witness, particularly when his house was also inspected during the investigation. However, Sanaullah was neither cited as a

prosecution witness nor examined during trial, which creates a significant gap in the prosecution's version and adversely affects its credibility.

9. Furthermore, the complainant along with his two witnesses deposed that they were informed by the ladies of the house regarding the non-return of the victim after a considerable lapse of time. Despite the fact that the entire search operation initiated by the complainant and his witnesses based on the information provided by these ladies, none of them were cited as prosecution witnesses, nor is there any indication that the Investigating Officer recorded their statements under Section 161 Cr.P.C. This omission amounts to withholding of material witnesses, which creates a serious dent in the prosecution's case and raises questions about the truthfulness and completeness of the investigation.

10. According to the evidence on record and the memo of the place of incident, the occurrence allegedly took place inside a room situated within the house, which, particularly, had only one entrance door. As per the prosecution's own version, the complainant along with two witnesses entered through the same door and it is highly improbable and unnatural that an accused person, allegedly found in the act of committing rape, would have had sufficient time to put on his shalwar and flee through the same single exit without being apprehended, especially in the absence of any resistance or pursuit. Moreover, no witness has deposed that the accused was armed with any weapon or posed any threat to deter apprehension and there is no allegation that the accused used force or intimidation to escape. This sequence of events, as presented by the prosecution, appears to be highly improbable, thereby creating serious doubt on the veracity of the incident as narrated.

11. Now, the prosecution's version is primarily based on the presence of the grandmother of the victim, who was present throughout all material events including accompanying the victim to the police station for lodging the FIR and remained present during the medical examination. However, the officer who recorded the FIR contradicted this version, as he made no mention of the grandmother or any female companion accompanying the victim at the time of registration of the FIR. Surprisingly, the said grandmother despite being a key and material witness was not produced by the prosecution, nor her statement was recorded under Section 161 Cr.P.C and she did not appear before the trial

Court to depose in support of the prosecution case. This deliberate omission makes serious doubt on the prosecution's case and amounts to withholding of the best possible evidence.

12. According to the ocular account as well as the statement of the Medical Officer, the victim was referred to Civil Hospital Khairpur for further treatment and to obtain the opinion of a gynecologist. However, not a single document has been exhibited on record to establish that the victim was ever examined or treated by any gynecologist. Moreover, the complainant himself claimed that the victim remained admitted in the hospital for seven days, yet no medical record, admission slip, discharge summary, or treatment notes have been produced to substantiate this assertion. It is also pertinent to mention that no gynecologist was examined during trial, nor has any report or opinion from Civil Hospital Khairpur been placed on record. The complete absence of documentary or oral evidence regarding the alleged hospital admission and gynecological examination seriously undermines the credibility of the prosecution's version and reflects a gap in the evidentiary process.

13. Now, on the face of the record, it appears that the complainant attempted to create corroboration of the prosecution story by testifying that he, along with other witnesses, had gone to the house of the victim to attend a birth ceremony of a child. However, this version is contradicted by the statement of prosecution witness Ghulam Rasool, who deposed that they had gone to the house of the victim to keep some labour-related articles. This material contradiction between the complainant and his own witness raises serious doubt about the presence and purpose of the witnesses at the place of occurrence, thereby affecting the credibility of the prosecution story.

14. The prosecution case is that the victim left her house to purchase some grocery items. However, the complainant party has admitted that multiple shops (approximately 8 to 10) are situated within close proximity at a mere calling distance from the residence of victim. Despite that, the alleged place of incident is stated to be at a considerable distance. This raises serious doubt as to the manner in which the alleged abduction occurred, particularly the claim that the accused came from afar and dragged the victim through a thickly populated area, consisting of both residential houses (mohallah) and active shops.

15. Furthermore, the victim was stated to be mentally ill and it is not likely to be true that a mentally unstable person would be allowed to go unaccompanied to a distant location. If such a person were forcefully dragged in broad daylight through a populated area, shopkeepers or bystanders would likely have noticed and intervened or at the very least raised an alarm.

