

Stereo. HCJDA-38
JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Criminal Appeal No.41759 of 2022
(Rizwan Sami Khan versus The State etc.)

JUDGMENT

Date of Hearing	20.11.2024
Appellant by	Mr. Manzoor Hussain Dogar, Advocate
State by	Mr. Muhammad Waqas Anwar, Deputy Prosecutor General
Complainant by	Complainant in person along with Mst. Shumaila Shahzad, victim

Syed Shahbaz Ali Rizvi, J: - Through this appeal, Rizwan Sami Khan, appellant has assailed the judgment dated 17.06.2022 passed by the learned Addl. Sessions Judge/GBV Court, Sheikhpura in case FIR No.252 dated 10.07.2020 registered for offence under Sections 376, 292, 500 and 509 PPC at Police Station Saddar Farooqabad District Sheikhpura whereby, the appellant was convicted under Section 376 PPC and sentenced to rigorous imprisonment for ten years with fine of Rs.1,00,000/- and in default thereof, to further undergo simple imprisonment for six months. He was also convicted under Section 509 PPC and sentenced to one year. He was further convicted under Section 292 PPC and sentenced to rigorous imprisonment for three months. He was also directed to pay Rs.1,00,000/- as compensation as provided under Section 544-A of the Code of Criminal Procedure, 1898 read with Section 17 of the Anti-Rape (Investigation & Trial) Act, 2021 which was ordered to be recovered as arrears of land revenue. The appellant was however, extended benefit of Section 382-B of the Code of Criminal Procedure, 1898.

2. Brief facts of the case, as disclosed by Muhammad Shahzad, complainant (PW-2) in his application (Exh-PB) on

the basis of which formal crime report (Exh-PC) was registered, are that on 28.06.2020 at about 02.00 p.m, when the complainant was out of city in connection with some urgent work, the appellant while armed with weapon entered into his house, locked his children into a room on gun point and committed rape with his wife Mst. Shumaila Shahzad. He also took pictures and made video of his wife in naked condition through mobile. He also extended threats to upload the pictures and video if the complainant did not effect compromise in the earlier case.

3. After completion of investigation, report under Section 173 of the Code of Criminal Procedure, 1898 was submitted. The learned trial court, after observing pre-trial codal formalities, framed the charge against the appellant to which he pleaded not guilty and claimed trial.

4. The prosecution, in order to prove its case, produced as many as five witnesses during the trial. Tariq Mahmood 436/C (PW-1) is the witness of recovery of mobile phone along with memory card which was taken into possession vide recovery memo Exh-PA. Muhammad Shahzad (PW-2) is the complainant whereas, Mst. Shumaila Shahzad (PW-3) is the victim of the case. Saif Ullah, ASI (PW-4) is the duty officer who, on receipt of complaint (Exh-PB) registered FIR (Exh-PC) without any addition or omission whereas, Muhammad Javed, ASI (PW-5) is the Investigation Officer of the case. Learned Deputy District Public Prosecutor, on the instructions of complainant as well as his learned counsel, gave up Allah Ditta and Rashid PWs being unnecessary and after tendering in evidence Audio Visual Analysis Report (Exh-PH) close the prosecution case.

5. Thereafter, statement of the appellant under Section 342 of the Code of Criminal Procedure, 1898 was recorded wherein, he refuted the allegations levelled against him and professed his

innocence. He further deposed that he was innocent and had wrongly been involved in this case. He further deposed that he used to visit house of complainant and the victim being his close relative and that the complainant was his business partner and due to some business dispute between them, the complaint got registered a false FIR against him by introducing his wife as fake victim just to usurp his amount. He also disclosed that there was no evidence and that the investigation was biased as all the proceedings conducted by the police were false and fictitious. He did not opt to appear as his own witness as provided under Section 340(2) of the Code of the Criminal Procedure, 1898 in disproof of the allegation levelled against him however, he did produce his nine snaps (Exh-DA/1-8) with victim of this case in his defence.

