

2022 P Cr. L J Note 17

[Balochistan (Turbat Bench)]

Before Jamal Khan Mandokhail, C.J. and Nazeer Ahmed Langove, J

AMJAD ALI and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No. (T) 83 of 2019, decided on 27th January, 2020.

(a) Penal Code (XLV of 1860)---

---Ss. 376(2) & 34---Rape, common intention---Appreciation of evidence---Unnatural conduct of witnesses---Scope---Accused were charged for committing zina with the nieces of complainant---Record reflected that the conduct of the alleged victims and their family members was unnatural for the reasons that as per the story of prosecution, both the victims boarded a vehicle and shifted to some place where they were subjected to rape, however, the alleged place of abduction and the area wherefrom they travelled was highly populated, keeping mum the alleged victims negated the story of the prosecution as mentioned in the FIR and narrated by the prosecution witnesses---First Information Report was not registered by the victims, their father or brother, which otherwise was unnatural---Medical examination showed that there were no marks of violence on their persons---Accused were not identified by the victims correctly during the trial, thus, false implication of the accused for ulterior motive, could not be kept out of consideration--- Material contradictions, dishonest improvements and inconsistencies had been noted in the statements of witnesses, which made the very case of prosecution doubtful---Alleged disclosure made by the accused was also of no avail, as a result, no recovery or discovery of new facts could be unearthed nor the accused made any confession in that behalf---Circumstances established that the prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal against conviction was allowed, in circumstances.

(b) Criminal trial---

---Benefit of doubt---Principle---If a single doubt is created even then the defence is entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right.

Muhammad Akram v. The State 2009 SCMR 230 and Sher Umer Khan v. Khan Pur alias Khaney and 2 others PLD 2014 Pesh. 143 rel.

(c) Criminal trial---

---Sentence---Harsher the sentence, stricter the standard of proof.

(d) Administration of justice---

---Standard of sentence---Scope-Some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence in order to obviate chances of miscarriage of justice on account of exaggeration by the Investigating Agency---Such minimum standards of safety are even otherwise necessary for safeguarding the fundamental rights of the citizens regarding life and liberty, which could not be left at the mercy of police without production of independent reliable evidence.

Abdul Waheed for Appellants.

Sudheer Ahmed, Deputy Prosecutor General for the State.

Date of hearing: 8th January, 2020.

JUDGMENT

NAZEER AHMED LANGOVE, J.---This appeal is directed against the judgment dated 26th June 2019 (hereinafter the "impugned judgment"), passed by learned Additional Sessions Judge, Panjgur (hereinafter the "trial court"), in case No.04/2018, whereby the appellants Amjad Ali son of Jumma and Nawaz Hussain son of Hussain were convicted under sections 376(2) and 34, P.P.C. and sentenced to suffer imprisonment for life each, with benefit of section 382-B, Cr.P.C.

2. Facts of the case are that, pursuant to application (Ex:P/1-A) by PW-1 Ejaz Ahmed son of Allah Bakhsh (complainant), instant criminal case, vide, FIR No.112/2018 (Ex: P/11-A), dated 25th August 2018, under sections 376 and 34, P.P.C. was registered at Police Station Panjgur, wherein it was alleged that on fateful day of incident i.e. 24 August 2018, his niece namely Mst. Sabina and Iqra daughters of Khuda Rahm set out to bring water; but not returned, it was presumed that they might had gone to the house of their sister; in the next morning, PW-4 Dad Khan, came and informed that Sabina and Iqra are present in his house; who informed that when they were going towards Karez to fetch water, confronted by Shehzad and Tanvir in a car, driven by co-accused (their third fellow), boarded them in the car forcefully and started towards mountains, where they committed Zina with them, and; left in the area of Shabanan at night; they took refuge in the house of PW-Dad Khan. Hence, this case and arrest of the appellants.

