IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

17/25

PRESENT:
Mr. Justice Salahuddin Panhwar
Mr. Justice Ishtiaq Ibrahim

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Criminal Appeal No. 297 of 2023
(Against the judgment dated 15.05.2018, passed by Lahore High Court, Multan Bench Multan in Cr.A. No.454 of 2013)

Muhammad Azam

...Appellant

versus

The Stat etc.

...Respondents

For the Appellant:	Ms. Shazia Bilal, ASC
For the State:	Mr. Irfan Zia, APG.
Date of hearing:	19.02.2025

JUDGMENT

Ishtiaq Ibrahim, J.- Muhammad Azam, the appellant, along with co-accused Nazeer Hussain and Muhammad Jameel, was tried by Additional Sessions Judge Kot-Addu, District Muzaffargarh (*"trial Court"),* in case FIR No.117 dated 21.05.2017, under sections 365-B, 376, 381 & 411 PPC, registered at Police Station Mehmood Kot, wherein the appellant along with his brothers/co-accused, namely, Nazeer Hussain (acquitted), Muhammad Jameel and Muhammad Ismaeel (absconding), was charged for abduction of a minor girl, namely, Mst. Asma aged 13/14 years, daughter of Sajjad Hussain (PW.3) from her house, situated in Mauza Essan Wala, on 14.05.2007 and committing her rape as well as committing theft in the house of the complainant. The occurrence was reported by Sajjad Hussain (PW.3), which is Exh.PA on the basis of which FIR *(ibid)* was

registered against the appellant and co-accused. After arrest of the appellant and co-accused Nazeer Hussain and Jameel *challan* was submitted against them before the learned trial Court. During trial, accused Muhammad Jameel went into hiding whereas accused Nazeer Hussain was acquitted, however, the appellant having been found guilty, was convicted under section 365-B PPC to undergo imprisonment for life and to pay Rs.20,000/-, as a fine and in default thereof to further undergo 01 month simple imprisonment (S.I). The appellant was also convicted under section 376 PPC PPC and sentenced to undergo 25 years rigorous imprisonment (R.I) and to pay Rs.20,000/- as fine and in default of payment thereof to further undergo 01 month S.I. and under section 380 PPC to undergo imprisonment for five years and to pay Rs.10,000/- as fine or in default of payment thereof to further undergo 15 days S.I. The substantive sentences of imprisonment under each offence were directed to run concurrently and benefit of section 382-B Cr.P.C. was extended to the appellant vide judgment dated 15.05.2018.

2. The appellant challenged his convictions and sentences before the Lahore High Court Multan Bench, Multan through Cr.A. No.454 of 2013, which was partially allowed, consequently, his conviction and sentence under section 380 PPC were set-aside, however, his convictions and sentences under the remaining offences were upheld vide judgment dated 15.05.2018 *("impugned judgment"),* hence, the present appeal by leave of this Court granted vide order dated 27.03.2023.

3. Learned counsel for the appellant argued that complainant has falsely involved four brothers including the appellant with *mala fide*; that neither mother nor brothers of the abductee, who allegedly were present in the house at the time of occurrence have been medically examined or cited as prosecution's witnesses; that the packet in which the appellant had allegedly brought intoxicated sweets and served on

the inmates of the house of complainant, has been recovered from the spot or produced by the complainant to the police; that during medical examination of the victim girl, her hymen was found to be having old tears and healed and no mark of violence on her body was noticed by the lady doctor, which falsifies the stance of rape; that viginal swabs taken from the alleged victim girl were sent to chemical examiner after a delay of three weeks for which no plausible explanation has been furnished by the prosecution; that the alleged victim girl has not been recovered by the police rather by her father and produced before the police which also makes the prosecution's story doubtful; that the place where the abductee was confined has not been disclosed by the prosecution; that the lady who allegedly informed the complainant about confinement of the victim girl in a house has neither been named nor made as a prosecution's witness; that none of the family members of the victim gril has been produced as a witness. She lastly contended that prosecution's evidence is pregnant with doubts benefit of which is to be extended to the appellant not as a matter of grace and concession but as a matter of right.

