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Judgment Sheet

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN

(JUDICIAL DEPARTMENT)

Criminal Appeal No.525 of 2016

Muhammad Amir	versus	The State etc.
Date of hearing		**20.04.2018**
The Appellant by		M/s Makhdoom Syed Najam-us-Saqib and Sohail Tahir, Advocates
The State by		Mr. Adnan Latif, Deputy District Public Prosecutor.

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Asjad Javaid Ghural, J. Through the afore-titled criminal appeal under Section 410 Cr.P.C., appellant Muhammad Amir has challenged the vires of judgment dated 28.05.2016 passed by the learned Additional Sessions Judge, Muzaffargarh in case FIR No.45 dated 02.02.2012, in respect of an offence under Section 376(1) PPC, registered at Police Station, Rohilanwali District Muzaffargarh whereby he was convicted and sentenced as under:-

> **Under Section 376(1) PPC**
>
> Rigorous imprisonment for eleven (11) years with the fine of Rs.200,000/- and in default thereof, to further undergo simple imprisonment for six months.
>
> The benefit of Section 382-B Cr.P.C. was extended to the appellant.

2. The prosecution story unfolded in the crime report (Ex.PD) registered on the complaint of Mst. Mumtaz Bibi (PW-1), is that she was a house-wife having been married with one Bakht Ali 4/5 years back and out of the wedlock, one female child was born. In the noon of 23.01.2012, she went to the cotton crop of Babu Muhajir to ease herself. When she sat in the cotton crop, Amir (appellant) and Arshad (since acquitted) armed with pistol, who had already hidden, came there. Amir started forcibly committing sexual intercourse with her. She raised hue and cry whereupon Arshad made him silent by showing the pistol whereas Amir went on committing sexual intercourse with her. On getting opportunity, she again

raised hue and cry whereupon Ijaz Hussain (PW-2) and Ghulam Yasin (PW-3) attracted and witnessed the occurrence. On seeing them, the accused persons succeeded to flee away towards their house in North. Thereafter, the accused persons remained seeking pardon. She made an application to the learned Area Magistrate whereupon her medical examination was conducted and after getting medico-legal report, she reported the mater to the police on 02.02.2012 and this case was registered.

3. Talib Hussain, SI (PW-8) had drafted the complaint (Ex.PA) on 02.02.2012 when he was present at Chowk Aludey Wali and sent the same to the police station for the registration of case. On 03.02.2012, he visited the place of occurrence, prepared unscaled site plan Ex.PE and recorded the statements of witnesses under Section 161 Cr.P.C. On the same day Muhammad Ramzan 1343/C (PW-5) had handed over to him photocopy of the medico-legal certificate, copy of court-order and two sealed phial containing swabs, which were taken into possession vide recovery memo Ex.PF. He recorded the statements of witnesses under Section 161 Cr.P.C., transmitted the sealed phial to the office of Chemical Examiner. He got prepared interim report under Section 173 Cr.P.C.

Khadim Hussain, SI (PW-9) had arrested the appellant on 24.01.2013 and co-accused Muhammad Arshad on 14.02.2013, got prepared respective incomplete reports under Section 173 Cr.P.C.

4. Dr. Shabana Abid (PW-4) had conducted medico-legal examination of victim Mumtaz Mai on 30.01.2012 and observed the following injury:-

No.1 A contusion mark of 4 cm x 1 ½ cm below right eye on right cheek.

No.2 Multiple scratched marks on both right and left elbow posteriorly. Breast well developed. Black areola and everted black nipple pubic and axillary hair preset.

The hymen was absent, vagina was admitting two fingers easily, two external and two internal vaginal swabs were taken and sent to the Chemical Examiner for detection of semen. On receiving the report of Chemical Examiner (Ex.PC), the swabs were found stained with semen.

5. At the commencement of the trial, the learned trial Court had framed a charge against the appellant and his co-accused to which they had pleaded not guilty and claimed to be tried.

6. The prosecution had produced 09-witnesses besides the photocopy of report of Chemical Examiner (Ex.PC). The appellant and his co-accused, in their statements recorded under Section 342 Cr.P.C. had denied and controverted all the allegations of fact leveled against them, they neither opted to make their statements under Section 340(2) Cr.P.C., nor had they produced any evidence in their defence.

7. Learned trial Court, upon conclusion of the trial had acquitted co-accused Muhammad Arshad whereas convicted and sentenced the appellant as stated above, hence the aforementioned criminal appeal.