3. On completion of investigation, challan (Ex: P/11-F) was submitted and trial commenced.

To substantiate accusation, the prosecution produced and examined PW-1 Ejaz Ahmed (complainant); PW-2 Mst. Sabina (victim), PW-3 Mst. Iqra (victim); PW-4 Dad Khan son of Shafi Muhammad; PW-5 Zaheer Ahmed SI, is witness of identification parade forms (Ex: P/5-A to P/5-D) of appellants and co-accused. PW6 Dr. Hafeezullah, Medical Officer, vide, MLCs (Ex: P/6-A and P/6-B) of PWs-2 and 3. PW-7 Rehmat Ali, HC, is witness of recovery memo (Ex: P/7-A) of parcel (Article-P/1) containing mobile sim

(Article-P/2) and sample of seal (Article-P/3); recovery memo (Ex: P/7-B) of parcels (Article-P/4 and P/5) of shalwars of Mst. Sabina and Mst. Iqra (Article-P/6 and P/7), and samples of seal (Article-P/8 and P/9). PW-8 Muhammad Jan, Constable is witness of recovery memo (Ex: P/8-A) of parcel (Article-P/10) containing empty tin of bear (Article-P/11) and sample of seal (Article-P/12). PW-9 Muhammad Daleep is witness of recovery memo (Ex: P/9-A) of samples of seamen of appellants and co-accused; PW-10 Sabir Saleem, Civil Judge, identified his signatures on identification parade forms (Ex: P/5-A to P/5-D). PW-11 Javed Ahmed, SI (Investigation Officer) produced FIR (Ex: P/11-A), site sketches (Ex: P/11-B and P/11-C), interim challan (Ex: P/11-D), FSL report (Ex: P/11-E), and supplementary challan (Ex: P/11-F).

CW-1 Malik Ahmed SI, vide non-bailable warrant (EX: C/1-A) of accused Shehzad; CW-2 Kulsoom Ibraheem, CW-3 Mah Jabeen, Lady Health Visitors.

The appellants (accused) were examined under section 342, Cr.P.C, wherein they disputed the case of prosecution and pleaded their innocence; they recorded their statements on Oath under section 340(2), Cr.P.C, with same effect and placed their CNICs as Mark-1/A and 2/A; however, did not produce any witness in defence.

4. The learned trial court after hearing arguments and evaluating the evidence, vide impugned judgment convicted and sentenced the appellants for the period mentioned above. Hence, this appeal with the prayer to set aside the impugned judgment passed by the trial court and to acquit them of the charge.

5. Heard the learned counsel for the parties and gone through the record with their assistance, which reflects that during entire episode, conduct of the alleged victims and their family members was unnatural for the reasons that as per the story of prosecution, PW-2 Mst. Sabina and PW-3 Mst. Iqra (victims) were boarded in a vehicle and shifted to some place where they were subjected to rape, however, the alleged place of abduction and the area wherefrom they travelled, was highly populated, keeping mum by the alleged victims, negates the story of the prosecution as mentioned in the FIR and narrated by the FIR was not registered by the victims, their father or brother, which otherwise is unnatural. Moreover, on medical examination, there were no marks of violence on their persons. It has also come on record that during trial, the accused were not identified by the victims correctly, false implication of the accused for ulterior motive, not disclosed by the parties, cannot be kept out of consideration.

6. Now coming to the credibility of evidence furnished by the prosecution, perusal whereof clearly shows that the prosecution has failed to establish its case against the appellants beyond reasonable doubt, material contradictions, dishonest improvements and inconsistencies have been noted in the statements of witnesses, which in our perception are sufficient to make the very case of prosecution doubtful, alleged disclosure made by the appellants is also of no avail, as a result, no recovery or discovery of new facts could be unearthed nor the appellants made any confession in this behalf.

7. Legal aspect of the matter is that the Courts are under obligation to consider

respective contentions in true perspective with well-recognized principle of preferential right of defence plea when weighed and kept in juxtaposition. The Courts should not be made handicapped, a judge is required to see beyond and to look into the matters with due care and caution because the judges are blessed with a noble cause of dispensation of justice, which demands hard work, devotion and commitment because human progress is neither automatic nor inevitable, every step toward the goal of justice require sacrifice, suffering, and struggle, and passionate concern of dedicated individuals. No doubt punishment is justice for the unjust. Similarly justice cannot be for one side alone, but must be for both. We should be mindful that there is a higher Court than courts of justice and i.e. the court of conscious. It supersedes all other courts. It is important to know that fairness is what justice really the keystone justice is the belief of common man that the legal system treats all equally and fairly. Another important aspect should not lose sight is that society is now less convinced of absolute accuracy of the criminal justice system, therefore, the judges are required to be very vigilant while deciding fate of an aggrieved, as a matter of fact that "there really can be no peace without justice." There can be no justice without truth." And there can be no truth, unless someone rises up to tell you the truth." Justice is itself the great standing policy of civil society, and any imminent departure from it, under any circumstances, lies under the suspicion of being no policy at all.

