IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.410/2017

Appellant	:	Shabbir Ahmed and another, through Mr. Wazeer Hussain Khoso advocate assisted by Mr. Muhammad Siddiq, advocate.
Respondents	:	The State, through M/s. Siraj Ali Khan Chandio, Additional P.G. and Faheem Hussain Panhwar, Assistant P.G. Complainant present on date of hearing.
Date of hearing	:	27th February, 9th April and 8th May, 2019.
Date of order	:	8th May, 2019.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Appellants have assailed judgment dated 19.08.2017 passed in S.C. No.894/2014 arising out of FIR No.689/2013, u/s 365-B, 376(ii), 34 PPC, PS Sachal, whereby they were convicted and sentenced to suffer R.I. for life imprisonment for committing offence under section 365-B PPC and to pay fine of Rs.50,000/- each to the victim, in case of failure they shall suffer S.I. for six months more; they were also convicted and sentenced to suffer R.I. for life imprisonment for an offence under section 376(ii) PPC; They were given benefit under section 382-B Cr.P.C for the period which they remained in jail.

2. Prosecution's case is that on 19.12.2013 at 2350 hours, complainant Bakhtiar Khan registered FIR stating that he was doing work of baking meals at Shahi Hotel, Safoora Chowrangi; on the day of incident he was present at his duty place when at about 2230 hours, he received a phone call from his wife namely Zareena Taaj, who asked the complainant to immediately come home as there was an emergency, when the complainant reached home, he saw that his

daughter Nazia's (aged about 10/12 years) shalwar was full of blood. His wife informed him that Nazia had gone to shop to buy something at about 10:00 pm and returned home while weeping at about 10:30 pm, who informed that two boys whose name she did not regain at that time but can identify them if seen again, took her to the other street of the road at an open plot behind bushes and after beating, removed her shalwar, they committed rape with her and threatened her not to disclose such facts to her family members; the complainant inquired such facts from victim daughter, who narrated the same facts of rape, complainant brought his victim daughter to police station and lodged FIR; the victim was referred for medical examination and treatment.

3. Investigation Officer (SIP Sahib Khan) took the victim to Jinnah Hospital for treatment and medical certificate as well recorded the statement of PWs, got prepared the sketches of culprits, inspected the place of incident; arrested accused Shabbir, Riaz, Dilshad and Achar and others who were put to identification parade before the concerned Magistrate on 26.12.2013 where the victim baby Nazia identified two accused namely Shabbir Ahmed and Achar. Later on 16.01.2014 accused Riaz was arrested by the second Investigation Officer (Pir Bux Chandio) and submitted charge sheet against accused Shabbir, Riaz and Achar while showing accused Nazim as absconder and let off the accused Sultan Haider, Sher Mohammed, Wazir, Abdul Hameed, Zeeshan, and Riaz, under section 497 (2) Cr.P.C.

4. The formal charge was framed at exhibit 5 on 17.10.2014 against the accused, who pleaded not guilty and claimed trial vide plea at exhibits 5/A to 5/C.

5. Prosecution examined PW-1/victim Nazia at exhibit 6 who produced memo of site inspection at exhibit 6/A and memo of identification parade exhibit 6/B; PW-2/Complainant Bakhtiar at exhibit 7, who produced FIR bearing No.689/2013 at exhibit 7/A, memo of arrest of accused Shabbir Ahmed and Sultan at exhibit 7/B, memo of arrest of accused Achar, Wazeer, Abdul Hameed, Riaz, Ghulam Shabbir and Dilshad at exhibit 7/C; PW-3 Zareen Taaj examined at exhibit 8 who is mother of victim Nazia; PW-4 Doctor Nasreen Qamar at exhibit 9, who is Senior Medico Legal Officer at JPMC. She produced letter to M.L.O at exhibit 9/A, Medico Legal Report at exhibit 9/B; PW-4, ASI Sikandar Ali examined at exhibit 10, who is author of FIR; PW-5, SIP Sahib Khan at exhibit 11, who is first I/O of this case. He produced departure entry at exhibit 11/A. sketches of accused at exhibit 11/B, arrival entry No.29 at exhibit 11/C, roznamcha entry No.40 at exhibit 11/D, sketches of culprits at Ex.11/E to Ex.11/G, letter to MLO at Ex.11/H, departure entry No.28 at Ex.11/I, letter for identification parade at Ex.11/J, copy of order dated 21.12.2013 at Ex.11/K, letter for DNA report at Ex.11/L, and receipt at Ex.11/M, letter for medical report at Ex.11/N, memo of arrest of accused Riaz at Ex.11/O; PW-6, DSP Peer Bux at exhibit 12, who is 2nd I/O of the case. He produced order dated 21.12.2013 at Ex.12/A for constitution of special team by DIG East, letter to chemical report at Ex.12/B, chemical report at Ex.12/C, letter to SIO for recording 164 Cr.P.C statement at Ex.12/D, letter dated 05.01.2014 at Ex.12/E, notice to accused at Ex.12/F, attested copy of application at Ex.12/G, departure entry at Ex.12/H, arrival entry No.65 at Ex.12/I, letter to DNA report at Ex.12/J, and Ex.12/K; PW-8 Adam Singhaar examined at exhibit 14, who was retired Judicial Magistrate. He produced letter dated 26.12.2013 alongwith the notice

