

IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.400/2016

Appellants : Abdul Kareem and others,
through Mr. Shah Muhammad Maitlo, advocate.

Respondent : The State,
through Mr. Abrar Ali Khichi, APG.

Date of hearing : 02.10.2018.

Date of order : 02.10.2018.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Appellants/accused have assailed judgment dated 15.10.2016 in S.C. No.1424/2014 (FIR No.385/2014 u/s 365-B, 109, 376 PPC, PS Sukhan) whereby they were convicted and sentenced as under:-

“Accused No.1 to 4 convicted and sentenced to life imprisonment for committing the offence under section 365-B, 109 PPC with fine of Rs.20,000/ each, in case of default of payment they shall further suffer S.I for three months more; accused Abdul Kareem @ Ahsan son of Huzoor Bux is also convicted and sentenced for ten years for committing the offence under section 376 PPC with fine of Rs.20,000/, in default whereof he shall further suffer S.I for three months. The sentences awarded to accused Abdul Karim @ Ahsan shall run concurrently. The Benefit of Section 382-B Cr.P.C are also extended to them.”

2. Brief facts of the case are that the complainant Jalal Shah lodged FIR on 10.11.2014 at 0045 hours that on 09.11.2014 at 0500 hours, when he came to his house his mother informed him that his sister Nazia Bibi is missing; he remained in her search and came to know that one Karim Bux son of Huzoor Bux at the instance of Huzoor Bux, Akbar and

Mohammad Ashraf have abducted Mst. Nazia Bibi with intention to commit zina with her hence FIR was registered.

3. Charge framed at exhibit-2 against the accused/appellants, to which they pleaded not guilty and claimed to be tried vide pleas at exhibits 2/A and 2/D respectively.

4. Prosecution examined PW-1 complainant Jalal Shah at exhibit 3 who produced FIR, memo of site inspection, memo of arrest of accused, and memo of secured abductee at exhibits 3/A to 3/D respectively; PW-2/victim Mst. Nazia examined u/s 164 Cr.P.C. at exhibit 4 who her statement recorded before Civil Judge & Judicial Magistrate, Malir, at Ex.4/A; PW-3 Syed Sultan Shah at exhibit 5. PW-4 Dr. Feroza Akhund, Sr. CMO at Civil Hospital examined at exhibit 6, produced police letter to MLO, medico Legal Report, final medico legal report, chemical report at exhibits 6/A to Ex.6/D; PW-5 I/O ASI Noor Mohammed examined at exhibit 7 who produced sketch of place of incident, various departure and arrival entries, receipt of recovered abductee, letter dated 23.11.2014, at exhibits 7/A to 7/N; PW-6 Dr. Qarar Ahmed Abbasi examined at exhibit 8, produced ML Certificate at Ex.8/A and prosecution closed its side.

5. Statements of accused under section 342 Cr.P.C were recorded at exhibits 10 to 13 wherein they denied the allegations leveled against them by the complainant and victim. Accused Abdul Kareem claimed that he is innocent and Mst. Nazia is his wife and produced original Nikahnama at exhibit 10/A, certify copy of constitution Petition No.1125/2014 alongwith certify copy of cause list, affidavits at exhibits 10/B, certified copy of judgment and decree at exhibit 10/C. Other accused also stated that Mst. Nazia has married with accused Abdul Karim.

6. Learned trial Court framed and answered points for determination as under:-

1	Whether on 09.11.2014 at 0500 hours, inside house of complainant New Abadi near Government School, Bhains Colony, Karachi the present accused persons abducted Mst. Nazia with intention to compel her to marry with accused Abdul Kareem who committed rape with her by force?	Affirmative
2	What offence(s) if any is/are committed by the accused persons?	Accused are convicted u/s 265-H(ii) Cr.P.C.

7. I have heard learned counsel for appellants and learned APG.

8. Learned counsel for appellants contended that alleged victim herself had left house of her parents; contracted marriage with appellant Abdul Kareem; filed petition however but all such material was not considered by learned trial court judge while convicting the appellants. He added that manner in which happening of incident was claimed was improbable hence no conviction could be recorded on such improbable story hence it was never a case of conviction.

9. Learned APG has contended that the complainant, victim and other witnesses have fully implicated the appellants / accused therefore, learned trial court judge committed no illegality in recording conviction to appellants.