16. It is also significant that no shopkeeper or independent witness from the alleged route or vicinity was examined by the Investigating Officer nor was any statement recorded from those who could confirm that the victim was seen being dragged or was a known regular customer of the shops. This lack of corroboration from natural, independent witnesses casts further serious doubt on the veracity of the prosecution's version.

17. The Medical Officer who examined the victim deposed during trial that she had secured and sealed the clothes of the victim at the time of medical examination. However, it is undisputed that such clothes were never produced during trial, nor they were exhibited as case property, thereby causing a material lapse in the chain of evidence. Furthermore, the prosecution witness of the place of incident testified that blood stains were visibly present at the scene when he visited, yet the Investigating Officer failed to collect the blood-stained earth or preserve any forensic material from the site. This constitutes a serious omission in the investigation, particularly in a case where the prosecution claims the commission of a violent act. In addition, the said witness categorically deposed that the memo of place of incident produced in court was not the same as the one actually prepared at the scene, raising concerns about the authenticity and integrity of the documentary evidence. These material discrepancies and procedural lapses not only weaken the prosecution's case but also cast serious doubt upon the fairness and reliability of the investigation.

18. So far as the statement of the victim is concerned, it is noteworthy that the first Investigating Officer deposed that despite his repeated efforts over a period of six months, he was unable to record the statement of the victim as she was not produced by the complainant. On the other hand, the second Investigating Officer, who took over the investigation on 15.09.2020, deposed that he recorded the statement of the victim, including a video recording, in which the victim allegedly stated that the accused caused a knife blow to her. However, this

allegation of a knife injury is neither mentioned in the medical record nor anywhere else in the prosecution's evidence, and the video recording itself has not been made part of the case file. Moreover, the second Investigating Officer also claimed that he obtained a mental health opinion regarding the victim, and the concerned doctor allegedly opined that the victim is 75% of unsound mind. However, upon scrutiny of the record, no such report is found on file, nor it was exhibited during trial. The source or basis on which the Investigation Officer made such an assertion remains unsubstantiated. In fact, the only document available is a letter from a medical officer who examined the victim, recommending that she be referred to Karachi for further assessment, as the facilities for clinical psychology were not available at Khairpur. The witness namely Rehmatullah deposed that the victim was of sound mind prior to the incident, thereby contradicting the prosecution's stance that the victim was mentally ill.

19. The victim's deposition is crucial and holds significant weight in determining the facts of the case. Prior to her deposition, the Court was satisfied that the victim was capable and competent to testify. This assessment was made after the Court posed several questions, to which the victim provided appropriate and coherent responses. Based on this evaluation, the trial court concluded that the victim was competent to give evidence and proceeded accordingly.

20. The victim deposed that *"I left my house for purchasing eatable things and went outside the house. Accused Wazeer dragged me from street in a empty house. Accused forcibly committed offence (zori) with me and ran away. Thereafter, my uncle/complainant brought me at PS. Then police arrested accused. I along with my uncle / complainant went to hospital for medical examination. At that time PW Ghulam Rasool was also with us. Doctor examined me at hospital. Police recorded my statement. Accused Wazeer present in the Court is same. **Cross Examination :-** My father was present in the house when I left house for purchasing eatable items. After incident I went to my house. I disclosed the facts of incident to my father. I went to the hospital after fifteen days of incident. My uncle read over the contents of FIR to me it is incorrect that I have come to court to depose falsely. I had purchased eatable items from the shop. The eatable items were in my hands. I went alone for purchasing of eatable items from my*

house. It is correct that I am deposing at the instance of my uncle. It is incorrect I deposed false."

21. Upon reviewing the deposition of victim, it becomes apparent that it presents a different picture of the case. Especially, the victim did not confirm that, at the time of the alleged rape, the complainant party had reached at place of incident instead she testified that she had informed her father about the incident. In contrast, the complainant party categorically stated that the father of victim was not present either at the time of the incident or when they left the house of victim. Furthermore, the victim failed to acknowledge that she was accompanied by her grandmother for a medical examination and she did not mention any visit to the police station. This inconsistency raises doubts regarding the credibility of the ocular set, as a result, it is extremely difficult to accept the complainant party as eyewitnesses to the incident.

