IN THE HIGH COURT OF SINDH AT KARACHI

CR. JAIL APPEAL NO.340/2016

Appellant	:	Muhammad Shakeel, through M/s Irshad Ahmed Jatoi and Abbas Hyder Gaad, advocates.
Respondent	:	The state, through Mr. Faheem Hussain, D.P.G.
Date of hearing	:	31.01.2019.
Date of order	:	31.01.2019.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Appellant has challenged judgment dated 31.08.2016 passed by the trial Court in S.C. No.1058/2013 arising out of FIR No.558/2013, u/s 376 PPC, PS Sohrab Goth, whereby appellant/accused was convicted and sentenced to suffer R.I. for ten years and to pay fine of Rs.20,000/-; he was extended benefit of section 382-B Cr.P.C.

2. Brief facts of case are that Complainant Mst. Nasreen Akhtar got second marriage with Muhammad Shakeel (appellant), later she was divorced; Muhammad Shekeel forcibly contracted marriage with Mst. Zaibun aged about 17 years who was daughter of first husband of complainant, hence she had an FIR registered; that on 05.09.2013 at about 0600 hours Muhammad Shakeel and his wife Zaibun came to complainant's house, in meanwhile Mst. Zaibun went inside the room and Muhammad Shakeel locked the outer door of the room and forcibly committed zina with complainant. Complainant and Zaibun raised cries but accused did not stop hence complainant had the FIR registered.

3. Heard and perused the record.

4. I am conscious that statement of victim alone can be sufficient for conviction but same must qualify to be convincing, natural and confidence inspiring. Case of the prosecution is that complainant Mst. Nasreen Akhtar was subjected to rape by her ex-husband (appellant) in courtyard where other house inmates, including his (appellant's) own wife was available though allegedly locked in a room. At this point, it would conducive to reproduce examination-in-chief of complainant Nasreen Akhtar which reads as:-

> "That on 05.09.2013 at about 6.00 p.m. accused Shakeel alongwith my daughter namely Zaibun came at my house and they stayed there. In the night, my daughter Zaibun and her husband Shakeel were slept in the room and I slept in courtyard. At about 4.00 a.m. accused Shakel came out from his room and he locked the door of the room of my daughter and he has committed forcibly rape with me. On my cries, my daughter Zaibun awoke and struck on the window and she also raised cries. On the cries of my daughter, another daughter namely Sana Qamar was also awoke. **Thereafter, accused Shakeel went in the bathroom and he returned back to his room.** Prior to this, accused Shakeel was my husband 10 years ago.

Such story, *prima facie,* is hard to be believed particularly when neither appellant, having committed the zina, tried to escape rather preferred to sleep in same house (place of incident).

5. The PW Zaibun stated in her examination-in-chief as:-

> "This incident took place on 06.09.2013. On 05.09.2013 my ex-husband namely Shakeel stated me that he want to go the house of my mother alongwith me. I refused at that time. On his resistance I agreed. In the evening time we went to house of my mother, at Jahanabad Katchi abadi at 6.00 pm. We take meal 8.00 pm after taking meal we slept in the room. Before sleeping we talk with each other in the whole night at that time, **except Shakeel, my mother and myself were awake up and remaining persons were sleeping.** .. During that period I went to washroom. Thereafter, Muhammad Shakeel closed the door of the room from outside. I heard the cries of my mother. I knocked the door but they did not open the door. I saw them from window that accused Shakeel was forcibly committed zina with my mother. After committing zina, he (Shakeel) opened the door. My mother also told me about the incident. **At 9.00 am my mother went to police post and**

> **made application about the incident. At 10 am two police official came at my house and arrested the accused,** ..

6. From above, it is quite obvious that presence of other house inmates in house (place of incident) is admitted but neither appellant made any attempt to restrict approach of such house inmates by locking their rooms etc nor none of them tried to rescue the complainant or to catch the appellant. On the other hand, from above narration it appears that though appellant *allegedly* committed forcible zina upon the complainant yet he preferred to take a sleep so as to make his arrest easy. Here, it may also be added that place of ***sirzamin*** indicates **'one room'** only which further negates the claim of the complainant to the effect i.e:-

> "It is correct to suggest that at the time of incident my daughter and my children were available in the house. But they were present in room."

As per categorical claim of the complainant and PW Zaibun only she (PW Zaibun) and appellant were sleeping in the **room** hence presumably other children were to be present in courtyard. This also causes serious dent in prosecution story.

7. Further, it is also unbelievable that though a forcible zina was committed upon complainant within sight of her daughter at **'4-00 am'** yet they both waited till **'9-00 am'** and did not bother to disclose / call any body including those residing in neighbourhood. This was so admitted by PW Zaibun in her cross examination as:-

> "It is correct to suggest that we have not informed to any person before the lodging of the FIR."

