

2018 P Cr. L J 1538

[Balochistan (Sibi Bench)]

Before Abdullah Baloch, J

MUHAMMAD SIDDIQUE---Petitioner

Versus

The STATE---Respondent

Criminal Revision Petition No. (s) 16 of 2016, decided on 19th January, 2018.

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

---Ss. 365, 377 & 34---Kidnapping or abducting with intent to secretly and wrongfully confine person, unnatural offence, common intention---Appreciation of evidence---Ocular account corroborated by medical evidence---Prosecution case was that the accused forcibly took away the minor son of complainant on motorcycle and then took him into a room, where another unknown person was present, where all of them committed sodomy with the minor---Ocular account of the occurrence was furnished by the complainant and the victim---Record showed that complainant of the case appeared as witness and fully reiterated the contents of FIR and narrated the entire story in line with the fard-e-bayan and the FIR---Complainant narrated the whole story with regard to non-return of his son from bazaar and his arrival on the following day and on query, the victim disclosed about the episode---Complainant without any loss of time promptly lodged the FIR by specifically nominating the accused persons and the act of abduction as well as committing unnatural offence with his son---Evidence of said witness was subjected to lengthy cross-examination, but nothing beneficial had come out on record in favour of the accused---Victim appeared and narrated the whole story with regard to his abduction on motorcycle by the accused persons and taking him towards fisheries pool and committing unnatural offence with him the whole night and setting him free on the following day---Statement of the victim was in line with his earlier statement---Said witness was cross-examined at sufficient length, but nothing fruitful had come on record in favour of defence---Nothing was on record to show that victim was tutored by his elders---Statement of the victim child had been corroborated by the circumstantial witnesses and medical evidence---Both the complainant as well as the victim remained consistent and firm in their depositions---Said witnesses accurately uttered the date, time and manner in which the accused persons took the victim and committed sodomy with him---Ocular testimony produced by the prosecution was direct in nature and the same remained unshaken, consistent and confidence inspiring on all material counts---Witnesses fully supported the case of prosecution---Case of prosecution had further been strengthened by the medical evidence produced by the Medical Officers, who opined, after complete examination of victim, that the victim had been sexually assaulted---Medical evidence had remained unshaken and unchallenged---Record transpired that prosecution had produced corroborative and confidence inspiring evidence and the defence had failed to cause any dent in the same---Circumstances established that defence had failed to point out any misreading or non-reading of evidence and major contradiction in the statements of prosecution witnesses or any material illegality or irregularity in the impugned judgment, warranting interference---Appeal was dismissed in circumstances.

Kamran alias Kami v. The State 2012 PCr.LJ 1200 and Muzammil Shah v. State 1991 MLD 1944 rel.

(b) Criminal trial---

---Witness---Interested/related witness---Testimony of interested/related witness---Scope---Related witness was as much competent witness as any other provided, he was not inimical towards accused and had no motive to implicate the accused in a false case.

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

---Ss. 365, 377 & 34---Kidnapping or abducting with intent to secretly and wrongfully confine person, unnatural offence, common intention---Appreciation of evidence---Solitary statement of victim---In case of sodomy or zina, the solitary statement of victim was sufficient to convict the accused if it was confidence inspiring.

Fayyaz alias Fayyazi and another v. The State 2006 SCMR 1042 and Mushtaq Ahmed and another v. The State 2007 SCMR 473 rel.

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

---Ss. 365, 377 & 34---Kidnapping or abducting with intent to secretly and wrongfully confine person, unnatural offence, common intention---Appreciation of evidence---Delay of one day in lodging FIR---Defence had objected that FIR was lodged after the delay of one day which was fatal to the prosecution case---Effect---Delay alone in lodging the FIR was not helpful for defence to claim acquittal of the accused---In the present case, FIR was lodged promptly by the complainant as and when the victim returned to his house and informed his father about the incident---In such like cases, the prestige and respect of family was involved as the child of someone was defamed---People were reluctant in filing report to the police and it was a natural course that the guardian of victim must have consulted his relatives, whether to file report or not---Delay in filing FIR, in circumstances, was natural and same was not material to the case.

