

[Balochistan]

Before Muhammad Kamran Khan Mulakhail and Iqbal Ahmed Kasi, JJ

FARMAN ULLAH---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 191 of 2022, decided on 30th October, 2023.

(a) Penal Code (XLV of 1860)---

----Ss. 376 & 506(b)---Rape, criminal intimidation---Appreciation of evidence---Contradictions in the statements of witnesses---Accused was charged for committing rape with the sister of the complainant, capturing her pictures and threatening her of dire consequence---As per allegations of complainant, after lodgment of FIR, he along with victim rushed towards hospital, while the victim in negation of such statement of complainant, stated that they after two or three days went to hospital for medical examination---Circumstantial witness stated that they proceeded to hospital, after two or three days, while contrary to that Medical Officer/Police Surgeon deposed that on 05.04.2020 at about 09.00 pm, the victim was brought to Civil Hospital for medical examination---All the witnesses contradicted each other on the point of medical examination of the victim---Furthermore, as per prosecution story, the alleged occurrence had taken place on 05.04.2020, while the victim appeared in witness box and stated the alleged date of occurrence as 06.04.2020---Prosecution witnesses were also not in line with regard to the age of the victim, as Medical Officer deposed that a girl, aged about 21 years, was brought by Investigating Officer while all the prosecution witnesses deposed the age of victim as about 12/13 years---Both the medical opinions contradicted each other---Circumstances established that prosecution could not prove its case against the appellant beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

(b) Criminal trial---

----Two conclusions possible---If two conclusions are possible on the evidence adduced in the case, one indicating the guilt of accused and other to his innocence, the view favorable to the accused is to be adopted.

Iftikhar Hussain and others v. The State 2004 SCMR 1185 and Muhammad Zubair v. The State 2010 SCMR 182 rel.

(c) Penal Code (XLV of 1860)---

----Ss. 376 & 506(b)---Rape, criminal intimidation---Appreciation of evidence---Defective investigation---Accused was charged for committing rape with the sister of the complainant, capturing her pictures and threatening her of dire consequence---Main allegation against the appellant was that he committed rape with the sister of complainant and also captured her naked photographs, but the prosecution failed to recover the mobile phone through which the photographs were captured, despite the fact that the appellant was arrested on the same date, which otherwise was the best piece of evidence with the prosecution to strengthen its case---Thus, such negligence on the part of the prosecution made the case doubtful---Circumstances established that prosecution could not prove its case against the appellant beyond any shadow of doubt---Appeal against conviction was allowed, in circumstances.

(d) Criminal trial---

----Benefit of doubt---Principle---If there is a single circumstance creating doubt regarding the prosecution case, the same would be sufficient to give benefit of doubt to accused.

Muhammad Ikram v. The State 2009 SCMR 230 rel.

Taj-ud-Din Sherani for Appellant.

Muhammad Younus Mengal, Additional Prosecutor General along with Dr. Ayesha Faiz, Police Surgeon, Sandmen Provincial Hospital, Quetta for the State.

Date of hearing: 12th October, 2023.

JUDGMENT

IQBAL AHMED KASI, J.---The instant Criminal Appeal has been preferred by appellant Farmanullah son of Abdul Jalil, challenging the validity of the judgment dated 25.03.2022 ("the impugned judgment") passed by the Special Judge Anti-Rape/Sessions Judge, Quetta ("the trial Court"), whereby, the appellant was convicted under Section 376, P.P.C and sentenced him to suffer imprisonment for life with fine of Rs.100,000/- (rupees one hundred thousand), in default whereof to further undergo SI for a period of one year. He was also convicted under Section 506(b), P.P.C and sentenced to suffer imprisonment for 03 (three) years and to pay a fine of Rs.20,000/- (rupees twenty thousand), in default whereof, to further undergo SI for a period of one year with benefit of Section 382-B, Cr.P.C.

2. Brief facts arising out of the instant appeal are that complainant Bilal Ahmed, lodged FIR No.75 of 2020, with Police Station, Zarghoonabad, Quetta, alleging therein that his younger sister Bibi Hafsa (victim) was committed to rape by the accused in his house at about 06:20 p.m. The accused captured her pictures by show of knife and also threatened her for dire consequence. Consequently, the FIR was lodged.

3. After registration of FIR, the appellant/accused was arrested, investigated and sent to face trial before the trial Court.

4. It may not be out of place to mention here that initially appellant/accused was challaned to the Court of Additional Sessions Judge-VII, Quetta, where on 05.08.2020, a formal charge was framed and read over to the appellant, to which he pleaded not guilty and claimed trial. The prosecution got examined PW-1 Bilal Ahmed (complainant), PW-2 Bibi Hafsa (victim), PW-3 Rafiullah, PW-4 Shabbir Luqman, Judicial Magistrate-XIII, Quetta, PW-5 Dr. Ayesha Faiz (Police Surgeon), PW-6 Muhammad Hassan and PW-7 Zaib-un-Nisa. On establishment of Anti-Rape Courts, the case was transferred/transmitted to the trial Court.