Though the complainant and PW Zaibun remained crying which, even, could not help in disturbing the sleep of house inmates because

admittedly they remained sleeping at such time. The PW Zaibun admitted in her cross as:-

> "It is correct to suggest that at the time of occurrence I myself, my mother and Shakeel were awoke up and remaining family member were sleeping".

8. Further, it is also a matter of record that PW Zaibun (*daughter of first husband of complainant)* contracted run-away marriage with appellant because of which she (complainant) was annoyed and admittedly had lodged the FIR against appellant for run away marriage, happened about four months before alleged date of incident, so is evident from statement of complainant, detailed in memo of arrest (*ex.03/B).* The complainant admitted in her evidence as:-

> "It is incorrect to suggest that I called my son-in-law (accused) to meet with his child."

> "It is correct to suggest that I lodged FIR No.334/2013 u/s 365-B PPC for abduction of my daughter against accused Shakeel."

> "It is correct to suggest that I have not good relations with accused after marriage of my daughter with him."

If, there existed no good relations between the parties and accused / appellant was not invited by complainant to her house then it is hard to believe that the appellant *himself* dared to go to house of complainant who had lodged FIR against him and was at annoyance. Such approach *direct* approach appears to be illogical particularly when the wife of the appellant i.e PW- Zaibun had refused, so she claimed in her evidence as:-

> "This incident took place on 06.09.2013. <u>On 05.09.2013 my ex-husband namely Shakeel stated me that he want to go the house of my mother alongwith me</u>. **<u>I refused at that time</u>**. On his resistance I agreed. In the evening time we went to house of my mother, at Jahanabad Katchi abadi at 6.00 pm.

Such picture, at one hand, gives a motive to complainant to falsely involve the appellant while on the other fades possibility of a well-come entry to appellant by complainant which, otherwise, was admitted by complainant in her evidence as:

> "It is correct to suggest that I, my daughter and accused Shakeel were present in courtyard and they were talking to each other in ***good atmosphere."***

To believe such story/ the abnormal rather unbelievable conducts of appellant and complainant party would be at the cost of safe Criminal Administration of Justice where benefit of every reasonable doubt has to be given to accused, even if, same appears in consequences to ***'****inferences'* which, *otherwise,* plays an important role so as to examine veracity and truthfulness of a testimony of a witness. Reference may well be made to the case of *Lal Khan v. Qadeer Ahmed* 2018 SCMR 1590, that:

> ***"3. ...a conjecture has no place in criminal law whereas an inference plays an important role because the same is based upon a logical deduction from circumstances available on the record.."***

9. Be that as it may, a bare reading of the available material shows that such improbable story:

> "starting from abnormal direct visit by appellant; commission of Zina with complainant before his own children and wife; sleeping in room without an attempt of escape thereby resulting into his arrest from very place of incident i.e ***house***"

stands denied when the mashirnama of arrest and evidence of the PW-5 ASI Qadir Bux is examined. The relevant portion of the examination-in-chief of the PW ASI Qadir Bux is referred hereunder:-

> "On 06.09.2013 I was posted at Ahsanabad Chowki of P.S. Sohrab Goth. On the same day Mst. Nasreen came at P.S and produced the accused Muhammad Shakeel and narrated the facts of offence of Zina. I arrested the

> accused and prepared memo of arrest in presence of Mst. Zaibun and PC Abdul Latif at P.S..

10. The above categorical statement not only denies specifically claimed facts i.e:-

> i) arrest of appellant from house;
>
> ii) claimed *alone* going of complainant to police station for making application;
>
> iii) claimed remaining of PW Zaibun at house at all time till arrest of appellant from house;

rather leads to unbelievable conclusions, easily deducible i.e ***"having committed forcible Zina the appellant voluntarily accompanied to complainant to police station".*** The position, being so, is sufficient to establish that prosecution story was / is not only unbelievable but does not fit to normal conduct and behaviour of a ***prudent mind.*** Needful to add that it is always the conduct; reactions and behaviour in a certain situation whereby inference (s) are drawn that whether claimed actions / reactions are worth believing (natural) or otherwise?. Reference is made to the case of *Zafar v. State* 2018 SCMR 326 wherein, while appreciating the conduct of witnesses, their presence *even* was disbelieved.

