

Judgment Sheet
**IN THE PESHAWAR HIGH COURT, ABBOTTABAD
BENCH
JUDICIAL DEPARTMENT**

Cr.Appeal No. 203-A/2018

JUDGMENT

Date of hearing.....**10.10.2019**.....

Appellant (Hashim) By Mr. Abdul Saboor Khan, Advocate.

Respondents. (State) By Sardar Muhammad Asif, Assistant A.G
and (Complainant) By Sardar Basharat, Advocate.

SHAKEEL AHMAD, J.- In a trial conducted by the learned Sessions Judge Abbottabad, appellant Hashim, aged about 31 years, was found guilty of committing rape with Mst. Tahira Sarfaraz (complainant), thus, he was sentenced to rigorous imprisonment for ten (10) years with a fine of Rs.50,000/- or in default of payment of fine to suffer further six (06) months S.I under Section 376 PPC and to one year R.I with a fine of Rs.10,000/- or in default of payment of fine to six (06) months S.I under Section 342 PPC. The fine, if realized, was ordered to be paid to the victim. Similarly, in the same trial, appellant Tanveer, aged about 24 years, was also found guilty of facilitating the offence to one year R.I with a fine of Rs.10,000/- or in default to suffer

further six (06) months S.I under Section 109 PPC. Benefit of Section 382-B Cr.P.C was extended to both the appellants. Since the appellants have filed their separate appeals, therefore, through this single judgment we shall also decide **Cr.Appeal No. 197-A/2018** titled ***“Tanveer Vs. The State & another”*** being the outcome of one and the same impugned judgment dated 23.10.2018.

2. The incident took place on 22.12.2016 at 08:00 A.M inside the shop allegedly owned by accused Tanveer. The report was lodged by the complainant Mst. Tahira Sarfaraz (PW-8) on 26.12.2016 at 19:40 hours at Police Station Donga Gali Tehsil and District Abbottabad. The distance between the police station and place of occurrence is 25 / 26 kilometers.

3. The prosecution case is that Mst. Tahira Sarfaraz d/o Sarfaraz (complainant / victim) submitted an application to the effect that she is a student of 7th class at Government Middle School Pirkot. As routine, after working hours, a student used to be deputed for cooking of food on daily

basis. One month prior to the occurrence, when she went inside the kitchen for cooking food, teacher Hashim entered into the kitchen, locked it and took her snapshots and asked her to keep her mouth shut, otherwise, he would upload her snapshots on internet and she would also be expelled from school, whereupon she kept mum. After a few days, he called her in his office and obtained her signature on a blank paper posing it to be an admission form. On 22.12.2016, at about 08:00 A.M Hashim accused called her through watchman for bringing milk from shop of co-accused Tanveer. Hashim asked her that the document over which her signature was obtained was the Nikah Nama form and now she is his legally wedded wife. He undressed her forcibly and committed Zina with her by use of force. On her hue and cry Nazir and Riaz, associate teachers came there, beat Hashim, whereafter he decamped from the spot. She put on her clothes and proceeded to house. Her mother took her to her father, who was serving in Pak Army at Kharian. On return, she lodged the report,

which was incorporated into FIR. She was referred to BBS Teaching Hospital Abbottabad, where she was medically examined on 27.12.2016 and observed as under: -

“Conscious, well oriented in date and place. No mark of violence or resistance on any part of body or clothes.”

4. On 30.12.2016, accused Hashim was examined by Dr. Muhammad Irshad (PW-13) and found him fit to do sexual intercourse, his report was exhibited as Ex.PW-10/8. Ex.PW-7/1 is the medico-legal report of the complainant / victim. According to report of Radiologist Ex.PW-10/2 complainant was aged about seventeen and a half years. Muhammad Khalid, ASI, (PW-10) arrested the appellant Hashim on 29.12.2016.

