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**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Cr. Appeal No.S-232 of 2010

Date of Hearing: 14.02.2022
Date of Judgment: 14.02.2022

Appellants/accused: 1) Dadlo S/o Gullan
2) Ghulamoon S/o Hashim
3) Jumo S/o Muhammad Jamil
4) Mangal @ Khamiso S/o Rawat
through Mr. Ghulam Shabbir Mari,
Advocate

Complainant: Premchand
Through Mr. Hameedullah Dahri,
Advocate

The State: Through Mr. Shahzado Saleem
Nahiyoon, Additional Prosecutor
General, Sindh.

J U D G M E N T

NAIMATULLAH PHULPOTO, J,- Appellants Dadlo,
Ghulamoon, Jumo and Mangal @ Khamiso were tried by learned
Sessions Judge, Umerkot in Sessions Case No.06 of 2010 for offences
under Sections 365-B, 376(1) PPC. After regular trial, vide judgment
dated 10.06.2010, appellants were convicted only under Section 365-B
PPC and sentenced to imprisonment for life and to pay fine of
Rs.100,000/- each. In case of default in payment of fine, they were

ordered to suffer R.I for one year more. Appellants however, were extended benefit of Section 382-B Cr.P.C.

BRIEF FACTS

2. Brief facts of the prosecution case as disclosed in FIR are that complainant Premchand reported matter at P.S Umerkot on 06.01.2010 at 1700 hours; it was recorded vide Crime No.04 of 2010 under Sections 376(1) & 365-B PPC. It is alleged in the FIR that complainant resides in Village Rabario alongwith his unmarried sister namely Sht. Bhagwani, aged about 14/15 years. It is further alleged that on 04.01.2010 complainant was present at his house, in the evening, his sister Sht. Bhagwani left home for some work. At about 07:30 p.m., complainant heard cries of Sht. Bhagwani from street and came out of the house and saw a car and motorcycle in which accused namely Dadlo S/o Gullan Mari, Ghulamoon S/o Hashim Mari, both armed with repeaters, Jumo armed with hatchet and three unidentified persons who were also armed with hatchets were found and they forcibly took her in car. Complainant and PWs Kewal and Jai @ Bhagwano witnessed the incident. It is also alleged that complainant tried to rescue his sister but accused Dadlo aimed his pistol at him and issued him threats of dire consequences. Thereafter, accused abducted Sht. Bhagwani with intention to force to illicit intercourse. Complainant started search of his sister but in the next morning, Sht. Bhagwani returned home and disclosed that she was abducted by force and confined in a room where she succeeded to run away and reached home. Thereafter, FIR of the incident was lodged on 06.01.2010 at 1700 hours. under Sections 376(1) & 365-B PPC.

3. After usual investigation, challan was submitted against the appellants under the above referred sections.

4. Trial Court framed the charge against the appellants at Ex-02. Appellants pleaded not guilty and claimed to be tried.

5. Prosecution in order to prove its' case at trial examined Premchand (PW-1) at Ex-07, Sht. Bhagwani (victim PW-2) at Ex-09 and Kewal (PW-3) at Ex-10. Thereafter, prosecution side was closed.

6. Trial Court recorded statements of accused under Section 342 Cr.P.C at Ex-12 to 15, to which they claimed false implication in this case and denied the prosecution allegations. Accused declined to give statement on oath in disproof of the prosecution allegations; no evidence was led in defence.

7. Trial Court after hearing the learned Counsel for the parties and assessment of the evidence, vide judgment dated 10.06.2010, convicted and sentenced the appellants as stated above, appellants being aggrieved have filed instant appeal against their conviction and sentence.

SUBMISSIONS OF APPELLANTS

8. Learned Advocate for the appellants mainly argued that victim girl Sht. Bhagwani has not supported the case of the prosecution at trial and she was declared hostile; that she was not medically examined during investigation; that Investigating Officer has also not been examined by the prosecution. Lastly, it is submitted that prosecution has failed to prove its' case against the appellants beyond any shadow of doubt.

SUBMISSIONS OF STATE

9. Learned Additional Prosecutor General submitted that victim girl has not supported the case of the prosecution and he has not defended the impugned judgment.

10. Mr. Hameedullah Dahri, Advocate for complainant argued that prosecution has proved its case against the appellants and prayed for dismissal of the appeal.

