I N T H E H I G H C O U R T O F S I N D H A T K A R A C H I

Criminal Appeal No.178 of 2017

Dates of hearing	:	04.09.2019
Date of Judgment	:	04.09.2019
Appellants Bilawal & Azad @ Azam @ Azoo	:	through Mr. Mubashir Ahmed Mirza, Advocate.
State	:	through Mr. Farman Ali Kanasro, Addl. Prosecutor General, Sindh.

JUDGMENT

MUHAMMAD SALEEM JESSAR, J.- Through instant criminal appeal, the appellants have assailed judgment dated 16.03.2017 passed by learned Additional Sessions Judge, Sujawal in Sessions Case No.185/2013, (re: State v. Bilawal & another), arising out of F.I.R No.29/2013 registered at P.S Jati, whereby both the appellants were convicted for an offence punishable under section 376 PPC read with section 34 PPC and awarded sentence of imprisonment of life for committing zana with victim girl Mst. Rozina aged about 11/12 years. However, accused / appellants were extended benefit of Section 382-B Cr. P.C.

The crux of the prosecution case is that complainant Dodo Rajho appeared at P.S. Jati on 28.5.,2013 at 1100 hours and lodged his FIR whereby stating therein that he owns and possessed cows and he has no issue, therefore, he has adopted the daughter of his brother namely, Mst. Rozina aged about 11/12 years. On 27.5.2013 the said Mst. Rozina went to graze the cattle in the land of Chano Christian. The complainant and his nephew Nizamuddin were standing adjoining to Sher Khan Mori. In the meanwhile, they heard cries from the land of Chano Christian. On cries the complainant party immediately rushed there and noticed that accused Bilawal Samejo and Azad @ Azam @ Azoo Zamejo by falling down Mst. Rozina on earth committing zina with her. The accused Bilawal had caught hold the arms of Mst. Rozina and accused Azad @ Azam @ Azoo had been committing zina with her and she was crying. The accused to see the complainant party ran away. The complainant covered Mst. Rozina with her clothes and on enquiry Mzt.Rozina disclosed that she was grazing the cattle, in the meanwhile accused Azad @ Azam @ Azoo and

Bilawar came and took her forcibly towards Devi Jungle, her shalwar (trouser) was removed and firstly accused Bilawal committed zina with her while accused Azad @ Azam @ Azoo caught hold her and then accused Bilawal caught hold her Azad @ Azam @ Azoo committed zina. Thereafter complainant party brought Mst. Rozina to P.S. Jati and obtained letter for medical checkup and after checkup from lady doctor the complainant at P.S. and got registered the FIR.

The police after usual investigation submitted the charge sheet before the court of law by showing accused Bilawal son of Ramzan @ Ramoo and Azad @ Azam @ Azoo son of Bholoo both by caste Samejo under custody, while one accused Roshan son of Essa Samejo was shown as absconder.

A formal charge was framed against accused Bilawal Azad @ Azam @ Azoo at Ex.5. Statement of charge was read over to accused in Sindhi to whch they denied and claimed trial vide their plea Ex.6 and 7 respectively.

Prosecution in order to prove its case examined victim Mst. Rozina at Ex.8, complainant Dodo at Ex.9, who produced FIRin Crime 29/2013 Ex.9/A, P.W. Nizamuddin at Ex.10, Mashir Rajab Ali Ex.11 who produced memo of place of incident as Ex.11/A and memo of producing the clothes of victim 11/B, WMLO Dr. Najma Ex.12, who produced letter Ex.12/A, provisional certificate of Mst. Rozina Ex.12/B, 12/C and final medical certificate Ex.12/D, Mashir Abdul Hameed Ex.13 who produced memo of clothes of accused Azad @ Azam @ Azoo and Bilawal Ex.13/A. Medical Officer Dr.Mohammad Umer examined at Ex.14 who produced letter Ex.14/A, medical certificate of Azad @ Azam @ Azoo Ex.14/B, 14/C, chemical examiner report Exc.14/D, final medical certificate of accused Bilawal Ex.14/E and final medical certificate of Azad @ Azam @ Azoo 14/F. Syed Abdul Majeed Abbas was examined at Ex.15 who produced chemical examiner report Ex.15/A, H.C. Niaz Hussain at Ex.16 who produced memo of arrest of both accused as Ex./16/B, J.M. Shahid Ali Memo was examined at Ex.17 who produced letters 17/A and 17/B, copy of otice at Ex.17/C and statement of victim recorded u/s 1`64 Cr.P.C. Ex.17/D. ASI Mohamamd Ramzan was examined at Ex.18 who produced letter at Exc.18/A and copy of chemical examiners report Ex.18/B. Thereafter learned ADPP closed prosecution side vide statement Ex.19.