5. In order to prove its case, the prosecution examined as many as thirteen (13) witnesses. Sabir Khan, SI (PW-2) only recorded FIR Ex.PA. Amjad, Constable, is witness of recovery memo Ex.PW-3/1 vide which lady doctor handed over three swab

tubes sealed in Khaki envelop for DNA to ASI Donga Gali. Abdul Shakoor (PW-4) is witness of recovery memo Ex.PW-4/1 vide which doctor handed over to him a phial 3cc for onward transmission for DNA and cross match. Asim (PW-5) brought the docket, which he incorporated in the entry of two parcels in Register No.5/21 Ex.PW-5/1, whereafter, he handed over the same to constable Tufail for sending the same to FSL Islamabad. Tariq Zaman, Constable No. 697 9PW-6) is marginal witness of recovery memo through which doctor handed over 3cc blood for onward transmission for DNA test alongwith swabs of victim. The recovery memo was exhibited as Ex.PW-6/1. PW-7 and PW-13 are the medical officers, gist of whose statements have been given whereas Mst. Tahira Sarfaraz, complainant, appeared as PW-8 and supported the contents of FIR. Muhammad Riaz (PW-9) the alleged eyewitness of the occurrence was declared hostile, he was cross-examined by the learned counsel for the complainant as well as defence counsels. The second eyewitness

of the occurrence namely, Nazir Ahmad was given up by the prosecution on the ground of having been won over. Muhammad Khalid, ASI (PW-10) investigated the case and after completion of investigation handed over the case file to PW-1 for submission of challan. Muhammad Amin (PW-11) and Muhammad Zareen (PW-12) are witnesses of pointation memo Ex.PW-10/31 vide which Tanveer pointed out the place of occurrence to the I.O. The accused when examined denied the charge and pleaded innocence, however, did not produce evidence in defence.

6. It has been argued by learned counsels for the appellants that appellants are innocent and have falsely been implicated in the case; that complainant i.e. alleged victim was sixteen (16) years of age at the time of occurrence; that the prosecution has failed to bring home the guilt of the accused beyond a ray of doubt; that the medico-legal report does not support the version of the complainant; that there is inordinate delay in lodging the report; that evidence so furnished is not sufficient to sustain conviction; that PW-

9 Muhammad Riaz did not support the stance of the complainant and prayed for acquittal of the accused by extending benefit of doubt.

7. On the other hand, learned counsel appearing on behalf of the complainant and the learned Assistant Advocate General, representing the State, jointly argued that statement of victim is straightforward and rings true; that complainant is aged about 13 / 14 years, she has got no ill will or personal enmity with the accused to falsely implicate them; that appellant Hashim is attached to a noble and sacred profession and was supposed to impart knowledge to the students not to outrage their modesty; that all the prosecution witnesses are consistent on the manner, mode, time and place of occurrence, they were cross-examined at length but no dent could be caused in their statements; that prosecution has proved its case beyond a ray of doubt and that the impugned judgment needs no interference.

8. We have heard the arguments of learned counsel for the parties and scanned the record with their valuable assistance.

9. In our opinion Mst. Tahir Sarfaraz, complainant, at the time of alleged occurrence was not below the age of sixteen (16) years as stated by her and recorded by the investigating officer. According to report of Radiologist Ex.PW-10/2, she is seventeen and half years ($17\frac{1}{2}$) old. Although lady Doctor Shaheen Mahtab stated that she was aged about 13 / 14 years, she admitted in cross examination that her age was written as 13 / 14 years at the instance of Investigating Officer, however, the determination of age by medical officer is always probable determination and one cannot say with certainty about the age of the person examined by the medical officer. Thus, keeping in view report of Radiologist, we hold that Mst. Tahira Sarfaraz was above sixteen (16) years of age at the time of occurrence.

10. We have gone through the statements of the victim (Mst. Tahira Sarfaraz) and lady Doctor. The medical evidence Ex.PW-7/1 shows that there are no marks of violence or injury on any part of the body of victim. Her hymen was found torn, but

it was an old tear, admitting two fingers with slight difficulty. According to the allegation of the victim, her clothes were removed by the accused Hashim forcibly and thereafter he committed *Zina-Bil-Jabar* with her, but despite that neither her clothes were torn nor any injury was given nor any resistance was found on her body or clothes by the lady Doctor nor any sign of resistance was found or observed on the scene of crime by the I.O during spot inspection.

11. Another important aspect of the case is that PW-7, the lady doctor, who examined Tahira Sarfaraz, while answering to a question stated in cross-examination that the mention of old healed tear of hymen means that the first sexual contact took place with the victim more than two weeks back as this tear heals within two weeks. Admittedly, she was examined on 27.02.2016, seven (07) days after the occurrence. The above discussion leads us to the conclusion that occurrence has not taken place in the manner, mode, place and time as described by the prosecution.