under section 160 Cr.P.C at exhibit 14/A. Thereafter prosecution closed their side vide statement exhibit 15.

6. The statement u/s 342 Cr.P.C of accused Shabbir Ahmed, Riaz Hussain and Achar were recorded at exhibits 16 to 18 recorded. Accused Shabbir Ahmed in his statement claimed that in fact prior to this FIR, the complainant and his wife had dispute with him due to fight of children therefore they falsely implicated him to take revenge. Accused Achar claimed that complainant party disputed with accused Shabbir over the fight of children and he rescued them and due to such grudge he has been falsely implicated. They neither examined themselves on oath nor produced any witness in their defence.

Point No.1 Whether on 19.12.2013 at 2200 hours, at house No.B-44, Abdullah Shah Ghazi Goth, Scheme No.33, Karachi you alongwith absconding co-accused took away Mst.Nazia aged about 10/12 years with common intention that she may have illicit intercourse and did commit zina of Mst. Nazia, as such you have abetted and committed rape alongwith absconding accused in commission of the alleged offence?	Accordingly.
Point No.2 What offence (s), if any is/are committed by the accused?	Accused Shabbir Ahmed, Achar are convicted U/S 265-H (ii) Cr:P.C, whereas accused Riaz Hussain s/o Ghulam Rasool is acquitted U/S 265-H(i) Cr.P.C.

7. I have heard learned counsel for the parties and perused the record.

8. Learned counsel for appellants contended that victim in her statement recorded by I/O has mentioned names of seven

persons viz. Haji, Sher Muhammad, Achar, Riaz Siraiki, Nazam Siraiki and two other unknown persons who committed rape whereas FIR is against two boys, whereas in her 161 CrPC statement she deposed that four persons committed rape; further place of commission of offence as mentioned in FIR is bushes on an open plot whereas the victim in her statement has said that it was a room thus witness remained changing her stances hence lost her credibility. He added that the victim deposed that she was brought to identify three accused persons before the Judicial Magistrate whereas identification parade shows nine accused persons were brought; that identification parade conducted against guidelines provided by apex court as it was a joint identification parade where three accused persons were mixed with 11 dummies and names of those dummies were not mentioned in memo of identification parade, reliance is placed on 2002 SCMR 1439. He also added that on 02.01.2014 PW-2 and 3 (father and mother of victim respectively) swore affidavit before police exonerating Sher Muhammad, Sultan Haider, Abdul Hameed, Wazeer Ahmed, Riaz, Dilshad and Ghulam Shabbir; that they also swore affidavits before the Court of 1st A.D.J Malir in S.C.No.894/2014 (Re: The State vs. Shabbir Ahmed) whereby exonerated the appellants from the charge, both these PWs appeared before this Court and affirmed the contents of their affidavits therefore, the stand, taken during trial, is not worth believing. that on same facts and evidence accused Riaz Husain was acquitted by the trial court hence conviction to appellants is not sustainable. Reliance is placed on 2015 SCMR 137; DNA analysis was not conducted and articles, sent for such purpose, were returned by National Forensic Science Agency Project hence there was never any conclusive proof that offence was committed by sent up accused persons, including the appellants. Learned counsel

for appellant has relied upon 2000 PCrLJ 333, 2017 SCMR 1189, 1998 PCrLJ 581, PLD 2007 PESHAWAR 83, 2016 SCMR 1554 and PLJ 2019 S.C. (Cr.C.) 265.

9. Learned Additional P.G has argued that impugned judgment is in accordance with law; evidence of prosecution is sufficient to dismiss the appeal.

