

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Cr. Appeal No.S-85 of 2021

Appellant : Dilshad Mahar,
Through Mr. Ahsan Ahmed Qureshi, Advocate.

State : Through Mr. Aitbar Ali Bullo, Deputy Prosecutor
General.

Date of hearing : 01.11.2024.

Date of Decision : 14.11.2024.

J U D G M E N T.

Arbab Ali Hakro, J.- Appellant Dilshad S/o Shahnawaz Mahar, was tried by learned Sessions Judge, Shikarpur ("**trial Court**") in Sessions Case No.343/2020 re: The State VS. Dilshad Mahar, arising out of FIR bearing Crime No.18/2020 registered at P.S Lakhni Ghulam Shah, for offences punishable under sections 377, 377-B, PPC and after trial, vide judgment dated 11-11-2021, appellant was convicted and sentenced in the following terms:-

- Under Section 377 PPC, sentenced to undergo R.I. for ten(10) years, with a fine of Rs.100,000/- and, in case of default in payment thereof, further to undergo S.I. for six(06) months.
- Under Section 377-B PPC, sentenced to undergo R.I. for fourteen(14) years, with a fine of Rs.10,00,000/- (one million) and, in case of default in payment thereof, to further undergo S.I. for six(06) months.
- Benefit of section 382-B, Cr.P.C also extended in favour of the appellant.

2. The appellant assailed his conviction and sentence through this appeal.

3. The prosecution case detailed in the FIR lodged by complainant Allah Warayo on 04-03-2020 at Police Station Lakhi Ghulam Shah regarding a distressing incident involving his younger brother, Iqrar Ali, aged about 5/6 years. On the day of the incident, Iqrar Ali took some money to purchase an item and went outside. After a short while, the complainant, his brother Barkat Ali and their relative Muhammad Yousif also stepped outside their home. At around 6:00 p.m., they heard the cries of Iqrar Ali coming from a nearby Katcha hut located on the land of Akbar Mahar. Upon rushing to the scene, they discovered Iqrar Ali in a vulnerable state, with his clothes removed and identified the accused, Dilshad S/o Shahnawaz, by caste Mahar, who was forcibly committing sodomy upon Iqrar Ali. On seeing them, the accused Dilshad fled the scene, taking his trousers with him. Iqrar Ali was found crying, and the complainant helped him get dressed, and they returned home. After consultations with their nekmards, the complainant lodged FIR against the accused.

4. After the usual investigation, a challan was submitted against the appellant. The trial court framed a formal charge against him for offences punishable under Sections 377 and 377-B, PPC, to which he pleaded 'not guilty' and claimed to be tried.

5. In order to substantiate the charge, the prosecution has examined PW-1 complainant Allah Warayo at Ex.5, who produced an FIR at Ex.5/A, PW-2 eyewitness/mashir Barkat Ali at Ex.6, who produced memo of the place of incident, and that of recovery of clothes of the victim at Ex.6/A and B respectively, PW-3 victim Iqrar Ali at Ex.7, PW-4 Medical officer Dr.Irfan Ali at Ex.8, who produced provisional as well as final medical certificates and DNA report at Ex.8/A to d respectively, PW-5 Dr.Satish Kumar at Ex.9, who produced police letter and a letter addressed to the Project Director LUMS at Ex.9/A and B respectively and lastly PW-6 Investigation officer SIP Muhammad Aslam was examined at Ex.10, who produced station diaries of his departure and arrival, a memo of arrest of accused, a letter addressed to the Medical officer and R.C No.57 at Ex.10/A to F respectively. Thereafter, the State counsel closed the side of prosecution vide statement at Ex.11.

6. Statement U/S 342 Cr.P.C of appellant Dilshad was recorded at Ex.12, wherein he denied allegations levelled by the prosecution against him

and professed innocence. However, he neither led evidence in his defence nor examined himself on oath in terms of S.340(2) Cr.P.C.

7. After hearing the counsel for both parties and examining the evidence, the trial Court passed the impugned judgment and awarded a sentence to the appellant, as mentioned above. Being aggrieved and dissatisfied with the judgment, the appellant has preferred this criminal appeal.