4. Conversely, learned Additional Prosecutor General, appearing on behalf of the State contended that the prosecution has proved guilt of the appellant through cogent and confidence inspiring evidence of the minor victim supported by medical evidence, hence, both the courts below while appreciating available evidence in its true perspective have arrived at a right conclusion by holding the appellant guilty of the offences to which no exception can be taken.

5. We have given our anxious consideration to the arguments advanced at the bar and perused the record and evidence available on file.

6. As per version of complainant Sajjad Hussain (PW.3) on 14.05.2017 he was in *Manawan* for the purpose of some domestic affairs, whereas his wife, namely, Mst. Haseena Begum, daughter

Mst. Asma Bibi aged 13/14 years and sons, namely, Muhammad Nadeem, Muhammad Waseem and Muhammad Sohail, were present in the house; that on the same day at about *Isha Waila*, his maternal cousins, namely, Muhammad Azam (appellant) and Muhammad Jameel (absconding co-accused) visited his house and offered some sweets to his wife and children duly intoxicated on the pretext that he had purchased a new motorcycle; that after taking the sweets inmates of his house became unconscious; that on the next morning at 06.00 AM when he returned home he saw his wife and children in sleeping condition. He tried to wake them up, but observed that they are semi-conscious and noticed that his daughter Mst. Asma Bibi, gold ornaments, cash amount of Rs.4700/-, a licensed rifle, CD and TV are missing from the house; that on his raising hue and cry, Muhammad Hanif (PW.4) and Khalid Hussain attracted to his house who told him that on last night when they were taking fodder on a donkey cart they saw Muhammad Azam (appellant) and Muhammad Jameel (absconding co-accused) taking Mst. Asma Bibi on their motorcycle and when they inquired from them, the accused told that they are taking her for medicine; that one Muhammad Ismail and Nazeer Hussain (co-accused), having TV and CD in their possession were following the appellant on another motorcycle. Complainant disclosed that one year prior to the occurrence, appellant Muhammad Azam had trespassed into the house of his brother, namely, Fida Hussain with bad intention, therefore, he was prevented them not to visit their house on which the appellant was annoyed.

7. Prosecution's story being foundation on which the entire superstructure of the case is built, occupied a pivotal status, it should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability as it would neither be safe to believe the prosecution's story which did not meet the said requirements nor the prosecution's case based on improbable story could sustain

conviction. In the instant case we have noticed that the prosecution's story from its every inception is improbable and irrational as the same did not appeal to reason. The occurrence allegedly took place on 14.05.2021 at *Isha Waila,* but has been reported after a delay of seven days on 21.05.2007 by complainant Sajjad Hussain (PW.3). He has not furnished any explanation, much less plausible, about the delay in reporting the incident. We are surprised that how a father whose minor daughter has been abducted could keep mum for seven days. The complainant has not disclosed in his report as to who narrated the incident to him as he himself was not present in his house at the time of occurrence. Neither mother of the abductee, who allegedly distributed the intoxicated sweets among her children nor brothers of the abductee, who had also been served with the said intoxicated sweets has been cited as prosecution's witnesses nor produced in the trial court so much so their statements have not been recorded by the Investigating Officer under section 161 Cr.P.C. despite the fact that they were the most material witnesses of the prosecution's case. Imam Bakhsh SI (PW.6) who has recorded report of the complainant in his cross examination has stated that:-

> ***"I did not record statement of father of the abductee, her maternal uncle and so called Advocate Ghanzanfar, after recovery of the abductee. I did not interrogate the abductee during my interrogation. I did not record the statement of mother of the abductee, namely, Haseena and brother of the abductee, namely, Nadeem, Waseem and Sohail nor I summoned them during investigation to interrogate them. The complainant did not produce any shopper bag or box in which the sweets were produced at the house of the complainant and later on administered to them.***

No medical report of mother of the victim girl and her brothers with regard to availability of intoxication material in their stomach or blood has been obtained so as to substantiate version of the complainant and

the alleged abductee. All the above discussed flaws create serious doubts in the prosecution's case.