Statement of accused was recorded u/s 342 Cr.P.C. at Ex.20 and 21 respetively. The accused in their statements denied the allegations of prosecution and claimed to be innocent. The accused Bilawal in his statement

submitted copy of FIR No.64 of `2009 at Ex.20/A and copy of report u/s 173 Cr.P.C. Ex.20/B. Both the accused wanted to examine one Ghulam Mustafa as D.W. and they refused to examine themselves on oath. The evidence of D.W. Ghulam Mustafa was recorded at Ex.22.

After formulating points for determination, recording evidence of the prosecution witnesses and hearing learned counsel for the appellant / accused and the ADPP for the State, the trial Court has convicted and sentenced the appellants, as stated above, hence instant criminal appeal.

I have heard learned counsel for the appellants and learned Addl. P.G, Sindh appearing for the State and perused the material available on the record.

Learned Counsel for the appellants, while arguing the appeal, submitted that no case for Zina is make out as, according to prosecution case, the clothes allegedly worn by the victim, at the time of incident, either were changed or washed away and, therefore, the clothes produced by her before the police as well WMLO were found without any blood or semen. He next submitted that in fact the appellants as well Complainant and victim are co-villagers and their lands are situated adjacent to each other. Next submits that upon the issue of grazing of cattle, appellants slapped to victim Mst. Rozina; consequently victim as well her father, in order to get revenge of that slap, cooked up this false case and have implicated them falsely. He further submitted that medical evidence is not in consonance as well supported in terms of allegations leveled by the prosecution. He further submits that 1.0 of the case namely ASI Muhammad Ramzan/PW-11 EXh No. 18, at page-215 of the Court file, has made certain discrepancies whereby he has clearly stated that no offence of Zina was committed. He has focused upon the last paras of his cross-examination at page-217, which reads as under:

> ***"It is correct that as per my investigation no zina was committed with Mst. Rozina and the Complainant party due to grudge overslapping of Mst. Rozina have lodged the instant FIR of rape. It is correct that as per WMO no rape was committed with Mst. Rozina"***

He further submitted that one Abdul Hameed/PW-6, Exh. No. 13, at page-149, being Mushir of the case, has been declared hostile by the prosecution itself and as far as medical evidence is concerned, he has focused upon the evidence of Medico Legal Officer namely Dr.Najma/PW-5, Exh. No. 12, at page-135 of the paper book, and submits that she herself has deposed that the expert, while examining the Swabs of the either party, could not determine

grouping of semen and therefore, while sum up his arguments, submitted that prosecution has failed to prove its case beyond the shadow of reasonable doubt. Per him, the appellants are entitled for their acquittal. In support of his contention, he has placed reliance upon the cases of Salman Akram Raja and another vs. Government of Punjab and another (2013 SCMR 203), Sabir alias Sabir Hussain vs. The State (2017 YLR 1270) and Waheed Murad alias Sheikha vs. The State (2012 P Cr. LJ 437).

Conversely, Mr. Farman Ali Kanasro, Additional Prosecutor General, Sindh, appearing for the State, opposed the appeal and supported the impugned judgment on the ground that minor discrepancies may not vitiate the veracity of prosecution evidence/case. According to him, presence of appellants has not been denied, therefore, learned Additional Prosecutor General is of the opinion that they had committed offence as alleged by the prosecution. However, when confronted with the evidence of WMLO Dr. Najma, at page-135, relevant at page-137, which reads as under:

> ***"I examined them and found no mark of mud-semen of bloodstains. 1 sealed the cloths to send it to chemical examiner. I produced that provisional certificate part-ll at Exh.12/C. After receiving of chemical examination report I issued final medical certificate and opined that sexual intercourse has been performed on the victim. Semen group cannot be determined as per the chemical examiner report. I produce the final medical certificate as Exh. 12/D".***
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> ***Again confronted "1 have not held the two fingers test to find out the virginity of the victim. On the next date of the examination issued the provisional medical certificate. I asked the victim and she informed me that she has changed the cloths which she was wearing at the time of incident. I do not remember the colour and print of the dress of the victim she was wearing at the time of her medical examination. I did not find the mark of bruises on the neck of the person. First the victim was brought to my private clinic at Jati without police letter with the complaint of sexual assault but I advised her that to come up with the police letter in the Taluka Hospital Jati as it is police case. Within 15 to 30 minutes the victim came again with police letter to Taluka Hospital Jati. I received the wearing cloths of the victim on the next day through police."***

Learned Additional Prosecutor General submitted that even then the appellants have been connected with the alleged commission of the offence. The referral of evidence of WMLO reveals that the Complainant, by playing all cards including to get the maneuvered Medico Legal Certificate and then got registered a criminal case only to exert illegal pressure upon the police so that they could meet with his unjustified demands. The malafide on the part of WMLO is evident when the alleged victim was referred to her directly and then

at her advice, the police letter was obtained beside the last worn clothes of victim have been changed and some exchanged clothes were received to her through police on following day which were not blood or semen stained. Question arises when clothes were not stained with any mud, blood or semen then how the WMLO had formed her opinion particularly when an Expert could not determine the semen grouping? Even then in order to compensate the Complainant party, she has deposed that sexual assault was committed/made. On the other hand, neither blood or semen stained clothes were produced by the victim before the police or before the WMLO nor were secured by the police during investigation. In her 164 Cr.P.C statement at Exh. 17/page-207, the victim admitted that her cattle grazed the standing crop of sunflower at the land near to land of Chin. Per FSL report at Exh. 14/P/l at page-167, human semen group cannot be determined due to insufficient material as well due to Hemolysis of red blood cells. The plea taken by the appellants in their defence that the Complainant is habitual blackmailer and always used to obtain amount from the innocent by implicating them in false criminal cases, has not been considered by the trial court even it was not kept in juxtaposition. In his statement under Section 342 Cr. P.C. Exh. 20, available at page-231, appellant Bilawal has explained his position, which is supported by documentary evidence but the trial Court did not consider the same; beside, the Investigating Officer of the case has deposed in clear terms that according to his investigation, no offence of zina was committed except the annoyance over slapping by the appellants to victim.

Of course the allegations levelled against the accused / appellants are of very serious nature and the offence allegedly committed by them is of very heinous nature where modesty of a young girl aged about 11/12 years has been destroyed / spoiled. However, in view of the gravity of the alleged offence, it is to be examined with utmost care and cautious as to whether unimpeachable evidence is available with the prosecution to declare the present appellants guilty of the alleged offence. In my view, the most important evidence in such like cases is that of WMLO who examines the victim girl / lady and her medical report. In the instant case while examining the evidence of the P.W.05 Dr. Najma, WMO, Taluka Hospital Jati, who allegedly examined the victim girl, Mst. Rozina daughter of Sajjan Rajho on the same day of alleged incident, it seems that she in her examination-in-chief, *interalia*, deposed as under:

> *"**General and Physical Examination (External)***
>
> 1. *No any mark of violence seen on all over body.*
> 2. *No pain and difficulty in walking.*

Examination of Genetical Organ.

1. *No any mark of violence seen externally.*
2. *No sign of scratches and bruises.*

Internal Examination.

No any mark of violence seen.

Note: Vaginal swabs taken, sealed and sent for chemical analysis report.....

