HCJD/C-21

JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Criminal Appeal No.333-J of 2014

(Zafar Iqbal alias Zafri versus The State, etc.)

J U D G M E N T

Date of Hearing	***13.09.2021***
Appellant (Zafar Iqbal alias Zafri) represented by:	*Mr. Muhammad Abbas Shah, Advocate.*
The State represented by	*Mr. Muhammad Akram Tahir, Deputy Prosecutor General.*

SARDAR AHMED NAEEM, J.*:- Zafar Iqbal alias Zafri (appellant) was tried by the learned Additional Sessions Judge, Arifwala in case F.I.R. No.523/2011 dated 08.09.2011, under sections 376/382 P.P.C., registered at Police Station Qabula Sharif, District Pakpattan. At the conclusion of the trial, the learned trial Court vide judgment dated 31.05.2014, the appellant was convicted and sentenced as under:-*

i.	***Under Section 376 P.P.C:***	***Fifteen years R.I. with a direction to pay fine of Rs.10,000/-, in case of default to further undergo simple imprisonment for three months.***
ii.	***Under Section 382 P.P.C:***	***Three years R.I. with a direction to pay fine of Rs.5,000/-, in case of default to further undergo simple imprisonment for one month.***

Both the sentences of imprisonment were ordered to run concurrently with the benefit of Section 382-B Cr.P.C.

2. The prosecution story, in brief, was that on 06.09.2011 at about 08:00 p.m., Zafar Iqbal alias Zafri appellant committed rape upon Mst. Sahiba Bibi, complainant and also took away Rs.2,500/- from the box lying in the room of the complainant.

3. After usual investigation challan was submitted against the appellant before the Court. The learned trial court after observing all the pre-trial codal formalities, charge sheeted the appellant to which he pleaded not guilty and claimed to be tried.

4. The prosecution, in order to prove its case, produced as many as eight witnesses during the trial.

Mst. Sahiba Bibi (PW.1) was complainant of the case. She corroborated the prosecution story as mentioned in the FIR. Shah Din Alvi (P.W.2) deposed that on 06.07.2011, at about 02.00, he heard noise and was attracted to the place of occurrence. Some people were also present there and saw the decoits while running towards the fields. He inquired from the people who told that unknown persons committed dacoity and the appellant also committed rape upon Sahiba Bibi. The complainant told that decoits also looted Rs.2,500/-. Arshad Ali (P.W.3) corroborated the statement of P.W.2. Safdar Mehndi H.C. (P.W.4) chalked out the FIR Ex.PA/1 on the basis of written complaint Ex.PA. Ghulam Mustafa Constable (P.W.5) was witness of recovery of Pistol and Rs.1,000/- which were taken into possession vide recovery Memo Ex.PB. Shabbir Hussain, father of the complainant (P.W.6) corroborated the story of the FIR. Abdul Hameed ASI (P.W.7) investigated the case and prepared challan against the appellant. Doctor Humera medical examined the victim Mst. Sahiba Bibi but her attendance could not be procured, therefore, Doctor Muhammad Younas Rana examined as P.W.8 and deposed that he remained posted with her in D.H.Q. Hospital Pakpattan Sharif. He was examined as secondary evidence as he recognized her handwriting. He described that she conducted medical examination of Mst. Sahiba Bibi on 09.09.2011 at 11.15 a.m. and found following injuries:-

> ***"Vulva vagina was healthy, hymen old torn and healed margins admits two fingers easily. Uterus and cervix were normal. Six vaginal swabs were taken, three were sent to chemical examiner and three for DNA."***

5. Learned Assistant District Public Prosecutor gave up Doctor Saghir Ahmad Ch. and Zahid Ali Constable PWs as being unnecessary.

