

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No.S-142 of 2023

Appellant: Khaliq alias Abdul Khaliq son of Khurshed Muhammad by caste Malik (Confined at Central Prison Khaipur **Through** Chaudhry Ahmed Khan Gondal, advocate.

The Complainant: **Through** Mr. Shoaib Niaz Khaskheli, advocate.

The State: Through Mr. Shafi Muhammad Mahar, Deputy Prosecutor General.

Date of hearing: 15-04-2024

Date of judgment: 15-04-2024

J U D G M E N T

IRSHAD ALI SHAH, J- It is the case of the prosecution that the appellant committed rape with PW/victim Mst. Kaneez Fatima a young girl of 15 years of age (as per medical evidence), for that he was booked and reported upon by the police. On denial of the charge by the appellant, the prosecution examined complainant Mst. Malikan Khatoon and her witnesses and then closed its side. The appellant in his statement recorded under section 342 Cr.P.C denied the prosecutions' allegations by pleading innocence; he did not examine anyone in his defence or himself on oath. On conclusion of trial, the appellant was convicted under section 376 (iii) PPC and sentenced to undergo rigorous imprisonment for life and to pay compensation of Rs.100,000/- to PW/victim Mst. Kaneez Fatima and in default in payment whereof to undergo simple imprisonment for six months with benefit of Section 382(b) CrPC by learned IVth Additional Sessions Judge/Gender Based Violence Court, Khairpur, vide

judgment dated 28-11-2023, 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 and has been convicted and sentenced by learned trial Court on the basis of misappraisal of evidence; therefore, is entitled to his acquittal by extending him benefit of doubt. In support of his contention, he relied upon case of *Atta-ul-Mustafa Vs. The State (2023 SCMR 1698)*

3. Learned DPG for the State and learned counsel for the complainant by supporting the impugned judgment have 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 reasonable doubt. In support of their contention, they relied upon case of *Farooq Ahmed Vs. The State (PLD 2020 SC 313)*.

4. Heard arguments and perused the record.

5. It was stated by complainant Mst. Malikan and PW Ghulam Mustafa that on 12-09-2020 PW/victim Mst. Kaneez Fatima went for neighborhood, but did not return, they and PW Mushtaq Ahmed went for her search, when reached adjacent to cattle pond of Qabil Mangnejo, on hearing her cries, they went inside of it, the appellant was found going outside and on inquiry PW/Mst. Kaneez Fatima told them that the appellant has committed rape with her, she then was taken to PS Hingorja; the entry in *roznamcha* was recorded and then she was referred to RHC Hingorja for medical examination later-on they lodged FIR of the incident with PS Hingorja on 14-09-2020, it was with

delay of about two days to the actual incident. On asking, both of them were fair enough to admit that they have not seen the appellant committing the rape with PW/Mst. Kaneez Fatima, if it is so then, their evidence hardly appears to be of any help to the case of the prosecution. The entry which was recorded in *roznamcha* at Sr. No. 38 dated 12-09-2020 by PW/HC Moula Bux at the instance of PW Mst. Haseena does not contain name of the culprit involved in the incident, which appears to be surprising. The disclosure of the name of the appellant in FIR by the complainant with delay of about two days to the actual incident could be result of deliberation and consultation. PW/Mst. Kaneez Fatima has involved the appellant in commission of the incident. On asking, it was stated by her that no other person was present at the cattle pond at the time of incident. How it could be, when it was owned by Qabil Mangnejo, a person having no concern with the appellant; he even otherwise has not been examined by the prosecution; his examination being independent person was essential to prove the factum of the incident. As per medical officer Dr. Fozia Memon, no mark of violence was seen on the body of PW/victim Mst. Kaneez Fatima and the appellant was not found contributor of semen stain/sperm fractions identified on her vaginal swabs samples and cloths as per DNA report. If such report is believed to be true, which of course is, then it belies PW/victim Mst. Kaneez Fatima that she was subjected to rape by the appellant. On asking it was stated by medical officer Dr. Fozia Memon that no evidence with regard to forcible rape was found with the PW/victim Mst. Kaneez Fatima and she was found in habit to sexual intercourse earlier to the present one. If it is believed to be so, then it reflects adversely on character of PW/victim Mst.

Kaneez Fatima. PW Mushtaq Ahmed has not been examined by the prosecution under the deception that he is not feeling well. No proof with regard to his ailment is brought on record. The presumption which could be drawn of his non-examination in terms of Article 129 (g) of Qanun-e-Shahadat Order 1984 would be that he was not going to support the case of the prosecution. PW Mst. Haseena on asking was also fair enough to admit that she has not seen the appellant committing the alleged incident, her evidence too is of no help to the case of the prosecution. Evidence of PW Mst. Robeena is only to the extent that she recorded 164 Cr.P.C statement of PW/victim Mst. Kaneez Fatima, it hardly needs any discussion. Evidence of I.O/SIP Muhammad Ameen, if is believed to be true, even then is not enough to improve the case of the prosecution to maintain conviction under the circumstances.

6. The conclusion which could be drawn of above discussion would be that the prosecution has not been able to prove its case against the appellant beyond shadow of reasonable doubt and to such benefit he is found entitled.

7. In case of *Imran Ashraf and others vs. the State (2001 SCMR-424)*, it has been held by Apex Court that;

“Section 154, Cr.P.C. lays down procedure for registration of an information in cognizable cases and it also indeed gives mandatory direction for registration of the case as per the procedure. Therefore, police enjoys no jurisdiction to cause delay in registration of the case and under the law is bound to act accordingly enabling the machinery of law to come into play as soon as it is possible and if first information report is registered without any delay it can help the investigating

agency in completing the process of investigation expeditiously”.

8. In the case of *Muhammad Mansha vs. The State* (2018 SCMR 772), it has been held by the 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".

9. The case law which is relied upon by learned counsel for the complainant is on distinguishable facts and circumstances. In that case the violence on the person of the victim was suggesting the involvement of the accused. In the instant case, no mark of violence on the person of the victim is found.

10. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant under impugned judgment are set aside, 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.

11. The instant Criminal Appeal is disposed of accordingly.

Judge