Judgment Sheet

IN HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No.578 of 2023
Ashir @ Waseem v. The State

Appellant	Ashir @ Waseem son of Boota Masih Through M/s. Abdul Naeem A. Qureshi and Muhammad Ali Advocates.
Respondent	The State Through Fayyaz Hussin Sabti, Additional Prosecutor General.
Date of Hearing	19.02.2024
Date of Decision	21 .03.2024

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JUDGMENT

ARSHAD HUSSAIN KHAN, J.– This Cr.Appeal has been preferred against the judgment dated 10.11.2023, passed by learned Xth Additional Sessions Judge, Krachi, [West] in Sessions case No.2097/2022 [Crime No.109/2022], registered under Sections 377-B, 506-B, 34 PPC at Police Station Maripur, Karachi, whereby learned trial court has convicted the appellant / accused as follows :

> "32……..The accused Ashir alias Waseem son of Boota Masih is hereby convicted under Section 265-H(ii) Cr.P.C. for the offence punishable under Section 377-B PPC and sentenced to suffer RI for 14 years and to pay fine of Rs.10,00,000/- [one million] and in case of default of payment of fine he will further suffer SI for six months only. The accused is also hereby convicted for the offence punishable under Section 506 PPC and sentenced to suffer SI for two years only and to pay fine of Rs.50,000/- and in case of failure to pay fine he will further suffer SI for three months. All convictions /sentences will run concurrently".

2. Briefly, the facts as narrated in the FIR by the complainant namely; Wajid Mehmood son of Abdul Jabbar are that on 30.4.2022, at around 2.00 pm his mother sent his younger brother namely; Abdul Rehman, a student, aged about 16 years, to Contractor Raju, who kept Manuel @ Menga as a washerman, at Dhobi Ghaat, for dropping the blanket for washing and at about 3:30 pm his younger brother returned back to home. On 23.5.2022, his younger brother-Abdul Rehman disclosed to his mother that on 30.4.2022 when he reached at Dhobi Ghaat for getting the blanket washed he met Menga Dhobi, where Ashir @ Waseem and one

unknown person were also present. They pointed pistol and knife and committed sodomy with him one by one in a room at Dhobi Ghaat where machines are installed and threatened him that if he disclosed such fact to anyone they would kill him. Now, (1) Manuel @ Menga son of Patras, (2) Ashir @ Waseem son of Boota Masih shown him video in which the act of sodomy was being conducted and are pressurizing his younger brother to again commit the same. His mother informed him (the complaint) about the incident. Hence, subject FIR was registered.

3. It appears from the record that after registration of the FIR, investigation was conducted and the above named accused was arrested; after usual investigation he was challaned for the offence punishable under Section 377-B and 506-B and 34 PPC while accused Menga, absconder in the case, was challaned under Section 512 Cr.P.C. During trial, the charge containing prosecution allegations against the present accused was framed on 15.12.2022 at Exh. 4, to which the he pleaded not guilty and claimed to be tried, vide his plea at Exh.4/A.

4. At the trial, in order to establish accusation against the appellant/accused, prosecution had examined the following witnesses:

(i) PW Abdul Rehman [victim] was examined at Exh.5, who produced his statement under Section 164 Cr.P.C. at Exh.5/A.

(ii) PW Wajid Mehmood [complainant] was examined at Exh.6, who produced the FIR and memo of inspection at Exh.6/A and 6/B.

(iii) PW HC Asif Khan was examined at Exh.8, who produced Roznamcha entry at Exh.8/A.

(iv) PW MLO Dr. Gulzar Ali was examined at Exh.9 who produced MLC and application at Exh.9/A and 9/B.

(v) PW PI Ali Asghar [I/O] was examined at Exh.10, who produced Roznamcha entries, photographs of place of incident, letter to MLO, CRO at Exh.10/A to 10/G.

(vi) PW Asif Raza Meer [Judicial Magistrate] was examined at Exh.11 who produced photographs of accused at Exh.11/A and B.

5. Before the trial court aforesaid witnesses were cross-examined by learned counsel for the appellant / accused. Thereafter, learned DDPP closed the prosecution side, vide statement at Exh.12. The statement of the accused under Section 342 Cr.P.C. was recorded at Exh.13, wherein he denied the prosecution allegations and claimed to be innocent. He further deposed that the victim has falsely deposed against him in his

statement recorded under Section 164 Cr.P.C. as well as before this Court. Lastly, the accused prayed for his acquittal and justice. However, he has not been examined himself on Oath nor produced any defence witness in support of his claim. Subsequently, trial court after hearing the parties counsel, convicted and sentenced the accused Ashir @ Waseem as mentioned in the preceding para. Hence, instant appeal has been preferred against the impugned judgment.