6. Statement of the appellant under Section 342 of the Code of Criminal Procedure, 1898, was recorded. He refuted the allegations levelled against him and professed his innocence. Responding to question No.7 "Why this case against you and why PWs deposed against you?, appellant replied as under:

> ***"It is a false case which was lodged against me on the asking of Ashraf Thaikedar with whom I had exchanged hot words. The victim, Sahiba Bibi, has illicit relations with Ashraf Thaikadar and on his instigation, the complainant got lodged this false case against me. All the PWs have deposed falsely against me on the asking of Ashraf Thaikidar. They are inter se related with each other."***

7. The appellant neither appeared as his own witness on oath as provided under Section 340(2) of The Code of Criminal Procedure, 1898 in disproof of the allegations levelled against him nor produced any evidence in defence.

8. The learned trial Court vide its judgment dated 31.05.2014, held the appellant guilty, convicted and sentenced him as mentioned and detailed above.

9. Learned counsel for the appellant, inter-alia, contends that the prosecution miserably failed to prove its case against the appellant; that no independent witness is cited by the prosecution; that the ocular account is full of contradictions and discrepancies; that the medical evidence lends no support to the prosecution story; that the case of prosecution is improbable and does not fit in the probabilities; that the benefit of doubt is the vested right of the accused and not to be extended by way of concession but grace as of right, thus, the appellant is entitled to acquittal.

10. Learned Deputy Prosecutor General opposed this appeal with vehemence and submitted that there was no reason for the prosecution witnesses for his false implication; that the

eye witnesses have rendered straightforward account of the occurrence; that the contradictions do creep up after the passage of time and discrepancies hinted at by the learned counsel for the appellant were not fatal for the prosecution. Concluding the arguments, learned District Public Prosecutor submitted that the prosecution has proved its case beyond reasonable shadow of doubt and prayed for the dismissal of appeal

11. Heard. Available record perused.

12. The occurrence in this case had taken place on 06/7.9.2011 at 8:00 p.m under the 'Sheesham' tree in the area of Chak No.27/KB Arif Wala, Pakpattan. The victim appeared as PW.1 and stated that two persons came to their house. They were armed with pistols. The co-accused of the appellant, namely, Shahid confined the sister/father of the victim in the room and that then the appellant brought the victim to a nearby field at a distance of about four kanals from her house. It was month of September but the prosecution was uncertain if the day of occurrence was 6th or 7th of September as midnight does not begin at 8:00 p.m. The conduct of the victim appears to be unnatural. She neither raised any hue and cry nor attempted to resist the appellant in any manner while she was being taken/brought to a nearby field. She claimed to have been raped upon by the appellant against her will but neither she produced her torn clothes during the investigation nor any mark of violence was seen/observed by the medical officer at the time of her medical examination, conducted after three days of the occurrence. The victim claimed that bulb was on at the time of occurrence but no such bulb is shown in, at or around the 'Sheesham' tree, whereas, Shabbir Hussain (PW.6) claimed otherwise. He responded to a question that no bulb was on at the time of occurrence, thus, question of witnessing the occurrence either by the father of the victim or any other seems to be improbable, in particular, when no such light find mentioned

in the site plan prepared by the Investigating Officer. It is also in the evidence that co-accused of the appellant introduced himself as Shahid, tied the hands of the sister and father of the victim and then confined them in the room near tube well but the said sister was not examined either during the investigation or at trial, thus, the best evidence was withheld by the prosecution and necessary inference may be raised in view of the Article 129(g) of Qanun-i-Shahadat that had she been produced at trial, she would not have supported the prosecution version.

13. The prosecution has not explained as to why the victim was medically examined after three days. As mentioned above, her last worn clothes were not produced before the medical officer or secured during the investigation. The victim was medically examined by Dr. Humera Huma WMO and her medico legal report was proved through secondary evidence. The medico legal report Exh.PC suggested that the vaginal swabs were dispatched to the chemical examiner and the opinion of the medical officer was subject to the result of the said swabs but neither the report of the chemical examiner was available on record nor taken during the investigation and for that reason, the final opinion of the medical officer was also not available on the record.

