

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Criminal Appeal No. 25 of 2015

Sajid Mahmood

Versus

Mst. Shabeena Abbasi and others

Criminal Appeal No. 94 of 2017

Mst. Shabeena Abbasi

Versus

Kausar Hussain Awan and others

Appellant(s) by : Syed Hassan Abbas, Advocate (In Crl. Appeal No. 25/2015).
Raja Shiraz Ahmed Janjua, Advocate (In Crl. Appeal No. 94/2017).

Respondents By : Raja Shiraz Ahmed Janjua, Advocate (In Crl. Appeal No. 25/2015 for respondents No.1&2).
Mr. Atif Mehmood, Advocate (In Crl. Appeal No. 94/2017 for respondents No.1&2).
Malik Awais Haider, State Counsel.

Date of Hearing : 27.11.2019.

AAMER FAROOQ, J. -This judgment shall decide Criminal Appeal No. 25 of 2015 as well as Criminal Appeal No. 94 of 2017, as common questions of law and facts are involved.

2. The appellant, namely Sajid Mehmood has filed Criminal Appeal No. 25/2015; he was tried in case FIR No. 77, dated 14.05.2007, under sections 365-B and 376 PPC, Police Station Secretariat, Islamabad (lodged by complainant Muhammad Zakarat, father of Mst. Shabeena Abbasi) as well as private criminal complaint filed by Mst. Shabeena Abbasi and was convicted vide judgment dated 16.01.2015, whereby life sentence as well fine of Rs.30,000/- was awarded for offence under section 365-B PPC; in case of non-payment of fine, he was to undergo Simple Imprisonment of two months. With respect to offence under section 376 PPC, the appellant was sentenced 10 years Rigorous Imprisonment

and fine of Rs.20,000/-. In the referred case, Kausar Hussain and Khizar Hussain were also tried being co-accused of Sajid Hussain but were acquitted vide said judgment and appeal against their acquittal was filed by Mst. Shabeena Abbasi (Criminal Appeal No. 94/2017).

3. Case of the prosecution is that Muhammad Zakarat filed a complaint that Sajid Hussain alongwith Kausar Hussain and Khizar Hussain has kidnapped his daughter and took her to Kharian, where they kept her for 10 days, raped her in the house kept by an old lady and her son. It was also alleged that his daughter namely Mst. Shabeena Abbasi somehow informed him whereupon the police raided the place and recovered her. The matter was investigated and report under section 173 Cr.P.C was filed. Upon recovery, Mst. Shabeena Abbasi made statement under section 164 Cr.P.C; later, being dissatisfied with her statement made request to change the same and subsequently filed a criminal revision in this Court wherein it was observed that if she was not satisfied, she may file a criminal complaint. Subsequently, Mst. Shabeena Abbasi filed a criminal complaint and recorded her cursory statement alongwith statement of Muhammad Zakarat. Challan case as well as private complaint case was tried by the learned Trial Court whereupon the prosecution adduced Mst. Shabeena Abbasi as PW-1 and Muhammad Zakarat as PW-2. Ehsan-ul-Haq constable, Abida Parveen HC, Zulfiqar Ahmed Inspector, Rasheed Ahmed ASI, Muhammad Rafique Constable, Ilyas Ahmed SI and Syed Hussain Bahadar Ali Magistrate appeared as CW-1 to CW-7. Raja Abdul Ghafoor appeared as DW-1. Statements of all accused were also recorded under section 342 Cr.P.C. As noted above, Sajid Hussain (Appellant in Crl. Appeal No. 25/201) was convicted, whereas Kausar Hussain and Khizar Hussain were acquitted.