10. Learned Additional P.G. has relied upon 2011 PCrLJ 1443, 2012 YLR 847 (FSC), PLD 2010 SC 47 and 2014 PCrLJ 1280.

11. After hearing the respective sides and going through the available record, I have observed that it is an *undeniable* position that:-

i) in the FIR the allegation of commission rape was against **two persons:**

ii) in the FIR the place of commission of offence was specific i.e **bushes in an open plot;**

however, during course of trial the prosecution witnesses, including victim changed both **'numbers of accused persons'** but also **place of incident.** The relevant portion of the examination-in-chief of victim, being material, is referred hereunder:-

> "....when I was still in the way then suddenly **four persons** came in my way out of them, one put his hands on my mouth and then all accused forcibly took me towards **<u>one house in room</u>** and forcibly removed my Shalwar and **all four accused persons** turn by turn committed rape with me by force..'

The complainant (PW-2) in his cross-examination (s) admitted that:-

> Complainant:- It is fact that in my FIR it is mentioned that **two culprits** committed rape with my daughter in **open plot** behind bushes.

While PW-5 I.O (*first)* SIP Sahib Khan in his examination-in-chief stated that:

> "On 21.12.2013 I went to hospital and recorded the statement of victim Nazi under section 161 Cr.P.C. in her 161 Cr.P.C statement she disclosed that **<u>8/9</u>**

> **culprits committed rape the gang rape with her** and she can identify them.

From above, it is quite clear that victim of the incident remained changing her stances. I would add here that changing in place of incident and number of accused persons in any **offence** shall be fatal because both these things are *integral* parts of an offence. The **number of accused persons** details the **manner** of incident while the place of **incident** is **root** so as to substantiate **happening** of the incident. *Prima facie,* in the instant case both things were changed by prosecution hence the *victim* lost her credibility and was never worth believing for holding conviction on a capital charge. In an *identical* case, reported as *Haider Ali & Ors v. State* 2016 SCMR 1554, the Honourable apex court acquitted the appellants while appreciating / discussing such conduct of the victim. The relevant portion of the judgment reads as:-

> 3. After hearing the learned counsel for the parties and going through the record we have observed that the FIR in this case had been lodged with a delay of one day and the complainant had stated before the trial court in so many words that the FIR had been lodged after consultation and deliberations. The solitary witness of the alleged gang-rape was none other than the alleged victim herself namely Mst. Sumera Bibi who was a young girl aged about fourteen years. 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 available near a Sunday bazaar. That story was changed during the trial and it was alleged that the alleged victim had in fact been subjected to gang-rape 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 falsehood of the story.** ..

Further, the perusal of the record shows that there had always been number of *infirmities* in prosecution story and manner wherein the present appellant as well acquitted co-accused were brought on record as ***'accused'***. I am quite unable to understand that normally

the *culprits* always try to conceal their identity particularly when they are known to *victim* and they (accused) leave the *victim* to go away. Reliance may well be placed on the case of *Muhammad Asif v. State* 2017 SCMR 486 wherein it is observed as:-

> "7. It is , normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future, thus , human faculty of prudence would not accept the present story rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no circumstances would have chosen to preserve it in his own shop if believed so because that was susceptible to recovery by the police.

In the instant matter, it was admitted by prosecution witnesses as:-

> Victim:- It is fact that accused Haji Shabbir Ahmed and accused Riaz Hussain were already known to my mother **as they are resident of our locality.**
>
> PW-3 Zareen Taaj:- It is fact that the present accused are previously known / seen by my children **so also victim.**

If the accused persons were resident of the same **locality** and were known / seen by *victim* then it is not worth believing to a prudent mind to believe below referred portion of examination-in-chief of victim i.e:-

> "**The all four accused persons were properly seen by me**. They were namely Achar, Riaz, Nazim Shabir and Sultan. After committing rape accused persons threaten (ed) me not to disclose the above facts to any one **and left me**."

because it is not expected from a *prudent mind* (accused persons even) that:

i) they would choose their ***own place of residence*** as ***place of incident;***

ii) they would let the *victim* (known person) to properly see them;

iii) they would let the *victim* go at her own by leaving place of incident thereby letting a chance to bring relatives / police to such place;

Such *abnormality* in prosecution story was never appreciated by the learned trial Court judge properly though confidence inspiring evidence would always mean **evidence / story** which a *prudent mind* normally behave in peculiar circumstances hence the Courts are always required to appreciate such aspects *too* and to extend benefit thereof to the accused. In the case of *Mst. Rukhsana Begum & Ors v. Sajjad & Ors* 2017 SCMR 596, while finding such story as ***natural*** the benefit thereof was extended to the accused. The relevant portion thereof reads as:-