*The affected cloths received **late on second day** of issuance of certificate which were orange colour Dupatta, green colour shalwar and green colour shirt with multicolour printing. I examined them and found **no mark of mud-semen or blood stains.** .....After receiving of chemical examination report I issued final medical certificate and opined that sexual intercourse has been performed on the victim. Semen group **cannot be determined** as per the chemical examiner report."*

In her cross-examination she made following admissions:

*"I have not held the two fingers test to find out the virginity of the victim. **On the next day of examination** I issued the provisional medical certificate. I asked the victim and she informed me that **she has changed the cloth which she was wearing at the time of incident. .....I did not find the mark of bruises** on the neck of the person. First the victim was brought to my **private clinic** at Jati without police letter with the complaint of sexual assault but I advised her that to come with the police letter in the Taluka Hospital Jati as it is police case. Within 15 to 30 minutes the victim came again with police letter to Taluka Hospital Jati. I received the wearing cloths of the victim **on the next day through police**. It was about 12.30 to 01.00 p.m. when police brought the cloths of the victim.....I thoroughly check the cloths to find out the mark of semen or blood stains **but I did not find them.** I did not receive the cloths under any memo of seizure.....I apparently **victim was not subjected to sexual intercourse.....**"*

From the evidence of WMLO it seems that severe dents have been put in the case of prosecution. She has categorically deposed that after examining the victim girl she was of the opinion that the victim was not subjected to sexual intercourse. Another blow to the prosecution case is that the victim girl herself admitted before WMLO that she had changed the cloths which she were wearing at the time of alleged incident. Not only this, even the said cloths were not produced by the police on the same day of examination of the victim girl by the WMLO but the same were produced before her on the next date which also adversely affects even the report of the Chemical Examiner. Furthermore, even in the final medical report it has been mentioned that semen group cannot be determined. Without undertaking the process of semen matching, any opinion

given by the Medical Officer would not prove the sexual intercourse by the accused / appellants upon the victim girl. Even Dr. Mohammad Umer, who allegedly examined the two appellants / accused, after receiving the report from the chemical examiner, opined to the effect, *"**accused is potent and capable of sexual assault."*** Needless to emphasize that without undertaking the matching process, simply opining that the accused are potent and capable of sexual intercourse is not enough to connect the accused with the alleged commission of rape with the victim girl.

In the case of Waheed Murad alias Sheikha (Supra) it was held by Lahore High Court as under:

> ***"14. It has been held by the Hon'ble Federal Shariat Court in Mst. Ehsan Begun v. The State (PLD 1983 FSC 204) that as facility of grouping of semen is available in Pakistan, therefore, the Medical Officer while examining the male for potency purposes should obtain the specimen of semen so that it be sent for grouping and matching with the semen if secured from the person/body of the viginal swab of the victim. Another Judgment titled Abid Javed alias Mithu v. The State (1996 PCr.LJ 1161) it has been observed by the Hon'ble Federal Shariat Court of Pakistan that;--***
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> ***"Vagianl swabs of the victim girl were found to be semen stained by the Chemical Examiner, but the report on the swab sent to the Serologist for semen grouping was not produced in Court and the Chemical Examiner's report had lost its evidentiary value-- ……."***.

Again in the same Judgment, it is held as under:-

> ***"16. Unfortunately in the present case the evidence in the shape of P.W.4 Mst. Shah Jehan complainant/victim does not find any corroboration from the statement of P.W.5. Muhammad Hanif as both are contradicting to each other on material aspects and then subsequently medical evidence and later on report of Chemical Examiner which was inconclusive in the light of the observation of the Chemical Examiner as the semen and the clothes of the victim were subsequently sent for blood grouping about which there is no evidence/report available on record. If that test was conducted and it conducted why the report of Serologist was not brought on record a question which is not answered by the prosecution on the basis of evidence available on the record. Thus the evidence available on record is not sufficient to bring home the guilt of the appellant/accused"***.

In another case reported as Sabir alias Sabir Husain (Supra) it was held by a Division Bench of Baluchistan High Court as under:

> ***"13. Admittedly, PW-1 Bashir Ahmed complainant of this case, who happens to be the father of the victim namely Safia, is not an eye-witness and he has narrated whatever he heard from Naseer Ahmed. PW-2 Safia, is the victim of this case, who appeared in the witness box and supported the prosecution version. She claimed that the appellant forcibly committed rape with her. The statement***

of the victim is negated by the medical evidence because as per statement of PW-5 Dr. Zakia, Lady Medical Officer, the hymen intact and she only observed mild redness and one fresh scratch mark about I c.m on rectal area. Statement of PW-5, LMO, shows that Shalwar of the victim was sent for forensic report but perusal of the record shows that the prosecution did not produce any report from Forensic Science Laboratory. Admittedly, no bleeding occurred at the time of occurrence. If a girl of 10 years was forcibly raped by a young boy of 18/19 years, as per prosecution version, there must have been symptoms of the same on the body of the victim, but as per MLC no marks of violence were found on her body. Mere redness at Rectal area as deposed by the Medical Officer could be self suffered. From the evidence on the record, it is established beyond any shadow of doubt that no penetration took place as the hymen of the victim was found to be completely intact. This fact negates the entire story of the victim and the complainant as narrated in the FIR. It was a serious matter so there was no occasion for the complainant and the victim not to report the matter immediately to the police and get the victim medical examined".

