

HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT
BAHAWALPUR BENCH
BAHAWALPUR
JUDICIAL DEPARTMENT

1. (Criminal Appeal No. 344 of 2019)

Muhammad Irfan Haider & 2 others

Versus

The State & another

2. (Criminal Appeal No. 365 of 2019)

Ikram ul Haq

Versus

The State & another

Date of Hearing: 13.09.2022

Appellants by: Syed Zeeshan Haider and Hafiz Shahid Nadeem
Kahlon Advocates.

Complainant by: Ch. Imran Ashraf and Mian Tanveer Iqbal Arain
Advocates.

State by: Mr. Javed Iqbal Bhaaya Assistant District Public
Prosecutor.

J U D G M E N T

By way of this single judgment above mentioned Criminal Appeals, one filed by Muhammad Irfan Haider, Abdul Ghaffar and Muhammad Bilal (*344 of 2019*) and other by Ikram-ul-Haq (*365 of 2019*) are being decided together as arise out from judgment dated 30th of May, 2019 passed by the learned Additional Sessions Judge, Yazman¹ district Bahawalpur² on the basis whereof all the appellants were convicted and sentenced as under: -

➤ **Under Section 367-A PPC³** to undergo
10 years RI⁴ each and fine of
Rs.50000/- (fifty thousands) each and in

¹ A city that is primarily called the gateway to the Cholistan Desert.

² A city located in the Punjab province of Pakistan. It is the 11th largest city in Pakistan by population. It is also the largest city by land area consisting of Cholistan, the largest desert of Punjab (<https://en.wikipedia.org/wiki/Bahawalpur>)

³ Pakistan Penal Code (XLV of 1860)

⁴ Rigorous imprisonment (with hard labour) {See: Section 53 PPC}

default thereof to further undergo six months SI⁵ each

- **Under Section 377 PPC** to undergo ten years RI each and fine of Rs.50000/- (fifty thousands) each and in default thereof to further undergo six months SI each.

2. In addition to above, **Ikram-ul-Haq** was also convicted under Section 337-L(ii) PPC and sentenced to pay an amount of Rs.10000/- (*ten thousands*) as *Daman*⁶ to Shahid Sharif (*Pw-1*)⁷. Similarly, **Muhammad Bilal** too was convicted under Section 337-F(iii) PPC and sentenced to pay an amount of Rs.30000/- (*thirty thousands*) as *Daman* to Shahid Sharif (*Pw-1*).

3. All the sentences of appellants were ordered to run concurrently⁸ and benefit of Section 382-B⁹, Cr.P.C¹⁰ was also extended to them. The convictions of appellants are an outcome of prosecution they faced in case FIR¹¹ No. 34 (*PA*) recorded on 10th of April, 2018 under Sections 367A/377/337F(iii)/337L(ii) PPC on the complaint of Muhammad Sharif (*Pw-2*) for the abduction and committing sodomy with Shahid Sharif (*Pw-1*).

4. Facts of the case are that on 10th of April, 2018 Muhammad Sharif (*Pw-2*) submitted an application (*PA*) to SHO¹² Police Station *Derawar*¹³ district Bahawalpur where he maintained that on 06th of April, 2018 his son Shahid Sharif (*Pw-1*) aged 14/15 years was present in his house where at about 12:00 noon his neighbrouer Ikram-ul-Haq (*appellant*) came, asked Shahid Sharif to accompany him and thereafter they both moved together on a motorbike; Ikram-ul-Haq, after

⁵ Simple Imprisonment (See: Section 53 PPC).

⁶ Compensation determined by the court to be paid by the offender to the victim for causing hurt (See: Section 299{d} PPC).

⁷ Prosecution Witness.

⁸ At the same time.

⁹ Earlier period of confinement in jail in the same case.

¹⁰ Code of Criminal Procedure (Act V of 1898).

¹¹ First Information Report (See: Section 154 Cr.P.C).

¹² Station House Officer; Officer Incharge of Police Station (See. Section 4 {P} Cr.P.C).

