

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Cv. Appeal No. 458/18
also Conf. Case 7/18
Gulzar Shah vs. The State
SINDH HIGH COURT

Composition of Bench.

Single/D.B.

Mr. J. Mohammad Karim Khan Aghe
Mr. J. Zulfiqar Ali Saigal

Dates of hearing: 15th & 16th Oct., 2018

Decided on 21st Oct., 2018

(a) Judgment approved for reporting.

Yes
~~No~~

10/10/18

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/ explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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[Signature]
Deputy Registrar (Judicial)

3134

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. *459* of 2018

Gulzar Shah

Son of Syed Qamar Shah
Muslim, adult, Resident of
House No.A-294, Khayber Mohala
Keamari Town, Karachi
Presently confined at the
Central Prison, Karachi

..... Appellant

VERSUS

The State

..... Respondent

FIR No. 431/2016
U/s.376 P.P.C.
P.S. Docks Karachi

APPEAL UNDER SECTION 410
CRIMINAL PROCEDURE CODE
AGAINST THE JUDGMENT,
SENTENCE AND FINE DATED
04.09.2018, PASSED BY THE
LEARNED ADDL.DISTRICT &
SESSIONS VIII, KARACHI
WEST, IN SESSIONS CASE NO.
41/2017.

Being aggrieved and dissatisfied with the conviction,
Judgment, sentence and fine dated 04.09.2018, in Sessions
Case No. 41/2017, passed by the learned Addl.District &
Sessions VIII, Karachi West, convicting and sentencing the
Appellant as under:-

**"For the offence under section 376 PPC
and sentenced him to death as Tazir. He be**

✓

ion and c.

**IN THE COURT OF ADDITIONAL DISTRICT &
SESSIONS JUDGE-8, KARACHI WEST**

No.ADJ-8/K/W/ 339 /2018
KARACHI Dated: 4th September, 2018

To,

The Worthy Registrar,
Honorable High Court of Sindh
Karachi.

INWARD TO 1484
BRANCH CRL
DATE 12/9/18
HIGH COURT OF SINDH AT KARACHI

Subject: REFERENCE UNDER SECTION 374 CR.P.C IN
SESSIONS NO.41/2017, RE: (THE STATE VERSUS
GULZAR SHAH), U/S.376 PPC, CRIME NO.431/2016,
P.S DOCKS

Accused Gulzar Shah son of Syed Qamar Shah has been convicted by this Court, on 4th September, 2018 and sentenced to death in the above Sessions Case as under;

1. For offence under section 302(b) PPC to death as Tazir, he be hanged by neck till he is dead and under section 544-A Cr.P.C, fine of Rs.500,000/ (Five Lac Only), for the hurt, anguished, psychological damage caused to the personality and body of the victim and same shall be paid to her. If the amount of fine is not deposited by the accused, then in default of payment of fine, the accused shall further undergo simple imprisonment for period of 6 months.

The original record and proceedings in 02 parts are submitted herewith duly paged along with index in pursuance of Section 374 Cr.P.C. for confirmation of death sentence, awarded to the accused/convicted Gulzar Shah s/o Syed Qamar Shah.

(NAMEED AHMED SOOMRO)
VIA Addl Sessions Judge
Karachi West
04/09/18.

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha.

Mr. Justice Zulfiqar Ali Sangi.

Criminal Appeal No.459 of 2018

Confirmation Case No.07 of 2018

Appellant	Gulzar Shah through Mr. Salahuddin Khan Gandapur, Advocate
Respondent	The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General.
Date of hearings	15.10.2019 and 16.10.2019
Date of Announcement	21.10.2019

JUDGMENT

Mohammad Karim Khan Agha, J:- The appellant Gulzar Shah son of Syed Qamar shah in the instant appeal has assailed the impugned judgment dated 04.09.2018 passed by the Additional District & Sessions Judge VIII, Karachi (South) in a Sessions Case bearing No.41 of 2017 whereby the appellant was convicted under Section 265-H (ii) Cr. P.C for offence under Section 376 PPC and awarded the death sentence subject to confirmation by this court. A fine of Rs.5,00,000/- (Rupees Five Lacs) was also imposed upon the appellant for hurt, anguish, psychological damage caused to the personality and body of the victim which shall be paid to her and in default to pay the same he was to undergo SI for a period of six months.