8. Learned counsel for the appellant submits that the appellant is quite innocent and has nothing to do with the alleged occurrence; that the matter had been reported to the police with an inordinate delay of 10-days, which shows it was registered with due deliberation, consultation and fabrication; that the statement of the victim is contrary to her own statement recorded earlier under Section 154 Cr.P.C.; that she had made self-contradictory statement with regard to the time and also her conduct during the occurrence; that admittedly the victim was a married lady and her medical examination was conducted after 7-days of the occurrence and, thus, the report of positive report of the Chemical Examiner with regard to the swabs being stained with semen, provides no corroboration to the ocular accounts especially when no DNA analysis conducted; that Ijaz Hussain (PW-2), maternal uncle and Ghulam Hussain (PW-3) a cousin of the victim, were not eye witnesses, who had seen the appellant and his co-accused while running away from far distance on seeing them, which is otherwise impossible; that co-accused Arshad, having provided facilitation to the appellant by show of fire arm weapon to the victim, had already been acquitted of the charge by the learned trial Court by disbelieving the prosecution evidence to their extent, and no appeal against his acquittal has been filed and, thus, the appellant deserves for the same treatment; that the prosecution has miserably failed to prove the charge against the appellant beyond shadow of reasonable doubt and the

learned trial court, while passing the impugned judgment of the appellant's conviction, has erred in law and facts of the case, which warrants interference by this court.

9. Conversely, learned Deputy District Public Prosecutor appearing for the State submits that it was a day light heinous offence and exploited the victim's future by the appellant at the expense of his lust; that the victim was a married lady and it cannot be expected from her to put her future at stake for the purpose to falsely implicate the appellant in this case for nothing; that the defence had itself admitted the commission of sexual intercourse with the victim by the appellant with some variation by suggesting that the complainant was a consenting party to the sexual intercourse, which was denied by her; that putting such suggestion amounts to admission; that the medical examination of the victim was conducted after seven days of the occurrence and, thus, delay in reporting the matter to the police has no adverse affect on fate of the prosecution case because in the cases where family honour is involved, immediate rushing to the police station for lodging the crime report and put the honour at stake, is always difficult for anybody and to cross social norms and customs; that the report of Chemical Examiner (Ex.PC) regarding swabs being stained with semen has been received with positive result, which lends further corroboration to the ocular account; that the victim was a married lady but it cannot advance license to anybody to commit Zina with her taking the advantage of her marriage; that the eye witnesses had made consistent statement inter-se and the victim; that the medical evidence provides further corroboration to the ocular account; that there was no occasion for the prosecution to falsely implicate the appellant in the alleged occurrence; that the impugned judgment entailing the conviction and sentence of the appellant does not warrant interference by this court.

10. I have heard learned counsel for the appellant, learned Deputy District Public Prosecutor appearing for the State and have perused the record with their able assistance.

11. This occurrence had taken place on 23.12.2012 at about noon as mentioned in the crime report (Ex.PD), the medico-legal examination of

the victim was conducted after seven days of the occurrence on 30.01.2012 but it was reported to the police on 02.02.2012 without any plausible explanation, which shows the real possibility that the matter was reported to the police with due consultation, deliberation and fabrication. The complainant/victim was a married lady, her medical examination was conducted after seven days and during interregnum, she remained with her husband, therefore, delay of ten days in reporting the matter to the police creates serious doubt with regard to the veracity of positive report of the Chemical Examiner (Ex.PC) as well as the victim herself.

12. Mst. Mumtaz Bibi (PW-1)/victim had appeared before the learned trial court and made statement contrary to her statement recorded under Section 154 Cr.P.C. wherein she had stated that ten years before she was married with one Bakht Ali, on the fateful day at 1:00 p.m., she went to the fields for easement at a distance of three Bigas from her house, the appellant alongwith his co-accused Arshad (since acquitted) had already hidden themselves, appellant caught hold of her, she raised hue and cry whereupon Arshad pointed his pistol, she turned to silence due to the fear of threat to life, appellant committed sexual intercourse with her forcibly, she again made hue and cry whereupon Ijaz Hussain (PW-2) and Ghulam Yasin (PW-3) attracted there and the accused persons, on seeing them, succeeded to flee away. In her statement before the learned trial court, the complainant had stated that on the fateful day, she went to the fields for the purpose to ease herself where the appellant alongwith one Arshad came there, the appellant put a pistol on her forehead, co-accused Arshad remained sitting near the water-course, she raised hue and cry, appellant inflicted butt blow of his pistol and made her to be silent, and appellant forcibly committed sexual intercourse with her, she again raised hue and cry whereupon the aforesaid witnesses attracted there and on seeing them, the appellant and his co-accused succeeded to run away, the witnesses took her to the house and then approached the police station but the police did not record her statement, she filed an application before the learned Magistrate for her medical examination, which was conducted on 30.01.2012 and thereafter the case was registered on 02.02.2012 on her statement (Ex.PA). In her deposition before the learned trial court, the