10. *Prima facie*, perusal of the case would show that on 10.11.2014 at 0045 hours, complainant Jalal Shah lodged FIR with PS Sukhan wherein alleged that he was informed by his mother that victim Nazia Bibi was sleeping alongwith his brother in a room but in morning was found missing; complainant made search and learnt that she (*victim*) was forcibly abducted

by appellant / convict at instance of other appellants. There can be no denial to the legal position that to constitute an offence within meaning of Section 365-B PPC, it is always mandatory obligation of prosecution to *prima facie* establish that :

- i) *removal of victim from one place to other place under any of the conditions, so detailed in this section itself;*
&
- ii) *such removal was with an object to compel her to marry any person against her will or in order that she could be forced / seduced to illicit intercourse;*

Both above conditions are to be proved beyond reasonable doubts by leading direct, natural and confidence inspiring evidence. Perusal of the evidence of the complainant shall make it clear that he (complainant) never referred any body to have witnessed the incident yet specifically named persons with their parentages and even **addresses** while recording the FIR which is quite surprising. In absence of any reference to person, informing the complainant about commission of **abduction** by appellants / convict, cannot be taken as **natural** or **confidence inspiring** rather could safely be said to be result of consultation and deliberation.

I would further add that it was never claimed by complainant (prosecution) that:

- i) the appellant / convict Kareem Bux earlier did any act which could have been taken as sufficient to bring him under *suspicion* for abduction of victim;
- ii) there was claimed no acquaintance with appellant / convict Abdul Kareem which could justify knowing of his *exact address* with parentage;
- iii) the victim was not claimed to be **consenting party**;
- iv) an easy and free access (entry) into house of complainant was *possible*;

yet surprisingly the appellant / convict Kareem Bux not only succeeded in making an *easy* access (entry) into house of complainant but also succeeded in abducting away the victim though it was also specific and categorical claim of the prosecution that “alleged victim was sleeping in a room with her *bhabhi*” while during such process of *forcible abduction* none of house inmates heard anything. This was admitted by complainant in his cross examination as:-

“On the said night my sister was sleeping with my babhi in her room. It is fact that no any family member heard any commotion during night time”

This aspect, showing a *prima facie* defect in prosecution story, was never appreciated by the learned trial court judge while recording conviction.

Since, I am quite conscious of the legal position, as held in 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..”

Therefore, if prosecution case is examined, it was always requiring explanations for number of questions (*circumstances*), not limited but including that of:

- a) as to who informed the complainant about names, parentage and address of appellants / convicts?;
- b) if there had been one to have seen **abduction** then why he was not made as a **witness**?

- c) as to how appellant / convict Kareem Bux obtained easy access (entry) into house which too in a manner that none of *admittedly* available house inmates heard any thing?
- d) as to how appellant / convict Kareem Bux obtained access (entry) inside the room where the victim was sleeping alongwith her **bhabhi?**;
- e) why alleged victim not raised any cry when she was being forced by appellant / convict Kareem Bux?

These, *prima facie*, cannot be said to be '**conjectures**' but '**inferences**' going to hit at root of prosecution story and make the same '**improbable**' for a prudent mind hence *prima facie* defects in prosecution story were always requiring to be appreciated in favour of the accused because it is *otherwise* well settled extraordinary care and caution is to be taken while dealing with the offences of grave nature, attracting capital punishment, which could not be awarded unless charge against the accused is proved by leading absolutely credible, trustworthy and unimpeachable evidence..

11. Be that as it may, since I am quite conscious of legal position that in such like case (s), the conviction can safely be recorded *solely* on basis of the statement of '*victim*' but if same is found by the Court to be '**confidence inspiring**', as held in the case of Ibrar Hussain v. State (2007 SCMR 605) that:

"8. It is a settled law that in rape / Hudood cases conviction can be recorded on the sole testimony of the victim subject to the condition that the statement of victim must inspire confidence..."

therefore, I would proceed to examine the evidence of the victim , if same provides explanation (s) / answers to said **inferences**. The examination-in-chief of victim is reproduced hereunder:-