> 6. **The conduct of the witnesses of ocular account also deserves some attention**. According to complainant, he along with Umer Daraz and Riaz (given up PW) witnessed the whole occurrence when their father was being murdered. It is against the normal human conduct that the complainant, Umer Daraz and Riaz (PW since given up) did not make even an abortive attempt to catch hold of the appellant and his co-accused particularly when the complainant himself has stated in the FIR and before the learned trial court that when they raised alarm, the accused fled away. **Had they been present at the relevant time, they would not have waited for the murder of their deceased father and would have raised alarm the moment they saw the appellant and his co-accused standing near the cot of the their father**.

11. I would further add that **'inferences'**, if are going to hit at root of prosecution story and making the same **'improbable'** for a prudent mind then it would never be safe to hold conviction in such like situation because the law always insists to extend benefit of every single ***reasonable doubt*** to accused, if even, same is on finding the story / foundation of prosecution case as ***improbable and unbelievable***. Reference is made to the case of *Shamim v. State* 2003 SCMR 1466 wherein it is held as :-

> '7. .... The prosecution story is indeed improbable and irrational because it does not appeal to reason that the appellant Mst. Shamim had procured the complainant for her husband and the complainant had accompanied a strnager to pluck cotton from unknown fields. The prosecution story being the foundation on which edifice of the prosecution case is raised occupies a pivotal positon in a criminal case. It shold therefore, stand to reason and must be natural, convincing and free from any inherent improbability. It is neither safe to believe a prosecution story which does not meet these requirements nor a prosecution case based on an imporbable prosecution story can sustain conviction.

12. Though, the above position is more than enough to record an acquittal yet I would proceed a little further. The perusal of the available record shows that except the words of the complainant and her daughter PW Zaibun there is no other corroborative / supportive material except that of ***positive*** report of chemical examiner, which, however indicates nothing more than ***"detection of Human sperm".*** In absence of ***'semen 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 v. State* 2016 SCMR 1554 wherein it is held as:-

> '3. ...To start with, we have found the story advanced by the alleged victim to be hard to believe because she had alleged that as many as three persons had committed rape with her repeatedly at about 06.00 P.M in some bushes aailable near a Sunday bazaar. That story was changed during the trial and it was alleed that the allged victim had in fact been subjectedf to gangrape not in some bushes near a Sunday bazaar but in an under-construction house. Such change of the place of occurrence has been found by us to be irreconcilable pointing towards falselhood of the story. The alleged victim had failed to receive any support from the medical evidence inasmuh as despite an alleation that three accused persons had committed rape with her nine times over she had nt received any mark of violance on any part of her body. .... The only other piece of evidence avaiabe on the record is in the shape of a positive report of Chemical Examiner but we note that no DNA test had been conducted in this case nor any semen matching was undertaken so as to conclusively establish that the semen found on the vaginal swabs of the allegd victim belonged to any of the petitioners or their co-accused.

13. Further, it is also a matter of record that complainant never stated a single word in her examination-in-chief that she was ever examined by doctor so as to ascertain allegation of rape which, *otherwise,* is necessary for such like charge of *forcible zina*. It is important to add here that as per Exh.5/A (letter to Chemical by I.O) further shows that at time of approach at police station the complainant had handed over her ***shalwar*** particularly when at no time both complainant and PW Zaibun had claimed so. Be that as it may, though in said letter (Exh.5/A) I.O claims to have sent the complainant for her medical examination but it is matter of record that prosecution has also failed to produce medical officer with regard to examination of victim Nasreen Akhtar nor any thing, showing medical examination of complainant, was produced. Needful to add that in cases of ***Zina,*** mere proof of potency of accused, *alone,*

would never be sufficient to prove commission of ***'zina'*** if other corroborative / supportive material is missing

14. The above discussion is sufficient to conclude that prosecution failed in discharging its duty i.e to establish the charge beyond reasonable doubts. In absence thereof, legally no conviction can sustain particularly when the charge is one of capital punishment. Accordingly, instant appeal was allowed by short order.

15. While parting, I am compelled to add that in the instant case the quarter concerned (*I.O)* completely failed in making a proper investigation which always require an investigating officer to conduct investigation without any fear or influence of a person or his / her contention rather as insisted in one of the *directives* , so issued in the case of *Sughran Bibi v. State* PLD 2018 SC 595 as:

> "During the investigation the investigating officer is obliged to investigate the matter from all possible angles while keeping in view all the versions of the incident brought to his notice and, as required by Rule 25.2(3) of the Police Rules 1934 "It is the duty of an investigating officer to …….He shall not commit himself prematurely to any view of the facts for or against any person."

Therefore, a copy of the judgment be sent to the IGP Sindh for appropriate action against the I.O for making a departure to his own legal obligations, within meaning of Rule 25.2(3) of Police Rules. As well as copy shall be sent to prosecutor general regarding para No.s13 relates non-examination of Medical Officer by the Prosecutor.

J U D G E

Imran/PA