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IN THE HONOURABLE HIGH COURT OF SINDH AT KARACHI
(APPELLATE JURISDICTION)

Criminal Acquittal Appeal No. 135 of 2013

Razia Kubra
Wife of Fayaz Rahim/Hussain
Muslim, Adult,
Resident of Mauza Juthala,
Lodhran, Province of Punjab,
presently in Karachi.....Appellant

Versus

1. The State
2. Khadim Hussain Shah
Son of Walayat Hussain Shah
Muslim, Adult,
Resident of House No.B-365,
Block-N, Pepus Colony,
Karachi
3. Arif Ansari
Son of Anwer Ali Ansari
Muslim, Adult,
Resident of House No.3-B/4,
Nazimabad, No.3,
Karachi (Central)
4. Raja Muhammad Arif
Son of Raja Muhammad Afzal
Muslim, Adult,
Resident of House No.61, Street No.2,
Sector D, Qayyumabad,
Karachi (East).....Respondents

CRIMINAL ACQUITTAL APPEAL UNDER SECTION 417(2-A), CRIMINAL
PROCEDURE CODE, 1898

It is most respectfully and most humbly submitted that being aggrieved and dissatisfied by the Judgment dated: April 6th, 2013 [herein after referred to as the 'Impugned Judgment'], passed by the IIND Additional District & Session Judge,

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Karachi (East), in Session Case No.179 of 2008 ['The State Versus Khadim Hussain Shah & Others'] under Sections 365-B and 376(ii), P.P.C., 1860, through which Impugned Judgment, the Respondents No.2 to No.4 were acquitted from the offences under Sections 365-B and 376(ii), P.P.C., 1860. Therefore, the Appellant above-named most respectfully and most humbly prefers this Appeal on the following, inter alia, facts and grounds:

A copy of the abovementioned Impugned Judgment dated: April 6th, 2013, is annexed and marked as Annex 'A'.

FACTS

1. That the Appellant is the rape survivor/victim in the gang rape criminal case numbered as Session Case No.179 of 2008. For the purpose of this Acquittal Appeal, it is important to state the following relevant facts.
2. That Bashir Ahmed [i.e. father of the Appellant] was the Complainant in a Criminal case arising out of FIR No.50 of 2008 [herein after referred to as the 'said FIR'], under Sections 365-B and 376(ii), P.P.C., 1860 [P.S. Brigade, Karachi East]. It is submitted that the allegation in the said FIR against the Respondents No.2 to 4 was of kidnapping and gang rape of the Appellant.
3. That in relation to the said FIR, a Charge Sheet No.25 of 2008, dated: 10-5-2008, was filed. It is submitted that on 02-08-2008, the learned Trial Court was pleased to frame Charge against the Respondents Nos. 2 to 4 under Sections 365-B & 376(ii), P.P.C., 1860. It is further submitted that the Respondents No.2 to No.4 entered pleas of not guilty to the aforementioned Charge.

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A copy of the abovementioned Charge dated: 02-08-2008, and the Plea of the Accused, is annexed and marked as Annex 'B' & B-1' respectively.

4. That the prosecution has examined fourteen witnesses i.e. PW-1 to PW-14, in support of the abovementioned Charge and said FIR. It is submitted that after the closing of the side of the prosecution, the Statement of the Respondents No.2 to 4 [i.e. Accused Persons] was recorded under Section 342, Cr.P.C., 1898.

A copy of the abovementioned Evidence of PW-1 to PW-14, and the Statements under Section 342, Cr.P.C., 1898, are annexed and marked as Annex 'C-1' to 'C-17' respectively.

5. That the Respondent No.2 [i.e. Khadim Hussain] opted to record his Statement under Oath under Section 342(2) Cr.P.C., 1898. It is submitted that the Respondent No.2 [i.e. Khadim Hussain] also examined two defence witnesses i.e. DW-01 and DW, marked as Exhibit No.27.

A copy of the abovementioned Statement on Oath, and testimony of two defence witnesses, is annexed and marked as Annex 'D' to 'D-2' respectively.

