

# IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Appeal No. 95 of 2023

[Faheem .....v..... The State]

Date of Hearing : 11.07.2023  
Appellant through : Mr. Wazir Hussain Khoso, Advocate.  
Respondents through : Mr. Moulvi Iqbal Haider, Advocate for complainant.  
Mr. Talib Ali Memon, Addl. P.G.

## ORDER

**Zulfiqar Ahmad Khan, J:-** Through instant Criminal Appeal, the appellant has impugned the judgment dated 24.01.2023, passed by the learned IInd Additional Sessions Judge Karachi Central, in Sessions Case No. 278 of 2021, arising out of FIR No.251/2020, under section 377 PPC at Police Station Hyderi Market, Karachi, whereby appellant was convicted and sentenced to suffer R.I. 14 years and fine of Rs.10,000/-. In default, the appellant has to undergo S.I. for 6 months. The benefit provided under Section 382-B Cr.P.C was also extended to the appellant.

2. The allegation against the appellant is that on 27.11.2020 at about 12:30 p.m. he had carnal intercourse against the order of nature with victim Ashar.

3. After framing of charge, the prosecution has examined as many as seven (7) witnesses. PW-01 Muhammad Sajid (complainant) at Exh. 3, PW-02, Ashar (victim) at Exh. 4, PW-03 Asia at Exh. 05, PW-04 Abdul Sattar at Exh. 6, PW-05 Muhammad Ajmal at Exh. 7, PW-06, Dr. Ghazanfar Ali Shahryar (MLO) at Exh. 8, PW-7 Muhammad Imran at Exh. 09. Thereafter prosecution side was closed vide Ex:10 and statements of appellant under section 342,

Cr.P.C. was recorded at Exh. 11, who claimed his innocence, however, neither examined himself on oath nor led defense witnesses in support of their claim.

4. After observing all formalities and hearing the parties, the learned trial Court convicted the appellant through impugned judgment in the manner described in the operative part of this edict.

5. The appellant being aggrieved and dissatisfied with his conviction has preferred instant appeal. Learned counsel for the appellant contended that there are several discrepancies in the prosecution case which was not considered by the learned trial Court. According to him, no human sperm was found on the internal swab as well as no penetration was proved which is a main ingredient to constitute alleged offence, therefore, the conviction recorded by the learned trial Court be set aside and accused be acquitted of the charge. He lastly contended that the cloths was also not produced before the trial Court showing any human sperms, therefore, on this sole ground alone, the conviction be also set aside.

6. On the other hand learned counsel for the complainant assisted by learned APG argued that learned trial Court is the fact finding authority and having examined the all material available on record, the learned trial Court convicted the appellant which judgment based on the sound reasons and does not call for the interference by this Court.

7. I have heard the arguments and have gone through the relevant record. On reappraisal of the evidence, it is observed that

neither the complainant nor anyone else is an eye-witness of the alleged occurrence. There is no denial to the proposition that the conviction can be recorded on the solitary statement of the victim provided that if the same was corroborated by the other circumstantial evidence, particularly, with the opinion rendered by the medical witness. I am afraid that neither first condition of the eye-witness nor the second condition with regard to corroboration of the medical evidence with the solitary statement of the victim was produced in the trial court. The victim Ashar in his examination in chief disclosed the factum of alleged incident. On the other hand, the medical witness rendered a positive opinion in respect of sodomy on the basis of tenderness observed by him on the anal region of the victim. The unnatural offence and its punishment is provided under section 377, P.P.C. which reads as under:-

“377. Unnatural offences.---Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which (shall not be less than two years nor more than) ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section”.

8. The afore referred provision provides that the offences will be completed when the carnal intercourse is taken place while the law on the subject provides that for constituting an offence in afore referred section and to establish the carnal intercourse, the “penetration” is a condition precedent, therefore, the explanation provided in section 377, P.P.C. states that “penetration is sufficient to constitute the carnal intercourse necessary to the offence

described in this section”. But, since the victim is silent about penetration, while the opinion rendered by the medical witness is not conclusive. The medical jurisprudence provides a complete procedure for examining the victim of sodomy. The medical opinion rendered by a medical witness is not in line with the procedure contemplated in the medical jurisprudence, therefore, it is instructed to produce the relevant procedure for medical examination of the victim of sodomy. as provided in the “Medical Jurisprudence and Toxicology” authored by “Mr. N.J. Modi’ in Chapter XVI, page 334 and 335 with a caption of sexual offences, which elaborates the examination of the passive agent in the following manner:-

As in rape, consent must be obtained before commencing a medical examination. The following signs may be discovered of the body (passive agent) is not accustomed to sodomy:-

1. Abrasions on the skin near the, anus with pain in walking and on defecation, as well as during examination. These injuries are extensive and well-defined in cases where there is a great disproportion in size between the anal orifice of the victim and the virile member of the accused. Hence lesions will be most marked in children, while they may be almost absent in adults, when there is no resistance to the anal coitus. These injuries, if slight, heal very rapidly in two or three days in most of the cases brought before Modi, he had seen superficial abrasions, varying from 1/6" to 1" x 1/6" to 1/4", external to the sphincter ani. In some cases, there may be bruising of the parts round about the anus, and the abrasions may extend into the anus beyond its sphincter.

