

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

Criminal Appeal No.S-213 of 2016

Dates of hearings: 25.01,2019 and15.02.2019.

Date of decision: 22.02.2019.

Appellants: Ali Ahmed and others
Through Mr. Muhammad Hashim Laghari, Advocate.

Complainant: Mashooque Ali
None present for complainant.

The State: M/s Syed Meeral Shah Addl.P.G. and Shewak Rathore,
D.P.G. for the State.

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MUHAMMAD IQBAL KALHORO,J:- Appellants have impugned the judgment dated 14.10.2016, passed by 1st Additional Sessions Judge, Badin convicting and sentencing them under section 376(ii) r/w section 34 PPC to suffer imprisonment for life with benefit provided u/s 382-B, Cr.P.C.

2. Brief facts of the prosecution case are that on 11.09.2013 in the morning time sister of complainant namely Mst. Najma aged about 35 years, who is not mentally fit, went outside of the house. Upon which complainant along with his cousins Din Muhammad and Muhammad Soomar went in search of her and when they reached Seerani to Ahmed Rajo road at the fish pond, they saw one Rickshaw standing and heard cries of Mst. Najma. They rushed to the spot and saw Mst. Najma lying on the ground without shalwar accused Allah Jurio Khaskheli committing zina with her, whereas co-accused Ali Ahmed Mallah, Allah Bachayo, Altaf Mandhro and three (3) other unknown persons standing nearby in naked condition. The accused seeing complainant party put on clothes and ran away in the Rickshaw. The complainant finally after narrating said facts to Neck Mares and on their advice appeared at police station and lodged FIR.

3. Usual investigation led to filing of the challan and commencement of the trial against the accused. A formal charge was framed against accused persons that they opted to contest and pleaded not guilty. The prosecution examined P.W-1 Dr. Farzana Kousar at Ex.3, who produced medical record at Ex.3-A to Ex.3-M, P.W-2 Dr. Abdul Razzaque at Ex.4, who produced medical record at Ex.4/A to Ex.4-L, P.W-3 Dr. Abdul Jabbar was examined at Ex.5, who produced medical record at Ex.5-A and Ex.5-B, P.W-4 complainant Mashooque Ali at Ex.6, he produced F.I.R. at Ex.6-A, P.W-5 Mst. Najma at Ex.7, P.W-6 Din

Muhammad at Ex.8, who produced 164, Cr.P.C statement at Ex.8/A, P.W-7 Soomar at Ex.9, who produced 164, Cr.P.C statement at Ex.9/A, P.W-8 mashir Noor Ahmed at Ex.10, who produced mashirnamas at Ex.10/A to Ex.10/D, P.W-9 ASI Aijaz Ali Turk at Ex.12, who produced letter dated 14.09.2013 at Ex.12-A. Thereafter, prosecution side was lodged by ADPP vide his statement Ex.13.

5. Subsequent to evidence of prosecution witnesses, statements of the appellants under section 342 Cr.P.C. were recorded. They have denied the case against them and have professed innocence. However, neither they examined themselves on oath nor led any evidence in their defense. Finally at the conclusion of trial, the learned trial Court after hearing the parties convicted the appellants vide impugned judgment in the terms as stated above. Being aggrieved by the same, the appellants have preferred instant appeal.

6. Mr. Muhammad Hashim Laghari learned Counsel appearing for appellants has contended that the prosecution case is full of doubts and infirmities; that the trial court has not considered the DNA test report which is in negative; that as per chemical examiner report and final medico legal certificate no group matching of semen of the appellants with that of victim has been made; that the F.I.R. is delayed for one day for which no plausible explanation has been furnished by the prosecution; that the alleged victim has not supported the prosecution case qua the appellants and has admitted in her cross examination that accused are not the same who had committed Zina with her; that there are material contradictions and discrepancies in the evidence of prosecution witnesses; that all the PWs are interested and related to each other and as such their evidence is without any sanctity; that in criminal trial, if a single infirmity arises, the benefit of which is to be extended to the accused not as a matter of grace, but as a right.

7. Mr. Meeral Shah learned Additional Prosecutor General Sindh has not supported the impugned judgment and said that since the victim has not identified the appellants to be the same person who had committed rape with her and the DNA report is in negative, the case against the appellants has become doubtful. y she prayed for dismissal of the appeal.

9. I have considered submissions of the parties and perused the material available on record. The case as set up by the complainant and pw namely Din Muhammad in FIR and their evidence has not been supported by the victim Mst. Najma in her evidence. Their evidence is to the effect that on the day of incident they found Mst. Najma unavailable in house went in her search and spotted appellant Allah Jurio committing Zina with her near a fish pond in Seerani town whereas other appellant were standing nearby. The evidence of

the victim, however, is to the effect that she was abducted by six persons in front of “*our shops forcibly*” on show of weapons and was brought in the jungle of ‘*Lae*’ (a kind of tree) situated Badipur where all accused committed Zina with her forcibly. On her cries one Nazir Khaskheli was attracted who rescued her and brought her at her house where she narrated the said facts to her family. Her evidence has made presence of complainant and pw Din Muhammad highly doubtful and unworthy of trust. Regarding authenticity of her evidence, it may be noted that although she has taken name of Nazir Khaskheli as witness of her ordeal but prosecution did not make any effort to examine him in support of her version of being raped by the accused. Further in her examination in chief, after describing the incident she has said all four accused present in the court are same. But in her cross examination has concurred with an obvious suggestion about appellants being not the relevant accused by saying ‘*It is correct to say that present accused did not commit zina with me*’. Her disclosure in evidence has made involvement of the appellants in the alleged offence suspicious which is further credited by negative DNA report in respect of blood samples of the appellants and semen found on the body of victim, which has been produced by woman medical legal officer Dr. Farzana Kosur in her evidence.

The net result of above discussion would be that although factum of victim being subjected to intercourse has been established from evidence of her own supported by evidence of Dr. Farzana Kosur but identity of the real culprits and the manner in which it has been alleged in FIR and evidence of other PWs could not be satisfactorily determined from the material available on record. When such is the position, the case against the appellants would be doubtful and they would be entitled to the benefit of doubt. Resultantly the appeal in hand is allowed and the appellants are acquitted of the charge against them. They shall be released forthwith if not required in any other custody case. The appeal stands disposed of in the above terms.

JUDGE