6. Learned counsel for the appellant/accused contended that the accused is innocent and has falsely been dragged into this case due to malafide intention and ulterior motives; that the complainant is not the eye witness of the alleged incident and his all evidence is based on heresay. He has further contended that initially burden of proof is lying on the prosecution to prove the guilt against the appellant/accused. He has further contended that there are contradictions and inconsistencies in the prosecution case due to which the whole case of the prosecution has become doubtful; that the prosecution has not been able to prove the case as alleged against the appellant/accused beyond the shadow of reasonable doubt. Learned counsel has further contended that the alleged victim was examined by the MLO Dr. Gulzar Ali who opined after examining the victim that *no such act of sodomy was taken place, however, he deposed that however attempt to commit act of sodomy cannot be ruled out.* He has argued that there is no direct or indirect evidence available on the record against the appellant/accused. It is argued that there is no eye-witness of the alleged incident and further no one has seen the appellant/accused Ashir at the place of incident with the alleged victim or any other source which corroborate the statement of the victim to connect the appellant/accused with the alleged incident. He has argued that the prosecution has failed to trace out the alleged unknown third accused. He has also argued that according to the video, the person who is committing the alleged act of sodomy is Menga and not the present accused as the accused Ashir is not visible in such video; the only evidence against the present appellant/accused is that the victim alleged that the person who is making the video, is accused Ashir and such statement of the victim is solitary and due to such statement the accused Ashir was implicated in this case and it is the duty of the prosecution to prove the case with other visible and corroborated evidence as mentioned in Article 19 of Qanoon-

e-Shahadat Ordinance, 1984, which could connect the accused Ashir with the alleged incident. He has further contended that the prosecution story is full of doubt and without any strong and corroborative evidence an innocent person cannot be convicted. He has argued that the trial court has seriously erred by not considering the material evidence brought on the record and by ignoring the cross-examination, which completely and absolutely shatters the case of the prosecution against the appellant/accused; that the trial court has failed to apply its judicial mind and passed the impugned judgment in hasty manner. He has urged that the prosecution has also failed to prove its case, therefore, the appellant/accused is entitled for acquittal. In support of his arguments he has placed reliance on the cases of *Muhammad Asif v. The State* [2022 YLR Note 121], *Muhammad Ismail v. the State* [1991 MLD 577], *Muneeruddin v. The State* [PLD 1982 Karachi 240], *Muhammad Amir v. The State* [2018 YLR 2592], *Muhammad Nawaz alias Nazoo v. The State* [1988 P Cr. L. J 1986], *Ali Sher v. The State* [2018 YLR 56], *Saeedullah v. Asfandiyar and another* [2017 PCr.L.J Note 5], *Atif Ali v. The State* [2015 MLD 624], *Shahid and 03 others v. The State* [2002 MLD 624], *Ejaz ul Haq v. The State and another* [2013 YLR 2563], *Muhammad Khan v. The State* [2020 P Cr. L. J Note 10], *Saghir Ahmed v. The State and others* [2023 SCMR 241], *Sabir Hussain and another v. The State* [2011 P Cr. L. J. 1672], *and Shahid and 3 others v. The State* [2002 YLR 2908].

7. Conversely, Additional Prosecutor General while supporting the impugned judgment has argued that the prosecution has proved its case against the appellant/accused. He has urged that the appellant/accused is very much nominated in the FIR with the alleged role of committing sodomy with the minor victim Abdul Rehman aged about 16 years. He has further contended that the minor has fully implicated the appellant/accused and identified him being the same person who along with two other accused persons committed the act of sodomy with him and also made his video. The victim has also clearly implicated the appellant/accused Ashir with the alleged act of sodomy. He has further contended that the victim has no enmity or malice with the appellant/accused to falsely implicate him with the alleged crime. It is further contended that watching of the video clip clearly shows that the co-accused was committing the alleged act while one accused is making

the video and according to the victim the person who was making the video is the present accused Ashir. Lastly, it is urged that the trial court has rightly appreciated the evidence, convicted and sentenced the appellant/accused in accordance with law and as such the appeal may be dismissed. In support of his arguments he has placed reliance on the cases of *Zahid v. The State* [2022 SCMR 50], *The State /ANF v. Muhammad Arshad* [2017 SCMR 283] and *Zahid and another v. The State* [2020 SCMR 590].

8. Heard learned counsel for the appellant / accused and the learned Additional Prosecutor General and have also gone through the entire evidence available on the record.