4. Learned counsel for the appellant namely Sajid Hussain, *inter alia*, contended that the judgment of the learned Trial Court is based on conjectures and surmises as there is no evidence which implicates the appellant with commission of the crime. It was submitted that in the same set of evidence,

Kausar Hussain and Khizar Hussain have been acquitted. It was also contended that there are major discrepancies in the statements of Mst. Shabeena Abbasi inasmuch as the facts as alleged in the statement under section 164 Cr.P.C are not quite the same as in the criminal appeal filed by her and then cursory statement recorded and statement in the trial as PW-1. It was contended that no allegation was made against Sajid Hussain that he raped her, whereas in the private complaint allegation has been made to the effect. It was further submitted that in the FIR, it has been alleged that she was blindfolded and when her blinds were unfolded, she found herself in Kharian, whereas in the criminal complaint and in evidence during trial, she did not say that in so many words. Learned counsel further argued that statement of medical expert i.e. Dr. Maria Azad CW-8, is to the effect that no marks of violence exist except abrasion on one of the thighs which again is not conclusive. It was also submitted that though her statement supports that there was semen but report of the Chemical Examiner was not taken in evidence as exhibit, neither any expert appeared in person. It was also submitted that the old lady in whose house it has been alleged that Mst. Shabeena Abbasi stayed and her son also were not called in evidence. Learned counsel further pointed out that there is no DNA analysis report which implicates the appellant with the commission of offence.

5. Learned counsel for Mst. Shabeena Abbasi and complainant, *inter alia*, contended that evidence regarding guilt of Sajid Hussain is overwhelming and it clearly shows that the appellant abducted Mst. Shabeena Abbasi and raped her. It was further contended that at the relevant time, Mst. Shabeena Abbasi was unmarried and the fact that swabs taken contained semen clearly shows that rape has been committed with her and since she was recovered from kharian that also shows that she had been abducted.

6. Learned State Counsel supported arguments of learned counsel for Mst. Shabeena Abbasi.

7. Learned counsel arguing the case against acquittal in Criminal Appeal No. 94/2017, submitted that same set of evidence adduced by prosecution clearly establishes guilt of Kausar Hussain and Khizar Hussain and there was no justification or basis for their acquittal inasmuch as they were equally involved in the commission of offence and abducted Mst. Shabeena Abbasi and raped her.

8. Learned counsel for Kausar Hussain and Khizar Hussain (Respondents in Criminal Appeal No. 94/2017) stated that appeal filed against them is barred by limitation and delay cannot be condoned, hence same is liable to be dismissed.

9. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

10. The allegation against Sajid Hussain is that he abducted Mst. Shabeena Abbasi and raped her. Initially, the allegation was made on the complaint filed by her father namely Muhammad Zakarat which resulted in registration of FIR No. 77 dated 14.05.2007. Mst. Shabeena Abbasi also upon recovery recorded her statement under section 164 Cr.P.C, which was tendered in evidence as Ex.C-3. In the referred statement, allegations have been levelled against Kausar Hussain, Khizar Hussain and Sajid Hussain. It has been alleged in the statement that she was blindfolded and when her blinds were removed she was in kharian, where she was taken to the house like Haveli, in which there was living an elderly woman and her son. It was alleged that Khizar Hussain and Kausar Hussain raped her. In the statement, it has also been alleged that Sajid Hussain though lived with her in the Haveli but rape was committed by her cousins and threat was extended to her and Sajid Hussain by her cousins. Mst. Shabeena Abbasi was subjected to cross-examination wherein she categorically stated that she did not know whether Sajid Hussain was involved with her cousins in the commission of offence. This statement under section 164 Cr.P.C was the subject matter of Criminal Revision No. 137 of 2007, but later the

criminal revision was not pressed in order to file a private complaint. In the private complaint, it has been alleged that Sajid Hussain was also involved and abducted Mst. Shabeena Abbasi and raped her. It has also been stated that they kept Mst. Shabeena Abbasi in custody for about 10 days, whereas in the statement under section 164 Cr.P.C, it is mentioned that she was remained in illegal confinement for about 4 to 5 days. Likewise, in her cursory statement, she stated that she was blindfolded and when the blinds were removed, she found herself in Kharian. She resiled from statement under section 164 Cr.P.C. and stated in evidence that she had specifically stated in statement under Section 164 Cr.P.C. that Sajid Hussain raped her but said part of statement was not recorded correctly. In her statement, during trial, she again stated that she was blindfolded and when the blinds were removed, she found herself to be at an unknown place, which later transpired to be Kharian. She stated that she remained for about 4 days there during which period she was subjected to physical torture and rape. She also stated that during this time, she also got an opportunity while shifting from one room to another and called her father who recovered her. She also stated that direction was given for filing of criminal complaint by this Court, whereas the order was passed by this Court to the effect that revision petition was not pressed. Father of Mst. Shabeena Abbasi, Muhammad Zakarat appeared as PW-2 who also affirmed the statement made by PW-1 and also stated that she called him, whereupon police raided the place and recovered her. Dr. Maria Azad appeared as Gynecologist CW-8, who opined that there was abrasion on inner side of thigh but no physical marks of torture, however, swab taken from vagina was stained with semen. Report of Chemical Examiner was not tendered in original but as mark-C. The Magistrate namely Syed Hussain Bahadur appeared as CW-7 and stated that he recorded the statement on 24.05.2007. No specific question was asked by the counsel of Mst. Shabeena Abbasi regarding the authenticity of the statement and the thrust of cross-examination was that the statement was recorded in hasty manner and