14. At this juncture, it may be mentioned that the appellant was medically examined by Dr. Sagir Ahmed Ch regarding his potency. A novel procedure has been adopted by the learned trial Court by recording a statement of the accused without oath to the following effect:

"I am potent"

The statement of the appellant was recorded on 07.9.2013 but this fact also find no mention in the interim order of the said date.

The above statement of the accused cannot be equated with a statement which is recorded under section 342, Cr.P.C. or 340(2), Cr.P.C. As the statement of the accused under

section 342, Cr.P.C. is recorded in question and answer form and a certificate is to be furnished by the learned trial Court at the foot of the statement in terms of section 364 Cr.P.C, whereas, the statement under section 340(2), Cr.P.C. is always on oath and the accused can be cross-examined by the other side. There is no cavil with the proposition that the statement of the accused can be recorded under section 342, Cr.P.C more than once in appropriate cases, if needed, but of course, after observing formalities as prescribed by law. The statement is also read over to the accused and then he admits the contents of the statement and then put his thumb impression or signed the same as token of its correctness. As highlighted above, a procedure which is not prescribed by law was adopted by the learned trial Court by recording statement of the appellant referred to above and then, neither the medical officer was summoned nor the said medico legal report was put to the accused in his statement recorded under section 342, Cr.P.C.

15. The superior Courts has been repeatedly impressing upon the trial Courts that questioning of accused under section 342, Cr.P.C. should not be treated as mere formality as it is an important facet for criminal trial and in this case, it has been followed only in breach. If a particular incriminating material is not put to the accused calling upon him either to admit or to deny or to explain the same, it can never be used against the accused. In this case, the said legal duty has not been properly discharged by the learned trial Court. The learned trial Court has not put separate questions in respect of this incriminating evidence, rather, no question find mentioned in the above statement of the accused dated 07.9.2013 except his reply which is neither thumb marked nor signed nor any certificate was recorded by the learned trial Court under section 364 Cr.P.C.

It is settled principle of law since long that if there is any incriminating circumstance, flowing from any

event/circumstances or documentary evidence, question in that respect has to be put to the accused seeking his reply/explanation in his statement under section 342, Cr.P.C. if it is not done so then such circumstance has to be excluded and in no case any order regarding prejudice or conviction, can be passed against the accused persons on the basis of such circumstance. If question of such circumstances has been ignored by the learned trial Court then it is illegal and amounts to an abuse of the process of the Court. In the present case, the trial Court has committed the abuse of the process of Court by not questioning the appellant in respect of the incriminating circumstance i.e. medico-legal report regarding his potency, although the document was available on the record. It is also settled by now that when incriminating circumstances were not put to the accused in examination under section 342, Cr.P.C. the evidence giving rise to the circumstance cannot be utilized by the Court.

16. The father of the victim also claimed to be the eye witness of the occurrence. The occurrence took place at 8:00 p.m and prosecution could not prove the fact if it was 6th or 7th of September or if it was midnight between 6th or 7th September. The site plan available on the record did not reflect any outlet, window or ventilator in the room then occupied by family of the victim and in such circumstances, there was no possibility of witnessing the occurrence at 8:00 p.m from a distance of four kanals. The record is totally silent regarding source of light at the place of occurrence or the room wherein the father and sister of the victim were confined and they claimed to have witnessed the occurrence. As the victim claimed to have been raped upon by the appellant in an open field but neither any family member nor any passerby or independent person was cited by the prosecution in support of the complainant's version. The record further suggested that the parties were related to each other and at some stage there was chance of betrothal/engagement between the victim and

the appellant. Allegedly, the appellant as well as his co-accused were armed with weapon but how that weapon was used during the commission of crime is another question which is open to objection. No such explanation is forthcoming on record, thus, recovery effected from the appellant lends no corroboration to the prosecution version.