5. The prosecution in order to substantiate charge against the appellant/accused produced as a whole twelve witnesses, which are as under:

PW-1 Bibil Ahmed, complainant of the case, who produced his written report as Ex.P/1-A.

PW-2 Bibi Hafsa, is the victim.

PW-3 Rafiullah.

PW-4 Shabbir Luqman, the Judicial Magistrate, who recorded the statement of victim under Section 164, Cr.P.C. and produced the same as Ex.P/4-A and Certificate as Ex.P/4-B.

PW-5 Dr. Ayesha Faiz, Police Surgeon, examined the victim and appellant/accused. She brought on record the MLCs as Ex.P/5-A and Ex.P/5-B, respectively.

PW-6 Muhammad Hassan, is the circumstantial witness.

PW-7 Zaib-un-Nisa, is also the circumstantial witness.

PW-8 Anjum Masih, ASI, is the recovery witness of knife. He produced recovery memo. of knife, parcel No.1, specimen of seal, parcel No.2, Pillow, specimen of seal, site inspection memo, envelop, seal parcel, mobile phone and specimen of seal as Ex.P/8-A to Ex.P/8-C and produced the said articles as Art.P/1 to Art.P/10.

PW-9 Muhammad Zohaib, Constable, is the recovery witness of agreements of

tenancy and details of tenants, containing 15 pages and produced the recovery memo. of the same as Ex.P/9-A and also produced said agreements and details of tenants as Art.P/11 to Art.P/25.

PW-10 Liaqat Ali, ASI, is recovery witness of plastic box, containing the Shalwar and Kameez of victim Bibi Hafsa, five tubes, plastic box, containing the Shalwar of accused, which were taken into possession through recovery memo. Ex.P/10-A and produced the said articles before the Court as Art.P/26 to Art.P/30.

PW-11 Samiullah, S.I. is the 1st Investigating Officer. He produced FIR as Ex.P/11-A, site map as Ex.P/11-B and incomplete challan as Ex.P/11-C.

PW-12 Muhammad Hameed, SI/SHO, is the 2nd Investigating Officer. He produced PFSA/DNA reports as Ex.P/12-A, Final Opinion Ex.P/12-B and also produced Cyber Wing (CCW) FIA digital Forensic Analysis Report as Art.P/31 to Art.P/42.

6. On closure of prosecution side, appellant/accused was examined under Section 342, Cr.P.C., wherein, he again denied the prosecution allegations levelled against him and professed his innocence. However, the appellant/accused neither got recorded his statement on oath under Section 340(2), Cr.P.C. nor produced any witness in his defence.

7. At the close of trial, the learned trial Court, after hearing arguments from both sides, convicted and sentenced the appellant/accused as mentioned in para supra.

8. Learned counsel for the appellant contended that the appellant is innocent and has wrongly been implicated in the instant case; that the trial Court badly failed to consider that there is clear contradictions in the statements of PWs; that the medical of the victim is not clear and it does not suggest the appellant with the commission of the alleged crime; that the impugned judgment is result of misreading and non-reading of evidence; that the trial Court passed the impugned judgment in haphazard manner and not considered the material facts and law, which warrant interference by this Court.

9. On the other hand learned APG while opposing the contention of the learned counsel for the appellant contended that the trial Court has passed a well-reasoned and speaking judgment, thus, there is no room available to interfere in it.

10. We have heard the learned counsel for the parties and have perused the available record. In order to establish the charge, prosecution in toto has produced twelve witnesses, minute perusal whereof, did not justify the impugned judgment of conviction, rather, certain major contradictions, dishonest improvements and legal defects are apparent on the face of the record. The most important aspect of the case is that as per allegations of PW-1 Bilal Ahmed, after lodgment of FIR, he along with victim Bibi Hafsa (PW-2), rushed towards Hospital, while the PW-2 in negation of such statement of the PW-1, in reply to question No.35, stated that they after two or three days went to Hospital for medical examination and PW-7 Zaib-un-Nisa, also in reply to question No.18, stated that they proceeded to Hospital, after two or three days, while, in contrary Dr. Aysha Faiz, Police Surgeon (PW-5) deposed that on 05.04.2020, at about 09:00 p.m. the victim Bibi Hafsa was brought to Civil Hospital for medical examination. All the witnesses contradicted each other on the point of medical examination of the victim Bibi Hafsa. Furthermore, as per prosecution story, the alleged occurrence had taken place on 05.04.2020, while the victim appeared in witness box and stated the alleged date of occurrence as 06.04.2020. Apart from above, the prosecution witnesses are also not in line with regard to the age of the victim, as PW-5 Dr. Aysha Faiz deposed that a girl, namely, Bibi Hafsa, age about 21 years was brought by one Samiullah, SI (PW-11) while the whole prosecution witnesses deposed the age of victim Bibi Hafsa as about 12/13 years.