¹³ A fort that was built in the 9th century AD by Rai Jajja Solanki, a Hindu Rajput Ruler.

enticing had taken Shahid Sharif to the *Dera*¹⁴ of Abdul Ghaffar (*appellant*) where Abdul Ghaffar, Muhammad Bilal (*real bothers*) and Muhammad Irfan Haider were already present; all they committed sodomy one by one with Shahid Sharif; on his hue and cry, Nawaz Sharif (*Pw-3*) and Ghulam Haider (*not produced*) arrived there and rescued Shahid Sharif; on resistance, Muhammad Bilal having a *Churi*¹⁵ gave an injury on the thumb of left hand of Shahid Sharif whereas Ikram-ul-Haq caused an injury with brick on small finger of his left hand; Abdul Ghaffar placed him under fear by aiming with the pistol; during the occurrence appellants also captured the incident through a video.

5. On the basis of above application, FIR (*PN*) was recorded by Iftikhar Ali ASI¹⁶ (*Pw-9*).

6. On arrest of appellants, report¹⁷ under Section 173 Cr.P.C was submitted in court.

7. Initially, on 22nd of June 2018, a charge was framed against Ikram-ul-Haq, Abdul Ghaffar and Muhammad Irfan Haider however later on, when Muhammad Bilal came in picture, an amended charge on 22nd of October, 2018 against all appellants under Sections 367A/377/337F(v)337L(ii) PPC was framed, which they pleaded not guilty and demanded the trial.

8. In order to prove its' case prosecution had produced Shahid Sharif/victim (*Pw-1*), Muhammad Sharif/complainant (*Pw-2*), Nawaz Sharif/eye witness (*Pw-3*), Dr. Zeeshan Ahmad (*Pw-4*), Munir Ahmad Constable (*Pw-5*), Ahsan Umair (*Pw-6*),

¹⁴ This is a word in several languages of South Asia that means 'camp', 'mound' or 'settlement'.
(<https://en.wikipedia.org/wiki/Dera#:~:text=Dera%2C%20Dero%2C%20Daro%2C%20Dhoro,of%20a%20number%20of%20places.>)

¹⁵ Knife.

¹⁶ Assistant Sub Inspector.

¹⁷ Commonly said as 'Challan'.

Muhammad Nawaz HC/Moharrar¹⁸ (Pw-7), Rafaqat Ali (Pw-8), and Iftikhar Ali ASI/Investigating Officer (Pw-9).

9. After producing the reports of PFSA¹⁹ (PS to PU), learned Deputy District Public Prosecutor had closed the prosecution's evidence.

10. In their examinations made under Section 342 Cr.P.C, appellants pleaded their false implications and opted not to produce defence evidence or to appear as witnesses in terms of Section 340(2) Cr.P.C.

11. **HEARD.**

12. Prosecution claims that Nawaz Sharif (Pw-3), the real brother of victim, is also an eye witness but the position is otherwise for the reason that according to his own statement, he did not see the occurrence and when he arrived at crime scene, the episode was over and disclosed to him by his brother Shahid Sharif. However, he added that in his presence appellants had succeeded to escape from venue of offences.

13. Perusal of declaration of Nawaz Sharif (Pw-3) further reveals that he is a chance witness. Amongst the various and known kinds of witnesses²⁰, one is called 'Chance Witness' that means: -

- *A person who, by coincidence or accidentally, is present at the scene of crime'.*
- *A person who in ordinary circumstances has not to be present, where he claims to be.*
- *A person who in view of his place of residence or occupation and in the ordinary course of events is not supposed to be present at the place of the occurrence but states to be there by chance.*

¹⁸ Diarists.

¹⁹ Punjab Forensic Science Agency.

²⁰ Natural witness, Independent witness, Interested witness, Stock witness, Eye Witness, Official Witness, Related Witness, Accomplice Witness and Child Witness.

14. Under the settled principles of law statement of a Chance Witness requires scrutiny with great care and caution and can be accepted only if he gives satisfactory explanation of his presence at or near the place of the occurrence at the relevant time otherwise his testimony is liable to be rejected straightaway²¹.

15. It is not a disputed fact that residence of Nawaz Sharif (*Pw-3*) was at a distance of about two Kilometers from place of occurrence. He claimed that on the crime day he came to a shrine near to venue of occurrence. His explanation to visit the shrine is not logical, reasonable, convincing and acceptable and does not appeal to mind for a simple reason that he was a shopkeeper in the village which he used to open at 06:00 am and to close in late night. It was not his case, that on the relevant day there was any special event at the shrine and due to that cause, while closing his shop, he went there.

16. His presence has also been negated because of his unnatural conduct. His junior brother aged 14 years was committed to sodomy by four persons, who all at the time of his arrival were present but he made no effort to apprehend any of the them, despite the fact that he was also a young man aged 25 years and was in a position to make resistance to some extent.

