

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 135 of 2023

Appellant: Aamir Ali Shehzad through M/S SM Nehal Hashmi, Naseer Nehal Hashmi and Illahi Bux Lakho, advocates for the appellant

The State: Mr. Khadim Hussain Khuharo, Addl. PG for the State

Complainant: Mr. Basim Ali Dahri, advocate

Date of hearing: 29.08.2023

Date of judgment: 29.08.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is alleged that the appellant has been committing rape with Mst. Kainat, a young girl aged about 20 years, said to be his stepdaughter, for that he was booked and reported upon by the police. On conclusion of trial, he was convicted under Section 376 PPC and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.100,000/- and in default whereof to undergo simple imprisonment for six months, with benefit of Section 382(b) Cr.P.C by learned VII-Additional Sessions Judge/Gender based Violence Court Karachi East vide judgment dated 07.02.2023, which he has impugned before this Court by preferring the instant Criminal Appeal.

2. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party in order to deprive him of his house; the FIR of the incident has been lodged with unexplained delay of about 1 ½ years; there is no DNA report and evidence of PWs being doubtful in its character has been believed by the learned trial Court without lawful justification, therefore, the appellant is entitled to be acquitted by extending him benefit of doubt.

3. Learned Addl. PG for the State and learned counsel for the complainant by supporting the impugned judgment has sought for dismissal of the instant criminal appeal by contending that the

prosecution has been able to prove its case against the appellant beyond shadow of doubt. In support of their contention, they relied upon the case of *Feroz Khan v. The State and another* (2015 YLR 703).

4. Heard arguments and perused the record.

5. It was *inter alia* stated by PW Mst. Kainat that she conceived pregnancy on account of rape which the appellant being her step father has been committing with her, she narrated such incident to her mother PW Mst. Rohi Bano, thereafter, the appellant and her mother PW Mst. Rohi Bano arranged for her abortion at a private clinic. Nothing has been brought on record by the prosecution, which may suggest that PW Mst. Kaninat actually aborted her pregnancy. It was further stated by her that she then was shifted by her mother PW Mst. Rohi Bano to house of her maternal uncle Mirza Waseem Baig, subsequently, her mother PW Mst. Rohi Bano also joined her there and then they after consultation lodged report of the incident with police. FIR lodged after due consultation that too with delay of about 1 ½ years could hardly be relied upon. On asking, it was admitted by PW Mst. Kainat that the dispute was going on between her mother PW Mst. Rohi Bano and the appellant who happened to be her husband. By stating so, she also admitted that she in her 164 Cr.PC statement has stated that the appellant was going to police station to lodge FIR against her mother PW Mst. Rohi Bano, therefore, they lodged FIR against him firstly. If her such version is believed to be so, then lodgment of the FIR of the present case by PW Mst. Kainat against the appellant *prima facie* suggests that it was lodged by her only to save her mother PW Mst. Rohi Bano from legal consequences, which the appellant was going to take against her. PW Mst. Rohi Bano, on asking, was fair enough to admit that she has not witnessed the incident with her own eyes. Her evidence, therefore, is of little help to the case of prosecution. PWs Mirza Waseem Baig and Mst. Amber, on asking, were fair enough to admit that PW Mst. Kainat was shifted to their house by her mother PW Mst. Rohi Bano 4/5 months before lodgment of the FIR of the present case. As per Woman Medical Officer, Dr.

Zainab Arshad, the hymen of PW Mst. Kainat was found torn and healed with no mark of violence on her body. If it was so, then such process might have taken place during the intervening period of 4/5 months, which she spent in house of her maternal uncle PW Mirza Waseem Baig. No DNA report is produced which may suggests involvement of the appellant in commission of the incident. The appellant in his statement recorded under Section 342 Cr.P.C has denied the prosecution's allegation by pleading innocence by stating that he has been involved in this case falsely by his wife and her brother Mirza Waseem Baig only to grab money from him. In that situation, it would be safe to conclude that the prosecution has not been able to prove its case against the appellant beyond shadow of reasonable doubt.

6. In the case of *Muhammad Mansha vs. The State (2018 SCMR 772)*, it has been held by the Hon'ble Apex court that;

"4....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

7. The case law which is relied upon by learned Addl. PG for the State and learned counsel for the complainant is on distinguishable facts and circumstances. In that case, the delivery of baby with DNA report was found to be sufficient proof of the rape.

8. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant by way of impugned judgment are set aside, consequently, he is acquitted of the offence for which he was charged, tried, convicted and sentenced by learned trial Court and shall be released forthwith, if not required to be detained in any other custody case.

9. Above are the reasons of short order of even date, whereby the instant Criminal Appeal was allowed.

JUDGE