2. The brief facts of the case as per FIR are that on 25.11.2016 at about 1540 hours instant FIR was lodged by the complainant Mst. Sanora alleging that on 23.11.2016 in between 1930 to 2030 hours her daughter namely baby Dilawara (the victim) aged about 10 to 11 years was subjected to rape by accused Gulzar Shah s/o Syed Qamar Shah. Thus, FIR was lodged under Section 376 PPC and accused was booked under Section 376 PPC.

3. After usual investigation the accused was challoned and sent up to face trial for the said offense.

4. Formal charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

5. The prosecution in support of its case examined 08 PWs and exhibited numerous documents. The statement of the accused/appellant was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed his false implication in the case. He did not record his statement on oath or call any witnesses in support of his defense.

6. Learned District and Sessions Judge VIII Karachi West after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 04.09.2018, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

7. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has argued that there was an unexplained two day delay in lodging FIR which enabled the complainant to cook up the story against him; the appellant was arrested before the FIR had even been lodged; that there was no eye witness to this night time incident and the other witnesses gave hearsay evidence; that the medical examination of the victim took place after an unexplained delay of two days; that there was no DNA match and for one or any of the above reasons the appellant was entitled to be acquitted of the charge based on the benefit of the doubt. In support of his contentions he has placed reliance on **Mehmood Ahmad and 3 others v. The State and another** (1995 SCMR 127), **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274), **Muhammad Aslam v. The State** (2019 MLD 973), **Muhammad Mansha v. The State** (2018 SCMR 772), **Muhammad Nawaz and another v. The State and others** (PLD 2005 Supreme Court 40), **Hashim Qasim and another v. The State** (2017 SCMR 986) and **The State and others v. Abdul Khaliq and others** (PLD 2011 SC 554).

9. On the other hand Mr. Mohammad Iqbal Awan, learned Deputy Prosecutor General appearing on behalf of the State argued that there was no delay in lodging the FIR; that the victim eyewitness evidence could be safely relied upon as it was corroborated by the medical evidence and as such the impugned judgment along with sentence and conviction be upheld and the appeal should be dismissed.

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law.

11. Before deciding this case we would reiterate that the rape of a minor 10/11 year old child is an extremely abhorrent and heinous crime for which the most severe penalty is applicable if proven against the accused. However, although we are cognizant of the fact that the law needs to be dynamic in criminal cases we cannot be so cavalier in our outrage as to caste aside some of the golden principles of criminal jurisprudence. Namely that it is for the prosecution to prove its case beyond a reasonable doubt against the accused based on cogent, reliable and trustworthy evidence on record (both oral and documentary) and that the accused is entitled to the benefit of the doubt and that it is the evidence and not our emotions or personal feelings or gravity or heinousness of the offense which must guide our decisions.

12. This view was recently emphasized by the Supreme Court in the case of **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274) which was a case concerning kidnap for ransom and murder of a pre teenager which held as under at P.290 Para 32.

"It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration

might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty."(bold added)

13. From the evidence we find that the prosecution has proved beyond a reasonable doubt by both ocular and medical evidence, that the victim was raped on 23-11-2016 between 1930 and 2030 hours in the vicinity of Shakir Street Muhammed Colony Karachi.

14. The sole issue before us is therefore whether the appellant raped the victim inside his shop as alleged in the charge or if he raped her at all.

15. There is a two day delay in lodging the FIR however we do not consider that this is fatal to the prosecution case based on the particular facts and circumstances of the case where the prosecution has explained the delay. Namely, the victim had to be taken to hospital immediately but she was returned home and then taken back the next day due to legal complications which the mother was unaware of. In such type of cases it is not unusual for a mother giving priority to the well being of her daughter over lodging an FIR especially as the mother is sick with worry about what has happened to her young child and is very often not immediately aware of the legal course to be adopted.

