

**HCJDA.38**  
**JUDGMENT SHEET**  
**IN THE LAHORE HIGH COURT, LAHORE**  
**JUDICIAL DEPARTMENT**

**Criminal Appeal No.615-J of 2014**

Ghaffar alias Kali Vs. The State etc.

**JUDGMENT**

Date of hearing:	<b>09.06.2021.</b>
Appellant by:	Mr. Faheem Altaf Raja Advocate/defence counsel.
State by:	Ch. Muhammad Ishaq, Additional Prosecutor General.

**Malik Shahzad Ahmad Khan, J:-** This judgment shall dispose of **Criminal Appeal No.615-J of 2014**, filed by Ghaffar alias Kali (appellant) against his conviction and sentence recorded by the learned Additional Sessions Judge, Chunian District Kasur vide impugned judgment dated 21.10.2014.

2. Ghaffar alias Kali (appellant) along with his co-accused, namely, Jahangir, Iftikhar and Zulfiqar was tried in case FIR No.171 dated 26.04.2011 offences under sections 496-A and 376 PPC registered at Police Station Changa Manga District Kasur. After conclusion of the trial, the learned trial Court *vide* its judgment dated 21.10.2014, has convicted and sentenced the appellant as under: -

**Under section 376 PPC** to rigorous imprisonment for 25 years and fine of Rs.100,000/-. In case of non-payment of fine, to undergo further six months simple imprisonment

However, vide the same impugned judgment, Iftikhar alias Papu Shah, Zulfiqar and Jahangir (co-accused), were acquitted by the learned trial Court while extending them the benefit of doubt.

3. Brief facts of the case as narrated in complaint (Ex.PB), on the basis of which the formal FIR (Ex.PC), was chalked out are that Amanat Ali complainant (PW-4), was resident of Old Rehmanpura, Changa Manga. About 1 ½ months ago, the complainant got contracted Nikah of his sister with one Muhammad Ramzan but the rukhsati had not taken place. Accused persons, namely, Jahangir etc. (named in the FIR) were annoyed from the said Nikah. On 25.04.2011, at about 1.00 P.M., the complainant was not present in his house, however, sisters of the complainant namely Mst. Zubaida (alleged victim) and Mst. Abida Bibi (PW-9), were present there. In the meanwhile Jahangir son of Muhammad Ilyas (co-accused since P.O), while armed with pistol, Arif (co-accused since P.O) while armed with pistol, Muhammad Jahangir son of Amir (co-accused since acquitted) while armed with gun, Sughra Bibi (co-accused since P.O) and Allah Rakhi (co-accused since P.O) along with two unknown accused while armed with firearms came to the house of the complainant and entered into the said house after knocking the door. Mst. Abida Bibi (PW-9) tried to make noise but the accused persons threatened her and wrapped '*dupatta*' around her neck. The accused persons also tortured Mst. Zubaida Bibi (alleged victim/PW-5). Both the sisters of the complainant were taken to a room of the complainant's house where they searched an iron box and robbed 03-Tolas gold ornaments and cash amount of Rs.50,000/- from the said box. The accused persons also snatched 02-Tolas gold ornaments from Mst. Zubaida Bibi (alleged victim). The accused persons thereafter abducted Mst. Zubaida Bibi at gun point. Muhammad Ramzan (PW since given-up) and Malik Muhammad Anwar (PW-10), attracted to the spot and saw the accused persons while abducting Mst. Zubaida Bibi (alleged victim) in a car.

Initially the FIR was lodged under section 496-A PPC but subsequently on 27.04.2011, on the basis of statement of Mst. Zubaida Bibi (alleged victim) recorded under section 164 Cr.P.C, beside addition of further accused persons in this case, namely, Ghaffar alias Kali (appellant), Iftikhar (accused since acquitted), Zulfiqar (accused

since acquitted) and Mansha (accused since P.O), offence under section 376 PPC, was also added in this case.

4. The appellant was arrested in this case by the police and after completion of investigation the challan was prepared and submitted before the learned trial court. The learned trial Court, after observing legal formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant and his co-accused on 03.07.2012, to which they pleaded not guilty and claimed trial. In order to prove its case the prosecution produced eleven witnesses. Prosecution also produced documentary evidence in the shape of Ex.PA to Ex.PO. The statements of the appellant and his co-accused under section 342 Cr.P.C, were recorded, wherein they refuted the allegations levelled against them and professed their innocence.

5. The learned trial Court *vide* its judgment dated 21.10.2014, found the appellant guilty, convicted and sentenced him as mentioned and detailed above, hence the instant appeal.

6. As per police report, the complainant of the case, namely, Amanat Ali had died and notice of this case has duly been served on his real brother, namely, Liaqat Ali who had been pursuing the instant case but despite repeated calls no one appeared on behalf of the complainant before this Court today. Even otherwise, it is a State case and the learned Additional Prosecutor General for the State is ready to argue the same, therefore, I proceed to decide the instant appeal after hearing arguments of learned defence counsel for the appellant, learned Additional Prosecutor General for the State and perusal of the record.