6. Arguments heard. Record perused.

7. It has straightaway been observed that according to prosecution's case against Rizwan Sami Khan, appellant, he on gun point, forcibly raped Mst. Shumaila Shahzad (PW-3) wife of Muhammad Shahzad, complainant (PW-2) but during the physical custody of the appellant with the Investigation Agency, no gun could be recovered at his instance. The inmates of the house who were locked in a room on gun point, as per contents of the FIR, were not produced by the prosecution before the Investigation Officer (PW-5) and similarly, they did not join the proceedings of trial as witnesses. Meaning thereby, the natural witnesses were withheld by the prosecution. PW-2, PW-3 and the Investigation officer (PW-5) are also inconsistent qua the age of eldest son of the victim. Though during physical custody of appellant memory card was taken into possession by the Investigation Officer through recovery memo Exh-PA yet the fact also remains that during the evidence rendered by the Investigation Officer (PW-5) and Tariq Mahmood 436/C (PW-

1), the recovery witness, the memory card and the nude pictures were not produced in the court because of which the same could not be exhibited in evidence. Similarly, though report of Punjab Forensic Science Agency (Exh-PH) regarding the non editing of contents available in memory card is available in evidence yet prosecution failed to produce *Moharrer* of police station who per the Investigation Officer (PW-5) was given the sealed parcel containing memory card and naked photographs for safe custody in '*Malkhana*' on 14.07.2020 and the *Moharrer* returned the same to him on 23.07.2020 for its transmission to Punjab Forensic Science Agency. Thus prosecution remained fail to prove safe custody of the case property that even otherwise could not be produced in evidence. PW-1, the recovery witness also admits, during cross examination that the memory card and the photographs were not available on judicial or police file. Giving Number/description of memory card in his examination in chief, he mentioned "highfast MMA/2AL8-GB 07/2019" which reflects that the content pertains to the year 2019. The Investigation Officer (PW-5) also confirmed this fact in his statement while per prosecution case subject occurrence took place during the year 2020. It is also relevant to mention here that Mst. Shumaila Shahzad, victim (PW-3) never got herself medico legally examined to substantiate the charge against the appellant. Similarly, though the Investigation Officer (PW-5), in his statement, stated that he got the appellant examined for potency yet admittedly neither any medico legal examination certificate/report is available on record nor the prosecution produced any Medical Officer in this regard. Proof of potency of the appellant/accused in a case of sodomy etc. is a requirement to be met with. For this reason the legislature inserted Section 53-A in the Code of Criminal Procedure, 1898 through Criminal Law Amendment Act XLIV of 2016 that for reference and convenience is reproduced hereunder: -

“[53-A. Examination of person accused of rape, etc. by medical practitioner.—(1) When a person is arrested on a charge of committing an offence of rape, unnatural offence or sexual abuse or an attempt to commit rape, unnatural offence or sexual abuse under section 376, section 377 and section 377-B respectively and there are reasonable grounds for believing that an examination of the arrested person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting examination under sub-section (1) shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely: --

(a) name and address of the accused and of the person by whom he was brought;

(b) age of the accused;

(c) marks of injury, if any, on person of the accused;

(d) description of material taken from person of accused for DNA profiling; and

(e) other material particulars in reasonable detail.

(3) The report under sub-section (2) shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination under sub-section (1) shall also be noted in the report under sub-section (2). The registered medical practitioner shall, without delay, forward the report to the investigating officer who shall forward it to the Magistrate through public prosecutor referred to in section 173 as part of the report referred to in that section]”

This provision highlights the relevance and significance of potency test of the accused of sexual offences punishable under Sections 376, 377 and 377-B, PPC while in the instant case the prosecution has not bothered to procure and bring such material piece of evidence on record. Consequently, the appellant was then potent and able to perpetrate the offence as alleged is a fact

that could not be established by the prosecution during trial that creates serious doubt about the prosecution case.

All these circumstances lead this Court to hold that the prosecution remained fail to prove its case against the appellant beyond the shadow of a reasonable doubt. Even otherwise, both, complainant (PW-2) and the victim (PW-3) present in Court, one by one, stated that they do not have any objection if the appellant is acquitted of the charge hence, **Crl. Appeal No.41759 of 2022** filed by Rizwan Sami Khan, appellant is allowed, his convictions and sentences are set aside and he is acquitted of the charge levelled against him by giving him benefit of doubt. He is in custody, be released forthwith if not required to be detained in any other case.

Diary No.162940 of 2024
Office Objection

8. Office objections are sustained.

Signed on 03.12.2024 **(Muhammad Amjad Rafiq)** **(Syed Shahbaz Ali Rizvi)**
Judge **Judge**

APPROVED FOR REPORTING:

(Muhammad Amjad Rafiq) (Syed Shahbaz Ali Rizvi)
Judge Judge

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