6. That after hearing arguments of the prosecution, and defence counsels, the IInd Additional District & Session Judge, Karachi East, through Impugned Judgment dated: 06-04-2013, acquitted the Respondents No.2 to 4, from the offences under Section 365-B and 376(ii), P.P.C., 1860, in Session Case No.179 of 2008.
7. That it is most respectfully and most humbly submitted that the Appellant is aggrieved and dissatisfied by the Impugned Judgment. Therefore, the

Appellant challenges the abovementioned Impugned Judgment on the, inter alia, following grounds:

GROUNDS

- A. That it is respectfully submitted that the Impugned Judgment is clearly contrary to the law and the facts of this case. It is further respectfully submitted that the Impugned Judgment is clearly contrary to the settled law as laid down by the Honourable Supreme Court and the Honourable High Courts.
- B. That the Impugned Judgment is based on the presumption that the offence of Zina and the offence of rape, or gang rape, under Section 376, P.P.C., 1860, are not distinct but same offences. This misconceived presumption is obvious from the fact that the point No.1, framed by the Court, at page 7 of the Impugned Judgment, does not referred to the rape incident but rather refers to 'intention to commit illicit intercourse'. It is respectfully submitted that the Impugned Judgment is clearly erroneous because the offence of Zina and the offence of rape are distinct offences. It is further submitted that the Impugned Judgment has not even considered, nor is it based on, the judicial fact that the charge against the accused person was framed for gang rape under Section 376, P.P.C., 1860. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.
- C. That the entire Impugned Judgment is based on the presumption that the standard and the nature of proof for the offence of Zina and the offence of rape, or gang rape, under Section 376, P.P.C., 1860, under Qisas and not Tazir, are distinct but same offences. It is respectfully submitted that the Impugned

Judgment is clearly erroneous because it has even failed to consider whether the standard of proof required for a conviction for gang rape under Section 376, P.P.C., 1860, under Tazir, was present in this case or not. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.

- D. That the Impugned Judgment is based on the presumption that the charge framed against the Respondents No.2 to 4, was not also under Section 375-B P.P.C., 1860. It is respectfully submitted that the Impugned Judgment has failed to consider, or give any finding on the offence of kidnapping. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.
- E. That the Impugned Judgment relies upon a number of Judgments of the Superior Courts of Pakistan for its findings in the Impugned Judgment. It is respectfully submitted that the Impugned Judgment is clearly erroneous because none of the case law relied upon is legally relevant or applicable. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.
- F. That the Impugned Judgment is based on the presumption that the rights of the accused persons are to be preferred over the rights of the victim. It is respectfully submitted that it is settled law that both the rights of the accused persons and the victim are to be balanced and are to be equally protected. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.
- G. That the Impugned Judgment is also based on the main finding that the testimony of the complainant, victim and other witnesses, is full of contradiction, improvement and tainted with forgery. It is respectfully submitted that the Impugned Judgment is clearly erroneous because it is settled law that the testimony of the rape survivor can be the sole basis for the conviction of the accused persons and in this case, the rape survivor gave

evidence against the accused persons in her statement under Section 164, Cr.P.C. 1898, and in her testimony before the Trial Court. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.

H. That the Impugned Judgment is also based on the main finding that the testimony of the complainant, victim and other witnesses, is full of contradiction, improvement and tainted with forgery. It is respectfully submitted that the Impugned Judgment is clearly erroneous because it is settled law that the testimony of the rape survivor can be the sole basis for the conviction of the accused persons, especially if it is corroborated by the medical evidence against the accused persons. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.

I. That the Impugned Judgment is also based on the main finding that the testimony of the complainant, victim and other witnesses, is full of contradiction, improvement and tainted with forgery. It is respectfully submitted that the Impugned Judgment is clearly erroneous because it is settled law that the testimony of the rape survivor can be the sole basis for the conviction of the accused persons, especially if it is corroborated by the forensic evidence [i.e. DNA evidence] against the accused persons. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.