17. Muhammad Sharif (*Pw-2*) father of victim admittedly is not an eye witness of the occurrence who reported the matter to police on the disclosure made by his son Shahid Sharif.

18. In view of above circumstances, this is a case of sole witness. No doubt that testimony of solitary witness can be accepted by following the principles of quality and not the quantity and can be a foundation for conviction alone but if

²¹ Javed alias Jaida Vs. The State & another **1978 SCMR 114**; Zafar Hayat Vs. The State, **1995 SCMR 896**; Muhammad Rafique Vs. The State & another **2004 SCMR 755**; Muhammad Khalid Khan Vs. Abdullah & others, **2008 SCMR 158**; Mst. Sughra Begum & another Vs. Qaiser Pervez & others **2015 SCMR 1142**; Ibrar Hussain & another Vs. The State, **2020 SCMR 1850**.

found trustworthy, suffering from no infirmity and inherent defects. Fact remains that criteria for assigning the sole witness stamp of truth, certainly depends on facts and circumstances of each case²².

19. Occurrence took place on 06th of April, 2018 at about 12:00 noon and first time the door of the police Authorities was knocked by Muhammad Sharif/complainant after four days that was 10th of April, 2018 at about 07:45 pm. There is no universal principle that every delayed FIR shall defeat the prosecution and at the same time the prompt FIR has to be followed blindly. The reasons and explanations in case of delayed FIR always play an important role and cannot be taken lightly if the allegations are serious and heinous in nature So the effect on prosecution's case because of delay in FIR has to be seen considering the special features of each case²³. In Asia Bibi's case²⁴ the apex Court on the question of five days delay in reporting the matter to police was pleased to hold as under: -

“There is no cavil to the proposition, however, it is to be noted that in absence of any plausible explanation, this Court has always considered the delay in lodging of FIR to be fatal and casts a suspicion on the prosecution story, extending the benefit of doubt to the accused. It has been held by this Court that a FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime; thus, it has a significant role to play. If there is any delay in lodging of a FIR and commencement of investigation, it gives rise to a doubt, which, of course, cannot be extended to anyone else except to the accused”

20. Coming to the case in hand, while explaining the reasons for delay in FIR, Muhammad Sharif (P_w-2) maintained that he was restrained by the persons of locality to approach the

²² Allah Bakhsh Vs. Shammi & others **PLD 1980 SC 225**; Farooq Khan vs. The State **2008 SCMR 917**; Habibullah Vs. The State **2011 SCMR 1665**;

²³ Mehmood Ahmed & 3 others Vs. The State & another **1995 SCMR 127**; Akhtar Ali & others Vs. The State **PLJ 2008 SC 269** and Ghulam Abbas & another vs. The State & another **2021 SCMR 23**

²⁴ Asia Bibi Vs. The State & others **PLD 2019 SC 64**

police. But who those persons were, that is a mystery even today? It was the duty of complainant to produce any of those fellows, either before the Investigating Officer or the court but no such effort was made at any stage, therefore, in the given circumstances this serious inherent defect cannot be ignored.

21. For the sake of arguments if the explanation in FIR is taken as correct, it was the duty of complainant to be consistent and firm and to stand on the same reasons but when he attended the witness box, he in his examination-in-chief, while deviating from earlier referred explanation stated that: -

“Feeling humiliation and insult I kept quiet for four days and on 10.04.2018 I moved an application Exh.PA to the SHO for registration of case”

22. Therefore, summing up this area of discussions, it is held the delay in reporting the matter to police is definitely damaging and fatal to prosecution.

23. It was the case of prosecution that the incident was captured through a video and for that reliance was made on the photographs (*PI/I-13*) stated to be retrieved from the mobile phone recovered from the possession of Ikram-ul-Haq (*appellant*). To detail this dimension, it was stated that on 16th of April, 2018 when Ikram-ul-Haq was arrested, from his possession a mobile phone was recovered and secured vide an inventory.

