

JUDGMENT SHEET

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**IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

1. Cr.A No. 187-M/2021

(Zakir Khan v. Wahid-ur-Rehman & the State)

2. Cr.R No. 43-M/2021

(Wahid-ur-Rehman v. Zakria & the State)

Present: M/S Hafiz Ashfaq Ahmad and Rahman Ali,
Advocate for the appellant/convict.

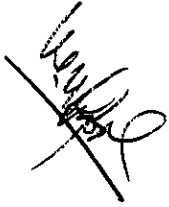
Mr. Alam Khan Adenzai, Asstt: A.G for the
State.

Mr. Attaullah, Advocate for the respondent/
complainant.

Date of hearing: 11.01.2023

JUDGMENT**Dr. Khurshid Iqbal, J.-**

1. Through this single judgment, we intend to decide the instant appeal Cr.A No. 187-M/2021 filed by the appellant/convict against his conviction and sentences awarded to him in a case FIR No.227 dated 16.09.2019 registered u/ss. 364-A/511, PPC read with section 53 of the Child Protection & Welfare Act, 2020 (C.P.A), by the learned trial Judge vide impugned judgment dated 30.06.2021 as well as a connected Cr.R No. 43-M/2021, filed by the respondent Wahid-ur-Rehman against the same judgment of the trial Court for the enhancement of sentences awarded to the appellant/convict.



2. Necessary facts of the case are that the complainant, Wahid-ur-Rehman (PW-2), reported the matter to the local police in Police Station Chakdara that on 16.09.2019, he, alongwith his father and other family members, was present in his house. At about 10:30 hours, on hearing noise outside his house, he came out and saw a man who was forcibly setting his minor daughter aged about 4/5 years on a motorcycle, while she was weeping. When he shouted, the man fled away from the spot and left the minor girl alongwith the motorcycle. The complainant and his father chased him and caught hold of him with the help of co-villagers. On checking his CNIC, he was identified Zakir Khan son of Said Raziq, a resident of Ouch Sharqi, Koz Palow (CNIC # 15302-2190807-5), now appellant before us. The occurrence besides him, was statedly witnessed by Amir Zaman son of Abdul Mateen Khan and Hidayatullah son of Muhammad Nabi. He charged the appellant for abducting his minor daughter, namely, Mst. Khalor Bibi, for sexual abuse, on which, the aforesaid FIR (Ex:PA) was lodged.



3. On completion of investigation, challan was submitted against the appellant Zakria Khan before the learned trial Court, who was supplied copies

from the relevant record u/s. 265-C, Cr.PC. Charge was framed against him, to which he pleaded not guilty and claimed trial.

4. The prosecution examined as many as eleven (11) PWs and thereafter, statement of the appellant/convict was recorded u/s. 342, Cr.PC, wherein he denied all the allegations leveled against him by the prosecution and professed innocence. He also recorded his statement on oath u/s.340(2), Cr.P.C. However, he did not opt for producing evidence in defence.

5. After hearing arguments of the learned A.P.P, for the State, and learned counsel for the parties, the learned trial Judge vide the impugned judgment dated 30.06.2019, convicted the appellant Zakria Khan and sentenced him as under:

- i. U/s.364-A read with section 511, PPC, to undergo rigorous imprisonment for 10 years and also imposed a fine R.100,000/- (rupees one lac);
- ii. U/s. 53, C.P.A, to undergo ten years rigorous imprisonment and imposed fine of Rs.100,000/- (rupees one lac).

However, benefit of section 382-B, Cr.P.C., was extended to the appellant/convict.

6. Being aggrieved, the appellant preferred the instant appeal Cr.A No.187-M/2019 for his acquittal in the case while the respondent/complainant filed a revision petition Cr.R No.43-M/2019 for enhancement of sentences awarded to the appellant.

7. We have heard arguments of learned counsels for the appellants/accused, learned counsel for the complainant as well as the learned Additional Advocate General, for the State and perused the record.