2. Owing to the strong contraction of the sphincter ani, the penis rarely penetrates beyond an inch, and consequently, the laceration produced on the mucous membrane within the anus with more or less effusion of blood is usually triangular in nature, having its base at the anus and the sides extending horizontally inwards into the rectum, Modi had found lacerations internal to the sphincter ani in several cases, but a typical triangular wound only in a few cases. These signs

may not be perceptible in cases where the active agent has introduced his penis slowly and carefully without using force into the anus of the passive agent who is a consenting party.

3. Blood may be found in or at the anus, on the perineum or thighs, and also on the clothes.

4. Semen may be found in or at the anus, on the perineum or on the garments of the boy too young to have seminal emissions.

5. Signs of a struggle, such as bruises, scratches, etc, on his person, if he is not a consenting party.

6. Prolapse of the anus.

7. Gonorrhoeal discharge, or the presence of a syphilitic chancre.

8. The presence of faecal matter around the anus is a corroborative sign.

9. Alfred Swaine Taylor, (1806-1880) a renowned scholar in the field of Medical Jurisprudence discusses “Essentials in the medical examination of the passive partner” and also laid down certain instruction for the medical witness, he states that it is essential for the medical examination that a medical witness/medico-legal officer must take a general medical history of the victim and in case of a very young or minor child, the doctor should take a medical history from parents or guardian. Thus, this may be taken either at the commencement of the examination or after the physical examination has been completed. Special attention must be given to questions relating to the victim bowel habits, including previous constipation, the regular use of laxative, enemata suppositories. In the most general terms, the younger the passive partner the most likely are the chances of serious injury to the anal verge, therefore, acute abrasions may frequently be seen, and these are very superficial and may be present at any part of the circumference of the anal verge. In

certain cases, haematomata are very often seen, and these may take the form of an 'all over' swelling over the anal verge. Tearing of the sphincter muscle is rare in the case of adult and older children and can take place, in the case of young children, and in cases where this has taken place there will be considerable laxity of the anal orifice and some time with frank gapping. The anal fissure has also been observed in certain cases, but it cannot be deducted without proctoscopy of the anal canal, thus in case of a young child who has been subjected to sodomy the presence of localized injury to the skin of the anal margin is of most tremendous greatest significance, therefore, the presence of fresh, moist, pink colored anal fissure may support the allegation of penile penetration. It is worthwhile to mention here that in case of a child, a victim of sodomy, chances of severe injury are always possible and abrasion on the skin near the anus with pain in walking and on defecation as well as during examination shall necessarily be observed. (Chapter-5, "Medico-legal examination of the living" Taylor's Principles and Practice of Medical Jurisprudence, Thirteenth Edition-1984 Edited by A. Keith Mant)."

10. In the instant case, the medico legal report states about the tenderness of anal region which under the medical jurisprudence can be caused due to constipation or in case of irregular bowel habits. The medical doctor has also failed to use the proctoscopy instrument in order to obtain the anal swab and did not notice any abrasion or injury on the anal region of the alleged victim. While the statement of victim Ashar is silent about penetration, thus without obtaining the anal swab of the victim and in the absence of positive report with regard to semen-stained clothes of the victim and the accused and

without getting blood group of accused in order to match the semen stains found on the victim clothes, on mere tenderness of the anal region, no conclusive opinion can be rendered whether sodomy has been committed or not.

11. It is also a fact that last wearing cloths of the accused and the victim were not produced before the learned trial Court nor was sent to the forensic expert which creates a reasonable doubt in the prosecution case. It is a well-settled principle of law that a criminal case is to be decided based on the totality of impressions gathered from the circumstances of the case and not on the narrow ground of cross-examination or otherwise of a witness on a particular fact stated by him. A similar view had been expressed by the Honourable Supreme Court of Pakistan in the case of State v. Rab Nawaz and another (PLD 1974 SC 87) wherein Honourable Supreme Court has observed that a criminal case is to be decided based on the totality of circumstances and not based on a single element.

12. It is noteworthy that there are material contradictions in in the prosecution case which are sufficient to declare that the prosecution could not establish the case against the appellant beyond reasonable doubt and where a single circumstance creating reasonable doubt in the prudent mind about the guilt of the accused, then accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In this regard, reliance is placed on the cases of Tariq Pervaiz v. The State [1995 SCMR 1345] Muhammad Akram v. The State [2009 SCMR 230] and Lal Bux alias Lal v. the State (2023 YLR 321) (authored by Zulfiqar Ahmed Khan J.)

13. In these circumstances, I am of the opinion that the quality and standard of evidence is lacking, which is required to establish a criminal case for justifying conviction and sentence. Therefore, appeal filed by the appellant is allowed the impugned judgment dated 24.01.2023 recorded by the learned trial Court is set aside. The appellant is acquitted of the charge. He be released forthwith, if no more required in any other criminal case.

Karachi  
Dated: 11.07.2023.

JUDGE

Aadil Arab.