victim had made a story contrary to her statement recorded under Section 154 Cr.P.C. (Ex.PA) on major aspects of the case stating that the appellant had pointed his pistol at her forehead and gave its blow on her right eye whereas co-accused Arshad remained sitting near the watercourse, she further stated that she had made an application for her medical examination on 02.02.2012 before the learned Area Magistrate wherein she had mentioned the time of occurrence as 4/5:00 p.m., the police recorded her statement in the police station, her brother and brother-in-law Muhammad Ijaz were present at the time of registration of the case, the police got her thumb impression on blank papers, her clothes were torn during the occurrence, the occurrence had taken place in the cotton crop with the height of 4/5 feet, none had attracted at the place of occurrence except Ijaz Hussain and Ghulam Yasin from a distance of one Bigha from the side of her house. She had denied the suggestions that it was the season of wheat cultivation instead of the cotton crop. In such state of affairs, her testimony requires scrutiny with some extra care and caution having narrower scope to be believed. She had stated that the occurrence had taken in the cotton crop with the height of 4/5 feet but in fact it was the season of cultivation of the wheat crop. The unscaled site plan (Ex.PE) shows that the place of occurrence was surrounded with wheat crop where the dry sticks of cotton were lying. The place of occurrence was at a distance of 1 ¼ kilometers from the victim's house. The question arises what constrained the victim to cover such a long distance for the purpose to ease herself when there was the crop of same height in the intervening distance. She got herself medically examined after 7/8 days of the occurrence, she proceeded to the police station in the company of her brother and brother-in-law, the police got her thumb impression on blank paper and the FIR was lodged after ten days of the occurrence. Furthermore, she had completely exonerated co-accused Arshad for the reasons best known to her by stating that said co-accused remained sitting on the watercourse whereas in her earlier statement (Ex.PA), it was alleged that he made her to keep silent by showing his pistol whereas the appellant went on committing sexual intercourse with her. It is quite astonishing that how both the accused persons were aware of the fact that

the victim would come exactly at the place where they had hidden themselves after covering the long distance of 1 ¼ kilometer (as stated in scaled site plan Ex.PE). All these pointed facts and circumstances of the case indicates that the mode and manner of the occurrence had not been ascribed by the victim as what actually happened on the day of occurrence. According to the prosecution's own case, it was a cotton crop, the complainant was forcibly subjected to sexual intercourse by the appellant but no relevant mark of violence was observed on any part of her body. The injuries/scratches, as mentioned above, on the person of the victim, have specifically been mentioned by the medical officer being not the result or connectivity with the rape.

13. No doubt the sole statement of the victim can be taken into account to maintain the conviction and sentence of the appellant under the charge of rape but only when the same is found to be confidence inspiring and trustworthy having corroboration from other independent source of evidence like the medical evidence. The self-contradictory statement of the victim is neither trustworthy nor confidence inspiring and, thus, the same is not worth reliance.

14. The other two material witnesses namely Ijaz Hussain (PW-2) and Ghulam Yasin (PW-3) had reached at the place of occurrence after hearing hue and cry of the victim from a distance of 3/4 Bigas and in their view the appellant alongwith Arshad succeeded to flee away from the place of occurrence. It is strange enough to observe that only aforesaid two persons from the locality had attracted at the place of occurrence and that too from a far distance of 3/4 Bigas. The claim of said witnesses of hearing hue and cry of the victim from such a long distance does not appeal to ordinary prudence. Even otherwise, they had seen the appellant and his co-accused when they were fleeing away from the place of occurrence and they had not witnessed the appellant committing sexual intercourse with the victim.

15. Dr. Shabana Abid (PW-4) had conducted the medico-legal examination of victim Mst. Mumtaz Mai and observed a contusion on her right cheek under the right eye and multiple scratched marks on both right and left elbows posteriorly. The hymen was absent and the vagina was

admitting two fingers easily. She had deferred her opinion with regard to the act of sexual intercourse till the receipt of report of Chemical Examiner on the internal and external vaginal swabs. On receipt of report from the said office (Ex.PC), the swabs were found stained with semen. Admittedly, no material was sent for DNA analysis for the purpose of semen grouping, which was essentially required to prove the charge of rape against the appellant when the victim was a married lady, her medico-legal examination was conducted after 07-days of the occurrence and during the interregnum she remained living with her husband. In absence of DNA analysis, the photocopy of positive report of Chemical Examiner (Ex.PC) cannot be connected against the appellant with any degree of certainty, which is otherwise against the mandate of Section 510 Cr.P.C. as the prosecution had neither examined subscriber nor signatory thereof. Furthermore, the medical officer had stated in his cross-examination that the injuries on her person might have been the result of friendly hand or fabricated and that the sexual intercourse might have been done with the victim by her husband because she was a married lady. In such state of affairs, the medical evidence provides no corroboration to the ocular account.