8. The crucial aspect of the case in hand is that the minor girl, namely, Mst. Khalor Bibi, aged about 4/5 years, the victim of the crime was not examined in the manner as required. She was produced for evidence at the trial on 18.02.2021. The trial Court recorded an observation that she was found not capable of giving evidence. Probably the learned trial Court found her too young to record her testimony. She was the star witness of the prosecution. In spite of the fact that on observation she was not found capable as a witness, we believe that the learned trial Court should have gone further before simply abandoning the crucial exercise as part of the trial. Subject to the conditions laid down in Articles 3 and 17 of the Qanun-e-Shahadat Order, 1984 (Q.S.O), there is no bar on the competency of a child to be a witness irrespective of



his/her age. A close reading of the above referred provisions evinces that a witness, including most particularly, a child in the personal context must pass what is known as the "rationality test", which means the capacity and intelligence of a witness to understand the question put to him and the ability to rationally respond to question. In the case of *Raja Khurram Ali Khan and 2 others vs Tayyaba Bibi and another*, reported as *PLD 2020 Supreme Court 146 [Supreme Court of Pakistan]*, our Supreme Court has observed that as compared to our judicial approach, Courts in other jurisdictions are more interactive with child witnesses during recording of their entire evidence. The Court has referred to a 1993 case, in which, the Canadian Supreme Court designed three pronged criteria of the capacity to observe (including interpretation), recollect and communicate. The relevant para of the judgment may be reproduced as under:

"46. In other common law jurisdiction, the Courts are more inter-active with the child witnesses during the recording of their entire evidence. Justice Mc.Lachlin, speaking for the Canadian Supreme Court in the case of *R. v. Marquard* [1993] 4 S.C.R. 223, has explained with precision the competency of the child witness, by stipulating the following criteria for testing the same in terms:

...(1) the capacity to observe (including interpretation); (2) the capacity to recollect; and (3) the capacity to communicate.... The judge must satisfy

him or herself that the witness possesses these capacities. Is the witness capable of observing what was happening? Is he or she capable of remembering what he or she observes? Can he or she communicate what he or she remembers? The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable.....Generally speaking, the best gauge of capacity is the witness's performance at the time of trial.... [T]he test outlines the basic abilities that individuals need to possess if they are to testify. The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate. [once] This established, deficiencies of perception, recollection of the events at issue may be dealt with as matters going to weight of the evidence."

9. Our Supreme Court urged the Courts to follow the above referred approach and strongly advised for compliance of the directions given in paras 49 and 50, which are reproduced as below:



"49. In other jurisdictions, we note that great care is taken to ensure that such child witnesses are able to depose their testimony at ease. By taking measures in the court room to lessen their stress and anxiety of court-room appearances in such a tender age. Such measures include child witness aid in testifying, screens in court rooms, closed courtrooms and counsellor aid before and after recording of evidence, which needs to be adopted and practiced in our jurisdiction in cases wherein a child victim is to appear as a witness. In this regard, we expect the respective governments to take appropriate legislative and administrative measures for ensuring the much needed protection and facilitation of child witnesses.

50. As for the presiding trial Court judges, they should take appropriate steps during the court proceedings to ensure that the child witnesses depose their testimony with ease, and that too, in a stress-free environment. In cases where the child witness is unable to depose in the court room, and his evidence is 'necessary' to find the truth, and it has a ring of 'circumstantial trustworthiness', then courts, as practiced in other common law jurisdictions, may consider in appropriate cases, allowing out-of-court evidence, as an exception to the 'hearsay rule'. Wigmore, a notable American scholar on the law of evidence, in his book *Wigmore on Evidence*, Volume 5 (Chadbourn rev. 1974), identified two considerations, which may serve as an exception to the 'hearsay rule': 'a circumstantial probability of trustworthiness, and a necessity for the evidence.'

10. In the case in hand, the learned trial judge did not take a pain to ensure the victim speak to the Court. We believe and expect the trial Court judges to follow these guidelines in such like cases.


11. We may here add a perspective from the UK's Youth Justice and Criminal Evidence Act, 1999 (text of the law at <https://www.legislation.gov.uk/ukpga/1999/23/content>, last accessed on 12/03/2023).

The law provides that all persons irrespective of age are competent to give evidence. However, the witness must be able to understand the question put to him as a witness and he/she give answers to questions which can be understood. It means a witness must be able to understand the question and the answer given must be capable of being understood (*Section 53*).

12. The law further provides that in criminal proceedings, a child under the age of 18 at the time of hearing is eligible for assistance on the ground of age [S. 16 (1) (a)]. The time of hearing means the stage in the trial when the court has to make a determination for the purpose of special measures direction under section 19(2).