8. Needless to mention here that the defence is not required to create a series of dents and doubts in prosecution case but for giving the benefit of doubt if a single doubt is created even then the defence is entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right. Reliance can be placed on the judgment title as Muhammad Akram v. The State (2009 SCMR 230). Relevant observation therefrom is reproduced herein below:-

"The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must occur in favour of the accused as matter of right and not of grace. It was observed by this court in the case of Tariq Pervaiz v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which create reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right".

Reliance can also be placed on a reported judgment titled as Sher Umer Khan v. Khan Pur alias Khaney and 2 others (PLD 2015 Peshawar 143) wherein it held as under:

"It is settled law that the prosecution primarily is bound to establish guilt against the accused without shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence enabling the court to draw conclusion: whether the prosecution has succeeded in establishing accusation against the accused or otherwise: and if it comes to the conclusion that the charges so imputed against the accused has not been proved beyond reasonable doubt, then accused would become entitled for his release on getting benefit of doubt in the prosecution case. The requirement of the criminal case is that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same must go to the

accused and it would be sufficient to discredit to the prosecution story and entitle the accused for acquittal. Moreover, accused is always consider as the most favorite child of law and every benefit of doubt goes to him regardless of fact whether he has taken any such plea or not. Reliance can be placed on case titled, "Fariad Ali v. State" 2008 SCMR 1086".

It is settled principle of law that rule of safe administration of criminal justice is; the harsher the sentence the stricter the standard of proof; therefore, for the purposes of safe administration of criminal justice, some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence in order to obviate chances of miscarriage of justice on account of exaggeration by the Investigating Agency. Such minimum standards of safety are even otherwise necessary for safeguarding the fundamental rights of the citizens regarding life and liberty, which cannot be left at the mercy of Police without production of independent reliable evidence.

9. At this juncture, we would like to quote famous arguments of Sir Geoffrey Lawrence, then King's Counsel, remembered in legal memory as a fine judge appointed on the King's Bench Division, to be later elevated as Lord Justice of Appeal in 1944 and who later was destined to Presides over the Tribunal set up to try war crimes at the Nuremberg Trials in 1946-1947 and who remarkably was a relative stranger to the criminal Court but was engaged as defence counsel in his first murder trial to defend Dr. John Bodkin Admas, a notorious serial killer of his age and accused of murder of a patient in "one of the greatest murder trials of all times" in his concluding address to the jury explained with startling simplicity and clarity how reasonable doubt operates in a criminal case:-

"Justice is of paramount consideration here, and the only way in which this can be done is for you to judge the matter on what you have heard in this court and in this court only. What you read in the papers, what you hear in the train, what you hear in the cafes and restaurants, what your friends and relations come and tell you; rumour, gossip, all the rest of it, may be so wrong. The possibility of guilt is not enough, suspicion is not enough, probability is not enough, likelihood is not. A criminal matter is not a question of balancing probabilities and deciding in favour of a probability. If the accusation is not proved beyond reasonable doubt against the man accused in the dock, then by law he is entitled to be acquitted, because that is the way our rules work. It is no concession to give him the benefit of the doubt. He is entitled by law to a verdict of not guilty."

10. In view of what has been discussed above, we are inclined to conclude that the prosecution has failed to prove its case against the appellants beyond reasonable doubt for which they are entitled to be benefited, in result whereof, the appeal is allowed and the judgment impugned dated 26th June 2019, passed by the learned Additional Sessions Judge, Panjgur, is set aside and the appellants namely Amjad Ali son of Jumma and Nawaz Hussain son of Hussain are acquitted of the charge under sections 376 and 34, P.P.C, in case No.04/2018, FIR No.112/2018, P.S. Panjgur by extending benefit of doubt in their favour, they are in custody, ordered to be released forthwith, if not required in any other case.

11. Above are the reasons of our short order dated 8th January 2020.

JK/89/Bal.

Appeal allowed.