Nadir Ali Chalgari for Petitioner.

Jameel Akhtar Gajani, APG for the State.

Date of hearing: 27th December, 2016.

JUDGMENT

ABDULLAH BALOCH, J.---This judgment disposes of the instant Criminal Revision Petition No.(S)16 of 2016 filed by the petitioner Muhammad Siddique son of Abdul Karim, against the judgment dated 22nd October 2015 (hereinafter referred, as "impugned judgment") passed by learned Judicial Magistrate/MFC Dera Murad Jamali (hereinafter referred as "the trial Court"), whereby the petitioner along with co-accused Ghulam Muhammad were convicted and sentenced under section 377, P.P.C. and sentenced to suffer RI for a period of three years with fine of Rs.10000/-, in default thereof to further undergo SI for four months. They were further convicted under section 365, P.P.C. and sentenced to suffer RI for a period of three years with fine of Rs.10000/- and in default thereof to further

undergo SI for a period of four months. The benefit of section 382(b), Cr.P.C. was also extended in their favour, however, all the sentences shall run concurrently, and against the judgment dated 29th February 2016 passed by the learned Additional Sessions Judge, Dera Murad Jamali (hereinafter referred as "the appellate Court"), whereby the appeal filed by the petitioner and co-accused was dismissed.

2. Facts of the case are that on 14th June 2015 the complainant Khuda Bakhsh lodged FIR No.84/2015 at Police Station City Dera Murad Jamali under sections 365, 377 and 34, P.P.C. wherein he alleged that on 13th June 2015 his son Amir Khan age about 12 years went to bazar and did not return home. He searched for his son, but to no avail. However, on the following day i.e. 14th June 2015 his son arrived home and stated that yesterday at about 11:30 a.m., the accused Ghulam Muhammad and Muhammad Siddique forcibly took away him on motorcycle from Chukhra Mohallah and taken him into a room near Fisheries Talab, where another unknown person was present, where all of them committed sodomy with him (complainant's son).

3. In pursuance of the above FIR, the investigation of the case was entrusted to PW-7 Ghulam Qadar SI, who during investigation inspected the site and prepared site plan, got conducted the medical examination of victim; arrested the petitioner and co-convict Ghulam Muhammad and got conducted their medical examination; recorded the statements of witnesses under section 161, Cr.P.C. and on completion of investigation submitted the challan in the trial Court.

4. At the trial, the prosecution produced seven (07) witnesses. The petitioner and co-convict were examined under section 342, Cr.P.C., however, neither they recorded their statements on oath under section 340(2), Cr.P.C. nor produced any witness in their defence. On conclusion of trial and hearing arguments, the trial Court awarded conviction to the petitioner as mentioned in para-1 above vide judgment 22nd October 2015. Under such circumstances, the) preferred an appeal before the appellate Court, which was dismissed, vide judgment dated 29th February 2016. Whereafter the instant petition has been filed.

5. Learned counsel for the petitioner argued that the evidence produced by the prosecution suffers from material contradictions and dishonest improvements; that the FIR was lodged after the delay of one-day of the alleged abducted without any plausible explanation; that the prosecution version is lacking independent corroboration as only interested witnesses were produced; that the medical evidence is in conflict with the ocular evidence; that the prosecution has miserably failed to prove the charge against the petitioner beyond any shadow of doubt and both the Courts below while awarding conviction and dismissing his appeal have badly erred in appreciating the evidence available on record.

6. Learned A.P.G. contended that the judgments of courts below are based on cogent and concrete evidence and the petitioner has failed to rebut the allegations; that the prosecution version was duly supported by oral as well as medical evidence; that the conviction awarded to the petitioner and co-convict was maintained by the appellate Court, based on proper appreciation of evidence by the Courts below and does not open for interference by this Court.

