

Judgment sheet.
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.
Cr. Appeal No.S-150 of 2017.

DATE	ORDER WITH SIGNATURE OF JUDGE
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For hearing of MA No.4133/17
as well as Main case.

Date of hearing: 08 .08.2017.

Date of decision: 10.08.2017

Appellant: Through Badal Gahoti, Advocate.

The State Through Mr. Shahid Ahmed Shaikh, A.P.G.

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J U D G M E N T:-

ABDUL MAALIK GADDI, J- Through instant appeal, the appellant has challenged the judgment dated 31.05.2017 passed by learned Additional Sessions Judge, Hala in Sessions Case No.04 of 2017, (Re: State vs. Muhammad Siddique and another) arising out of Crime No.80 of 2016 registered under Section 366, 371 A-B P.P.C, of police station Saeedabad, whereby the learned trial court after full-dressed trial convicted and sentenced the appellant in point No.II of the impugned judgment. For the sake of convenience, it would be appropriate to reproduce the findings in Point No.2 of the said judgment, which reads as under:-

“In view of my findings on Point No.1, that accused Siddique is convicted u/s 265-H(ii) cr.P.C and awarded sentence to suffer R.I 05 years for committing offence punishable u/s 366 PPC and he is also burdened with Rs.5,000/- in terms of Section 544 Cr.P.C. He is put in custody and remanded back to custody to serve out sentence as awarded above. Let CTC of this Judgment be provided to accused Siddique free of cost. The accused Ali Khan is acquitted of this charge u/s 265-H(i) Cr.P.C. He is present on bail, his bail bond stands cancelled and surety discharged. The case against

accused Nasreen be kept on dormant file and will proceed, when she surrender herself or brought before this court.”

2. Facts in brief as divulged in the FIR lodged by complainant SIP Muhammad Hassan Bhatti are that on 02.09.2016 he was posted at PS Saeedabad. On the same day, he left PS alongwith his sub-ordinate staff in government mobile under entry No.27 at about 0200 hours, for the patrolling in the area, from different places when they reached at Faqeerabad, where he received spy information that accused Siddique who is engaged in the business of sale the women, was standing at Kaneja Shakh with one unknown lady, on such information, he reached there and arrested the accused in presence of mashirs HC Mitha Khan and PC Riaz. During investigation he disclosed his name as Siddique and victim girl disclosed her name as Soniya Punjabi aged about 14 years, further she disclosed that she was sold by the absconding accused Mst. Nasreen to one Ali Khan Khoso in the sum of Rs.1,50,000/- and Mst.Nasreen called her on mobile phone with accused Siddique. hence this FIR.

3. At trial, HC Mitha Khan was examined as Exh.05, he produced mashirnama of arrest and recovery and mashirnama of place of incident at Exh.5/A to Exh.5/B. PW-2 ASI Muhammad Ramzan Malik was examined at Exh.06, who produced unexecuted warrant and statements of two peoples of locality at Exh.6/A to Exh.6/C. PW-3 Dr. Samina Kaka was examined at Exh.7, who produced police letter, refer letter, provisional medical certificate and final medical certificate of Mst. Soniya at Exh.7/A to 7/D respectively. PW-4 SIP Muhammad Hassan was examined at Exh.8,

who produced FIR, chemical examiner report, entry regarding the departure and arrival of police station at Exh.8/A to Exh.8/C. PW-5 Civil Judge & J.M. Mr. Meer Kamran Talpur was examined at Exh.9, who produced statement of abductee u/s 164 Cr.P.C, statement of Shafi Mohammad and Muhib at Exh.9/A to Exh.9/C respectively.

4. Counsel for appellant cross examined the prosecution witnesses. Thereafter, the side of prosecution was closed vide statement at Exh.10.

5. In 342 Cr.P.C statement recorded at Exh.11, the appellant has denied the prosecution allegation leveled against him and stated that he is innocent and has falsely been implicated in the present case. However, he has not examined himself on oath under section 340 (2) Cr.P.C nor produced any defence witness.