24. As the snaps were alleged to be retrieved from the mobile phone of Ikram-ul-Haq, therefore, it was the duty of prosecution to establish its’ safe custody. In the light of principles²⁵ laid down by apex Court, it is understood that the question of chain of safe custody is confined only to the cases

²⁵ Amjad Ali Vs. The State 2012 SCMR 577; Ikramullah & others Vs. The State 2015 SCMR 1002; The State through Regional Director ANF Vs. Imam Bakhsh & others 2018 SCMR 2039 and Zahir Shah alias Shat Vs. The State 2019 SCMR 2004

of narcotics. This Court in **Muhammad Hamza's case**²⁶ while extending the scope of said principles had observed as under:

“The principles of ‘safe custody’ and ‘chain of safe custody’ do not confine to any specific case or situation but in every case where prosecution demands conviction against an offender on the basis of any material that constitutes an offence like hand grenade as in the case in hand, bombs, explosive materials, narcotics, arms and ammunitions etc. these principles shall be strictly adhered to and cannot be compromised under any circumstance. There is a difference between ‘safe custody’ and ‘chain safe custody’. ‘Safe custody’ means, if the case property is with any official/individual that has to be in accordance and under an authority of law or at a secured place like ‘Malkhana’ where access has to be under a specified procedure and law. Whereas ‘chain of safe custody’ means that if case property is transferred or transmitted from one place to other place or from one official to other official, such transmission has also to be under a recognized method. Therefore, prosecution has to establish and prove both ‘safe custody’ and ‘chain of safe custody’ side by side and if any of the links of chain is broken the conviction cannot be recorded or if recorded cannot ordered to be sustained”

25. According to Iftikhar Ali ASI (**Pw-9**) after the recovery of mobile phone, it was handed over to Rafaqat Ali (**Pw-8**) a private person of Jatala Mobiles and on his (ASI) request said Rafaqat Ali retrieved the photographs which were taken into possession on 21st of April, 2018. It is not understandable that under what authority of law, Iftikhar Ali ASI handed over the mobile phone to a private person despite the fact that the required exercise had to be taken by government forensic agency and none-else. From 16th to 21st of April, 2018 the mobile phone remained in the personal custody of Rafaqat Ali (**Pw-8**) which under no situation can be considered as a lawful or safe custody. What he had been doing with the said mobile

²⁶Muhammad Hamza & another Vs. The State & another (Criminal Appeal No. 907 of 2017 decided on 14.04.2022) {approved for reporting (<https://sys.lhc.gov.pk/appjudgments/2022LHC2827.pdf>)}

during this period, no body knows. It is important to add here that Rafaqat Ali (*Pw-8*) is the witness who had direct conflict with the first cousin of Ikram-ul-Haq (*appellant*) which fact he had admitted in the process of cross-examination.

26. Prosecution in this context is also in serious contradictions. As mentioned earlier, version of Iftikhar Ali ASI was that he handed over the mobile to Rafaqat Ali on 16th of April, 2018 but when Ahsan Umair Constable (*Pw-6*) came forward he maintained that mobile phone was given to Rafaqat Ali on 21.04.2018 and on the same date photographs were retrieved and taken into possession. Therefore, again a serious uncertainty is there that during this period whether the mobile phone remained in the custody of Iftikhar Ali ASI or Rafaqat Ali? Prosecution is lack of any material to explain it.

27. Finally, the mobile phone was deposited in the office of PFSA on 30th of May, 2018 as evident from the report (*PU*). Even here, prosecution was under heavy responsibility to establish that from 21st of April, 2018 to 29th of May, 2018 (*period of more than a month*) the mobile phone was in official and lawful custody. Even in this regard, prosecution is at defeating end. Iftikhar Ali ASI (*Pw-9*) never stated that he ever handed over the said mobile to Muhammad Nawaz HC/Moharrar. The declaration of Muhammad Nawaz HC/Moharrar is also completely silent that he ever received said mobile phone during the entire investigation or he ever kept in Malkhana in safe custody or he ever handed over the same of Iftikhar Ali ASI for transmission to the office of PFSA.

28. The report of PFSA is also not significant. It shows that 40 pictures were there in the mobile but no video at all. About the genuineness of the pictures, it was observed that: -

“To opine about the genuineness of pictures is beyond the scope of SOPs of Audio Visual

Analysis Department, Punjab Forensic Science Agency”

29. Although pictures retrieved from the mobile phone have lost legal value thereof, but for the sake of complete justice I have also examined the same. All the pictures are so blur that it is difficult to identify any person. However, in two pictures only it can be seen that one person is committing sodomy with another and the passive also appears to be calm and cool.