It is also noteworthy that although in her deposition she categorically stated, ***"I offered resistance when the accused persons attempted to rape him (sic) but they made me helpless by binding my hands at my back with my Dupatta."*** Despite that as per medical report, upon her external examination no marks of violence were seen by the WMLO on her body. Even no marks of violence were seen by WMLO on her internal examination. This inflicts a severe blow to the alleged ocular testimony and even to the statement of alleged young victim girl aged only 11/12 years, who in her evidence had stated that she was **forcibly** taken in jungle, her both hands were **tied at the back side** with her Dupatta and her **mouth was also tied** with a strip of cloth and then three accused forcibly committed zina with her turn by turn. It is very strange that despite above, **no marks of violence** were available on her body both, externally and internally. This also creates serious doubt in the prosecution story.

Besides, there are also certain contradictions and admissions in the evidence of prosecution witnesses which are also fatal to the prosecution case. The complainant in his two statements i.e. one made in the F.I.R. and the other made in his deposition, has contradicted himself, inasmuch as; in the F.I.R. he stated that upon cries of the victim girl when he reached at the spot alongwith P.W. Nizamuddin, he saw that accused Bilawal had caught hold from the arms of the victim girl whereas accused Azam was committing zina with her and on their reaching at the spot, accused ran away. There is, at all, no mention of acquitted accused Roshan in the F.I.R. However, in his deposition he does not say that he himself saw the accused persons committing zina with Mst. Rozina,

rather he deposed, ***"In the meantime, I heard cries of my niece and she also came on my sight. She told me that Bilawal s/o Ramoon Samejo, Aazoo s/o Bholoo Samjo and Roshan s/o Esso had committed Zina with her."*** Again in the F.I.R. only two accused i.e. present appellants have been involved in the commission of the alleged offence, whereas in his deposition he has made improvement and exaggeration by deposing that acquitted accused Roshan also committed Zina with Mst. Rozina.

There are also contradictions in the statements of the complainant vis-à-vis. victim girl Mst. Rozina. In her examination-in-chief she deposed, ***"In the meantime, Nazam-ud-Din, who is my cousin came to the spot and the accused persons seeing him fled away. Thereafter, I put on my cloths, then went to my house.",*** She has, at all, not said a single word about complainant Dodo having reached at the spot at the time of alleged incident. She only says about the reaching of P.W. Nizamuddin-ud-Din. This is also major contradiction. Besides, in her cross-examination she made such statements which are contradictory not only to the statements of other prosecution witnesses, particularly complainant Dodo, but even to her own statement made in her examination-in-chief. According to her, her statement was recorded by the police on the next day of the incident i.e. 28.5.2013, whereas, in fact, her statement was recorded on the fourth day of the incident i.e. on 31st May, 2013. In her examination-in-chief she deposed, *"accused Bilawal taped my mouth from my Dupata...."* and in her cross-examination she stated, *"When the accused persons closed my mouth I was not able to cry out."* However, in her same examination-in-chief she contradicted her own statement by deposing, *"I was **crying** due to the said acts of the accused persons."* and in her cross-examination, she admitted, *"When **I cried** due to the incident no one came from the house of Christian community..."*. Likewise, in her cross-examination she deposed, *"The accused Bilawal was also armed with **Gun**."* However, in the same cross-examination she also admitted, *"In my statement to the police I **did not disclose** the fact that accused Bilawal was armed with **Gun**. My statement was recorded by one Judge (Magistrate). I also did not disclose this fact in my statement before him."* She further admitted, *"The fact that accused persons taped my mouth with strip of cloth is **not mentioned in my statement** before the police and Magistrate"*. She also admitted, *"In my deposition before the Court I stated accused persons stripped my all clothes (Shalwar and Qameez) off; this fact is **not mentioned in my statement** before the police and Magistrate*.