6. Learned counsel for the appellant inter-alia contends that the judgment passed by trial court is against the criminal administration of justice; that the impugned judgment is perverse and shocking; that the trial Judge while awarding the conviction has not considered the material contradictions made in the evidence of the PWs; that no independent witness has been cited by the prosecution and the PWs are police officials and subordinate to the complainant, who is author of FIR and I.O of the case, which creates doubt in the prosecution case; that the complainant has failed to collect any private person of locality to act as mashir; that the alleged abductee Mst. Soniya was not produced by the prosecution before the learned trial court, hence this aspect of the

case creates serious dent in the prosecution case; that non-examination of the alleged abductee by the prosecution gives inference that she is not supporting the prosecution case and she has malafidely been not produced before the trial court in order to save the prosecution case; that on the same set of allegations and evidence against co-accused Ali Khan, but who has been acquitted by the trial court; that whole judgment/conviction is based on the evidence of two police officials SIP Muhammad Hassan Bhatti and HC Mitha Khan and statement of alleged abductee who has not been examined before the trial court during the course of trial. He lastly prayed for justice.

7. Mr. Shahid Ahmed Shaikh learned A.P.G. has supported the impugned judgment on the ground that appellant is nominated in the FIR; that although there are some minor contradictions in the evidence of PWs, but the same may be ignored while deciding the appeal; that the alleged victim Mst. Soniya in her statement under section 164 Cr.P.C which is on record and has been produced in evidence by Magistrate, has fully implicated the appellant before the Civil Judge & Judicial Magistrate Saeedabad, therefore according to him non-appearance of Mst. Soniya (alleged victim) before trial Court for her evidence is not fatal to prosecution.

08. I have carefully considered the arguments as advanced by the learned counsel for the parties and carefully scanned the material so available before me. It is the case of the prosecution that on 02.9.2016 when complainant SIP Muhammad Hassan Bhatti alongwith his subordinate staff was on patrolling duty in the area and during patrolling when they reached at Faqeerabad, they

received spy information that appellant/accused was available at Kaneja Shakh with one lady namely Mst. Soniya in order to sell her. On such information, complainant reached at the pointed place and arrested the appellant in presence of mashir namely HC Mitha Khan and PC Riaz. During investigation the statement of Mst. Soniya (alleged victim) under section 164 Cr.P.C was recorded before the Civil Judge & J.M-I Saeedabad. She in her statement disclosed that one Mst. Nasreen had already sold her to one Ali Khan in the sum of Rs.1,50,000/-. Perused the evidence of the prosecution witnesses so examined and so also contents of FIR and statement under Section 164 Cr.P.C of Mst. Soniya. It is the case of prosecution in FIR that appellant has been arrested from Kaneja Shakh, but perusal of statement of Mst. Soniya recorded under section 164 Cr.P.C before Magistrate, it reveals that appellant was arrested from the house situated in Hala town. Furthermore, Mst. Soniya has not been produced before the trial court for recording her statement. Since, there is contradiction in between the place of arrest of the appellant, therefore, on this ground the prosecution story cannot be safely relied upon. It is an admitted fact that almost on the same set of allegation and evidence, co-accused Ali Khan has been acquitted by the trial court.

09. In addition to this, it may be observed that PW-4/complainant SIP Muhammad Hassan is himself the complainant and has also acted as an Investigating Officer. Legally he could not assume this dual function and it was incumbent upon him to have entrusted the investigation of the case to another disinterested police officer. The fact by itself, has rendered the very

trial of the case A sheer mockery. Additionally, it may be pointed out that if such a procedure / practice is allowed to continue, it would give license to the police to involve innocent people in false / fake cases according to their whims. This trend in my opinion is extremely dangerous and is accordingly deprecated.

10. In case of Nazeer Ahmed vs. the State reported in PLD 2009 (Karachi) 191, it has been held as under:-

“(e) Criminal Procedure Code (V of 1898)---

---S. 154---Registration of case and investigation---Principles---Officer, who is himself complainant in the case cannot be expected to collect and preserve evidence, which goes against his case---Such investigating officer cannot properly perform duties of an independent and fair investigating officer.”