8. No doubt, it a case of abduction and in such like cases, testimony of the abductee is always considered of worth significance, provided the same is corroborated by other strong evidence and supported by medical evidence. In this case, Mst. Asma Bibi, the alleged abdcutee, has appeared in the witness box as PW.2. In her statement she has deposed that on the fateful day at *Isha Waila* she was present in her house with her mother and brothers when appellant Azam having a packet of conventional sweets comprising *"Gulab Jaman"* visited her house and handed over the packet to her mother saying that as he has purchased a new motorcycle; that the packet was opened by her mother and the sweets were distributed among inmates of the house; that after taking the sweets she along with all family members became unconscious and when she gained senses, she found herself in a room in confinement of Azam (appellant) and Jameel (absconding co-accused). On query about her abduction, the appellant responded that he wants to marry her and when she started crying the appellant having pistol in his hand threatened her of dire consequence; that she was then shifted to another place in a motorcar where appellant Azam and co-accused Jameel committed repeatedly *zina-bil-Jabbar* with her turn by turn; that she gave telephone number of her father to an old lady who informed her father on which her father along with other persons came to the spot house and recovered her.

9. The occurrence took place on 14.05.2007 which was reported on 21.05.2007. The abductee was allegedly recovered on 24.05.2007 and produced before Khalil Ahmad Buzdar ASI (PW.3) in Police Station Mehmood Kot on 24.05.2007. As per statement of complainant he along with Ghazanfar, Akhtar and Haq Nawaz recovered the abductee from a house which was disclosed to him by an old lady on telephone. When the incident was already reported on

21.05.2007 then recovery of the abductee by the complainant himself along with his companions on 24.05.2007 without informing the police is quite disturbing aspect which create doubts in the prosecution's case. Neither the abductee nor the complainant has disclosed name of the said old lady who allegedly informed him about her confinement in a house. The said old lady has also not been examined by the Investigating Officer nor produced in the witness box nor any CDR data of her alleged phone call has been obtained. The persons who accompanied the complainant in the recovery process, have also not been examined under section 161 Cr.P.C. nor produced in the witness box. No site plan of the two houses where the alleged abductee was kept in illegal confinement has been prepared by the Investigating Officer. At this juncture we would refer to the cross-examination of Imam Bakhsh SI (PW.6), the Investigating Officer, relevant part of which is reproduced below:-

> "I did not inspect the place where as per allegation of the abductee she was detained and subjected to intercourse. It is correct that I did not inspect the place where the abductee was detained and subject to rape. I did not interrogate or to try to recovery the car in which she was taken on second day.

The above discussed facts and circumstances has nothing with reality rather recovery of the abductee seems to be a cook and bull story.

10. Non-production of mother of the abductee, her brothers, and Ghazanfar, Akhtar and Haq Nawaz, who allegedly accompanied the complainant in the process of recovery of the abductee as well as the old lady who allegedly informed father of the victim girl being material evidence, amounts to withholding of best available evidence, therefore an adverse inference within the meaning of Article 129(g) of the Qanun-e-Shahadat Order, 1984 would be drawn against the prosecution that had they been produced in the witness box they would not have supported the prosecution's case. Reliance in this

regard may be placed on case titled, ***"Mst. Zarsheda v. Nobat Khan" (PLD 2022 SC 21)*** wherein this court has ruled that:-

> "At this juncture Article 129 of the Qanun-eShahadat Order 1984 is quite relevant under which court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. According to the illustrations highlighted for resonating the presumption, Illustration (g) is quite relevant which illuminates "that evidence which could be and is not produced would, if produced, be un-favourable to the person who withholds it". Adverse inference for nonproduction of evidence is one of the strongest presumptions known to law and the law allows it against the party who withholds the evidence. Regardless of the presence of important witnesses (the alleged donor) and the alleged witness of the mutation, the defendant failed to produce them despite framing of specific issue whether there was no transaction of sale but a gift."