11. I have carefully heard learned Counsel for the parties and perused the evidence minutely.

12. Complainant Premchand (PW-1) has deposed that victim Sht. Bahgwani is his sister. Present incident took place on 04.01.2010 at 07:30 p.m. When he, his cousins Kewal and Jai alias Bhagwano were in his house, his unmarried sister Sht. Bhagwani had left the house to meet maternal grandfather, whose house is adjacent to the house of complainant. He has further deposed that he heard cries of Sht. Bhagwani alongwith PWs, came out of the house and saw a car and motorcycle in which accused Dadlo, Ghulamoon, Jumoon and Mangal alias Khamiso were found armed with repeaters and hatchets. Accused Dadlo and Ghulamoon forcibly dragged his sister Sht. Bhagwani and made her to sit in the car and two unknown persons followed the car of the accused to some unknown place. It is alleged that after two days, on 06.01.2010 at 09:30 a.m. his sister Sht. Bhagwani returned to the home and narrated the incident that present accused persons alongwith two unknown persons abducted her to the Otaq of Ali Mardan Shah situated in village Ghulam Nabi Shah, where the accused committed multiple intercourse with her for two days.

When she found the accused were unavailable in Otaq, she took benefit of their absence and succeeded to run away and came to home. Complainant has deposed that appellants abducted his sister for sexual intercourse and he lodged FIR of the incident, which he produced at Ex-8 before the trial court. In cross examination complainant denied the suggestion that he has involved the accused at the instance of Lal Malhi.

13. Sht. Bhagwani (PW02) has deposed that complainant is her brother and she resides in village Rabario alongwith the brother. Present incident took place on 04.01.2010 at 07:30 p.m, at that time she was present in a street. She saw three accused persons in car and two accused persons on motorcycle, their faces were muffled. They forcibly abducted her to village Ghulam Nabi Shah and confined her in Otaq for two days. She has deposed that five culprits compelled her for sexual intercourse for two days. Thereafter, she was handed over to her maternal grandfather and she came to home on 06.01.2010 in the evening. Police recorded her statement. Victim Sht. Bhagwani was declared hostile by the prosecution as she did not identify the culprits in the trial Court. She was cross examined by prosecutor but nothing favourable to the prosecution came on record. For proper appreciation of evidence of victim girl / Sht: Bhagwani, her evidence is reproduced as under:-

“PW1 complainant Premchand is my brother. I am residing in village Rabario alongwith my brother Premchand. This incident had taken place on 4.1.2010. It was about 7.30 PM I was in the street of my house. There a car and motorcycle came. I saw 3 persons in the car and two persons were on the motorcycle. Their faces were muffled.

They all forcibly set me in the car and took me to village Ghulam Nabi Shah and confined me in a otaq. There the culprits confined me for two days. In the otaq the four culprits committed rape upon me for two days. On the last day of my confinement one Ali Mardan Shah whose name disclosed to me by my maternal grandfather namely Samoon who handed over me to my maternal grandfather. I then returned to my house on 6.1.2010 in the evening. Thereafter PW1 complainant Premchand took me to Police Station Umerkot where my statement u/s. 161 Cr.P.C was recorded. Before the police I had stated that five persons whose faces were muffled abducted me and committed rape upon me. I say that I had not given the name of any person to the police. Accused Dadlo, Ghulamoon, Jumoon and Mangal alias Khamiso present in the Court I say that I had not identified them as at the time of my abduction in the faces of the culprits were muffled”.

14. Kewal (PW-3) has deposed that complainant is his cousin. On the day of incident, he alongwith PW Jai alias Bhagwano had gone to the house of complainant. Sht. Bhagwani left the house at about 7-30 p.m, they heard her cries and came out of the house alongwith complainant and saw several persons had gathered there. On his inquiry, the persons who had gathered there disclosed that Sht. Bhagwani had been forcibly abducted by some persons of the Mari community. PW Kewal did not support the case of prosecution and he was declared hostile by prosecution. Prosecution has also failed to examine the Investigation Officer at trial.

APPRECIATION OF EVIDENCE

15. While appreciating the evidence as aforesaid along with the matters attached to it, evidence can be divided into three categories broadly namely, (i) wholly reliable, (ii) wholly unreliable and

(iii) neither wholly reliable nor wholly unreliable. If evidence, along with matters surrounding it, makes the court believe it is wholly reliable qua an issue, it can decide its existence on a degree of probability. Similar is the case where evidence is not believable. When evidence produced is neither wholly reliable nor wholly unreliable, it might require corroboration, and in such a case, court can also take note of the contradictions available in other matters. Record reflects that occurrence in the present case as per prosecution, took place on 04.01.2010, whereas the matter was reported to the Police by complainant, the brother of the abductee, on 06.01.2010. If the contents of the FIR are accepted as correct, it is hard to believe that in an incident where a young married woman was abducted from a house by four men on gunpoint, the complainant side waited for about 07 days to report the matter to police. There is no explanation in the FIR for such inordinate delay. If the contents of FIR were accepted as correct, it was hard to believe that in an incident where a young unmarried girl was abducted outside of the house by four culprits on gunpoint, the complainant waited for two days to report the matter to the Police. No explanation has been furnished in the FIR or in evidence for such inordinate delay.

