

**2020 P Cr. L J 1243**

**[Lahore]**

**Before Malik Shahzad Ahmad Khan, J**

**MUHAMMAD TARIQ---Appellant**

**Versus**

**The STATE and another---Respondents**

Criminal Appeal No. 2023 of 2011, heard on 5th June, 2020.

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

---Ss. 376, 365 & 511---Rape, kidnapping or abducting with intent to secretly and wrongfully confine person, attempt to commit offence---Appreciation of evidence---Benefit of doubt---Enmity with accused---Non-production of victim---Contradictory statements---Un-natural conduct of witnesses---Delay in producing clothes of victim to police---Effect---Prosecution case against accused was that he abducted the daughter of complainant when she reached near his house; took her to his house; tore her clothes with intention to commit rape but the mother of victim while passing through the street saw the victim being abducted; which attracted two persons and the accused fled away from the spot---Admittedly, complainant party had enmity with the accused---No medico legal examination of the victim was produced which could have shown marks of dragging or violence on her body---Victim, although deaf and dumb, was not produced in the witness box---Statements of eye-witnesses were contradictory---Accused, despite being empty handed, was not apprehended by the complainant party even though it consisted of three adult members---Torn 'qameez' of the victim was produced before the police after seventeen days of the occurrence--Admittedly, accused and his brother lived in the house where the occurrence took place and it was not probable that the accused would attempt to commit rape where his family and family of his brother was living---Prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal against conviction, was allowed, in circumstances.

**(b) Criminal trial---**

---Witness---Related witness---Scope---Statement of related eye-witness can be relied upon to decide a case but such statement is required to be corroborated by independent evidence and it should be confidence inspiring and trustworthy.

**(c) Criminal trial---**

---Benefit of doubt---Scope---Single circumstance creating reasonable doubt in the prosecution case is sufficient to give benefit of doubt to the accused.

Tariq Pervez v. The State 1995 SCMR 1345 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Barrister Danyal Ijaz Chadhar for Appellant with the Appellant in person.

Ch. Muhammad Ishaq, Additional Prosecutor-General for the State.

Nemo for the Complainant.

Date of hearing: 5th June, 2020.

## **JUDGMENT**

**MALIK SHAHZAD AHMAD KHAN, J.**---This judgment shall dispose of the aforementioned criminal appeal, filed by the appellant, Muhammad Tariq, against his conviction and sentence. The appellant was tried in case FIR No. 128 dated 21.07.2009 registered at Police Station Harnoli District Mianwali offences under sections 376/511/365 of P.P.C. by the learned Addl. Sessions Judge, Piplan and after conclusion of trial, vide judgment dated 28.11.2011, the learned trial Court has convicted and sentenced the appellant as under:-

Under section 376 of P.P.C. to undergo rigorous imprisonment for seven years with fine of Rs. 30,000/-and in default of payment of fine, the appellant was directed to undergo SI for three months.

The benefit of section 382-B of Cr.P.C. was also extended to the appellant.

2. Brief facts of the case, as given by the complainant Muhammad Siddique (PW-2) in the FIR are that he was resident of Harnoli City and was working at a Petrol Pump situated in Chak No. 19-A/ML District Mianwali. On 21.07.2009 at 11:30 a.m., her daughter, namely, Zahida Bibi aged about 16 years, who was deaf and dumb, was returning home from the house of her uncle, namely, Muhammad Aslam and when she reached near the house of Muhammad Tariq (appellant), the appellant forcibly abducted her and took her to his haveli, where one unknown person was also present. At the time of abduction, mother of Zahida Bibi, namely, Mst. Safia Bibi was coming in the street after taking medicine, who raised hue and cry upon which Muhammad Ismail (PW-4) and Shahid (given up PW) attracted to the spot. On seeing the PWs, the appellant along with unknown accused fled away from the spot. Accused also torn the clothes of the daughter of the complainant and they had the intention to commit rape with her after her abduction.

3. After completion of the investigation, the challan was submitted before the Court. The learned trial Court framed the charge under section 365-B of P.P.C. against the appellant on 17.12.2009, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced eight witnesses during the trial. Medical evidence regarding the potency test of the appellant was produced through Dr. Sana Ullah Malik (PW-1). Muhammad Siddique (PW-2) was the complainant of the case, whereas, Mst. Safia Bibi (PW-3) and Muhammad Ismail (PW-4) were the prosecution eye-witnesses. Hamid Ullah S.I (PW-7) and Muhammad Ijaz Ali S.I (PW-8) were the Investigating Officers of this case, whereas, Muhammad Bashir 129-C (PW-5) and Muhammad Ajmal S.I (PW-6) were the formal witnesses. Muhammad Hafeez, Special Education Teacher, Government Deaf and Defective Hearing School, Mianwali was produced as (CW-1).