7. It is contended by learned defence counsel for the appellant that offence under section 376 PPC was punishable with death and the same was triable by the Sessions Court but neither the appellant was offered by the learned trial Court to cross-examine the prosecution witnesses nor defence counsel at the State expenses was provided to the appellant as required under Rule 1 Part C Volume 3 Chapter 24 of

the High Court Rules and Orders; that the right of cross-examination on the prosecution witnesses was a very valuable right of the accused/appellant in order to test the credibility of the said witnesses but fair opportunity to cross-examine the prosecution witnesses has not been provided to the appellant/accused; that the appellant was not named in the FIR and accused person, namely, Jahangir son of Muhammad Ameer nominated in the FIR, as well as, Iftikhar and Zufligar, accused persons implicated in this case through the statement of the alleged victim, namely, Mst. Zubaida Bibi (PW.5) recorded under section 164 Cr.P.C., have been acquitted by the learned trial Court vide impugned judgment on the basis of same prosecution evidence which has rightly been disbelieved by the learned trial Court but the appellant has been convicted and sentenced mainly due to the reason that he did not cross-examine the prosecution witnesses; that the prosecution evidence was highly doubtful and untrustworthy but the same has wrongly been relied upon by the learned trial Court; that neither any car or motorcycle nor any gold ornament or cash, mobile set or weapon has been recovered from the possession of the appellant; that no DNA test report has been produced in the prosecution evidence to connect the appellant with the alleged offence; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of doubt, therefore, this appeal may be accepted and the appellant may be acquitted while setting aside the impugned judgment. In support of his contentions, learned defence counsel for the appellant has placed reliance on the judgments reported as “Ghulam Rasool Shah and another Vs. The State” (2011 SCMR 735), “Syed Saeed Muhammad Shah and another Vs. The State” (1993 SCMR 550) and “Abdul Ghafoor Vs. The State” (2011 SCMR 23).

8. On the other hand, the learned Additional Prosecutor General has supported the impugned judgment on the ground that the prosecution has proved its case against the appellant beyond the shadow of any doubt; that the evidence of prosecution witnesses is trustworthy and reliable; that the prosecution case against the appellant is supported by the medical evidence according to which the hymen of

the victim, namely, Mst. Zubaida Bibi (PW.5) was found to be ruptured; that the appellant could not establish any mala fide on the part of the prosecution witnesses for his false involvement in the instant case; that there is no substance in the this appeal, therefore, the same may be dismissed.

9. Arguments heard and record perused.

10. The detail of the prosecution case has already been given in paragraph No.3 of this judgment, therefore, there is no need to repeat the same.

11. I have noted that FIR was initially lodged under section 496-A PPC against Jahangir son of Ilyas, Arif, Jahangir son of Muhammad Ameer, Mst. Sughran Bibi and Mst. Allah Rakhi, co-accused alongwith two unknown accused persons, with the allegation that on 25.04.2011 at about 1:00 P.M. (Noon), the above mentioned accused persons forcibly abducted sister of the complainant, namely, Mst. Zubaida Bibi (PW.5) at gun point while boarding her in a vehicle. It was further alleged that the accused persons also robbed total five tolas gold ornament and cash amount of Rs.50,000/- from the house of the complainant at the time of occurrence. Consequently, FIR (Ex.PC) was lodged against the above mentioned Jahangir accused persons etc. Ghaffar alias Kali (appellant) was not named in the FIR. He alongwith three additional accused was implicated in this case on the basis of statement of the alleged abductee, namely, Mst. Zubaida Bibi (PW.5) recorded under section 164 Cr.P.C. wherein she stated that after her abduction by the above-referred Jahangir accused etc. she was taken to a house situated in village Lakhan-ke near Sarai Chimba, where Ghaffar alias Kali (appellant), Zulfiqar Dogar (co-accused since acquitted), Iftikhar alias Pappu Shah (co-accused since acquitted) and Mansha Dogar (co-accused since P.O.) committed rape with her, turn by turn. It is noteworthy that three other accused tried in this case, namely, Jahangir son of Muhammad Ameer, Zulfiqar Dogar and Iftikhar alias Pappu Shah have been acquitted by the learned trial Court. The remaining accused persons mentioned in the FIR (except