22. Turning to the medical aspect of the case, the lady doctor who examined the victim issued a provincial medical certificate, concluding that both external and internal examinations indicated that rape had occurred. The victim was subsequently referred to the Civil Hospital Khairpur for further examination. During her deposition in Court, testified that samples were taken for DNA testing and the clothing was sealed. Additionally, the medical certificate confirmed that three vaginal swabs were taken for chemical analysis. As per Doctor due to heavy bleeding she referred the victim to civil hospital while it is necessary that when blood stains are seen, it must be ascertained if they are due to menstruation. On microscopic examination, menstrual blood is found to contain endometrial cells from the uterus, epithelial cells from the vagina and a large number of microorganisms which are not found in ordinary blood. Reference is made in *Chapter 27, Topic Examination of the Rape Victim, 7th Edition Parikh's, Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology.*

25. It is essential to provide a detailed description of the injuries found on the body of victim, particularly with reference to their nature and cause. Merely stating that a contusion was observed on the abdomen and back is insufficient. According to medical definitions, a contusion refers to slight bleeding into the tissues while the skin remains unbroken. Therefore, the medical report should specify the nature of the contusion; and the type of substance or force involved in

inflicting the injury. Such details are crucial to the medical evidence and to establishing the veracity of the claims regarding the injuries sustained by the victim.

27. The doctor bears primary responsibility for conducting a thorough and careful examination of the victim. In cases of alleged sexual assault, it is imperative that the genital area be meticulously examined to determine any injuries. Specifically, the vulva, (inner and outer lips of the vagina), hymen (a small, thin piece of tissue at the opening of vagina), vagina and perineum (thin layer of skin between genitals, vaginal opening or scrotum and anus) must be examined for any signs of trauma or injury. A detailed and accurate examination is essential in providing reliable medical evidence to support or refute the allegations made by the victim. As per in *Chapter 27, Topic Genital Injuries 7th Edition Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology* it is essential to determine the degree of hymeneal rupturing and whether this is recent or old, a glass rod with a small spherical head (Glaister Keene Rod) warmed to body temperature, if possible trans-illuminated, may be introduced into the vagina and partially withdrawn to display the edge of the hymen. Signs of recent rupture are ragged tears in the hymen with lack of epithelial healing, but with oedema and haemorrhage. In Addition, it is also explained that any bruising, laceration or swelling of the vulva is noted. The labia are then opened by gentle traction in order to examine the hymen for rupture. Laceration of this structure occurs with the first intercourse, and in a virgin this is the principle evidence of the crime.

28. There is very necessary that the body of the victim, especially the forearms, wrist, face, breasts, chest, lower part of abdomen, inner aspects of thighs and back, should be examined for mark of violence, such as scratches, abrasions and bruises caused as a result of struggle. However, in the present case, this critical aspect is notably absent. The victim did not disclose any details that could form a consistent chain of evidence. Moreover, while the medical officer briefly stated that marks of violence were observed, no specific description or elaboration was provided. Such a vague assertion, without corroborative details from the victim or the medical record, is insufficient to establish the occurrence of violence beyond reasonable doubt.

29. In this Context, reliance is placed upon the case of *Sania Jani v State of Orissa, reported in 2004 CriLJ 226*, it was held that "A Court of revision is concerned not only with the legality of the proceeding before the lower Court, but also with the propriety of the order passed under the particular circumstances of the case and in exercise of revisional jurisdiction, Court can interfere with the findings if the same are contrary to the materials available on record and are otherwise perverse. A reference to the evidence of the lady doctor P.W. 8 stating her opinion in the case, as quoted herein below, would clearly reveal that the findings of the Court below cannot be accepted without a pinch of salt :--

"..(1) She is capable of sexual intercourse;

(ii) as per physical examination, dental examination and by her own version and appearance the age of the victim is about 35 years approximately;

(iii) hymen present as carunaculae triformes;

(iv) the findings are not compatible to recent sexual intercourse, however it cannot be excluded;

(v) No marks of violence present on her private part, breasts, backside or any other part of the body;

(vi) No foreign hair, seminal stains, saliva stains present on the victim;

(vii) Spermatozoa not detected....."