16. PW 1 Dilawara is the 10/11year old victim. In her evidence she states that she had gone to the shop of Gulzar Uncle in order to purchase some biscuits. Thus, it appears that she knew the appellant and thus there was no need for an identification parade. However she further states in her evidence in chief that the light went out and suddenly some one came from behind her and put their hand on her mouth and thereafter she did not know where she was taken and that when she next opened her eyes she found herself in hospital. **In cross examination she categorically states that she did not see the person who put her hand over her mouth and raped her which contradicts her S.164 Cr.PC statement which was given after an unexplained delay of 8 days after the incident whereby she specifically names the appellant as closing her mouth and taking her inside the shop where after he committed certain acts against her.** We do not find it believable that the most vital part of her evidence she does not give under oath in the witness box namely that it was the appellant who raped her. It seems to us inexplicable that she can remember each and

every other detail surrounding the incident but not who was the perpetrator of the act on her who she apparently knew. It begs the question as to whether she was put up to say that it was the appellant who had committed the offense against her especially as there is an unexplained 8 day delay in recording her S.164 Cr.PC statement. This is more so as there are **no other eye witnesses to the rape and she herself cannot be deemed an eye witness under these circumstances**. The only other evidence that the appellant raped the victim is hearsay evidence which is inadmissible in evidence.

17. PW 2 Sinwara who is not an eye witness and is the mother of the victim who lodged the FIR states in her evidence that she found her daughter bleeding **outside** the appellant's shop and she lodged the FIR on the basis that her daughter was found outside the appellant's shop. Interestingly, although it was only hearsay evidence the mother states in her evidence that when she asked her daughter who had done this to her she told her mother that she had not seen the appellant as someone came from behind. **More significantly** in her FIR lodged 2 days after the incident she states that Gulzar had raped her daughter which is in complete conflict with her evidence as mentioned above. She also states in her evidence that no one in the Mohalla had seen the appellant committing the offense. Again PW Noor-ul-Amin in his evidence states that PW 2 Sinwara told him a day after the incident that she did not know who had committed the rape but she **suspected** it was Gulzar as this is what the victim was saying whilst she was in an unstable condition in hospital. Thus, there appears to be some doubt as to who actually raped the victim.

18. **Significantly**, nothing was recovered from the place of incident and no blood was recovered from **inside** the shop which ought to have been present if the victim was raped in the shop as according to the evidence she was bleeding heavily which begs the question whether the victim was raped in the shop or outside of the shop which creates further doubt as to the identity of the rapist. According to the memo of Inspection of scene of the offense it was stated that the offense was committed beside the wall of Hussain Panwala shop situated beside Gulzar's shop and in front of a rice godown but nothing was recovered from there. There is

also no evidence of blood stains on the pavement which again seems surprising as the evidence is that the victim was heavily bleeding and it was not raining and as such any blood would not have been washed away. According to the memo of Inspection of scene of the offense it was a crowded area at 7.30 to 8.30 pm at night yet no one heard or saw anything. Thus, it appears that the victim could not have been raped in the shop as there was no blood inside the shop despite the victim bleeding heavily. It is not even known if the appellant was alone in the shop. If the rape took place outside the shop again it is suspicious that no blood stains were present and no body heard or saw anything in this busy area and once we accept the proposition that the rape might have occurred outside the appellant's shop it means that it could have been committed by any passer by a part from the appellant which again raises further doubt as to the identity of the rapist.

19. **In addition**, the DNA sample did not match and the victim's blood was not found on the appellant or his clothes which would have been expected if he had raped her and she was heavily bleeding especially as he was immediately taken into custody before the FIR was even lodged which fact again raises doubt that the appellant was the rapist. Even in cross examination PW 8 Raja Intisar Ahmed who was the IO concedes that, "**apart from the S.164 statement (of the victim) there is no evidence against the accused.**"

20. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take any and as many defenses as he likes to the allegations against him as the onus rests on the prosecution to prove its case beyond a reasonable doubt as was held in the case of **Muhammed Shah V State** (2010 SCMR 1009) and if there is any doubt in the prosecutions case the benefit must go to the accused. As was held in the case of **Tariq Pervez V The State** (1995 SCMR 1345) that 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. Such principle was recently reiterated by the Supreme Court in the case of **Abdul Jabbar V State** (2019 SCMR 129).

21. Thus, based on our reassessment of the evidence for the reasons mentioned above the prosecution has not been able to prove its case against the appellant for the offense for which he has been charged beyond a reasonable doubt and as such the appellant is acquitted of the charge by extending him the benefit of the doubt. The appeal is therefore allowed and the impugned judgment is set aside with the confirmation reference being answered in the negative with the result that the appellant shall be released unless wanted in any other custody case.

22. The appeal and confirmation reference stand disposed of in the above terms.

MAK/PS