16. Sht. Bhagwani in her evidence has stated that she was kidnapped by some muffled faced persons and confined in a room where by force multiple sexual acts were committed with her by unknown persons. She was declared hostile by prosecution. It is well within the powers of the court to make an assessment of hostile witness and come to correct conclusion. The expression "hostile witness" does not find a place in Qanoon-e-Shahdat, Order 1984. It is

coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear it in mind that a witness may depose in favour of a party in whose favour it is meant to be giving through his chief examination, while later on change his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief examination could be termed as evidence. Such evidence would become complete after the cross examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion. **Unfortunately, Investigating Officer neither collected her clothes for DNA test nor she was produced before a lady Doctor for her medical examination and report.** Prosecution has failed to produce Investigating Officer who had conducted investigation in this case. Moreover, the offence of abduction under Section 365-B PPC requires two essentials, removal of woman by force from one place to another under compulsion or through inducement by deceitful means and the object of such removal

must be to compel her to marry any person against her will or in order that she could be forced or seduced to illicit intercourse. Victim Sht. Bhagwani has deposed that she was kidnapped by some muffled faced persons and was detained in a room where she was subjected to multiple intercourses by force. Ingredients for proving Section 365-B PPC are not satisfied from the evidence available on record. Victim Sht. Bhagwani had failed to identify any of the culprits before the trial Court and was declared hostile. She was subjected to cross-examination by the prosecution but nothing favourable to the prosecution came on record. In the peculiar circumstances of the case, non-examination of Investigating Officer would also be fatal to the case of prosecution.

17. It is a well settled principle of law that involvement of an accused in heinous nature of offence is not sufficient to convict him as the accused continues with presumption of innocence until found guilty at the end of the trial, for which the prosecution is bound to establish its case against the accused beyond shadow of any reasonable doubt by producing confidence inspiring and trustworthy evidence. It is a cardinal principle of administration of justice that in criminal cases the burden to prove its case rests entirely on the prosecution. The prosecution is duty bound to prove the case against accused beyond reasonable doubt and this duty does not change or vary in the case in which no defence plea is either taken or established by the accused and no benefit would occur to the prosecution on that account and its duty to prove its case beyond reasonable doubt would not diminish. The prosecution has not been able to bring on record any convincing evidence against appellants to establish their involvement in the

commission of offence charged with beyond shadow of reasonable doubt. Rather, there are so many circumstances / infirmities, discussed above creating doubts in the prosecution case and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of evidence and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the *Holy Prophet (PBUH)* that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent." Accordingly, I am of the considered view that the prosecution has failed to prove the guilt of the appellants beyond reasonable doubt. The convictions and sentences recorded against the appellants through impugned judgment dated 10.06.2010, are without appreciating the evidence in its true perspective, rather the same is packed with various discrepancies and irregularities, which resulted into a benefit of doubt, to be extended in favour of the appellants.

18. Admittedly, there are several circumstances in this case, which have created serious doubt in the prosecution case as discussed above. It is well settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit

not as a matter of grace and concession but as a matter of right as held in the case of by Honourable Supreme Court in the case of MOHAMMAD MANSHA v. The STATE (2018 SCMR 772) wherein the Hon'ble Supreme Court of Pakistan has held as under:-

"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". Reliance in this behalf can be made upon the cases of Tarique Parvez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Mohammad Akram v. The State 2009 SCMR 230) and Mohammad Zaman v. The State (2014 SCMR 749)."

19. In view of what has been discussed above, I am of the considered view that prosecution has failed to prove its case against the appellants beyond reasonable doubt. Resultantly, this appeal is allowed. The conviction and sentence of the appellants Dadlo, Ghulamoon, Jumo and Mangal @ Khamiso recorded by trial Court are set aside and they are acquitted of the charges levelled against them in this case. Appellants / accused are present on bail, their bail bonds are cancelled and surety is hereby discharged.

JUDGE