8. Learned counsel for the appellant has contended that the appellant has been falsely implicated in this case and that several discrepancies in the prosecution case were not considered by the learned trial court. He further contended that there was no independent eyewitness to the alleged incident. According to him, the alleged incident is said to have been witnessed by the complainant and PW Barkat, but the complainant is a driver whose duty hours are from morning to evening, while PW Barkat works at a Pepsi company whose duty is from 7:00 a.m. to 7:00 p.m, casting doubt on their presence at the scene of the incident. He has further argued that the evidence of the Medical Officer reveals no signs of violence on the body of the victim, and the appellant's semen did not match the semen collected from the victim's shalwar. Thus, the medical evidence does not support the ocular account. He also argued that the charge is defective in the element of common intention. Therefore, he has prayed that the conviction recorded by the learned trial Court may be set aside and the appellant may be acquitted of the charge. In support of his contentions, he relied upon the cases reported as **2023 SCMR 241, 2013 SCMR 203, PLJ 2011 FSC 460, PLJ 2010 FSC 241, PLJ 2008 FSC 971, PLJ 1999 Khi 20 and PLD 1995 SC 1.**

9. Conversely, learned Deputy Prosecutor General has supported and defended the impugned judgment. He has argued that the appellant is involved in a heinous offence and that the evidence brought on record is sufficient to prove the charge against him. Record reflects that on 30.3.2023 complainant Allah Warayo Mahar had appeared and by expressing his faith upon the prosecutor had refused to engage his Counsel.

10. I have heard learned counsel for the parties at length and have perused the evidence available on the record with their able assistance.

11. In the case at hand, the prosecution has alleged a serious crime involving the complainant's younger brother, Iqrar Ali, who is only 5 to 6 years old. The events unfolded in the FIR on 04-03-2020 when victim Iqrar Ali went outside after taking some money to purchase edible items. Shortly thereafter, the complainant, Allah Warayo, along with his brother Barkat Ali and their relative Muhammad Yousif, also exited their home. At around 6:00 p.m., they heard the cries of Iqrar Ali coming from a nearby Katcha hut located on the land of one Akbar Mahar. Upon rushing to the scene, they saw Iqrar Ali with his clothes removed and accused Dilshad S/o Shahnawazof forcibly committing sodomy upon Iqrar Ali. It is noteworthy to mention that in cases of carnal intercourse, the opinion of a medical witness has very significant importance, and without the opinion of a medical expert, it cannot be ascertained whether the offence has been committed or not. The record shows that a thorough medical examination of the victim was conducted on the same day by Dr. Irfan Ali, a Medical Officer(PW-4). The examination involved the collection of both internal and external swabs, which were subsequently sent to the Forensic Science Laboratory for DNA analysis. Besides this, the clothes of the victim and a blood sample were also submitted for testing. The forensic report dated 16-07-2020 revealed that the accused, Dilshad, was not the contributor to the semen stains or sperm fractions identified on Iqrar's clothing. The DNA profile obtained from the semen stains did not match the DNA profile derived from the blood sample of the accused, indicating a lack of biological connection between Dilshad and the evidence collected from the victim. Furthermore, the analysis of the anal swabs taken from the victim did not reveal any semen stains or sperm fractions, which raises substantial questions regarding the occurrence of the alleged act of sodomy. The final medical certificate, available as Exhibit 8/B, corroborates these findings, explicitly stating that the male DNA obtained from the semen stains on the victim's clothing did not share the required alleles with the DNA profile of the accused. The medical examination also noted the presence of abrasion at the anal site, which the doctor suggested could be attributed to a sharp substance, possibly due to itching, rather than any form of sexual assault. Importantly, the examination found no lacerations, bruises, or other injuries on the victim's body that would typically be expected in cases of sexual violence. Dr.Irfan Ali, the Medical officer, appeared as PW-4 and stated that on the basis of the report of the Chemical Examiner, he issued the final medical certificate that male DNA obtained from semen stains/sperm available