"I am victim of this case. Complainant Syed Jalal Shah is my real brother who used to drive his own Suzuki. On the night of 09.11.2014, my brother Jalal had gone to play his Suzuki, whereas I, my father and my younger brother and my mother were sleeping in the house. On the said night at about 3:00/4:00 one Karim Bux @ Ahsan by cast Bulari who was running his easy load shop in our mohalla entered in our house and abducted me on the point of

pistol and threatened me to keep silent, therefore I remained silent and he took me outside the street of our house where three other culprits alongwith car were available. Thereafter all accused persons forcibly took me in a car, they were talking with each other Balochi. After some time of journey, they changed the vehicle. Again says that Karim Bux took me in a bus towards unknown place and confined me in a house and used to commit zina with me without my consents. Accused Karim Bux kept me under illegal confinement for the purpose of committing Zina for about 15 days in the said house. Thereafter, Karim Bux having no expensives/ money. On 23.11.2014 Karim Bux brought me at 52-A bus stop, Bhains Colony, Karachi, where my brother Jalal Shah saw us and informed the police. Police came and arrested the accused Karim Bux and recovered me from his possession. Police prepared some documents and brought me and Karim Bux son of Huzoor Bux by cast Bulari at PS Sukhan where police recorded my 161 Cr.P.C statement. When I was brought at PS where I came to know accused Huzoor Bux, Akber and Ashraf were in custody where I identified the accused in police lockup. On same day, I was referred to Jinnah Hospital for my medical examination where I was examined by the WMLO. On 25.11.2014 I was brought before the Court of one Magistrate in Malir Court where my 164 Cr.P.C statement was recorded. My 164 Cr.P.C statement was recorded as per my verbatim without any force. I produce my 164 Cr.P.C statement at Ex.4/A. I see Ex.4/A and say that it is same correct, bears my thumb impression and my photographs. I see all four accused present in court and say that they are same.

The perusal of the above again leaves number of things unexplained rather against the human conduct and behaviour which again are sufficient to bring such evidence out of four corners of being **natural & confidence inspiring**. The victim though claimed to be sleeping with her father, younger brother and mother yet does not explain as to how she *alone* without disturbing any body else not only awoke but was abducted *too*. Surprisingly, she (*victim*) made no effort even to awake those with whom she was sleeping least rather preferred to accompany appellant / convict Kareem Bux who though was alleged to be armed with pistol yet was alone. From above, it also becomes quite obvious that she had number of opportunities to get help but at all material time, even in *bus* and '*coach*' she preferred to remain silent. It may be added that victim admitted in her cross examination that:

"It is fact that when accused Karim Bux took me in a bus where other passengers were available. It is fact that during traveled in a bus I did not raise any cry. Vol says that accused threatened me, therefore

I remained silent. It is fact that in my 164 Cr.P.C statement nowhere I have stated that accused Karim Bux threatened me in a bus."

Since, from examination-in-chief of victim it is also quite obvious that just after few times of alleged abduction, it was *only* the appellant / convict Kareem Bux who took victim to some unknown place in a bus (public transport) hence the victim had every opportunity for collecting people *least* pointing out her wrongful confinement but she seems to have been enjoying traveling with appellant / convict in complete silence. I would say that *normally* a **single** kidnapper shall never take risk of taking *abductee*, particularly grown one, through a *public transport* because such a *journey* not only requires performing of number of action (s) but would include possibility of leaving *abductee* alone for certain things during such *journey*. Since, the victim herself admits two *journeys* through such public transport without an allegation of any fear or apprehension in mind of appellant / convict of his arrest etc could safely result in an inference that same could only be possible if such alleged kidnapper has *firm* belief of no harm in such journeys which shall *only* be possible if the alleged abductee is a consenting party.

Further, it is also quite unbelievable that appellant / convict Kareem Bux himself brought the victim in a **coach** back to / near place of incident though allegedly appellant / convict Kareem Bux not only had abducted victim but remained committing zina upon her. This piece of story shall never be worth believing to any *prudent* mind because such act of appellant / convict Kareem Bux was sure to result in his arrest particularly when the petition, claimed to be *jointly* filed by appellant / convict and victim, did include specific mentioning of lodgment of FIR.

12. Since in the instant case, the respective sides i.e prosecution and defence have come forward with *specific versions / claims* i.e forcible

abduction and commission of *zina* and that of *legal & lawful marriage* therefore, in such eventuality the '**intercourse**', being otherwise not denied by defence, would need be of much *importance* except that of a circumstance to see whether it was *forcible* or *otherwise*. Therefore, I would come to this *later*, if needed but would prefer to examine both versions by putting in *juxta-position*.

13. At this juncture, before going into further details, I feel it quire necessary to add that *prima facie* learned trial court judge completely ignored well established principle of **criminal administration of justice** that if two views are possible in a given situation then the one favourable to the accused is to be taken. Reference may be made to the case of Ibrar Hussain & others v. State & another (2007 SCMR 605) wherein it is observed as:-

"9. It is a settled law that in a criminal case when two explanations are equally possible in a given situation the one in favour of the accused should normally be accepted meaning thereby benefit of doubt is always given to the accused but in the present case as mentioned above benefit of doubt was given to the prosecution."