7. Heard the learned counsel and perused the available record. In order to substantiate the case, the prosecution has produced the evidence of seven (07) witnesses. The complainant of the case appeared as PW-1, who fully reiterated the contents of FIR and narrated the entire

story in line with Fard-e-Bayan Ex.P/1-A and the FIR. PW-1 narrated the whole story with regard to non return of his son from Bazar and his arrival on the following and query the victim disclosed the entire story and the complainant without any loss of time promptly lodged the FIR by specifically nominating the accused persons and the act of abduction as well as committing unnatural offence with his son. The evidence of said witness was subjected to lengthy cross-examination, but nothing beneficial has come out on record in favour of the appellant. PW-2 is the victim with whom the petitioner and co-convict along with absconding accused committed unnatural offence. PW-2 narrated the whole story with regard to his abduction on motorcycle by the accused-petitioner along with co-convict and taking him towards Fisheries Pool and committing unnatural offence with him the whole night and on the following day he was set free. The statement of the victim is in line with his earlier statement. The said witness was cross-examined at sufficient length, but nothing fruitful has come on record in favour of defence. Both the complainant as well as the victim (PW-2) remained consistent and firm in their deposition. Both the witnesses accurately uttered the date, time and manner in which the petitioner and co-convict took the victim along with them on the motorcycle and committed sodomy with him. The ocular testimony produced by the prosecution is direct in nature and the same remained unshaken, being consistent, confidence inspiring on all material counts. The witnesses fully supported the case of prosecution.

8. The case of prosecution has further been strengthened by the medical evidence produced by PW-3 Dr. Talib Hussain. PW-4 Dr. Atta Muhammad and PW-5 Dr. Ayaz Jamali. PW-3 examined the victim/PW-2 and issued MLC Ex.P/2-A. perusal of which reflects that PW-3 after complete examination of victim has opined that the victim has sexually been assaulted. The medical evidence has remained unshaken and unchallenged.

9. PW-4 Dr. Atta Muhammad has examined the co-convict Ghulam Muhammad, while PW-5 Dr. Ayaz Jamali examined the petitioner Muhammad Siddique and found them potent and able to perform sexual act. After examination MLCs were issued as Ex.P/4-A and Ex.P/5-A, perusal of which confirms the unnatural offence committed by the petitioner and co-convict along with their absconding accomplices with the minor Amir Khan.

10. As far as non-production of an independent witness in the trial Court is concerned, suffice to state here that the statements of prosecution witnesses are confidence-inspiring and ring true. As regards the argument of the counsel for the petitioners that related witnesses are not reliable. It is not worth consideration, because none of the relatives has shown to be the eye-witness of the occurrence. It may be observed that a related witness is as much as competent witness, as any other provided he is not inimical towards accused and has a motive to implicate the accused in a false case. It may be observed that in case of sodomy or zina the solitary statement of victim is sufficient to convict the accused if it is confidence-inspiring. Reliance in this regard is placed on the case of Fayyaz alias Fayyazi and another v. The State 2006 SCMR 1042, the relevant portion reads as under:

"... It has also been rightly observed by the learned Federal Shariat Court that conviction could be based on the solitary statement of the victim provided the same is capable to implicit reliance and is corroborated by any other piece of evidence if so available in the case. Undisputedly victim of the offence namely Khadim Hussain at the time of commission of offence was aged about 10 years and a school going boy, who did not carry any ill will, grudge or malice against the appellants to falsely implicate them in the case. It has also been not disputed or challenged at the trial that