There is also contradiction in the statements of the victim girl and complainant vis-à-vis. the statement of WMLO, Dr. Najma with regard to time of reaching the victim girl at the Taluka Hospital Jati. The victim girl deposed, *"We reached to the Police Station at about 1:30 pm. We stay at Police Station* ***up to night*** *because police was not lodging the case by excusing that no such incident had taken place.....On the same* ***night I visited hospital****."* Likewise, complainant in his cross-examination admitted, *"We reached to Police Station at about 02:00 or 02:30 p.m. We remained stay at the police station* ***till about 10:00 of night*** *as the police was reluctant to lodge the FIR. First we visited the hospital alongwith the victim with police letter after sunset but the lady doctor refused to examine the victim by saying that she has only marks of bruises on her neck....The victim was admitted in the hospital* ***for night."*** Contrary to such statements of the victim girl and the complainant, WMLO Dr. Najma in her cross-examination deposed, *"The victim was brought on 27.05.2013 at* ***04:00 to 05:00 p.m."***

Again WMLO deposed, "*I asked the victim and she informed me that she has changed the cloth which she was wearing at the time of incident."* She further deposed, *"I received the wearing cloths of the victim on the next day through police."* However, complainant has made a contradictory statement in his cross-examination by deposing, *"At the time of departure from the police station to the hospital, the victim was cladding the same dress which she had worn* ***at the time of incident****."* He further admitted, *"The cloths which she was wearing were not washed up. When the victim was discharged from the hospital, she came back home by wearing the same dress."* However, the victim girl herself belied such statement of the complainant by admitting, *"Before reaching at home I washed up myself so of my cloths in the watercourse near the place of occurrence."* Yet there is another contradiction; the alleged victim girl in her evidence deposed, *"In the meantime, Nizam-ud-Din, who is my cousin came to the spot and the accused persons seeing him fled away. Thereafter, I put on my cloths, then* ***went to my house.*** *Then my father Dodo took me to police station."* The complainant has made contradictory statement in his cross-examination by deposing, *"After the incident I did not stay at my house and* ***straightly visited the police station*** *by arranging rickshaw hired from the road. Alongwith me there were the* ***victim*** *and my nephew Nizam boarded in the rickshaw."*

P.W. ASI Mohammad Ramzan who initially conducted the investigation of the case, in his cross-examination admitted, *"I departed from the PS at 12*

noon time to inspect the site of offence. I kept entry of departure in daily diary book but ***I neither produced it before this Court*** *nor remember its number.....It is correct that as per my investigation* ***no zina was committed with Mst. Rozina*** *and the complainant party due to grudge over slapping of Mst. Rozina have lodged the instant FIR of rape. It is correct that as per WMO* ***no rape was committed with Mst. Rozina****."*

It is also significant to point out that the alleged mashir P.W. Abdul Hameed in his evidence deposed, "*I do not remember the date but about one year back the police came to our village and took my thumb impression on a paper.....I say that police took my thumb impression on* ***blank paper***." At this stage this witness was declared hostile and learned DDPP cross-examined him. However, he could not succeed in getting anything favourable to prosecution from the mouth of this witness.

Another worth-importance point which is also fatal to the prosecution case is; that by a separate judgment of the same date i.e. 16.03.2017 passed by same trial Judge in Sessions Case No.331/2014, certified copy whereof has been placed as Annexure 'B' to the memo of appeal at page 43 of the case file, co-accused Roshan son of Esso has been acquitted holding that prosecution has failed to prove its case against the said accused beyond reasonable shadow of doubt. '*Rule of consistency'* demands that if an accused has been acquitted from the charge by disbelieving evidence of certain witness, other accused charged with similar allegations is also entitled to the same concession / treatment and the evidence of that particular witness cannot be made basis for convicting other accused. In this connection it would be advantageous to refer to a judgment of Honourable Supreme Court passed in the case of Mohammad Asif Vs. The State reported in 2017 SCMR 486 wherein it was held as under:

> *"It is a trite rule of law and justice that once prosecution evidence is disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co-accused unless they are corroborated by corroboratory evidence coming from independent source and shall be unimpeachable in nature but that is not available in the present case."*

In another case reported as Umar Farooque v. State (2006 SCMR 1605) Honourable Supreme Court held as under:

> *"On exactly the same evidence and in view of the joint charge, it is not comprehendible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted."*

Yet in another case reported as Mohammad Akram vs. The State (2012 SCMR 440) the Apex Court acquitted the accused in the said case, holding that same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge.