The prosecution has also produced documentary evidence in the shape of MLR of the appellant (Ex.PA), complaint (Ex.PB), recovery memo of 'qameez' of the alleged victim (Ex.PC), non-bailable warrants of arrest of the appellant and report over it (Ex.PD) and (Ex.PD/1), proclamation against the appellant and report over it (Ex.PE) and (Ex.PE/1), rough site plan of the place of occurrence (Ex.PF), application for issuance of non-bailable warrant of arrest of the appellant (Ex.PG), application for issuance of proclamation against the appellant (Ex.PH), and closed the prosecution evidence.

5. The statement of appellant under section 342 of Cr.P.C., was recorded. The appellant refuted all the allegations levelled against him and professed his innocence. While answering to a question that "Why this case against you and why the PWs have deposed against you", the appellant, replied as under:-

"The complainant is the real father of victim and PW Mst. Safia Bibi is mother of complainant and Mohammad Ismail is a close relative of the complainant. Due to previous enmity with complainant a false case was registered against me. PWs with mala fide intention deposed against me."

The appellant did not make statement under section 340(2) of Cr.P.C. in disproof of the allegations levelled against him, however, produced certified copy of application under section 133, Cr.P.C. (Ex.DA), copy of challan FIR No. 183 of 2008 of P.S. Harnoli Mark-DA and copy of Crl. Revision titled 'Muhammad Aslam v. Muhammad Afzal and others' Mark-DB in his defence.

6. The learned trial Court vide its judgment dated 28.11.2011, found the appellant Muhammad Tariq, guilty for the offence under section 376 of P.P.C. and convicted and sentenced him as mentioned and detailed above.

7. Learned counsel for the appellant, in support of this appeal, contends that the appellant has falsely been implicated in this case by the complainant due to his previous enmity with cousin of the complainant, namely, Aslam; that Muhammad Siddique (PW-2) has admitted that his cousin had enmity with the appellant; that no medico legal report of the alleged victim, namely, Zahida Bibi has been produced in the Court by the prosecution; that even the alleged victim did not appear in the witness box; that the allegedly torn 'qameez' of the alleged victim was produced before the police after seventeen days of the occurrence; that no independent witness appeared before the learned trial Court against the appellant to prove the prosecution case; that evidence of related eye-witnesses is not corroborated by any independent evidence and same is self-contradictory; that the prosecution miserably failed to prove its case against the appellant beyond the shadow of any doubt thus, this appeal be accepted and the appellant may be acquitted from the charge.

8. On the other hand, learned Addl. Prosecutor General has opposed this appeal on the grounds that the prosecution has fully proved its case against the appellant

beyond the shadow of any doubt; that evidence of the prosecution eye-witnesses could not be shattered during the process of cross-examination; that prosecution case against the appellant is further supported by the medical evidence of Dr. Sana Ullah Malik (PW-1), who has deposed that the appellant was capable of performing sexual intercourse; that there is no substance in this appeal therefore, the same may be dismissed.

9. Arguments heard. Record Perused.

10. Prosecution case as set forth in the FIR has already been reproduced in para No. 2 of this judgment therefore, there is no need to repeat the same. Muhammad Siddique complainant (PW-2) is father of the alleged victim, namely, Mst. Zahida Bibi. He admitted during his cross-examination that Aslam was his 'chachazaad' and he had enmity with the appellant. Relevant part of his statement reads as under:

"Aslam is my chachazad. It is correct that Aslam and accused have enmity inter se."

Similarly, Mst. Safia Bibi (PW-3) (mother of the alleged victim) also admitted the abovementioned relationship of Aslam as paternal cousin of her husband and she also admitted that the said Aslam and the appellant had enmity with each other. Relevant part of her statement is reproduced hereunder:-

"Aslam is "patrair" of my husband. It is correct that said Aslam and accused have enmity with each other."

It is therefore, evident that there was earlier enmity between the appellant and the complainant party. In this case, the prosecution produced eye-witnesses, namely, Mst. Safia Bibi (PW-3) and Muhammad Ismail (PW-4). As mentioned earlier, Mst. Safia Bibi (PW-3) is real mother of the alleged victim, whereas, Muhammad Ismail (PW-4) is paternal nephew of Mst. Safia Bibi. Their inter se relationship was brought on the record during the cross-examination of Mst. Safia Bibi (PW-3), who stated as under:-

"Shahid PW is my mamuzad whereas Ismaeel PW is my Bhatija."