13. Once the court has determined that a witness is eligible for assistance [*a child by virtue of section 16 (1) (a)*], it must then determine that any one or more special measures would be likely to improve the quality of evidence given by the witness.

14. The special measures the law provides are:

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- Screening witness from accused
 - Evidence by live link
 - Evidence given in private
 - Removal of wigs and gowns
 - Video recorded evidence in chief, cross-examination or re-examination
 - Examination of witness through intermediary Aids to communication (*sections 23-30*).

15. The purpose of the law is to help disadvantaged witnesses, such as, children under the age of 18, and those suffering with mental disorder or otherwise has significant impairment of intelligence and social functioning. The law lays down a host of

special measures which a court may employ to improve the quality of such vulnerable witnesses. Often a child abuse case hinges on the evidence of just one witness, as the victim of a crime. The special measures per the law helps make such witness to give better evidence and more confidently in a milieu of juvenile justice. Perhaps, it may be more helpful to follow the observations of the above referred observations of the Supreme Court as another best practice example.

16. Coming to the remaining ocular account, the same comprises of the deposition of Amir Zaman Khan (PW1) and Wahid-ur-Rehman, the complainant/father of the victim (PW2), respectively. The deposition of PW2/complainant would reveal that on the day of occurrence (16.09.2019 at 10:30 am), while he was present in his house alongwith his father, he heard noise. When came out of his house, he saw that the appellant had forcibly made his daughter, the victim, sit on the motorcycle and she was shouting. When he asked him, the appellant left the motorcycle and tried to run away from the scene. His father and other residents also came out and took hold of him after having been chased. He alleged that the appellant was abducting the victim for sexual assault.



PW1 rather furnished a shorter deposition in his examination-in-chief, which shows that on the day of the occurrence, while he was going to purchase some grocery items from a shop in village Adam Dherai, he got attracted on the noise, saw that the appellant was abducting the victim on his motorcycle. The appellant was chased by him, the father and grandfather of the victim and other residents of the village and taken hold of him alongwith the motorcycle. The cross examination of PW2 divulges that when he came out, he saw that the motorcycle of the appellant was not in started condition and the victim was sitting on the motorcycle and at that time, no other person was there. The cross examination of PW1 shows that when he reached to the spot, he saw the victim sitting on the motorcycle and the appellant not sitting there but was trying to run away. The deposition further shows that when he reached the spot, he saw that the appellant was sitting on the motorcycle and was trying to run away. That the victim was sitting on the front part of the motorcycle. The appellant was not holding her and she was weeping. It is, thus, doubtful as in which mode and manner both the PWs witnessed the occurrence. The circumstances show that the appellant could easily run away even while successfully abducting the victim while sitting on the motorcycle. PW1, in one breath deposed that when he reached, the appellant was not



sitting on the motorcycle and was trying to decamp. In the next breath, he stated that when he reached, the appellant was sitting on the motorcycle and was trying to decamp. Then, if the victim was sitting on the motorcycle and weeping and not in clutches of the appellant, she was surely to fall down if the appellant was trying to run away on the motorcycle.

17. The site plan of the occurrence depicts that the house of the complainant party to the west and a vacant house of one Muhammad Iqbal, to the east of the public thoroughfare, which turns towards west. The aforesaid public path of village Adam Dherai at points 3A, A1 and 4A in the south turns towards west. Towards the south of the public path, the open fields of the village are shown. The site plan does not depict the house of the PW1. It is doubtful as to whether he is a resident of the same locality and how he suddenly got attracted to the spot. The prosecution contended that there were so many other residents of the village who successfully overpowered the appellant and took him to the Police Station alongwith the motorcycle, but no other witnesses were examined as witnesses of the occurrence.

18. Regarding the allegation of abduction for the purpose of sexual assault, PW1 remained silent except the statement of PW2 (complainant), there is no



other evidence of the prosecution. Moreover, the Investigating Officer (PW10) did not record the statement of the victim. He did not verify the site plan from the victim. The I.O did not confirm whether the victim was capable to record her statement. He did not record statements of the owners of the nearby fields depicted in the site plan.


19. We would now advert to the previous involvement of the appellant and a family suit his wife filed against him due to his implication in the present case and her application that she wants divorce from him because of his habit of abducting children. MHC Abbas Khan (PW6), after having recorded the report of the complainant in the shape of the FIR, inquired from the Police Station of Ouch about the Appellant. He was informed that another FIR No.340 dated 17.06.2018 u/ss. 364-A, PPC read with 53 CPA in that Police Station was registered against him, in which, he was stated to have been released on bail.