9. From perusal of the record, it appears that the alleged incident took place on 30.04.2022 whereas the FIR was lodged on 23.05.2022 after a delay of 23 days. Whereas the statements under section 161 Cr.P.C. of the complainant and the victim were recorded on 27.05.2022 after a delay of 27 days of the incident and approximately after four days of lodging of the FIR that too without any plausible explanation. It is well settled proposition of law that delay in lodging of the FIR assume great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate[1]. It is also a settled position of law that late recording of statement u/s 161, Cr.P.C. of a prosecution witness reduces its value to nil unless there is plausible explanation for such delay[2] which in the present case is lacking.

10. Record also shows that in the FIR, it has been mentioned that the incident took place on 30.04.2024, however, the victim remained mum till 23.05.2022, when the Ashir and Menga had shown the video in which the act of sodomy was being conducted with the victim and demanded to repeat the same offence failing which they would viral the said video. Such act of the appellant/accused Ashir and co-accused Menga compelled the victim to disclose the incident to his mother who subsequently informed her elder son Wajid Mehmood (the complainant) who lodged

[1] Mehmood Ahmed & others vs. the State & another [1995 SCMR-127]
[2] Abdul Khaliq Vs. the State [1996 SCMR-1553]

the FIR. Whereas the victim in his statements u/s 161 Cr. P.C. stated that after few days of the incident some area people told him that they have the video of the incident upon which the victim told his mother who subsequently informed her elder son Wajid Mehmood who lodged the FIR on 24.05.2022 and whereas in the statement u/s 164 Cr. P.C. it has been mentioned by the victim that after few days of the incident some boys told him that his incident's video has been surfaced by appellant / accused Ashir. Besides the above contradictions in the statements of the victim, it is an admitted position that the victim neither disclosed the names of those boys who informed him about the video nor they have been produced in the evidence.

11. Record also reflects that the USB in which video of the incident was brought before the court was neither mentioned in the Charge, framed by the trial court against the appellant/accused nor the forensic of the said same has been done. This Court in the case of *Muhammad Asif v. The State* [2022 YLR note 121], while dealing with identical issue, inter alia, has held under:

> "In my view, framing of charge is the first major step in a criminal trial where the Court is expected to apply its mind to the entire record placed before it. Every criminal Court has the responsibility to frame the Charge consistent with the legal requirement under the provisions contained in Cr.P.C. Every such Court shall pay personal attention while framing Charge. A casual, perfunctionary, haphazard manner by framing of charge will result in serious miscarriage of justice and it will deprive the accused of his valuable right to have a fair trial. It will also affect to the prosecution adversely. Such defect in Charge alone could be a ground of acquittal…."

12. Record also transpires that in the video of the incident, produced before the court, in the USB under Article-A, the appellant/accused is not seen, however, it is claimed that the audio in the said video is of the appellant/accused. The record further shows that the abovesaid USB was obtained by the complainant from the area councilor and subsequently provided to the Investigation Officer. However, the I.O neither examined the area councilor to ascertain the fact about the origin of the video nor bothered to send the said USB to Forensic Science Laboratory for its authenticity. In the absence of any forensic report qua the authenticity of the USB/video, the same cannot be considered a legal basis for proceeding against the appellant/accused. In the case of *Ishtiaq Ahmed Mirza Vs.*

Federation of Pakistan [PLD 2019 SC 675] the Supreme Court of Pakistan, while dilating upon the requirements for admissibility of an audio tape or video in evidence before a court of law and the mode and manner of proving the same before the court, inter alia, has held that with the advancement of science and technology, it is now possible to get a forensic examination, audit or test conducted through an appropriate laboratory so as to get it ascertained as to whether an audio tape or a video is genuine or not, therefore, without a forensic examination, audit or test, it is becoming more and more unsafe to rely upon the same as a piece of evidence in a court of law. Mere producing of footage as a piece of evidence without any forensic test is not sufficient to be relied upon unless and until corroborated and proved to be genuine.

13. Besides above the MLO [Exh. No.9] in his evidence produced the Medico Legal Certificate as [Exh.9/B] and has stated as under:

> "… I examined the victim and observed the following things on his body.
> **On external examination**: There was no bruise, abrasion, laceration, swelling or any marks of violence/injury seen at the time of examination.
> **On internal examination**: there was no swelling, abrasion, any tear or any marks of injury seen.
> I had not collected the anal swabs or blood sample of the victim due to lapse of time.
> **Opinion:** In my opinion the act of sodomy was not performed, however attempt for sodomy cannot be ruled out."