> 15. Another intriguing aspect of the matter is that, according to the FIR, all the accused encircled the complainant, the PWs and the two deceased thus, the apparent object was that none could escape alive. The complainant being father of the two deceased and the head of the family was supposed to be the prime target. In fact he has vigorously pursued the case against the accused and also deposed against them as an eye-witness. The site plan positions would show that, he and the other PWs were at the mercy of the assailants but being the prime target even no threat was extended to him. Blessing him with unbelievable courtesy and mercy shown to him by the accused knowing well that he and the witnesses would depose against them by leaving them unhurt, is absolutely unbelievable story. **Such behaviour, on the part of the accused runs counter to natural human conduct and behaviour explained in the , provisions of Article 129 of the Qanun-e-Shahadat , Order 1984, therefore, the court is unable to accept such unbelievable proposition.**

12. As regard the medical evidence (*examination of victim of zina),* it would suffice to say that a positive medical examination report of victim could only establish commission of offence i.e ***zina*** and it *alone* can never help the prosecution in identifying the *culprit.* Reference may well be made to the case of *Ghulam Qadir v. State* 2008 SCMR 1221.

13. Before going into further details of the case, I find it in all fairness to first insist that a mere claim of commission of ***zina*** as well positive report thereof, *alone,* would never be sufficient to convict a *specific* person (accused) because commission of offence is a complete different thing while proof of its being committed by accused *(specific person)* is quite different. This aspect is always required to be kept in view while exercising powers in doing ***Criminal Administration of Justice*** because word ***'safe'*** the ***criminal administration of justice*** shall frustrate the very root of such administration whereby the prosecution is under *mandatory* obligation to prove the charge ***'beyond reasonable doubt'.***

In short, a positive report of commission of *zina* as well detection of ***human semen*** are not the conclusive proof that offence has been committed by specific person (accused) rather ***DNA.*** This has been the reason that in such like cases the requirement of ***DNA*** stood made as ***mandatory.*** Reference may well be made to the case of *Salman Akram Raja v. Govt. of Punjab* 2013 SCMR 203 wherein while reaffirming vitality of DNA test in such like cases, it was resolved as:-

> "16. In view of the above proposals, the petitioner as prayed that following points may be approved and the concerned public authorities be directed to enforce them through the course of investigation and prosecution of all rape matters in Pakistan:--
>
> a) ....
>
> b) Administration of DNA tests and preservation of DNA evidence should be made mandatory in rape case.
>
> c) ...
>
> d) ...

In the instant matter, undeniably the DNA was not conducted rather articles, sent for such purpose, were returned (Ex.12/K) with direction as:-

> "3. Keeping in view the above, the case is being returned in same condition. The case may be resubmitted by providing original High Vaginal Swab and reference blood sample of victim & accused (EDTA added tube) alonghwith (alongwith) relevant material (clothes, bedsheet etc) in sealed from at the earliest to process the case."

However, it is matter of record that prosecution never bothered to make compliance of said direction rather opted not to get DNA done. I would further add that it is not positive report of availability of *human sperm* but matching thereof and positive ***DNA*** report which are conclusive proof of commission of zina by *specific person* (accused). Reference is made to the case of *Haider Ali* supra wherein this aspect was reaffirmed as:-

> '3. ..... 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 alleged victim belonged to any of the petitioners or their co-accused.

Therefore, the learned trial court judge was always required to have appreciated this *legally* established position and was not required to have given much weight to positive chemical report, only showing/proving availability of ***human sperm.***

As regard another piece of evidence i.e *identification parade,* it would suffice to say that victim stated in his examination-in-chief as:-

> *"..my treatment was carried about two days thereafter I was discharged.* ***Police recorded my 161 Cr.P.C statement in which I disclosed the names of culprits.***

The PW-6 SIP Sahib Khan (*first I.O),* however, denies such claim of the victim. The relevant portion of examination-in-chief of PW-6 SIP Sahib Khan reads as:-

> *"On 21.12.2013, I went to hospital and recorded the statement of victim Nazia under section 161 Cr.P.C in her 161 Cr.P.C statement she disclosed that 8/9 culprits committed rape the gang rape with her and she can identify them."*

Be that as it may, the record further shows that the victim knew the culprits who were resident of her *mohalla;* she herself named the culprits; got prepared sketches of culprits; herself pointed out place of incident *(place of living of accused persons)* and per I.O SIP Sahib Khan he arrested the accused with help of sketches then there had never been any *need* of identification parade. Reference may be made to the case of *Javed Khan v. State* 2017 SCMR 524 wherein it is held as:-

> 9. ... In *State v. Farman (PLD 1985 SC 1)* , the majority judgments of which was authored by Ajmal Mian J, the learned judge had held that an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times (page 25V). The same principle was followed I the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of *Muneer Ahmed v. State 1998 SCMR 752)* , in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces. In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raised serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eye-witnesses who had seen the culprits fleetingly once would be inconsequential.