Jahangir son of Muhammad Ameer) were not tried in this case because they were declared proclaimed offenders in this case. It is true that neither any motorcycle nor any car or weapon of offence has been recovered from the possession of the appellant. Likewise, it is also true that neither any gold ornament nor any cash amount or mobile phone set through which the complainant party was allegedly threatened by the co-accused has been recovered from the possession of the appellant. The argument of learned counsel for the appellant is also correct that no DNA test report has been brought on the record by the prosecution though the Medical Officer in the MLR of Mst. Zubaida Bibi (PW.5) categorically mentioned that vaginal swabs taken in this case had been sent to the office of Punjab Forensic Science Agency, Lahore for DNA test. In spite of all the above mentioned facts, the appellant has been convicted and sentenced by the learned trial Court because statement of Mst. Zubaida Bibi (alleged victim/PW.5) was not cross-examined by the appellant or his learned counsel and right of the appellant to cross-examine the said Mst. Zubaida Bibi (PW.5) and other prosecution witnesses was closed. The perusal of the record shows that on 27.09.2012, Ch. Muhammad Sajid Wains Advocate submitted his Power of Attorney on behalf of Ghaffar alias Kali (appellant) and Iftikhar alias Pappu Shah (co-accused since acquitted). Perusal of order dated 07.03.2013 of the learned trial Court further shows that said learned counsel made a statement before the Court on behalf of Iftikhar alias Pappu Shah and Zulfiqar Ali, co-accused that he does not want to cross-examine the prosecution witnesses, namely, Amanat Ali (PW.4) and Mst. Zubaida Bibi (PW.5). It is further mentioned in the above-referred order of the learned trial Court that learned counsel for Ghaffar alias Kali (appellant) and Jahangir (co-accused since acquitted) did not appear before the Court on the said date due to the strike of the Lawyers, which means that there was some misunderstanding about the appointment of the counsel in this case on behalf of the appellant because Power of Attorney of above-referred Ch. Muhammad Sajid Wains Advocate shows that he was also appointed as counsel on

behalf of the appellant. However, cross-examination on the above mentioned prosecution witnesses on behalf of Ghaffar alias Kali (appellant) and Jahangir (co-accused since acquitted) was reserved on the said date by the learned trial Court. It is further noteworthy from the perusal of the orders dated 16.09.2014 and 22.09.2014 that right of cross-examination of the appellant on the prosecution witnesses, namely, Mst. Abida Bibi (PW.9) and Malik Muhammad Anwar (PW.10), as well as, on Amanat Ali (PW.4), Mst. Zubaida Bibi (PW.5) and Niamat Ali (PW.11) was closed by the learned trial Court on the above mentioned dates, respectively on the ground that Ghaffar alias Kali (appellant) had not yet appointed his counsel in this case. The above mentioned orders dated 16.09.2014 and 22.09.2014 read as under:-

“16.09.2014

Present: Learned DDPP for state  
Accused Ghaffar under police custody.  
Accused Zulfiqar, Iftikhar with their learned counsel  
Muhammad Sajad Veins, Adv.  
Accused Jahangir on bail without his learned counsel.  
PWs Abida Bibi and Malik Muhammad Anwar are  
present.  
Learned counsel for complainant Pir Mansha Bodla,  
Adv.

Evidence of PW-9 and PW-10 has been recorded and completed by closing right of cross examination of accused Jahangir and Ghaffar as accused Ghaffar did not yet appoint his learned counsel whereas accused Jahangir showed his inability to produce his defence counsel. No other PW is present. Now to come up for remaining prosecution evidence on 19.09.2014. Remaining PW/I.O. be summoned by SHO concerned.”

“22.09.2014

Present: Learned DDPP for state.  
Accused Ghaffar under police custody.  
Accused Zulfiqar, Iftikhar with their learned counsel  
Muhammad Sajad Veins, Adv.  
Accused Jahangir on bail without his learned counsel.  
PWs are present.  
Learned counsel for complainant.

Evidence of PW-11 has been recorded and completed by closing right of cross examination of accused Jahangir and Ghaffar as accused Ghaffar did not yet appoint his learned counsel whereas

accused Jahangir showed his inability to produce his defence counsel. Similarly, their right of cross examination on PW-4 and PW-5 has also been closed due to above said reason. No other PW is left to be examined. Now to come up for closing the prosecution evidence and statements of accused u/s 342 of Cr.P.C. on 24.09.2014.”

It is evident from the perusal of the above mentioned orders of the learned trial Court that the right to cross-examine the prosecution witnesses of the appellant was closed merely on the ground that he (appellant) had not yet appointed his counsel in this case. Offence under section 376 PPC is **punishable with death or imprisonment for life** and the same is triable by the Sessions Court. Under Rule 1 Part C Volume 3 Chapter 24 of the High Court Rules and Orders, if an accused is unrepresented in a Sessions case or he cannot afford to engage a counsel, the Sessions Judge/Additional Sessions Judge is bound to make arrangement to employ a counsel at government expense for the said accused. The above mentioned rule reads as under:-

**\*[1. Presiding Officer to report whether accused can afford to engage counsel.** If the accused is unrepresented in a Sessions case and cannot afford to engage a counsel, the Sessions Judge shall make arrangement to employ a counsel at Government expense. Counsel in such cases should be appointed well in time to enable him to study the documents mentioned in section 265-C of the Code of Criminal Procedure.”