Khadim Hussain was school going boy, who in his deposition before the Court stated that after attending the class he was on his way for the home through pavement where wheat crop was standing. He was ambushed by accused persons out of whom accused Abbas caught hold of his arms while accused Fayyaz committed sodomy upon him and thereafter accused Fayyaz caught hold of him and sodomy was committed upon him by accused Abbas. He also stated that accused was armed with a pistol who threatened him of serious consequences. The testimony of the victim could not be impeached or discredited though subjected to test of cross-examination by the learned defence counsel. Dr. Atta Muhammad Zafar the Medical Officer appeared as P.W.4 who stated that on 24-4-1998 he medically examined Khadim Hussain aged about 10 years was brought to him by Constable Munir Ahmed as a case of sexual assault. The victim was allegedly subjected to unnatural lust on 23-4-1998 and the matter was promptly reported to the police which was entered as Roznamcha Rappet No.3 on 23-4-1998 at about 2-30 p.m. and subsequently on 25-4-1998 at 9-30 p.m. FIR was registered against the nominated accused persons most probably in view of the MLR of the victim produced by the complainant. The findings noted in the MLR after the examination by the Medical Officer mentioned above clearly indicate that the injuries were caused by insertion of some blunt object within a duration of 20 to 40 hours. The Medical Officer was subjected to cross-examination by the learned defence counsel and it was not even suggested to him that the noted injuries could be result of any insensate object, therefore, in absence of any other indication or material available on record it could not be said that the same were not caused by penetration in respect whereof the victim expressly stated that he was subjected to sexual intercourse one after the other by the accused persons. Also, no suggestion was given to the Medical Officer in cross-examination that no injury of the like nature as noted in the MLR could be noticed on examination if conducted after 20 to 40 hours approximately on the person of the victim if so caused or inflicted. Hence, it could not be said that any symptom or injury on the person of a victim of unnatural offence could not have been noticed during the medical examination after 20 hours subsequent to the commission of the act. The Medical Officer admittedly was an independent person having no reason to issue a false certificate favouring the victim, therefore, this piece of evidence in view of the contentions raised on behalf of the appellants could not have been discarded and rightly so believed by the learned Federal Shariat Court."

Similar view has also been taken in the case *Mushtaq Ahmed and another v. The State*, reported in 2007 SCMR 473, wherein it has been held as under:

"It is consistent view of this Court that in rape cases mere statement of the victim is sufficient to connect the petitioners with the commission of offence in case the statement of the victim inspires confidence. In the present case both the Courts below have given concurrent conclusions that statements of both the victims (P.W.9 and P.W.10) inspire confidence and connected the petitioners with the commission of offence. They had faced lengthy cross-examination by the defence but defence had failed to shake their veracity. The statement of P.W.9 was duly corroborated by the medical evidence of Dr. Tahira Afzal Durrani who had categorically stated that her hymen was absent and she was pregnant. Her statement was also corroborated by the statement of Dr. Malik Saeed Akhtar Radiologist P. W. who had examined D.W.9 and also performed her ultra-sound according to which she was pregnant of about 18 weeks. Both the Courts below were justified to believe the statements of the aforesaid witnesses after reappraisal of evidence. The trial Court was justified to disbelieve the

defence version and upheld by the learned Federal Shariat Court. It is not believed or appealed to reason to observe that a sane person would ever like to put a stake his or her family honour as well as career of young unmarried daughter for such petty disputes as alleged by the defence. Both the Courts below after proper appreciation of evidence have concurrently convicted the petitioners with cogent reasons, keeping in view all the principles laid down by this Court in the safe administration of justice. This Court, as a rule should give due weight and consideration to the opinion of the Courts below and in particular to the opinion of the Court of the first instance which had advantage of hearing the parties, witnesses and watching their demeanour." (underlines provided emphasis)

11. So far as, the delay of one day in registering the FIR is concerned, in my view mere delay alone in lodging the FIR is not helpful for defence to claim acquittal of the petitioner. Even otherwise, the FIR was lodged promptly by the complainant as and when the victim returned to his home and informed his father about the incident. Even otherwise, it has been remained the consistent view of the superior courts that in such like cases the prestige of family and respect is involved as the child of someone was defamed people were reluctant in filing report to the Police and it was a natural course that the guardian of victim must have consulted his relatives, whether to file report or not. Even otherwise, the complainant soon after receipt of information from the victim reported the matter. Hence, the delay in filing FIR in the circumstances, as natural and same was not material to the case. Where a minor child could be defamed for whole life, no father or elder brother would involve an innocent person in the false case. The prosecution has produced corroborative and confidence inspiring evidence and the defence has failed to cause any sort of dent in the evidence of prosecution, therefore, the objection so taken by the defence is without any substance. Reliance in this regard is placed on the case of Kamran alias Kami v. The State, 2012 PCr.LJ 1200. For facilitation, the relevant portion is reproduced herein below:

"Another argument of the counsel for the appellant is that the FIR is delayed by four and half hours. This delay is unexplained, therefore, the conviction cannot be passed on the basis of this FIR. We have examined the whole record. From the record it is evident that the occurrence took place on 12-00 p.m. and when the convict-appellant released the victim, he went to his home and narrated the incident to his father, who filed the report. It may be observed that in our society, such like incidents where family prestige or respect is involved and child of someone is defamed, people are reluctant in filing reports to the Police. It is a natural course that the father of victim must have consulted his relatives whether, to file report or not and after consultation he filed the report. In the matters of family honors where a child of 11 years can be defamed for whole life, no father will involve an innocent person in a false case. The delay is natural and such delay is not material to the case."

12. Admittedly. PW-2 is a minor, but at the time of his examination-in-chief the Court enquired several questions from him and found him mentally mature and fit to answer the questions correctly and even during cross-examination he replied the questions correctly, which establishes the soundness of his mind and his statement cannot be thrown aside merely on the ground of his being minor age of twelve year rather alone his statement is enough to establish the charge against the appellant. Even otherwise, there is nothing on record showing that this witness was tutored by his elders. I am conscious of the fact that the rule of prudence requires that the testimony of child witness should not be relied upon unless it is corroborated by some cogent evidence on the record. However, in the case in hand the statement of child

witness has fully been corroborated by the circumstantial witnesses and medical evidence. Reliance in this regard is placed on the case of Muzammil Shah v. State, 1991 MLD 1944, wherein it has been held as under:

10. We have gone through the evidence of Mst. Irshad (P.W.5) with care. Before recording her statement, the learned trial Judge had recorded a note after putting her certain questions that he was satisfied that the witness was intelligent and was capable of making rational answers to questions put to her. Besides, she has been subjected to fairly lengthy cross-examination which she had withstood to an astonishing degree. A perusal of her statement shows that she made the statement in a frank and straightforward manner. Curiously there was no suggestion to her in her cross examination that she did not know the appellant. Then there are no circumstances to indicate that she might have been tutored. She had seen the appellant in the course of committing sodomy over the victim with his trousers loosened. She was intelligent enough to understand as to what had been done to her brother and neither she nor her father had any motive to falsely implicate him. We see no reason whatsoever why the statement of such a child witness should not be believed though a suggestion was made to Naeem Gul (P.W.4) that there was enmity of her relatives with the appellant. Nonetheless, the appellant when examined under section 342, Cr.P.C. did not take up this plea. We have not been able to discover any valid reason to reject the testimony of Mst. Irshad (PW.5).

13. Throughout the case, the petitioner and co-convict have failed to take any specific plea with regard to their false implication. In their examination under section 342, Cr.P.C., they simply denied the allegations and even did not record their statements on oath and also not produced any witness in their defence, whereas on the other hand the prosecution has produced direct solid evidence, hence the direct evidence so produced by the prosecution cannot be brushed aside merely on the basis of bald denial of the petitioners. Both the Courts below have rightly properly appreciated the evidence in its true perspective. The learned counsel for the petitioners have failed to point out any misreading and non-reading of evidence and major contradiction in the statements of PWs or any material illegality or irregularity in the impugned judgments, warranting interference by this Court. The case laws so referred by the learned counsel for the petitioners are not helpful to the defence.

For the above reasons, the petition being devoid of merits is dismissed. The petitioner is on bail; be taken into custody and be sent to Jail to serve his remaining period of sentence.

JK/13/Bal.

Revision dismissed.