However, before applying aforesaid 'rule of consistency' and the dictum laid down by the Superior Courts in the above-referred decisions to the present case, it would be appropriate to examine as to whether prosecution witnesses have implicated the acquitted accused Roshan in the instant case or not ? As stated above, the alleged victim girl in her evidence deposed as under:

> *"In the meantime three persons came, they were Bilawal, Aazoo and* ***Rolshan.*** *They are the co-villagers so I know them before the incident. They were also grazing in the land, they came and grappled me.....****Rolshan also committed rape with me"***

Complainant Dodo in his evidence deposed as under:

> *"She told me that Bilawal s/o Ramoon Samejo, Aazoo s/o Bholoo Samejo and* ***Roshan*** *s/o Esso had committed Zina with her."*

P.W. Nizamuddin deposed as under:

> *"in the meantime Mst. Rozina grazing cattle in the field came out and started crying and informed us that first accused Bilawal s/o Ramoon, then Aazoo s/o Bholoo and then* ***Roshan*** *s/o Esso had committed Zina with her. In the meantime, I also saw* ***all three accused persons*** *were moving eastern side from jungle towards their houses."*

From above, it is crystal clear that not only the complainant and P.W. Nizam-ud-Din but even the victim girl Mst. Rozina herself has fully implicated the acquitted accused Roshan in the commission of the alleged offence, despite that the trial Court in the judgment whereby he acquitted accused Roshan has observed, *"All the prosecution witness have not supported in respect of involvement of accused Roshan*." It is not understandable that despite the evidence of victim girl, complainant as well as P.W. Nizamuddin, as quoted above, as to how learned trial Court has made such observation. If for the sake of arguments, it is presumed for a while that the acquitted accused Roshan was innocent and was falsely involved by the victim girl, complainant as well as P.W. Nizam-ud-Din in the commission of alleged offence of committing zina, even then in such an eventuality it would adversely affect the veracity and credibility of the victim girl, complainant as well as P.W. Nizam-un-Din meaning thereby that they seem to be liars / falsifiers. If this is the position, then as to how the testimony coming from the mouth of such liars could be used for

convicting the present appellants. This is exactly what was held by Honourable Supreme Court in the case of Umer Farooque (supra) i.e.

> **"*On exactly the same evidence and in view of the joint charge, it is not comprehendible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted.*`"**

In this view of the matter I am of the firm opinion that '*rule of consistency'* as well as the dictum laid down by the Superior Courts in respect of such rule, as quoted above, are fully applicable to the instant case.

Needless to emphasize that it is a well settled principle of law that prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is cast upon the accused to prove his innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

> *"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but* ***no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution****."*

In another case reported as Shamoon alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

> *"The prosecution must prove its case against the accused beyond reasonable doubts* ***irrespective of any plea raised by the accused in his defence.*** *Failure of prosecution to prove the case against the accused, entitles the accused to an* ***acquittal****. The prosecution cannot fall back on the plea of an accused to prove its case……****Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise."***

The accumulative effect of the abovesaid admissions / contradictions as well as infirmities / legal flaws in the prosecution case is that serious dents have been put and doubts created in the prosecution case. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create

doubts in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

> ***"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."***

For the foregoing reasons, by short order dated 04.09.2019 instant appeal was allowed and the impugned judgment dated 16.03.2017 passed by learned Additional Sessions Judge, Sujawal in Sessions Case No.185/2013, (State v. Bilawal & another), arising out of F.I.R No.29/2013 registered at P.S Jati under Sections 376/34 PPC was set aside. Consequently, while extending benefit of doubt, appellant Bilawal @ Ramoon Samejo and Azad @ Azam @ Azoo were acquitted of the charges. Accused /Appellants were ordered to be released forthwith, if their custody was not required in any other criminal case by the jail authorities.

Above are the reasons for the said short order.

JUDGE