

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD, **JUDICIAL DEPARTMENT**

Criminal Appeal No.194/2015

Babar Rafique

versus

The State

Appellant by: Mr. Mehar Jabir Abbas, Advocate.
State by: Barrister Ayesha Siddique Khan, State Counsel.
Tahir Khan Niazi, S.I., P.S. Aabpara, Islamabad.
Date of Hearing: 31.01.2020.

MOHSIN AKHTAR KAYANI, J: Through the instant criminal appeal, the appellant has called in question judgment of the learned Additional Sessions Judge (West), Islamabad, dated 22.09.2015, whereby the appellant after being tried in case FIR No.201, dated 28.05.2012, under Sections 365-B, 376, 34 PPC, P.S. Aabpara, Islamabad has been convicted under Section 365-B PPC and sentenced to life imprisonment alongwith fine of Rs.10,000/-, whereas in default of payment of fine, the appellant has to further undergo six (06) months simple imprisonment. The appellant has also been convicted under Section 376 PPC and sentenced to undergo rigorous imprisonment for ten (10) years alongwith fine of Rs.10,000/-, in default whereof, the appellant has to further undergo six (06) months simple imprisonment. The appellant has been granted benefit of Section 382-B Cr.P.C.

2. Brief facts referred in the instant appeal are that on 26.05.2012, when Abdul Haq Masih (complainant) reached his house late from his duty at a hotel, his daughter namely Mst. Atiqah Bibi was not present there, upon which he tried to trace her in the locality, but to no avail and consequently, he made a telephonic call to Rescue 15 Police. On the next day, he filed complaint (Exh.PA) to S.H.O. P.S. Aabpara with the allegations of having apprehension that Babar Rafique/appellant in connivance with Rofan Masih, Mst. Shabana Masih, Mst. Parveen, Mst. Razia and Mst. Elizabeth abducted his daughter Mst. Atiqah Bibi for

the purpose of committing rape, whereupon case FIR No.201/2012 (Exh.PB) was got lodged against the said accused persons. The learned trial Court charge sheeted all the said accused persons on 07.01.2014, to which they pleaded not guilty and claimed trial. In order to bring guilt of the accused persons home, the prosecution produced evidence of ten (10) prosecution witnesses while the learned trial Court after recording of prosecution evidence, recorded the statement of accused persons under Section 342 Cr.P.C. and pursuant thereof, acquitted Rofan Masih, Mst. Shabana Masih, Mst. Parveen, Mst. Razia and Mst. Elizabeth of the charge by extending benefit of doubt, whereas Babar Rafique/appellant has been convicted under Sections 365-B and 376 PPC, and sentenced to life imprisonment and ten (10) years rigorous imprisonment, respectively, alongwith fine of Rs.10,000/- in each offence. In default whereof, the appellant has to further undergo six (06) months simple imprisonment, however benefit of Section 382-B Cr.P.C. has been extended to the appellant. Hence, the instant appeal.

3. Learned counsel for appellant contended that the impugned judgment passed by the learned Additional Sessions Judge (West), Islamabad is against the law and facts available on record, thus not tenable in the eyes of law; that from the bare reading of the FIR together with cross-examination of PWs, Section 365-B PPC does not attract to the appellant; that impugned judgment is entirely based on misreading and non-reading of evidence and is found on surmises and conjectures; that the prosecution story is contradictory on material points and thus liable to be discarded in toto, therefore, the impugned judgment may be set-aside and appellant may be acquitted of the charge.

4. Conversely, learned State Counsel while opposing the instant appeal supported the impugned judgment by contending that the learned trial Court has rightly appreciated the evidence produced by the prosecution witnesses, which is free from any illegality or contradiction, rather the prosecution

witnesses remained consistent in their testimony; that the appellant has rightly been linked with the commission of offence as sufficient material is available on record to believe that the appellant is guilty of offences under Sections 365-B and 376 PPC, under which he has rightly been convicted and sentenced by the learned trial Court vide impugned judgment, which is liable to be maintained.

5. Arguments heard, record perused.

6. Perusal of record reveals that the appellant Babar Rafique has been convicted in case FIR No.201, dated 28.05.2012, under Sections 365-B, 376, 34 PPC, P.S. Aabpara, Islamabad and sentenced to life imprisonment along with fine of Rs.10,000/-, whereas in default of payment of fine, the appellant has to further undergo six (06) months simple imprisonment. The appellant has also been convicted under Section 376 PPC and sentenced to undergo rigorous imprisonment for ten (10) years along with fine of Rs.10,000/-, in default whereof, the appellant shall further undergo six (06) months simple imprisonment. The appellant has been granted benefit of Section 382-B Cr.P.C. The complaint was filed by Abdul Haq Masih/PW-3 vide Exh.PA dated 27.05.2012 with the allegation that he is resident of G-7 Markaz Sitara Market, Islamabad and working in a Hotel in Blue Area, Islamabad. On 26.05.2012 at about 12:00 a.m night, when he came to home from his duty, he found out that his daughter aged about 16/17 years was missing, he immediately informed Rescue 15 police regarding missing of her daughter, however, he apprehended that his daughter has been abducted by the present appellant Babar Masih, Rofan Masih, Mst. Shabana Masih, Mst. Parveen Bibi and Mst. Razia Bibi, who have abducted his daughter. The complaint was converted into F.I.R No. 201/2012 as Exh.PB, however, Mst. Atiqa Bibi was recovered, who recorded her statement U/s 164 Cr.P.C as Exh.PD dated 04.06.2012 before the Magistrate Malik Farrukh Nadeem/PW-10 and has taken categorical stance that on 26.05.2012 at about 12:00 a.m at night, her neighborer Mst. Shabana Masih