on the clothes of the victim and semen of the accused does not tally with each other. Besides it, a complainant had deposed in his evidence that when he, along with his brother/PW Barkat, rushed towards Katcha hut, they saw accused Dilshad was committing sodomy upon Iqrar Ali but on the other hand, eyewitness/PW Barkat gave a devastating blow to the prosecution case by deposing that **"I did not see myself to the accused committing carnal intercourse with my brother but I was informed by my brother about it"**. In my view, this sole statement coming from the mouth of an eyewitness of the alleged incident made the whole case of prosecution open to doubt for the reason that the foundation of the prosecution's case relies heavily on eyewitness accounts. The claim of the complainant that he saw the act occurring is directly contradicted by PW Barkat's admission that he did not see the incident himself. Moreover, the credibility of the witnesses is paramount in establishing the truth of the allegations. The fact that one of the key eyewitnesses has recanted or diminished the strength of the prosecution's claims casts doubt on the overall integrity of the case.

12. The prosecution case further becomes dubious when eyewitness PW Barkat Ali presents another critical aspect concerning the timeline of events surrounding the alleged incident. During cross-examination, PW Barkat stated that he is employed at a private Pepsi company, with working hours that commence at 7:00 a.m. and conclude at 7:00 p.m. The alleged incident is said to have occurred at about 6:00 p.m. If PW Barkat's work hours extend until 7:00 p.m., it is reasonable to question how he could have been present with the complainant at the time of the alleged crime. The absence of any clarification or explanation from the said PW regarding his presence at the scene during working hours further damaged the prosecution's case. I have also observed discrepancies in the testimonies of the complainant and eyewitness PW Barkat regarding the timeline of events surrounding the victim's departure from home and the subsequent search for him. The complainant stated during his cross-examination that the victim left the house at 5:30 p.m. and that they began searching for him after about 15 minutes, which would place the start of the search around 5:45 p.m. Contrarily, PW Barkat deposed that they commenced their search approximately 40 minutes after the victim left the house, which would suggest that the search began 6:10 p.m. However, if PW Barkat's account is to be believed that they started a search at 06:10 p.m., it suggests that he and the complainant were not

present at the scene of the alleged crime when it was purported to have occurred, i.e. 06:00 p.m. Furthermore, P.W Barkat, who is also cited as mashir of inspection of wardat, has deposed that an Investigation officer inspected the wardat at 07:40 a.m. while the mashirnama of wardat itself reveals that it was prepared at 07:20 a.m. This contradiction in the timing suggests that either the mashirnama was not prepared at the crime scene or that it was not prepared in the presence of P.W Barkat. Moreover, the site plan (Ex.6/A) reveals that the place where the incident occurred was not isolated; rather, it was situated near agricultural land and a watercourse, which suggests that there may have been people working in the fields or passing through the area at the time of the alleged crime but none from the vicinity appeared as witness in this case.

13. It is a universally recognized principle of law that conviction can only be based upon unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused, not as a matter of grace but of right. In **"Ayub Masih v. The State" (PLD 2002 Supreme Court 1048)**, while quoting a saying of the Holy Prophet (PBUH) that **'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent'**, and referring to the maxim, that **'it is better that ten guilty persons be acquitted rather than one innocent person be convicted'**, Hon'ble Supreme Court of Pakistan has been pleased to observe as under:-

".....It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused, the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in The State v. Mushtaq Ahmad (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (P.B.U.H.) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".

14. The Hon'ble Supreme Court of Pakistan, while reiterating the same principle in the case of "**Muhammad Akram v. The State**" (2009 **SCMR 230**), observed as under:-

"13. The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State (1995 SCMR 1345) that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right".

15. The upshot of the above discussion is that the prosecution has failed to prove its case against the appellant beyond any reasonable shadow of a doubt. Resultantly, this appeal is **allowed**. The conviction and sentence awarded to the appellant Dilshad are hereby set aside and he is acquitted of the charge by extending him the benefit of the doubt. The appellant is in jail; he shall be released forthwith, if not required, in any other custody case.

JUDGE

Qazi Tahir PA/*