cutting was made and some other person was present in the room. The gist of the above evidence is to the effect that though case of the prosecution is that Mst. Shabeena Abbasi was abducted and raped by Sajid Hussain, but there is no cogent evidence that Sajid Hussain actively participated in the abduction and raped her and in the statement under section 164 Cr.P.C. and in cross-examination, she clearly stated that she was unaware that Sajid Hussain is involved with other co-accused; no allegation of rape was also levelled against him in statement under Section 164 Cr.P.C. It is only in the private complaint that such allegation was levelled in her statement; during trial while appearing as PW-1 she categorically stated that she was subjected to physical torture, whereas the opinion of the doctor namely Maria Azad CW-8 does not reflect the same except abrasion on one of the thighs. The old lady and her son in whose house allegedly the accused persons took Mst. Shabeena Abbasi were not produced or even Call Detail Record or phone record from which Mst. Shabeena Abbasi informed her father about the place where she was kept, is also not on record. Even otherwise, there are discrepancies in the complaint filed by Mst. Shabeena Abbasi.

11. Admittedly, as per opinion of the doctor, hymen was torn and there was presence of semen in the vagina, however, report of Chemical Examiner was never tendered in original as exhibit but rather marked only. It is trite law that there is no concept of marking a document in evidence and practice is alien to the law of evidence, hence there is nothing on record to establish that semen was actually found in the swabs taken. Moreover, DNA analysis was also not made or referred. The above evidence does not go on to establish the guilt of Sajid Hussain beyond reasonable doubt, hence his conviction and award of sentence are not sustainable.

12. Mst. Shabeena Abbasi filed appeal against acquittal of Kausar Hussain and Khizar Hussain against the judgment dated 16.01.2015. Alongwith appeal, application (C.M. No.02 of 2017) was filed for condonation of delay.

Reasons provided in the application for condonation of delay are that the counsel handling the brief passed away and file was not being traced and subsequently new counsel was engaged. Limitation provided under section 417 (2-A) Cr.P.C. for filing of appeal against acquittal is 30-days. Likewise, under section 417 (3) Cr.P.C. an application for special leave to appeal would not be entertainable after expiry of 60 days from the date of the order. Under section 29 of the Limitation Act, 1908, where special law provides period of limitation, certain provisions of the Limitation Act are excluded including section 5 of the Act which provides for condonation of delay. Since the period of limitation is specifically provided in section 417(2-A) and section 417(3) *ibid*, the limitation cannot be condoned under the Limitation Act, 1908. Even otherwise, no cogent ground exists for condonation of delay inasmuch as death of the counsel and entrustment of the case to new counsel, even loss of the brief is no cogent ground for condonation of delay. The judgment was passed on 16.10.2015, whereas appeal has been filed on 14.04.2017, almost after one and a half year. Where delay is to be condoned, it is trite law that each and every day is to be explained, which has not been done so in the instant case, hence C.M. No.02 of 2017 filed in Criminal Appeal No. 94/2017 is **dismissed**.

13. For the above reasons, Criminal Appeal No. 25/2015 is **allowed** and judgment dated 16.01.2015 is **set-aside**; consequently, the appellant is acquitted of the charges levelled against him in the aforementioned case and is ordered to be released forthwith, if not required in any other case. Criminal Appeal No. 94/2017 is **dismissed** as barred by limitation.

(AAMER FAROOQ)
JUDGE

Announced in open Court this 14th day of February, 2020.

JUDGE

M.Shah/.