17. It may be observed that the story of the prosecution does not fit in the probabilities. There is no cavil to the proposition that duty of the Court is to sift chaff from the grain. A similar question came up for consideration before apex Court in "Muhammad Saleem V. The State" ***(2010 SCMR 374)*** *at page 377, the apex Court was pleased to observe as under:*

> ***".....General rule is that statement of a witness must be in-consonance with the probabilities fitting in the circumstances of the case and also inspires confidence in the mind of a reasonable and prudent mind. If these elements are present, then the statement of a worst enemy of the accused, can be accepted and relied upon without corroboration but if these elements are missing then the statement of a pious man can be rejected without second thought. Reference is invited to Haroon alias Harooni V. The State and another 1995 SCMR 1627. The acid test of veracity of a witness is the inherent merit of his own statement. It is not necessary that an impartial and independent witness, who is neither related to the complainant nor inimical towards the accused would stamp his testimony necessarily to be true. The statement itself has to be scrutinized thoroughly and it is to be seen as to whether in the circumstances of the case the statement is reasonable, probable or plausible and could be relied upon. The principle, that a disinterested witness is always to be relied upon even his statement is unreasonable, improbable and not plausible or not fitting in the circumstances of the case then it would lead to a very dangerous consequences. Reference is invited to Muhammad Rafique V. State 1977 SCMR 454 and Haroon V. The State 1995 SCMR 1627"***

18. It is by now settled that benefit of doubt, if found in the prosecution's case, the accused shall be held entitled to the benefit, thereof. It is also settled principle of criminal administration of justice that if there is element of doubt, as to the guilt of accused, it must be resolved in his favour. The golden rule of benefit is initially a rule of prudence which cannot be ignored, while dispensing justice in accordance with law. It is based on maxim that it is better to acquit ten

guilty persons rather than to convict one innocent person. For acquittal of accused in an offence, how-so heinous it may be, only a single doubt in the prosecution evidence is sufficient. Reliance in this respect can be made on "Mst. Nazia Anwar versus The State and others" ***(2018 SCMR 911)*** *and the relevant observations of their lordships appearing in page-922 at para-12 read as under:*

> ***".....The cardinal principle in the criminal justice system in a situation like this, is to extend benefit of doubt to an accused to acquit him/her of capital charge, instead of reducing the sentence. Once doubts about the genuineness of the story lurk into the minds of the judges, the only permissible course is to acquit the accused and not go for the alternative sentence of life imprisonment. In this regard reference may be made to the following case laws:***
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> ***" (i) Ayub Masih v. The State (PLD 2002 SC 1048)***
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> ***(ii) Muhammad Zaman v. The State and others***
>
> ***(2014 SCMR 749)***
>
> ***(iii) Hashim Qasim v. The State (2017 SCMR 986)***
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> ***It is also well entrenched rule and principle of law that on the basis of probabilities, accused person may be extended benefit of doubt acquitting him/her of a capital charge however, such probabilities, high howsoever could not be made basis for conviction of an accused person and that too on a capital charge"***

In a recent case, titled Najaf Ali Shah Versus The State ***(2021 SCMR 736)****, the apex Court observed as under:*

> ***"9. Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the Court to do complete justice. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote, "Better that then guilty persons escape, than that one innocent suffer.". Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer. All the contradictions noted by the learned High Court are sufficient to cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary***

> ***that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that " if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The Stat (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129), when this Court observed that once a single loophole is observed in a case presented by the prosecution, such in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."***

19. After considering the material available on record, I am of the view that the prosecution had failed to prove its case beyond reasonable shadow of doubt against the appellant.

20. For the reasons mentioned above, this Criminal Appeal No.333-J of 2014 is allowed. The impugned judgment dated 31.5.2014 is set aside. He be released forthwith if not required in any other criminal case.

(SARDAR AHMED NAEEM)
JUDGE

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APPROVED FOR REPORTING

JUDGE