

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Criminal Appeal No.S-427 of 2019

Appellant: Ismail alias Bholo son of Shafi Muhammad Khaskheli, through Mr. Aziz Ahmed Laghari, Advocate.

Respondent: The State, through Ms. Sana Memon, APG.

Date of hearing: 03-03-2021.

Date of decision:03-03-2021.

JUDGMENT

IRSHAD ALI SHAH, J: The fact in brief necessary for disposal of instant appeal are that the appellant allegedly committed rape with baby Jiyan aged about 10/12 years, for that he was booked and reported upon.

2. The appellant denied the charge and the prosecution to prove examined complainant Jumoon and his witnesses and then closed the side.

3. The appellant in his statement recorded under section 342 Cr.P.C denied the prosecution's allegation by pleading innocence. However, he did not examine anyone in his defence or himself on oath to disprove the case of prosecution against him in terms of section 340(2) Cr.P.C.

4. On conclusion learned Sessions Judge, Mirpurkhas found the appellant guilty for the above said offence, consequently convicted and sentenced him for an offence punishable u/s 376 PPC to undergo Rigorous Imprisonment for ten years and to pay fine of Rs.50,000/- and in case of default in payment of fine to undergo Simple

Imprisonment for three months with benefit of section 382 (b) Cr.P.C, vide his Judgment dated 19.12.2019, which is impugned by the appellant before this Court by preferring the instant Criminal Appeal.

5. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant; the F.I.R of the incident has been lodged with delay of about two days; DNA report is not implicating the appellant in commission of incident and the evidence of the prosecution being doubtful in its character has been believed by the learned Trial Court without lawful justification. By contending so, he sought for acquittal of the appellant.

6. Learned A.P.G for the State has sought for dismissal of the instant appeal by contending that the offence alleged against the appellant is affecting the society at large.

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

8. The F.I.R of the incident has been lodged with delay of about two days; such delay having not been explained plausibly could not be overlooked. Complainant Jumoon and PW Mst. Zarina, who happened to be father and mother of the victim are not eye witnesses of the incident therefore, their evidence could safely be excluded from consideration. The evidence of baby Jiyan, the alleged victim of the incident is not appearing to be transpiring confidence to be relied upon for the reason that as per medical officer Dr. Veena Bai, no mark of violence was found on her person at the time of her examination and

she was found to be used for sexual intercourse previously. As per DNA report, no male sperm fractions were found in vaginal swab sample and cloth of baby Jiyan. In these circumstances, the involvement of the appellant in commission of incident is appearing to be doubtful one.

9. In case of *Muhammad Masha vs The State (2018 SCMR 772)*, it was observed by the Hon'ble Supreme Court of Pakistan that;

"....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

10. Having discussed above, the conviction and sentence recorded against the appellant by way of impugned judgment are set-aside, consequently he is acquitted of the offence for which he has been charged, tried and convicted by learned trial Court, he is in custody to be released in present case if, not required in any other custody case.

11. The instant appeal is disposed of in above terms.

JUDGE

Ahmed/Pa.