14. Above all, it is also a matter of record that co-accused Riaz Hussain was acquitted by the trial court while observing as:-

> "20. So far, the case of accused Riaz s/o Ghulam Rasool who was arrested on 16.01.2014 on the statement of co-accused Shabbir and Achar after about 26 days of incident, he was not put on identification parade. Therefore, the confession of co-accused could not be used against the accused under

> Article 38 and 39 of Qanun e Shahadat. Therefore, his case is not only different from the accused Shabbir and Achar but is doubtful and such single benefit of single circumstances (circumstance) goes in favour accused (of) Riaz s/o Ghulam Rasool held in 2009 S.C.M.R 230 placitum (C) that a single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefit, not as a matter of grace and concession, but as a matter of right, hence the point under discussion as proved against accused Shabbir s/o Sher Muhammad and Achar s/o Lakha Dino and answered as doubtful against Riaz Hussain s/o Ghulam Rasool accordingly."

I am unable to appreciate that how merely for reason of non-conduct of identification parade of the acquitted co-accused Riaz his case became different from that of convicted accused persons when, as already observed, the *identification parade* in instant case was never of any substance because names of accused persons, including acquitted co-accused, had been disclosed from one and same mouth i.e *victim.* The victim during her evidence made no *difference* among standing accused persons i.e convicts and acquitted co-accused and had said that ***"I see accused Shabir Ahmed, Riaz Hussain and Achar present in court are same".*** Needless to say that an *insignificant* thing was never a *distinguishing* line for purpose of acquitting one and convicting other on one and same set of evidence rather to apply principle of *sifting the grain from chaff* it was always requirement of law that there must be strong corroboration in shape of other pieces of evidences. Reference is made to the case of *Muhammad Mansha v. State* 2018 SCMR 772 (Rel.P-777) wherein it was held as:-

> ...In that eventuality, the conviction upon the statements of the witnesses who, in the assessment of the High Court, made dishonest improvements and their divergent stances in the FIR and in the private complaint made them totally doubtful then there was no legal justification to convict the appellant Muhammad Mansha on the same set of evidence without independent corroboration conspicuously lacking in the instant case, as held by this Court in the cases of.....

However, after judgment of honourable Apex Court (authored by his lordship Mr. Justice Asif Saeed Khan Khosa, C.J), reported as PLJ 2019 SC (Cr. C) 265, the principle of *falsus in uno falsus in omnibus* has been declared as ***integral part*** of Criminal Administration of Justice while holding as:-

> 21. We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society which tolerates it is destined to self-destruct. Truth is the foundation of justice and justice is the core and bedrock of a civilized society and, thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized society. Our judicial system suffered a lot as a consequence of above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in the light of discussion made above, we declare that the rule *falsus in uno falsus in omnibus* shall, henceforth, be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit. It is also directed that a witness found by a court to have resorted to a deliberate falsehood on a material aspect shall, without any latitude, invariably be proceeded against the committing perjury.

hence, the benefit of disbelief / doubt in prosecution case, so found by trial court, for one accused (*acquitted co-accused)* needs to be extended to the convicted *too.*

15. In the last, I would add that the Court (s) must never be influenced with severity of the offence while appreciating evidence for finding guilt or innocence because severity of an offence could only reflect upon *quantum of punishment.* Therefore, even such like *tragic* cases, the Courts are always required to follow the legally established position that it is intrinsic worth and probative value of evidence which plays a decisive role in determining the guilt or innocence and not heinousness or severity of offence. Reference may be made to case of *Azeem Khan & another v. Mujahid Khan & Ors* 2016 SCMR 274 wherein it is held as:-

> "29. The plea of the learned ASC for the complainant and the learned Additional prosecutor General, Punjab that because the complainant party was having no enmity to falsely implicate the appellants in such a heinous crime thus, the evidence adduced shall be believed, is entirely misconceived one. It is a cardinal principle of justice and law that only the intrinsic worth and probative value of the evidence would play a decisive role in determining the guilt or innocence of an accused person. Even evidence of uninterested witness, not inimical to the accused may be corrupted deliberately while evidence of inimical witness, if found consistent with the other evidence corroborating it, may be relied upon. Reliance in this regard may be placed on the case of *Waqar Zaheer v. The State* (PLD 1991 SC 447)."

Thus, the totality of the above discussion make me of the clear view that prosecution never succeeded in proving the charge against the appellant beyond reasonable doubts.

16. The above are the, *prima facie,* reasons of short order dated 08.05.2019 whereby impugned judgment was set aside and appeal was allowed.

J U D G E

IK