Although statements of the related eye-witnesses can be relied upon to decide a criminal case but the said statements are required to be corroborated by any independent evidence and the same should be confidence inspiring and trustworthy. I have noted that the alleged victim of this case was Mst. Zahida Bibi and it was case of the prosecution that she was dragged from outside the house of the appellant and was taken inside the said house. She (Mst. Zahida Bibi) offered resistance and her qameez was also torn during the occurrence but no medico legal examination of the alleged victim Mst. Zahida Bibi, which could have shown any marks of dragging or violence on her body, was conducted in this case and she was not medically examined in this case. Even the alleged victim, namely, Mst. Zahida Bibi did not appear in the witness box. It is true that the alleged victim Mst. Zahida Bibi was deaf and dumb but

Muhammad Ijaz Ali, AS1 (PW-8) stated in his examination-in-chief that he recorded the statement of the alleged victim Mst. Zahida Bibi on 02.09.2009 on her nodes translated by her mother. Statement of Muhammad Hafeez, Special Education Teacher was recorded as CW-1 but he stated that the alleged victim was not able to follow his sign language as she was uneducated and not able to understand his sign language. Moreover, the statement of the alleged victim, namely, Mst. Zahida Bibi was not recorded by the learned trial Court with the help of her nodes translated by her mother. It is also noteworthy that there is conflict in the statements of the prosecution eye-witnesses, namely, Mst. Safia Bibi (PW-3) and Muhammad Ismail (PW-4). Mst. Safia Bibi (PW-3) stated in her examination-in-chief that when she along with the other eye-witnesses entered into the house of the accused/appellant, only her daughter was present in the said house, whereas, accused/appellant was not present there, whereas, Muhammad Ismail (PW-4) stated in his examination-in-chief that on the day of occurrence, he while following his 'phuphi' (Mst. Safia Bibi PW-3) entered into the house of the accused (appellant) and saw that Tariq accused was running away from the spot. Relevant parts of the statements of the abovementioned prosecution eye-witnesses are reproduced hereunder:-

Mst. Safia Bibi (PW-3).

"I along with Ismaeel and Shahid PWs entered inside the haveli of the accused and saw that accused was not present in the house and only my daughter was found present in the house of the accused."

Muhammad Ismaeel (PW-4).

"On 21.07.2009, at about 11:30 a.m., I was coming from bazaar and Shahid PW was coming behind me at some distance. When I reached near the house of Aslam, I saw that my Phuphi Safia Bibi was making noise and entering into the house of Tariq accused following my Phuphi. I also entered into the house of accused and saw that Tariq accused was running away and Zahida Bibi was lying on the ground."

(Bold and underlining supplied for emphasis)

It is therefore, evident that there is conflict in the evidence of the abovementioned prosecution eye-witnesses regarding the material aspect of the case. I have also noted that there was no allegation against the appellant that he was armed with any weapon at the time of occurrence. It is further noteworthy that as per prosecution case, the complainant party was comprising of two male and one female adult members, namely, Mst. Safia Bibi (PW-3), Muhammad Ismail (PW-4) and Shahid (given up PW). The abovementioned PWs were closely related inter se because Mst. Safia Bibi stated during her cross-examination that Shahid (given up PW) was her 'mamoonzad', whereas, Muhammad Ismail (PW-4) was her 'bateeja'. It is therefore, not understandable that if the appellant was empty handed and the

complainant party was comprising of three adult members then as to why the appellant was not apprehended by them at the time of occurrence, I have also noted that the torn 'qameez' of the alleged victim was produced before the police after seventeen days of the occurrence. Hameedullah, Sub-Inspector (PW-7)/Investigating Officer of this case, stated in his examination-in-chief that Muhammad Siddique complainant produced the 'qameez' of the alleged victim before him on 07.08.2009, whereas, the occurrence in this case took place on 21.07.2009. No valid reason for production of the torn 'qameez' by the complainant to the police with the gross delay of seventeen days has been given by the prosecution. It is further noteworthy that Muhammad Ismail (PW-4) admitted during his cross-examination that at the time of incident, accused and his brother were living in the 'haveli', where the occurrence took place. Relevant part of the statement of Muhammad Ismail (PW-4) reads as under:-

"At the time of incident, the accused and his brother had not shifted with family and using the place of occurrence as Haveli."

It is therefore, not probable that the appellant would attempt to commit rape with the alleged victim, namely, Zahida Bibi in a 'haveli', where his (appellant's) family and family of his brother were also living.

11. I have considered all the aspects of this case and have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. It is by now well settled law that if there is a single circumstance which creates doubt regarding the prosecution case, the same is sufficient to give benefit of doubt to the accused, whereas, the instant case is replete with number of circumstances which have created serious doubt regarding the truthfulness of the prosecution story. In 'Tariq Pervez v. The State' (1995 SCMR 1345), the Hon'ble Supreme Court of Pakistan, at page 1347, was pleased to observe as under:-

'5. The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.'

The Hon'ble Supreme Court of Pakistan while reiterating the same principle in the case of 'Muhammad Akram v. The State' (2009 SCMR 230), at page 236, observed as under:-

"13. .... It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez 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 created 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."

12. In the light of above discussion, I am of the view that the prosecution has failed to prove its case against the appellant beyond the shadow of doubt, therefore, the instant appeal bearing Criminal Appeal No. 2023 of 2011 filed by Muhammad Tariq appellant is allowed and his conviction and sentence is hereby set-aside and he is acquitted of the charge by extending him the benefit of doubt. He is on bail. His bail bonds are directed to be released and sureties are discharged from liability.

SA/M-91/L

Appeal allowed.