11. In this respect I am also, to a great extent, supported by the following case law:-

**(1) 1996 P.Cr.L.J 440
Muhammad Altaf v. The State.**

“ Art. 4. Appreciation of evidence. Complainant police official also acting as Investigating Officer. Although the evidence of a complainant police official who also becomes the Investigating Officer is admissible in evidence yet for safe administration of justice for sustaining the conviction of an accused such evidence should be corroborated by independent evidence.”

12. As per record it appears that in this matter the complainant who is the I.O of the case has advanced information about the availability of the present appellant at the pointed place and despite of this fact no independent witness has been cited by the

prosecution and the PWs regarding mashir of arrest and recovery are police officials and subordinate to the complainant. This fact also creates doubt in the prosecution case. Nothing on record to show that the complainant has made any efforts to associate any independent person of the locality to witness the event.

13. In this case SIP Muhammad Hassan is the complainant and investigating officer of the case, therefore, in view of the above authorities/cases, his investigation cannot be safely relied upon for conviction of appellant.

14. It is argued by the learned A.P.G for State that in this case Mst. Soniya in her statement under Section 164 Cr.P.C before concerned Magistrate has categorically implicated the appellant, therefore, her statement can be taken into consideration as the same is on record and produced by PW-5 Meer Kamran Talpur, Civil Judge & J.M. Saeedabad. Reverting to the contention as raised by the learned A.P.G it is suffice to say that Mst. Soniya is only the star witness of the case to prove the allegation, but admittedly she did not appear before the trial court to give evidence. In my view it is not at all sufficient for abandoning the star witness for prosecution and that abandonment would not arm prosecution with a right to draw benefit from her statement under Section 164 Cr.P.C with utmost convenience of a normal witness examined and cross examined during trial. Abandonment of such witness was insufficient and improperly reasoned and more unjust was the reliance placed on it. In absence of appearance of such witness before trial court, no reliance at all could be placed on her statement recorded under Section 164 Cr.P.C. In this connection

I am supported with the case of Mst. Roshan vs. the State reported in 1996 MLD (Peshawar) 924. It is pertinent to mention here that if any incriminating piece of evidence is not put to accused under section 342 Cr.P.C for his explanation the same cannot be used against him. I have perused a statement of accused recorded under section 342 Cr.P.C, but in the said statement no question asked with regard to statement of Mst. Soniya recorded under section 164 Cr.P.C, therefore, on this ground also the statement of Mst. Soniya under section is not helpful for prosecuting without her evidence before the trial court.

15. I have gone through the evidence of complainant SIP Muhammad Hassan and Pw HC Mitha Khan, who are said to be witness of arrest and recovery, but their evidence has been found contradictory on material particulars. Besides this as I have observed above that the place of arrest and recovery of appellant is highly doubtful, therefore, the evidence of these witnesses cannot be safely relied upon.

16. I have gone through the case of **Tariq Perves v. The State** reported as **1995 SCMR 1345**, wherein it has been held that if a single circumstance creates reasonable doubt in the prudent mind about the guilt of the accused then he will be entitled to such benefit not as a matter of grace, but as a matter of right. Similar view has also been taken in the case of **Muhammad Akram v. The State** reported as **2009 SCMR 230**.

17. I have also perused the evidence and documents on record and has also considered the version of both the parties put forward

by them through evidence and found that the version of the appellant seems more plausible and convincing, while the version of the prosecution is totally doubtful.

18. For my above stated reasons, I have no hesitation to hold that the prosecution has failed to prove its case against the appellant and learned trial court did not appreciate the evidence and documents on record properly. Consequently, this appeal is allowed. The impugned judgment passed by the trial Court is set-aside. Resultantly, the appellant is acquitted from the charge. He is in jail, therefore, jail authorities are directed to release the appellant forthwith, if he is not required in any other case.

19. Since, the appeal is allowed, therefore, the listed application viz. M.A.No.4133 of 2017 is also disposed of having become infructuous.

JUDGE