J. That the Impugned Judgment has completely ignored the importance of the medical evidence and the forensic evidence [i.e. DNA test] against the Respondents No.2 to 4. It is respectfully submitted that the Impugned Judgment is clearly erroneous because it has completely failed to consider that the medical and the forensic evidence [i.e. DNA evidence] was conclusive proof against the Respondent No.2 and 3 and conviction against the said

Respondents should have followed for the charged offences. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.

- K. That the Impugned Judgment has not given weight to the medical evidence and the forensic evidence [i.e. DNA evidence] on the pretext that there are no marks of violence on the body of the rape survivor. It is respectfully submitted that the Impugned Judgment is clearly erroneous because it is settled law that for a conviction of rape and gang rape, marks of violence on the body of the rape survivor is not a legal requirement. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.
- L. That the Impugned Judgment has not even considered, or given any finding as to why the rape survivor and the complainant would allegedly falsely implicate the Respondent No.2 to 4, especially since there was no evidence of personal enmity between the Appellant, complainant and the Respondents No.2 to 4. It is respectfully submitted that the Impugned Judgment is clearly erroneous because it is settled law that the testimony of rape survivor will be accepted and believed for the purposes of conviction for rape and gang rape, especially in the absence of proof of any motive on the behalf of the rape survivor, or the complainant, to falsely implicate the accused persons. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.
- M. That the Impugned Judgment is based on the presumption that there is a conflict between the standard of proof as required under Islamic Law and forensic evidence under Pakistani Law, in the form of DNA evidence. It is respectfully submitted that the Impugned Judgment is clearly erroneously because it is settled law that there is no contradiction between the standard of proof as required under Islamic Law and forensic evidence under Pakistani

Law, in the form of DNA evidence, in cases under Tazir. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.

- N. That the Impugned Judgment is based on the presumption that convictions of rape and gang rape cannot be based on DNA evidence. It is respectfully submitted that it is settled law that DNA evidence can, and should be, used for purposes of conviction of accused persons for rape and gang rape under Section 376, P.P.C., 1860. Therefore, the Impugned Judgment is clearly illegal and liable to be set aside.
- O. That it is most respectfully and most humbly submitted that the Appellant seeks the permission of this Honourable Court to raise further facts and grounds at the time of the hearing of this Appeal.

PRAYER

It is most respectfully and most humbly prayed that in view of the abovementioned, inter alia, facts and grounds, this Honourable Court may be pleased to graciously pass judgment and/or orders in the following terms:

- (i) Allow this Appeal by setting aside the Impugned Judgment dated: April 6th, 2013 (Annex 'A'), passed in Session Case No.179 of 2008 ('The State Versus Khadim Hussain Shah & Others'), and consequently, this Honourable Court may convict the Respondents No.2 to No.4.
- (ii) Pass any other Order, or further Order, as may be just and proper in the facts of this Appeal and case.

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(iii) Graciously grant the costs of this Appeal.

APPELLANT

ADVOCATE FOR THE APPELLANT

Karachi:

Dated: April 29th, 2013

IN THE HONOURABLE HIGH COURT OF SINDH AT KARACHI
(APPELLATE JURISDICTION)

Criminal Acquittal Appeal No. _____ of 2013

Razia KubraAppellant

Versus

The State & Others.....Respondents

AFFIDAVIT IN SUPPORT OF THE MEMO OF THE APPEAL

I, Razia Kubra, wife of Fayaz Rahim/Hussain, Muslim, Adult, resident of Mauza Juthala, Lodhran, Province of Punjab, presently in Karachi, holding CNIC No. _____, do hereby state on oath as under:

1. I am the Appellant in this Criminal Acquittal Appeal, and I am well conversant with the facts of this case.
2. That the accompanying Appeal has been drafted and filed under my instructions and for the sake of brevity, the whole of the contents of the accompanying memo of Appeal may be read as a part of this Affidavit.
3. That unless the accompanying Appeal is allowed, the Appellant and the interest of justice will be irreparably prejudiced.
4. That whatever is stated above is true and correct to my knowledge and belief and the law as stated in the accompanying Appeal is believed to be correct in view of the advice received from my counsel.

DEPONENT