In the case of Muhammad Akram v. State (2012 SCMR 440), the above principle was further detailed while holding that if there is *possibility* of defence, put forth by accused, being **might** be true even then benefit thereof has to be given to the accused. The operative part thereof reads as:-

"It is cardinal principle of law that in such like cases of two versions, one is to be believed in toto and not in piecemeal. This proposition of law is well settled by now as reflected in the case of Safdar Ali v Crown (PLD 1953 FC 93) wherein it has been held that in a criminal case it is duty of the court to review the entire evidence that has been produced by the prosecution and the defence. If, after examination of whole evidence the, court is of the opinion that there is reasonable possibility that the defence put forth by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt not as a matter of grace but as of right because the prosecution has not provided is case beyond reasonable doubt. The aforesaid principle has been further elaborated in the case of 'Nadeem-ul- Haq Khan & others v The State (1985 SCMR 510)."

14. I would add that the learned trial court judge *however* seems to have acted in complete negation to such well settled principles of law which *too* in quite surprising manner. Such conduct of the learned trial court judge, being quite strange, needs an attention. Accordingly, operative parts of the impugned judgment whereby *defence* plea as well *documents* were discarded are reproduced hereunder:-

“15. I have considered the evidence adduced by the prosecution and also considered the defence plea of accused and documents produced by main accused Abdul Kareem. The claimed (*claim*) of the accused persons is that Mst. Nazia daughter of Syed Bachal Shah left her house on the night of 09.11.2014 with her own wish and will, accompanied with them, contracted marriage, such Nikah was performed with accused Abdul Kareem on 09.10.2014 at Larkana and Mst. Nazia and Abdul Kareem filed petition under article 199 against SHO Police Station Warah and others before the Honourable High court of Sindh circuit Court Larkana for harassment and accused Abdul Kareem also filed family suit NO.28/2015 before Family Judge Malir wherefrom it was transferred to VIIIth Civil Judge Malir Karachi against Mst. Nazia Shah for restitution of conjugal rights, which was decreed on 27.05.2016.....Here burden of proof of execution of Nikahnama dated 19.10.2014 lies upon the accused to prove that such Nikah was performed with Mst. Nazia Shah with her own wish and will in presence of witnesses but the accused neither examined any witness of Nikahnama in his defence nor examined any Nikahnama who performed the Nikah and also not examined the Registrar of Nikahnama, and **no suggestion question was put to Mst. Nazia during cross examination that she is legally wedded wife of accused Abdul Kareem, therefore, the execution of Nikahnama with wish and will of Mst. Nazia's has not been proved.** The accused Abdul Kareem relied another documents of filing of harassment petition before the Honourable High Court Sukkur Bench Larkana but its decision is not produced and no any proof has been produced which could show that **she appeared before the Honourable Bench at Larkana or any statement was recorded,** therefore, this document is also not supporting the plea of accused. The accused Abdul Kareem produced third document of **judgment of family suit No.28/2015** from perusal of it appears that the judgment was **obtained ex parte** in which plaintiff claims that his marriage was solemnized with the defendant on 19.10.2014 at Karachi according to Muslim Personal Law, whereas in Nikahnama Ex.10/A accused is claiming to be married with Mst Nazia at Larkana, however the accused Abdul Kareem suppressed the facts of criminal litigation in his family suit and he intentionally avoided to serve the notices / summons to complainant party who was

appearing in the present Sessions Case, **therefore, the exparte judgment dated 27.5.2016 is helpless to accused.**"

I am unable to accept the manner in which the learned trial court judge has discarded the above documents / pleas because if such appreciation is accepted the same shall be at the cost of well settled principles of law which can well be summarized as:-

i) for proper adjudication of legal status of **nikah** , the competence lies with the Family Court only hence a criminal court is not legally competent to hold such **nikah** as invalid. Reference though not needed yet may well be made to the case of Asia Perveen v. SHO PS Chinio 2005 P Cr LJ 681

iii) there can be no difference between a decree passed after contest and a decree passed exparte as both are decrees as defined in subsection (2) of section 2 of C.P.C, and / are executable (WBahadur Khan v. Muhammad Yousaf & another (1992 SCMR 2117). In another case of Hazratullah v. Rahim Gul (PLD 2014 SC 380), it is held as:

"an ex parte decree is valid, having some legal effects and as good as a contested decree, with the exception that the modes and mechanism for the setting aside such decree may be more; in any case , after having attained the knowledge of the decree, the appellants never assailed it (decree)... thus for all intents and purposes , the said judgment and decree had attained finality and would be binding..."

iii) the concept of presumption of legality, attached to a public document, shall loose its substance though same, *otherwise*, is provided by the Qanun-e-Shahdat Order, 1984 itself;

The learned trial Court judge entirely failed in appreciating that the alleged victim was specifically questioned about filing of the constitution petition as well **nikah** which shall stand evident from referral to operative part of cross examination i.e:

"It is incorrect to suggest that I myself filed CP No.1125/ 2014 re Nazia Shah and others versus SHO PS Warah and others in the Court of High Court Circuit Bench Larkana and sworn my affidavit against respondents No.1 to 9. It is incorrect to suggest that alongwith above constitution petition I had submitted by Nikahnama. Vol says that accused by force obtained my thumb impressions during my illegal confinement.

Thus, the learned trial court judge was never legally justified nor permitted to observe in *referred para* that:

“no suggestion question was put to Mst. Nazia during cross examination that she is legally wedded wife of accused Abdul Kareem, therefore, the execution of Nikahama with wish and will of Mst. Nazia’s has not been proved.”

I would add that if somebody admits execution of document but denies to have signed it with **wish / consent** then in such eventuality the ‘**document**’ cannot be adjudged as ‘**invalid**’ by a **Criminal Court** unless such **issue** is requiring an answer, being part of charges in cases of *offences* relating to **documents**. No such charge, *prima facie*, was ever framed by learned trial court judge yet the learned trial Court (*criminal court*) went on in making such comments without knowledge of legal consequence that if other circumstances prove victim as *consenting party* then intercourse, claimed by appellant/convict under **nikah** while denied by victim under force, shall stand converted into one ‘**zina-bil-raza**’ requiring punishment to both.

15. Be that as it may, it is not a matter of dispute that the appellant/ convict did produce the ‘**certified copy of harassment petition**’ with claim that it was *jointly* filed by him (appellant/ convict Kareem Bux) and victim. Such document was claimed as part of judicial proceeding i.e CP No.1125/2014, filed before High Court of Sindh, Circuit Court Larkana hence such document would fall within meaning of ‘**public document**’, as defined by Article 85 (3) and (4) of Qanun-e-Shahadat Order, 1984 which reads as:-

(3) documents forming part of the records of judicial proceedings;

(4) documents required to be maintained by a public servant under any law; and

The law (*Qanun-e-Shahdat Order*) itself allows certain presumptions of correctness towards such documents hence a strong proof is required before discarding such a **document**. Reference may well be made to the case of *Muhammad Ramzan v. LDA* (2002 SCMR 1336). Such legal position, *however*, appears to have been ignored by the learned trial court judge while demanding proof of appearance of *victim* before official, authorized to take Oath, at time of presenting petition (s) in High Courts though certified copy of petition was always showing required attestation. Even otherwise, it is worth to add that filing of such petition did *involve* number of independent persons such as '**advocate**'; Commissioner for taking affidavit; office legally authorized to receive such presented petition (s) who *otherwise* are not supposed to identify a *fake* lady as victim particularly in absence of any specific motive on part of such persons.

Be that as it may, the learned trial Court judge (*criminal court*) seems to have declared an *ex parte* judgment & decree, recorded by otherwise competent Family Court although same shall hold the field unless is got *legally* set-aside. Such approach by the learned trial court judge (*being a criminal court*) cannot be approved.

16. Having examined both versions, I would say that if the circumstances wherein the alleged *victim* was abducted while sleeping with her blood-relations; her *abnormal* silence during journeys through public transport; her staying only with appellant / convict for 15 days without any attempt to make anything showing herself to be in confinement and deliberate action of appellant / convict Kareem Bux in bringing the alleged victim back to / near place of incident are viewed in *juxta-position*, the same could surely tilt in favour of *plea*, so was raised by the appellant / convict

that alleged *victim* herself had left house of her parents; contracted marriage with appellant / convict Kareem Bux.

17. It may also be added that medical evidence also never suggested any *forcible* zina upon the victim which also advances the plea of the appellant / convict. Thus, the prosecution never established its case against the appellants / convicts beyond reasonable doubts, therefore, by short order dated 02.10.2018 the appeal was allowed. These are the reasons thereof.

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