12. We also noticed that the lady Doctor had taken her swabs from posterior fornix and cervix in three tubes and handed over the same for detection of semen and DNA. However, it was returned with the observation that possibility of semen detection for vaginal swabs sample of victim after three (03) days is very rare as is depicted from letter Ex.PW-10/24 and Ex.PW-10/26. No doubt, she was examined seven (07) days after the occurrence, but it is known phenomena / proposition, that semen remains active and alive upto 17 days at the best. In this respect reliance can be placed on the judgment reported as **2002 P.Cr.L.J 831 Mst. Sherman Vs. The State**. Though in the instant case she was examined seven (07) days after the occurrence but despite that the report of swabs and DNA was not given.

13. Now adverting to statement of Muhammad Riaz, the eyewitness of the alleged occurrence, who appeared as PW-9. The second eyewitness Nazir was abandoned on his being won over. In this case, at the relevant stage when examination in chief of

PW-9 was being recorded, the complainant side felt that PW is speaking in a different tone, which is not favourable to the prosecution, the learned counsel for the complainant requested that the witness may be declared hostile. After due hearing and perusing the record, he was declared hostile and the parties were given opportunity to cross-examine him. We have gone through his statement minutely to adjudge the credibility and veracity of his statement. It is by now established that statement of such witness cannot be discarded altogether and has to be considered like the evidence of any other witness, but with a caution. In this context reliance can well be placed on the judgments reported as ***Zahid Khan Vs. Gul Sher and another* 1972 SCMR 597, *Muhammad Sadiq Vs. Muhammad Sarwar* 1979 SCMR 214.** After perusal of the statement of Muhammad Riaz (PW-9), we came to the conclusion that despite opportunity of cross-examination this witness was not confronted with his earlier statement recorded under Section 161 Cr.P.C.

Furthermore, nowhere he stated that he had seen the accused Hashim committing *Zina* with Tahira Sarfaraz. Thus, evaluation of entire evidence available on the record leads us to the irresistible conclusion that there is no corroboration to the statement of Mst. Tahira Sarfaraz.

14. There is delay of six (06) days in lodging of the FIR. Mst. Tahira Sarfaraz has stated in her statement that after the occurrence, she came to her house, her mother took her to her father at Kharian, thereafter, they came back to Abbottabad on 27.12.2016 and lodged the report. In support of her this stance neither her mother nor her father was produced by the prosecution we are afraid, this explanation is too common to be given weight.

15. Now adverting to pointation of the accused Tanveer. Nothing was recovered or discovered or nothing new was added on his pointation, therefore, the same does not carry weight.

16. Coming to charge against accused Tanveer, he was charged for facilitating the

crime. Neither it was proved through evidence that the shop in question belongs to him nor PW-9 stated in his statement that he closed the door of the shop and facilitated the crime. Even otherwise, the prosecution has failed to prove the main charge against principal accused Hashim, therefore, conviction and sentence under Section 109 PPC is not sustainable against accused Tanveer.

17. The basic principle of Sharia law is that the conviction must be based on evidence beyond any shadow of doubt. The principle can be deduced from an undisputed Hadith: -

“Ayesha reported that the Messenger of Allah said ‘Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him, let him have his way, because the leader’s mistake in pardon is better than his mistaken in punishment: Mishkatul Msabili (Eng. Translation by Fazl-ul-Karim) Vol.II,P.544 Law Publishing Company, Lahore.”

18. Because the damage resulting from erroneous sentence is irreversible. The principle that it is better to acquit a guilty person than to punish an innocent one had been proclaimed by the Holly Prophet of Islam fourteen hundred (1400) years ago has now become the guiding principle for the safe administration of justice.

19. For the reasons stated hereinabove, we do not uphold the conviction of the appellants and allow this and the connected appeal, set-aside their conviction and sentences and acquit them of the charges, levelled against them by extending them benefit of doubt. They be set at liberty forthwith, if not required in any other case.

Announced:
10.10.2019.

J U D G E

J U D G E

/*Saif CS*/

Justices Ijaz Anwar and Shakeel Ahmad