11. It is also evident from the record that initially the victim was medically examined at Provincial Sandman Hospital, Quetta, where, the PW-5 examined the victim with the following observations.

"P/V EXAMINATION OPINION:-

On P/V examination No hymen found, Old defloration + fresh symptoms of sexual assault observed. Sexual assault has been performed upon her.

While, on contrary, the medical examination conducted by the Punjab Forensic Science Agency (Ex.P/12-A), states that:,

"Result and Conclusion

Human blood was identified on item #8.1, 8.2, 8.3 and 8.4.

No Seminal material was found on item #1, 6.1, 6.2 and 6.3; therefore, no further DNA analysis (Short Tandem Report profiling) was conducted on these items.

No semen stains were observed on item #7.

The DNA profile obtained from item #8.1, 8.2 and 8.4 matches the DNA profile of Farmanullah (item#5). The probability of finding an unrelated individual at random in the population as being a source of the DNA obtained from item #8.1, 8.2 and 8.4 is approximately one in 22.9 quintillion in Caucasians.

The DNA profile obtained from item #8.3 is a mixture of at least four individuals. Farmanullah (item #5) cannot be excluded as being a contributor to this DNA mixture profile. No conclusion can be made about Bibi Hafsa (item #2) as being contributor to this DNA mixture profile due to not fulfilling inclusion/exclusion criteria. Other contributor(s) to DNA obtained from this are unknown.

The possible contribution to the DNA obtained from item #8.3 by Farmanullah (item #5) is 16 quadrillion times more likely as compared to an unrelated Caucasian individual.

No analysis was conducted on item #3 and 4.

NIST Caucasians population database was used for the frequency calculation."

Subsequently, PW-5 Dr. Aysha Faiz, issued her final opinion (Ex.P/12-B), according to which, the PFSA report of appellant Farmanullah and victim Bibi Hafsa was found to be negative, for ready reference the final opinion of PW-5 is reproduced herein below:

"The Final Opinion of a Rape case of Bibi Hafsa and Farmanullah

The PFSA Report of Bibi Hafsa and Farmanullah is Negative.

Copy of report is enclosed."

12. Both the medical opinions contradict each other and it is settled law that if two ways are possible on the evidence adduced in the case, one indicating the guilt of accused and other to his innocence, the view favorable to the accused is to be adopted. Reliance in this respect is made to the case of "Iftikhar Hussain and others v. The State", 2004 SCMR 1185 and "Muhammad Zubair v. The State" 2010 SCMR 182.

13. The main allegation against the appellant was that he committed rape of PW-2 Bibi Hafsa and also captured her naked photographs, but the prosecution failed to recover the mobile phone through which the photographs were captured, despite the fact that the appellant was arrested on the same date, which otherwise was the best piece of evidence with the prosecution to strengthen its case, thus, such negligence on the part of the prosecution makes the case doubtful.

14. So far as the defence plea taken by the appellant in his statement under Section 342, Cr.P.C. is concerned, since the prosecution evidence is found to be doubtful, therefore, there is no need to discuss the same, which is self-explanatory in nature, for the reason that the prosecution should prove its case against the accused without any shadow of doubt.

15. We have considered all the pros and cons of the case and have come to a conclusion that prosecution could not prove its case against the appellant beyond any shadow of doubt. It is by now well established principle of law that it is the prosecution, which has to prove its case against the accused by standing on its own legs and it cannot take any benefit from the weaknesses of the case of defence. In the instant case, the prosecution failed to discharge its liability/responsibility of proving charge against the appellant. It is also well established that if there is a single circumstance which creates doubt regarding the prosecution case, same is

sufficient to give benefit of doubt to accused, whereas, the instant case is replete with number of circumstances which have created serious doubt about the prosecution story. Reliance is placed to the case titled as "Muhammad Ikram v. The State", 2009 SCMR 230.

For the forgoing reasons, the appeal in hand is allowed, conviction and sentence awarded to the appellant, vide judgment dated 25.03.2022, passed by the Special Judge, Anti-Rape/Sessions Judge, Quetta, are set aside and the appellant is acquitted of the charges levelled against him while extending him benefit of doubt. Farmanullah, appellant is in jail. He shall be released forthwith, if not required to be detained in any other case.

JK/21/Bal.

Appeal allowed.