accused came to her house and took her to her house and offered her tea, whereafter she became unconscious and when she came into senses, she found out that she was in Narowal, where Babar Rafique/appellant took her to a hotel and committed rape and when they came back from Narowal to Islamabad and reached near Zero Point, Fire Brigade, Islamabad, they were arrested by the Islamabad Police. During the said incident Babar Rafique did not marry with the abductee Mst. Atiq Bibi/PW-6. The Doctor Asma Ehsan, Medical Officer, Polyclinic Hospital, Islamabad /PW-7 has examined Mst. Atiq Bibi abductee on 31.05.2012 at about 04:10 p.m. and gave her opinion by performing two fingers test. During the course of cross-examination, she acknowledges that victim Mst. Atiq Bibi, who was 17 years of age, and stated that she could not find any mark of violence on the body of the victim. The OPD tickets have been exhibited as Exh.PC while the medical report has been referred as Exh.PE.

7. The complainant Abdul Haq Masih/PW-3 appeared in support of his version and reiterated his stance referred in Exh.PA, who was cross-examined at length and acknowledged that he had earlier informed the misdeeds of Babar Rafique/appellant to his family members, who (Babar Rafique) is residing with aunt Elizabeth. The victim Mst. Atiq Bibi appeared as PW-6 and stated that on 26.05.2012, at about 12:00 a.m. night, the accused Mst. Shabana Masih, who is neighborer came to her house and took her to her own house and offered tea, after taking tea, she became unconscious, however, after regaining of consciousness, she saw a woman who told her that she is in Narowal. She further stated that accused Babar Rafique took her to a hotel with the assurance that she will meet with her parents in a hotel, but after reaching the hotel for one day the accused committed rape. Thereafter accused Mst. Elizabeth, Aunt of Babar Rafique, who is residing of the same area, brought her and Babar Rafique to Islamabad and they boarded in the Taxi, when they reached near Zero Point, Fire Brigade, Islamabad, the police arrested them, whereafter she was examined by

the lady police who brought her to the Polyclinic Hospital. She also stated that she has recorded her statement under Section 164 Cr.P.C referred as Exh.PD. During the course of cross-examination, she acknowledges that she was primary pass and further acknowledges the different disputes with accused persons, which were pending in the different Courts. The appellant Babar Rafique has separately cross-examined the victim/PW-6, however, the victim/PW-6 acknowledged that Mst. Shabana Masih took her to her own house and she has failed to establish friendship with the accused Babar Rafique/appellant, she has also failed to prove the place, where she was found in Narowal and she acknowledged that she did not raise any hue and cry, when Babar Rafique committed rape with her, but she had explained that Babar Rafique/appellant threatened her, if she raised any hue and cry, Rofan will kill her parents. She also acknowledges that she has recorded her statement under Section 164 Cr.P.C., where she admitted that she has not informed any other persons while coming from Hotel to Bus Adda and during journey from Narowal to Islamabad nor she raised any hue and cry while accompanying the accused. The important fact, which she admits is that the accused Babar Rafique did not marry her and the said explanation was given on the question of the Magistrate.

8. The last important witness brought by the prosecution is PW-8 Hakim Khan Niazi, Inspector, who stated that he investigated the matter on registration of FIR and arrested Rofan Masih on 31.05.2012 and after receiving the spy information, he has arrested Babar Masih/appellant and recovered the abductee Mst. Atiq Bibi. The abductee has been sent to *Darulaman*, Rawalpindi and she has been again called before the City Magistrate, Islamabad on 04.06.2012, who recorded her statement. During the course of cross-examination nothing has been recovered in favour of the appellant.

9. The prosecution has also produced Munawar Ahmad, Inspector/PW-9, second Investigation Officer of the case, who has submitted the challan in the

Court after the conclusion of the investigation and denied that the accused were found innocent. The prosecution has also produced Malik Farrukh Nadeem, Magistrate, 1st Class, Islamabad/PW-10, who recorded the statement of Mst. Atiq Bibi vide statement Exh.PW-10/A, but he was not cross-examined on material points.

10. The appellant Babar Rafique has recorded his statement under Section 342 Cr.P.C, whereby he denied the entire incident for abduction and rape and has taken a specific stance that the alleged abductee has recorded her statement referred as Exh.PD after the delay of 4/5 days with the consultation and guidance of her parents as well as police and he was not given opportunity for cross-examination. The appellant has also explained the circumstances while answering the question No. 9 and referred the constrained relationship with the complainant's family.

