

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Criminal Jail Appeal No.S- 103 of 2016

Appellant: Qasim son of Mehar Gambheero
Through Mr. Ashfaque Ahmed Lanjar, Advocate

State: Ms. Sana Memon, A.P.G

Date of hearing: 19.08.2019

Date of decision: 19.08.2019

J U D G M E N T

IRSHAD ALI SHAH, J. The appellant by way of instant appeal has impugned judgment dated 26.05.2016 passed by learned Sessions Judge, Badin whereby he has been convicted and sentenced as under;

“accused Qassim son of Mehar Gambheer beyond any reasonable doubt for offence under sections 457, 364-A and 376 PPC. Accordingly, accused Qassim son of Mehar Gambheer is convicted for offence under Section 457 PPC and sentenced to suffer R.I for 5 years and to pay fine Rs.30,000-00 and in default, accused shall undergo R.I for three months more. He is convicted under Section 364-A PPC and sentenced to suffer R.I for seven years. He is also convicted under section 376 PPC and sentenced to suffer R.I for ten years and to pay fine of Rs.1,00,000-00 and in default, the accused shall suffer R.I for six months more, keeping in view the mitigating circumstances of the case. All the sentences shall run concurrently.”

2. It is the case of the prosecution that the appellant with rest of the culprits by committing trespass in house of complainant Abdul Latif abducted his daughter Mst. Nasima and then subjected her to rape for that the appellant and co-accused Sikander and Rajab were booked and reported upon by police to face trial for the above said offence.

3. At trial the appellant and co-accused Sikander and Rajab denied the charge and prosecution to prove it examined complainant Abdul Latif and his witnesses and then closed the side.

4. The appellant and co-accused Sikander and Rajab in their statements recorded under Section 342 Cr.P.C denied the prosecution allegation by pleading innocence, however, they did not examine themselves on oath or anyone in their defence.

5. On conclusion of the trial co-accused Sikander and Rajab were acquitted while appellant was found guilty for above said offence and was convicted and sentenced accordingly by learned trial court by way of impugned judgment.

6. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police, there is unexplained delay of about one day in lodgment of FIR; the complainant and mashirs have not supported the case of the prosecution; the evidence of Mst. Nasima being doubtful in its corrector has been relied upon by learned trial court without any lawful justification, which

too is disbelieved in respect of co-accused Sikander and Rajab. By contending so he sought for acquittal of the appellant.

7. Learned A.P.G for the State by supporting the impugned judgment has sought for dismissal of the appeal.

8. I have considered the above arguments and perused the record.

9. The FIR of the incident has been lodged with delay of one day, such delay is not explained plausibly. Complainant Abdul Latif during course of his examination was fair enough to admit that he has given the names of the accused before the police under suspicious and his signature was obtained on his FIR by the police without reading the contents whereof to him. By stating so, the complainant impliedly has not supported the case of prosecution as such his evidence could hardly be used against the appellant. PW / Mashir Abdullah was declared hostile by the prosecution, on account of his failure to support the case of prosecution. PW / mashir Muhammad Hanif did not support the contents of mahsirnamas by stating that his signatures on the mashrinama were obtained by the police on blank papers. PW Mst. Nasima, it is true has supported the case of prosecution to some extent, but the prosecution has not been able to explain under what circumstances her 164 Cr.P.C statement was got recorded with delay of about 15 days to her recovery. On asking it was stated by Mst. Nasima that she identified the culprits through their voice and on next morning she came to know of their identity when the culprits untied her face. If it is believe to be so then the identity of the appellant

by Mst. Nasima as a culprit responsible for committing rape with her is appearing to be doubtful. The incident of the rape as per Mst. Nasima took place at Dargah of Shah Qadri Oliya. No mashirnama of such place is prepared by the police. None has been examined from above said Dargah to ascertain about the correctness of the allegation of rape as was leveled by Mst. Nasima. The person who took Mst. Nasima to Doctor Aziz from the Dargah of Shah Qadri Oliya has not been examined by the prosecution for no obvious reason. As per lady doctor Mst. Farzana, the alleged victim Mst Nasima was found to has been subjected to recent sexual intercourse but such assertion is not enough to maintain the conviction and sentenced against the appellant simply for the reason that; there is no DNA match of the sperms of the appellant with those taken from the vagina of the victim Mst. Nasima. As per investigating officer sperms were dispatched to chemical examiner with delay of 12 days. No explanation to such delay is offered by the prosecution. PW PC Muhammad Aslam who allegedly taken the sperms to chemical examiner has been given up by the prosecution without any justification. Co-accused Sikander and Rajab on the basis of same evidence have already been acquitted by the learned trial court by extending them benefit of doubt. In these circumstances, the appellant too is found entitled to such benefit.

10. In case of **Sardar Bibi and others vs. Munir Ahmed and others (2017 SCMR-344)**, it was held by the Hon'ble Court that;

“When the eye-witnesses produced by the prosecution were disbelieved to the extent of one accused person attributed effective role, then the said eye-witnesses could not be relied

upon for the purpose of convicting another accused person attributed a similar role without availability of independent corroboration to the extent of such other accused”.

11. In case of ***Tariq Pervaiz vs the State (1995 SCMR 1345)***. It has been held by the Hon’ble Supreme Court that:-

“For giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating reasonable doubt in a prudent mind about the guilt of accused, then he would be entitled to such benefit not as a matter of grace and concession but of right.”

12. Based upon above discussion the conviction and sentence recorded against the appellant by way of impugned judgment could not be sustained, it is set aside. Consequently, the appellant is acquitted of the offence for which he was charged, tried and convicted by learned trial Court. The appellant shall be released forthwith in the present case.

13. The instant appeal is disposed of accordingly.

J U D G E