14. From perusal of the above Exh.9/B, it appears that in the present case the act of sodomy was not performed, however, if we take the opinion of the MLO qua possibility of an attempt of sodomy cannot be ruled out, even then, it is a well settled principle of law that if two views are possible on the evidence adduced in the case, one indicating the guilt of accused and other to his innocence, the view favourable to the accused is to be adopted[3]. It is also a matter of record that neither DNA was conducted nor recovery of any incriminating material has been effected from the appellant/accused. Record also shows that the appellant/accused in his statement U/s 342 Cr.P.C. inter alia, deposed that he and the complainant work in the same office and due to some dispute between them in respect of the office affairs he has been falsely

[3] Shahid Orakzai v. Pakistan Muslim League [2000 SCMR 1969], Ijaz Hussain v. The State [2002 SCMR 1455], Iftikhar Hussain and others v. The State [2004 SCMR 1185] and Muhammad Zubair v. The State [2010 SCMR 182].

involved in the case. The complainant and the victim though admitted the fact that the appellant/accused and the complainant work in the same office, however, they disputed the incident as mentioned in the above statement u/s 342 Cr.P.C. The above facts reflects that the appellant/accused and the complainant party known to each other prior to the occurrence of the incident and as such possibility of dispute and difference between parties cannot ruled out.

15. Before going into further discussion, it would be advantageous to reproduce the relevant excerpts of the deposition of the Investigating Officer of the case PW-5 [Exh.10]:

> "It is correct to suggest that the complainant party did not produce any witness in respect of any incident taken place on 23.5.2022 [Sic]….it is correct to suggest that in his statement U/s 164 Cr.P.C.the victim Abdul Rehman deposed before learned Judicial Magistrate that alleged video of his alleged act of sodomy allegedly made by the present accused Ashir was seen by his friends. It is correct to suggest that the victim had not disclosed the names of such friends who had seen such video which was allegedly made viral by the present accused in his statement recorded U/s 164 Cr.P.C. It is correct to suggest that the complainant party has not produced any witness against the present accused. In fact complainant and victim are implicating the accused. It is correct to suggest that in the alleged video the present accused Ashir is not visible in the video. It is correct to suggest that I had not got verified the video from the forensic laboratory. It is correct to suggest that except statement of the complainant and victim no any other proof produced by the complainant party which connects the present accused in the alleged offence. In fact only USB has been produced by the complainant party with the claim that the alleged video was made by the present accused Ashir. It is correct to suggest that I have not associated any witness from the place of occurrence which confirmed that the accused was present at the alleged place of occurrence during the alleged offence. ……It is correct to suggest that MLO has also not secured any anal swabs of victim at the time of his medical examination. It is correct to suggest that according to the MLO there was no mark of any injury on the body of the victim or on the private parts of the victim…"

16. The present case is based on the solitary statement of the victim. The court is neither oblivious of heinousness of the offence nor the legal position that the presumption of truth, in such type of cases, is attached to statement of the victim and his family members as normally nobody would own such allegation, however, such presumption would not be sufficient for conviction unless the evidence of such set of witnesses passed the required test for judging the evidence judicially[4]. Insofar as the

[4] Muhammad Khan v. The State [2020 P.Cr.J Note 10]

heinousness of the offence is concerned, the Supreme Court of Pakistan in the case of *Saghir Ahmed v. The state and other* [2023 SCMR 241] while dealing with somewhat on the identical issue has held as under:

> "Mere heinousness of the offence if not proved to the hilt is not a ground to punish an accused. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer." The above report of the Forensic Science Laboratory is sufficient to cast a shadow of doubt on the prosecution case, which entitles the petitioner to the right of benefit of the doubt….."

17. In the present case, as discussed above, there are number of infirmities / loopholes / lacunas, which create serious doubts in the prosecution case. It is a well settled principle of law that for the accused to be afforded the right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must got to the petitioner. The Supreme Court of Pakistan in the case of *Mst. Asia Bibi v. The State* [PLD 2019 SC 64] has categorically held that 'if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as a matter of right[5]. Similar view was taken in case of *Abdul Jabbar v. State* [2019 SCMR 129] wherein the Supreme Court of Pakistan, inter alia, has observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused. It is also well settled that the conviction must be based on unimpeachable and reliable evidence. Any doubt arising in the prosecution case is to be resolved in favour of the accused.

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[5] Tariq_Pervaiz v. The State [1995 SCMR 1345] and Ayub Mosih v. The State [PLD 2002 SC 1048]

18. I have also gone through the case law relied upon by learned Additional Prosecutor General, which are found distinguishable from the facts and circumstances of the present case, as such, the same are not applicable to present case.

For what has been discussed above, I am of the view that the prosecution has failed to prove its case against the appellant/accused beyond any reasonable doubt, hence the conviction so recorded by the trial court cannot be maintained. Consequently, the appeal is accepted, the impugned Judgment is set aside and the appellant/accused by extending the benefit of doubt is acquitted of the charge. The appellant/accused is in jail. He is directed to be released forthwith, if not required in any other custody case.

JUDGE

*Jamil**