20. After having been examined u/s.342, Cr.P.C, the appellant availed opportunity of recording his statement on oath u/s.340(2) of the Cr.P.C. In his statement on oath, while denying the charge, he deposed that on the eventful day, he was in Chakdara Bazar in connection with preparing a photo of his own

that was required to be annexed with his application for employment in the rescue 1122. He stated that there was a CCTV camera in front of the shop. He further deposed that he was also purchasing *Kheer* (pudding) for his daughter from a milk shop, for which purpose he entered in the shop and when he came out, found his motorcycle missing. While he was standing there, the complainant came there and started an altercation with him, at a result of which, he was taken to the Police Station. He complained that the CCTV photage was not obtained by the I.O despite his repeated requests and rather he was brutally beaten as a result of which he became ill. In this respect he also produced copies of his medical treatment comprising of 25 pages. The statement further shows that when he came to know that his motorcycle was missing, he made a cellular call from his SIM No.0344-9773642 to his home but the CDR was not obtained despite his repeated requests. He admitted that legally he can have more than one SIMS of his mobile phone. He also deposed that he has been implicated in the case due to his political affiliations. While under cross examination, he stated that he holds a master degree in Physics,



working as a clerk in the Deputy Commissioner office and that he is under the legal bar not to take part in politics. He admitted having made no report regarding missing his motorcycle. He stated that he does not know a village, Adam Dherai. He stated that he was acquitted in the previous criminal case u/s. 364-A, PPC. Regarding the family suit, he admitted that the same was filed against him, but later on, his wife withdrew it. He produced photocopy of the compromise deed dated 11.02.2020 Ex:PW/D1. The aforesaid document shows that his wife had withdrawn the family suit and denied from having made any application that the appellant was involved in abduction of children.

 **21.** On the strength of above reappraisal of evidence, we have reached to the conclusion that the prosecution has failed to bring home the charge against the appellant beyond any shadow of doubt. At the trial, the victim as not examined at all. While there could not be no gainsaying the fact the victim was observed as a witness, the Court did not make a demonstrable endeavour to establish it. The I.O did not a Medical Doctor about her exact age and her prudence and

rationality to stand as an efficient witness. Then, no independent witness was brought forward by the prosecution despite the fact that a mob chased the appellant. The efforts of the complainant party that the appellant's wife sought dissolution of marriage due to his alleged involvement in abduction of children, having disproved badly, suggest some mala fide. It is a settled law that even a single reasonable doubt is sufficient to record acquittal. In the case of *Khalid Mahmood alias Khaloo vs The State*, reported as 2022 SCMR 1148, wherein it was held as infra:



"It is a settled law that single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable, trustworthy and reliable evidence. Any doubt arising in prosecution's case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable shadow of doubt. However, as discussed above, in the present case the prosecution has failed to prove its case beyond any reasonable shadow of doubt.

Similarly, in the case of Najaf Ali Shah vs. The State (2021 SCMR 736), the august Supreme Court has observed that:

"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."

And the same principle was reiterated in the case, The State through P.G. Sindh and others versus Ahmed Omar Sheikh and others, reported as 2021 SCMR 873.

"It is settled since centuries that benefit of doubt automatically goes in favour of an accused. Even if a single circumstance creates reasonable doubt in a prudent mind regarding guilt of an accused then the accused shall be entitled to such benefit not as a matter of grace and concession but as a matter of right and such benefit must be extended to the accused person(s) by the Courts without any reservation."



22. Resultantly, we allow the instant appeal Cr.A No.187-M/2019 by setting aside the impugned judgment dated 30.06.2021 of the learned Additional Sessions Judge/Izafi Zilla Qazi/Judge Child Protection

Court, Dir Lower at Chakdara and acquit the appellant of the charges leveled against him. He shall be released forthwith from the jail, if not required in any other case. Whereas, the connected Cr.R No. 43-M/2019, filed by the respondent/complainant Wahid-ur-Rehman for enhancement of convictions/sentences awarded to the appellant being became infructuous, stands dismissed.

23. These are the reasons of our short order of the even date.

Announced
Dt: 11.01.2023


JUDGE


JUDGE

office W/R
28/03/23