11. The above referred position suggests that Mst. Atiq Bibi/PW-6 was abducted after administering the intoxicant tea on 26.05.2012 with the help of Mst. Shabana Masih accused, who have been acquitted from the charges, similarly all other accused persons have also been acquitted in the instant case, except the present appellant Babar Rafique, who was charged under Section 365 (b) and 376 PPC, therefore, it is necessary to go through the minimum requirements of Section 365(b), PPC, which is as under:-

"Kidnapping, abducting or inducing woman to compel for marriage etc. *Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced, or seduced to illicit intercourse, or knowing, it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."*

12. The above referred requirements are found to be fulfilled, when abduction and kidnapping has been committed in terms of Section 362 PPC, whereby any

person compelled by force or by any deceitful means by way of inducement to go from any place, the same is known as abduction, however, in this case Mst. Atiq Bibi/PW-6 was given a tea by Mst. Shabana Masih accused, whereafter she became unconscious and when she regained her senses, she was in Narowal, however, first part of the offence regarding abduction is apparent, but surprisingly the second important element of Section 365(b) PPC "*she will be compelled, to marry any person against her will is not proved nor is the case of prosecution*", however, the second part of the offence "*in order that she may be forced, or seduced to illicit intercourse, or knowing, it to be likely that she will be forced or seduced to illicit intercourse*" is visible from the statement of the victim Mst. Atiq Bibi recorded her statement under Section 164 Cr.P.C. referred as Exh.PD, therefore, it is necessary to corroborate the statement from the medical evidence referred as Exh.PE, which was prepared by the Doctor Asma Ehsan, Medical Officer/PW-7, but as such there is no sign of violence nor any fresh injuries have been referred, but this does not mean that Mst. Atiq Bibi is a consenting party to a sexual intercourse. At this stage, this Court truly believes that non-appearance of mark of violence in any sexual intercourse will not be considered, especially when PW-7 Doctor Asma Ehsan, Medical Officer has conducted two fingers test, however, the said stance of the Medical Officer has to be seen in light of Chemical Examiner Report, which states that, "*the high vaginal swab mentioned above is stained with semen, while the perineal swab is not stained with semen.*" As per semen identification test conducted on the high vaginal swab, the same has been declared "positive", while the perineal swab has the result of "negative".

13. The other offence with which the appellant has been charged is under Section 376 PPC, in which appellant was convicted and sentenced to undergo rigorous imprisonment for ten (10) years along with fine of Rs.10,000/- for commission of offence of rape with Mst. Atiq Bibi, which is justified from the medical evidence as well as from the statement of victim/abductee recorded under Section 164 Cr.P.C.

14. The entire evidence is silent qua the motive and the direct role was attributed to present appellant Babar Rafique, although the same was with the help of Mst. Shabana Masih accused, who was acquitted from the same charges, as such the mitigating circumstances have been surfaced on record, which entail some benefit of lesser punishment to be given to the appellant in these circumstances.

15. The prosecution has proved its case as the victim Mst. Atiq Bibi /PW-6 remained consistent in her testimony and no discrepancy has been noted, even the appellant's side has failed to cause any dent in the testimony of the victim.

16. The statement of the victim/PW-6 has to be seen in the light of requirement of Section 365(b) PPC, although the statement partly substantiates the kidnapping and abduction, but Mst. Atiq Bibi/PW-6 was raped by the appellant in a hotel, however she had not made any hue and cry, even from Narowal to Islamabad on public transport neither she raised any alarm during the entire journey, such conduct gives a different impression, which causes doubt on the charges of abduction, rather it seems that she has been compelled with different pretext by way of an inducement, especially when the element of intoxicant tea, which was administered to the victim has not been justified through any evidence, in this situation, the charges under Section 365(b) PPC seem to be doubtful, although the Magistrate/PW-10 has asked the specific question from the victim regarding her marriage with appellant, wherein she has taken a specific stance that Babar Rafique did not marry her, this aspect left nothing in favour of prosecution to justify the conviction under Section 365(b) PPC.

17. The second charge under Section 376 PPC for committing rape has to be seen in the light of testimony of Doctor Asma Ehsan /PW-7 with chemical examiner report, which corroborates with the testimony of the victim recorded under Section 164 Cr.P.C. as well as before the Court, therefore, no exception

could be taken to that effect. In view of what has been discussed, the prosecution has successfully proved the offence under Section 376 PPC without any shadow of doubt against the appellant, the sentence awarded to the appellant by the learned Trial Court under Section 376 PPC is upheld, while the offence under Section 365-B PPC has not been proved by the prosecution, benefit of which is extended to the appellant and he has been acquitted of the offence under Section 365-B PPC.

18. Resultantly, the instant criminal appeal stands **DISMISSED** in above terms.

(MOHSIN AKHTAR KĀYAN)
JUDGE

Announced in open Court on 11.02.2020 .

JUDGE

RAMZAN