11. The aforesaid facts and circumstances create suspicion as to the veracity of the prosecution evidence. The defence examined one witness as D.W. 1 who supported its plea and has stated about the prior enmity between the family of the petitioner and that of the prosecutrix. P.Ws. 1 and 4 have also admitted about such prior enmity. Law is well settled that enmity is a double-edged weapon.

12. In view of the aforesaid facts and circumstances, particularly the medical evidence and chemical examination report, I am satisfied that prosecution has not been able to bring home the charge against the petitioner. Accordingly, I have no hesitation to hold that the petitioner is entitled to benefit of doubt.

13. In the result, the Jail Criminal Revision is allowed. The impugned judgments of the Courts below as to conviction and sentence of the petitioner are set aside. The petitioner is acquitted of the charge on benefit of doubt and he being in custody for about two years and nine months, is directed to be released forthwith if his detention in custody is not required in connection with any other case.

30. As per Section 14 of the Anti-Rape (Investigation and Trial) Act, 2021, **(The Act-2021)**, the statement of the victim be recorded under Section 164 of the Cr.P.C before a Magistrate. However, in the present case, this essential requirement appears to have been entirely overlooked. There is no explanation on record as to why the victim was not produced before the Magistrate for the purpose of recording her statement under Section 164 Cr.P.C. The second Investigating Officer testified that he recorded the statement of victim under Section 161 Cr.PC and further claimed that the statement was video recorded

and shown to the Magistrate. Despite this, the victim herself gave a different version during her testimony in video recording, In light of Section 14 of the Act 2021, it was incumbent upon the prosecution to ensure compliance. The absence of such a statement under Section 164 Cr.PC undermines the evidentiary value of the victim's version.

31. It is very difficult to place reliance upon the prosecution's story when the report of Chemical Examiner confirms the presence of human semen, but the same does not match with that of the appellant. Furthermore, as per the DNA report, no male DNA sperm fraction was found in the samples collected from the victim. Reference is made to the case of *Idrees Masih Vs. The State* 2022 YLR Note 40, wherein is held that “... Further, the perusal of record shows that no vaginal swabs were taken but human sperm were found on clothes, therefore I am not inclined to accept such approach of the learned trial court judge because in absence of matching mere presence of human sperm, I would say, alone would never be sufficient to prove charge of zina. Reference is made to the case of *Haider Ali Vs. The State* 2016 SCMR 1554 *supra*”. A similar view was expressed in the case reported as PLD 1983 FSC 204, wherein it was held that semen should be collected for grouping purposes and failure to undertake such an essential exercise renders the prosecution case doubtful. In the present matter, the situation is quite similar.

32. There is no cavil to the proposition that the sole testimony of the victim in certain circumstances may be sufficient to connect the accused with the commission of the offence. However, such testimony must be trustworthy, unbiased, and independent and preferably find corroboration from other evidence on record. In the present case, there exists a serious flaw in this regard, as the testimony of the victim lacks independent corroboration and is marred by material contradictions. In this context, reference is made to the case of *Atta-Ul-Mustufa v. The State* (2023 SCMR 1698).

33. It is a well-settled principle of Law that if a single circumstance creates reasonable doubt in the prosecution's case, the benefit of such doubt must be extended to the accused, regardless of the gravity of the offence. In this regard, reliance is placed on the case of *Bashir Muhammad Khan v. The State*, 2022 SCMR 986.

34. In view of above, instant Cr. Jail Appeal is allowed. Consequently, the impugned judgment dated 17-01-2024 passed by learned IVth Additional Sessions Judge/Gender Based Violence Court Khairpur in Sessions Case No. 598/2020 Re. (*The State Vs. Wazeer Ali Vistro*) is set aside; as a result of which appellant Wazeer Ali son of Muhammad Nawaz bycaste Vistro is acquitted of the offence, for which he was charged, tried, convicted and sentenced by the trial court, he shall be released forthwith, if not required to be detained in any other custody case.

32. These are the reasons of my short order dated 06-03-2025.

J U D G E

*Ihsan/PA***