It is, therefore, evident from the perusal of record that trial of the appellant has been conducted and concluded in blatant and flagrant violation of above-referred rule on the subject. If, the appellant was unable to hire the services of a counsel in this case which was a Sessions trial or counsel appointed by him refused to represent him or to cross-examine the prosecution witnesses on his behalf, then it was duty of the Court to provide him a counsel at the State expenses. Moreover, it is by now well settled that a Court cannot come to just and fair decision of the case unless the credibility of a witness is



tested on the touchstone of cross-examination. Cross-examination of the prosecution witnesses is very valuable right of the accused. In the case of “Ghulam Rasool Shah and another Vs. The State” (2011 SCMR 735), the Hon’ble Supreme Court was pleased to observe that credibility of a prosecution witness cannot be tested unless he is subjected to cross-examination. It was further held that even the cross-examination conducted by an accused himself cannot be considered to be substitute of cross-examination conducted by a counsel. The relevant part of the said judgment is reproduced hereunder for ready reference:-

10. Notwithstanding the afore-stated observation, we are of the view that in a case of capital punishment a Court cannot come to a just decision unless the credibility of the witness is tested on the touchstone of cross-examination. Injustice is likely to occur in a case where cross-examination on the witnesses was not conducted either by the counsel provided at State expenses on account of unwillingness of the accused or by the accused themselves; Even, the cross-examination conducted by the accused himself has not been considered to be substitute of cross-examination conducted by a counsel.”

Likewise, in the case of “Abdul Ghafoor Vs. The State” (2011 SCMR 23), the Hon’ble Supreme Court of Pakistan set aside the judgment of learned trial Court, as well as, of the High Court and remitted the case to the Sessions Court while providing opportunity to the accused/appellant of cross-examination on the prosecution witnesses on the ground that if, the counsel engaged by the appellant sought too many adjournments even then it was duty of the learned trial Court to provide defence counsel at State expenses to the accused or could have given last opportunity to the accused to make arrangement to hire the services of another counsel. The relevant part of the said judgment reads as under:-

“7. With immense respect to the learned Judges of the High Court, we are persuaded to hold that it is the primary responsibility of the court seized of a matter to ensure that the truth is discovered and the accused are brought to justice.

If the learned trial Court found that the counsel engaged by the appellant had sought too many adjournments, even then he was not appearing, the court could either have directed that a defence counsel be provided to the appellant at State expense or could have given last opportunity to the appellant to make alternate arrangements failing which the court would proceed to decide the matter. This course was not adopted by the learned trial Court and instead on 2-12-1999 gave a total surprise to the appellant by asking him to cross-examine those witnesses for which obviously neither the appellant had the requisite expertise nor he was prepared to do so. In these circumstances and in view of the fair concession given by the State, we find that the procedure adopted by the learned trial Court is reflective of miscarriage of justice and the appellant be provided one opportunity to have the afore-referred witnesses cross-examined. Consequently, this appeal succeeds on this short ground.”

Similar view was taken by the Hon’ble Supreme Court of Pakistan in the case of “Syed Saeed Muhammad Shah and another Vs. The State” (1993 SCMR 550).

12. In the light of above discussion, this appeal is allowed and the impugned judgment dated 21.10.2014 passed by the learned Additional Sessions Judge, Chunian District Kasur is hereby set aside. The case is remanded to the learned District & Sessions Judge, Kasur who shall either proceed with the matter himself or entrust the same to any other Additional Sessions Judge of his district. The appellant shall be treated as under-trial prisoner. The learned trial Court shall provide opportunity to the appellant to hire the services of a private counsel of his own choice and in case of refusal of the appellant to hire a private counsel then the appellant shall be given the choice to choose a defence counsel from the list of defence counsel maintained by the learned Sessions Judge, Kasur. The learned private counsel or defence counsel appointed at State expense to represent the appellant in this case, shall be provided three opportunities to cross-examine the prosecution witnesses. As this is an old matter which pertains to the year 2011 and the appellant is behind the bars from the last more than

nine years and five months, therefore, the learned trial Court shall decide the matter within a period of thirty (30) days from the date of receipt of attested copy of this judgment. The learned trial Court shall decide the case afresh on its own merits without being influenced by any observation made by this Court in the instant judgment or by any observation made in the impugned judgment dated 21.10.2014 passed by learned Additional Sessions Judge, Chunian.

13. The instant appeal is allowed in the above mentioned terms.

**(Malik Shahzad Ahmad Khan)**  
**Judge**

**Approved for Reporting**

**(Malik Shahzad Ahmad Khan)**  
**Judge**

**Farman Ali**