In the same vein in ***"Muhammad Naeem Khan and another v. Muqadas Khan (decd) through L.Rs. and another" (PLD 2022 SC 99)*** this court has held as follows:-

> "Where a party keeps hold of the witnesses, the presumption would be that if such witnesses were produced, their testimony must have against him, therefore adverse inference of withholding evidence goes against the party who failed to call the concerned person engaged in the transaction who was in a better position to give firsthand and straight narrative of the matter in controversy. According to Article 129 of the Qanun-e-Shahadat Order 1984, the court may presume the existence of any fact which it thinks

> likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Illustration (g) attached to this Article is quite relevant to the facts and circumstances of the case in hand in which the court may draw adverse inference or presumption that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it. No misreading or non-reading of evidence or any other defect or error was pointed out in the impugned judgments which may warrant interference by this court."

11. So far as medical furnished by lady Dr. Shabana Tabassam (PW.1), who had medically examined the victim girl, is concerned, no doubt, as per her statement hymen of the victim girl were torn but healed and her vigina was admitting two fingers easily, hence, sexual intercourse was committed with the victim girl. The testimony of lady doctor, in absence of any other evidence of unimpeachable character would not be sufficient to prove that the sexual intercourse was committed with the victim girl by the appellant. Besides, the vaginal swabs taken from the victim girl were sent to the Chemical examiner after a delay of three weeks for which no explanation, much less, plausible, has been furnished by the prosecution. Similarly, the appellant though has been examined for potency, however, his semen has not been sent to the FSL for matching with the semen stained swab obtained from the victim girl. On this score too the positive Chemical Examiner Report is of not help to the prosecution.

12. On reappraisal of the prosecution's evidence we have reached to an irresistible conclusion that prosecution has miserably failed to prove guilt of the appellant through cogent and confidence inspiring evidence. The prosecution's evidence is pregnant with doubts benefit of which is to be extended to the appellant not as a matter of grace or

concession but as a matter of right. The appellant is behind the bars for the last 12 years and 05 months and 11 days as per report furnished by Superintendent of Central Jail Multan. It is a settled principle of law that for giving benefit of the doubt to accused it is not necessary that there should be so many circumstances creating doubt in the prosecution's case, rather if only a single circumstance creating reasonable doubt in the mind of a prudent person is available then such benefit is to be extended to an accused not as a matter of concession but as of right. This court in case of **"Muhammad Mansha Vs. The State" (2018 SCMR 772)** has enunciated the following principle:

> "Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akramv. The State (2009 SCMR 230) and Muhammad Zamanv.The State (2014 SCMR 749)."

Further reliance may also be placed on the judgment of this court in case **Najaf Ali Shah Vs. the State (2021 S C M R 736)** wherein in paragraph No.13 of page 236 it has been observed that:-

> " Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the court to do complete justice. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the

preeminent English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer." All the contradictions noted by the learned High Court are sufficient to Murder Reference No. 58 of 2016 34 cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must got to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."

13. For what has been discussed above, this appeal is allowed. Conviction and sentences of the appellant recorded by the learned trial Court vide judgment dated 29.10.2013 and upheld by the learned High Court Multan Bench Multan vide judgment dated 15.05.2018 are

hereby set-aside. The appellant is acquitted of the charge leveled against him in this case. He be set at liberty forthwith, if not confined in any other case.

Announced in open Court at Islamabad on 3rd March 2023.

Approved for reporting.
M.Siraj Afridi PS