30. Finally, coming to the medical evidence, Dr. Zeeshan Ahmad (*Pw-4*) on 10th of April, 2018 at about 07:30 pm had conducted the medical examination of Shahid Sharif (*Pw-1*). He observed two lacerations on 3’o clock and 6’o clock positions with no dilated anal sphincter. He did not find any mark of violence or resistance on any part of the body of the victim. He observed the stitched incised wound on the left thumb and a blackish bruise on the right finger of the victim. The statement of doctor clearly indicates that earlier the victim was medically examined but from where that is still in dark. The two injuries on hand are also not significant for the reason that Shahid Sharif was running a shop of Chicken in the village, therefore, said minor injuries could be possible in routine.

31. Four days’ delay in medical examination again is a destructive point to the prosecution in particular when the DNA reports (*PS and PT*) are negative as according to the expert no seminal material was detected on the tested evidence.

32. This Court in *Muhammad Hamza case* (*ibid*) on the principles of appreciation of evidence had observed as under: -

“Appreciation of evidence which may be direct or circumstantial is a delicate exercise that involves weighing the credibility and reliability of the incriminating material presented in a case and on conclusion thereof it must present a good picture that has to be accurate on all counts, with good composition, exposure, focus, light, and timing. In a

*criminal case as the question of life and liberty of an accused is at stake therefore under the settled principles of law a strict standard of proof is required so as to prove the guilt which cannot base on preponderance of probabilities but it must be proved beyond reasonable doubt. The words '**beyond reasonable doubt**' mean that the prosecution must convince the court that there is no other reasonable outcome of the evidence produced in trial except the conviction of accused.*

*The prosecution case presented in the court must be true. There is also a difference between the words '**may be true**' and '**must be true**' and between these two phrases there is a long distance that has to be covered by legal, reliable and unimpeachable evidence. So for seeking the conviction against an accused prosecution evidence '**must be true**'."*

33. In legal proceeding, there are two basics burdens called '**the legal burden**' and '**the evidential burden**'. The '**legal burden**' is the obligation on a party to prove what it has alleged. In criminal proceedings, it is the prosecution who has the legal burden of proving all the elements of offence or offences and certainly beyond reasonable doubt. Whether prosecution is successful or at the defeating end while discharging the said duty, it is to be decided by the court at the end of trial.

34. Whereas, the '**evidential burden**' is the duty of prosecution to adduce sufficient, reliable, convincing and conclusive evidence against the accused so as to get favorable findings from the court. The discharge of evidential burden will not lead to discharge the legal burden as both have to hit the bull's eye²⁷ simultaneously. Therefore by now these are the settled principles²⁸ of law that: -

- *Conviction cannot be based merely on the high probabilities that may be inferred from evidence in a given case.*

²⁷ The very center of a shooting or archery target.

²⁸ Rehmat alias Rhaman @ Waryam @ Badshah Vs. The State **PLD 1977 SC 515**; Abdul Majeed Vs. The State **2011 SCMR 941**; Nasrullah alias Nasro Vs. The State **2017 SCMR 724**; Ali Ahmad & another Vs. The State & others **PLD 2020 SC 201**

- *Finding of the guilt should rest surely and firmly on the evidence produced by the prosecution.*
- *Mere conjectures and probabilities cannot take the place of legal proof otherwise the golden rule of benefit of doubt will be reduced to naught.*
- *Accused is only to create doubt in prosecution's case.*
- *It is the duty of prosecution to prove its case beyond reasonable doubt.*
- *Benefit of every reasonable doubt must go to the accused.*
- *Benefit of doubt however slight must go to the accused.*
- *Single infirmity in prosecution's case will entitle the accused to benefit of doubt.*
- *Court is not supposed to thumb mark blindly what the prosecution has desired.*
- *Rule of law is the supreme consideration and nothing is top to it. A Judge is only to be impressed when "burden of persuasion" is successfully discharged which means to convince the court that qualitative evidence is there.*

35. The ultimate and only outcome of the discussions, deliberations and analyses made above is that prosecution had badly failed to prove its case beyond reasonable doubt against all the appellants Ikram-ul-Haq, Abdul Ghaffar, Muhammad Bilal and Muhammad Irfan Haider and by declaring so both criminal appeals are **allowed**. Impugned judgment is **set aside**. All the appellants are **acquitted** from the case. They are in custody and they shall be released forthwith if not required in any other case.

(Sohail Nasir)
Judge

Approved for Reporting

(Judge)