16. Now adverting to the legal proposition, it was suggested by the defence during cross-examination to the victim that she was a consenting party to the occurrence, which was specifically denied by her. Learned Law Officer contends that the said suggestion amounts to admission/confession on part of the appellant. No doubt any suggestion put and then denied by the witnesses is always taken to be the defence plea on behalf of the accused but the question whether such suggestion alone can be taken as an admission on part of the accused or not. The answer is a big “NOT”. An accused may take several contradictory defences but it cannot minimize the responsibility of the prosecution to prove its case through cogent, reliable and confidence inspiring evidence beyond even slightest doubt. The suggestions put during cross-examination and the answers given in the statement of an accused under Section 342 Cr.P.C., may be at variance. The evidence includes examination-in-chief, cross-examination and re-examination and the same

shall be taken into consideration as a whole for deciding the matter. The law is settled by now that in criminal cases, any fact mentioned in the examination-in-chief, if not cross-examined, shall not be deemed to be admitted one. In broader prospect, in the criminal administration of justice, if a suggestion is put by the defence, the same shall not be taken as an admission or confession on part of the defence and there should not be pick and choose from the suggestions put by the defence to a witness during cross-examination. The accused has every right to take many defences and if he does not opt to prove any of his defence, he cannot be burdened for taking such plea. Suffice is to say that the criminal case is to be decided on the basis of totality and not on the narrow ground of cross-examination or otherwise of a witness on a particular fact. A reference may be made to case titled "NADEEM RAMZAN versus The STATE" **(2018 SCMR 149)** wherein it has been held as under:-

> "While discussing the motive part of the case the High Court had observed that both the eye-witnesses had stated about the alleged motive and they had not been cross-examined by the defence on that aspect of the case and, thus, the alleged motive stood proved. This approach adopted by the High Court has been found by us to be fallacious inasmuch as it had been clarified by this Court in the case of S. Mahmood Alam Shah v. The State (PLD 1987 250) that the principle that a fact would be deem to be proved if the witness stating such fact had not been cross-examined regarding the same was a principle applicable to civil cases and not to criminal cases. It was held that a criminal case is to be decided on the basis of totality of impressions gathered from the circumstances of the case and not on the narrow ground of cross-examination or otherwise of a witness on a particular fact stated by him. A similar view had already been expressed by this Court in the case of State v. Rab Nawaz and another (PLD 1974 SC 87) wherein it had been observed that a criminal case is to be decided on the basis of totality of circumstances and not on the basis of a single element."

17. The aforesaid suggestion put by the defence that the complainant was a consenting party, may be given some weight when the prosecution succeeds to prove its case but in case the prosecution fails, the appellant cannot be held responsible for taking the said defence. Any such suggestion may be equated with the plea taken by the accused in his statement under Section 342 Cr.P.C. Though no such plea had been taken by the appellant in his statement under Section 342 Cr.P.C. yet the same

cannot be read in isolation. At present, it is the settled-principle of law that if the prosecution succeeds to prove the guilt of an accused then the inculpatory part of his statement recorded under Section 342 Cr.P.C. shall be read in support of the prosecution and if the prosecution evidence is not worth reliance, the statement of accused under Section 342 Cr.P.C. shall be taken in toto. A reference may be made to case titled "AZHAR IQBAL Versus The STATE **(2013 SCMR 383)**" wherein it has been held as under:-

> "if the prosecution fails to prove its case against an accused person then the accused person is to be acquitted even if he had taken a plea and had thereby admitted killing the deceased. A reference in this respect may be made to the case of *Waqar Ahmed v. Shaukat Ali and others* (2006 SCMR 1139). The law is equally settled that the statement of an accused person recorded under Section 342 Cr.P.C. is to be accepted or rejected in its entirety and where the prosecution's evidence is found to be reliable and the exculpatory part of the accused person's statement is established to be false and is to be excluded from consideration then the inculpatory part of the accused person's statement may be read in support of the evidence of the prosecution."

18. From the facts and circumstances of the case, the unavoidable and irresistible conclusion is that a single doubt is always considered sufficient to tilt the scale of justice in favour of the accused but a single instance favouring the prosecution, without corroboration, is not sufficient to maintain the conviction and sentence.

19. The nutshell of above discussion is that the appeal in hand is ***allowed***, the conviction and sentence of appellant Muhammad Amir awarded by the learned trial court vide judgment dated 28.05.2016 are set aside and he is acquitted of the charge by giving the benefit of doubt to him. He is directed to be released from jail forthwith, if not required to be detained in connection with any other case.

(Asjad Javaid Ghural)
Judge

APPROVED FOR REPORTING.

JUDGE

*Asif**