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IN THE COURT OF V-ADDITIONAL SESSIONS JUDGE KARACHI EAST

S.C. No. 448 of 2018,

The State.....Vs.....Ghulam Mustafa s/o. Fateh Khan

F.I.R. No. 655/2017,

U/S: 376 PPC

P.S. Zaman Town

Mr. Waqar Alam Abbasi, advocate for the accused,

Ms. Asia, advocate for complainant,

Mr. Muhammad Ashraf Bhatti, ADPP for the State.

JUDGMENT

29.05.2019

Accused namely Ghulam Mustafa son of Fateh Khan was sent-up to face trial in Crime No. 655/2017 of Police Station Zaman Town under sections-376, PPC by the SHO of P.S. Zaman Town.

2. Brief facts of the prosecution case are that the complainant Muhammad Anwar son of Fateh Khan lodged FIR at P.S. Zaman Town, stating therein that he is labourer and used to reside at the address given in column No 2 of the FIR on rent alongwith his family members. On 08.11.2017, at about 9.00 p.m. when he returned back to his house, his wife Mst. Nazeeran Bibi, aged about 30 years disclosed that his brother namely Ghulam Mustafa came at his house at that time she was moping the courtyard. He forcibly took her into the room and committed rape with her and also gave her Rs.250/-. The wife of the complainant has also disclosed about such fact to the landlord who used to reside on the ground floor of the said house, hence the complainant lodged the instant FIR against the accused.
3. After completion of the investigation, the challan was submitted against the above named accused in the Court of learned XX-Judicial Magistrate, Karachi East, where in compliance of the Provision of Section-265(c) Cr.P.C the copies of police papers supplied to the above named accused vide Ex:01. Since the offence is exclusively triable by the Court of Sessions, hence the learned Magistrate had submitted the R & P of this case to the Court of Honourable Sessions Judge, Karachi East, from where it was received to this Court by way of transfer for it's disposal according to law.
4. The charge was framed against the accused vide Ex:02, to which he pleaded not guilty and claimed trial vide Plea Ex:02-A.
5. In support of it's case the prosecution examined following witnesses:-
P.W No.1 Complainant Muhammad Anwar as P.W-1, vide Ex.4, who produced copy of his CNIC, FIR No.655/2017 memo of inspection of place of incident, at Ex.4/A and 4/C

P.W Nos.2 Mst. Nazeeran as P.W-2, vide Ex.5, who produced copy of her CNIC, at Ex.5/A.

P.W No.3 WMLO Noor Un Nisa, as P.W-3, vide Ex.6, who produced OPD Slip and Medico Legal Certificate at Ex.6/A and 6/B.

P.W No.4 SIP Majid Anwar Khan, as P.W-4, at Ex.7, who produced emergency slip, arrival and departure entries, another emergency slip, letter to chemical examiner, chemical examiner report, and notice u/s. 160 Cr. P.C. at Ex.7/A to 7/F.

6. Thereafter the learned ADPP closed the evidence side of the prosecution vide his statement Ex:08.

7. The statement of the above named accused recorded u/s 342 Cr.P.C vide Ex:09, wherein he has denied the allegations leveled against him by the prosecution and stated that he is innocent and involved in this false case over the dispute of plot by the complainant who is his step brother. He prays for justice, but he declined to examine any witness in his defence and also declined to examine himself on oath, though asked by the Court.

8. I have heard Mr. Waqar Alam Abbasi the learned counsel for the accused and Ms. Asia, advocate for complainant and Mr. Muhammad Ashraf Bhatti the learned ADPP for the State. I have also perused the record available to me. After hearing and perusal of record the undersigned has drawn the following points for determination of the case;-

POINTS

1. Whether on 08.11.2017, at about 1730 hours, inside House No.E-146, Sector E- Korangi NO.5 V. accused committed rape/zina with Mst. Nazeeran Bibi, the wife of complainant Muhammad Anwar?

2. What offence, if any, has been committed by the accused?

9. I have considered the arguments advanced by the learned counsel from both the sides and have also gone through the entire material placed on record carefully and my findings on the above points with reasons are as under;-

FINDINGS

POINT NO.1. Not proved / doubtful.

POINT NO.2 Accused acquitted u/s. 256-H (i) Cr. P.C.

REASONS

POINT NO.1.

10. The prosecution in order to prove it's case has examined total Four (04) witnesses.

11. The complainant Muhammad Anwar has deposed in his evidence at Ex:04 that he is the complainant in this case. He produced copy of his CNIC bearing No. 44102-9442608-7 as Ex. 4/A. This incident took place on 08.11.2017. On the same date he had gone for his routine work of labour. At about 2100 hours he returned to his house. His wife namely Mst. Nazeera had gone to house of her sister, which is also situated near their house. My wife Mst. Nazeera informed her that her step brother namely Ghulam Mustafa had committed rape with her. On the same

date at about 1730 hours when she was blooming the courtyard of their house. She informed him that accused Ghulam Mustafa committed rape with her on "Charpai". Thereafter he alongwith his wife Mst. Nazeera went to PS Zafan Town and lodged such FIR. He produced such FIR as Ex. 4/B and stated that it is same correct and bears his signature. On 10.11.2017 police inspected place of incident in his presence and prepared such memo of site inspection and obtained his signature thereon. He produced such mashrakama of site inspection as Ex. 4/C and stated that it is same correct and bears his signature. His statement U/S 161 CrPC was recorded by police. He identified the accused Ghulam Mustafa present in the court and stated that he is same.

During his cross-examination, the complainant has deposed that he used to do masonry work/labour. He admitted that usually the masonry work is done between 0800 hours to 1700 hours. Vol. stated sometimes the work extends to 1900/2000 hours. He was performing masonry labour at Masjid in Korangi No. 5½. The distance between his house and Korangi No. 5 can be covered within 10 minutes on foot. He admitted that he did not report the incident to PS on 08.11.2017. Vol. stated he lodged report on 09.11.2017. They four persons i.e. himself, his wife, the present accused and his wife reside in their house. He has been residing with present accused and his family for about 2 years prior to this incident. He admitted that they reside on the first floor of the house, while their landlord resides on ground floor. He admitted that there is open courtyard in their house. He denied that one house was being constructed in front of their house during the time of incident. He admitted that there is no mention in the FIR and his statement U/S 161 CrPC read over to him by the learned DDPP for the State in open court that when he came to his house from his work, his wife had gone to house of her sister. He admitted that there is no mention in the FIR and his statement U/S 161 CrPC read over to him by the learned DDPP for the State in open court that his wife Mst. Nazeera informed him that accused Ghulam Mustafa committed rape with her on "Charpai". He denied that there was dispute between him his step brother over ancestral house in their native village. He admitted that he has not seen the present accused committing the alleged offence, but he is deposing as per information given to him by his wife.

12. The P.W No.2 Mst. Nazeeran, the alleged victim has deposed in her evidence at Ex:05 that he is prosecution witness, as well as victim in this case. She produced copy of her CNIC bearing No. 44102-2312127-2 as Ex. 5/A. This incident took place on 08.11.2017. On the same date her husband had gone to his work. Her Bhabhi had also gone for work in the company. At about 1730 hours the present accused, who is brother of her husband and used to reside in their house alongwith his family, came and committed rape with her on Charpai. Thereafter, the accused was giving her amount of Rs. 250/-, but she did not accept the same. Then she went to house of her sister and the accused also ran away. She narrated the incident to her sister namely Fareeda. At about 2100 hours her husband Muhammad Anwar came to house of her sister. She also narrated the incident to her husband. On the next date at about 1630 hours her husband lodged such FIR at PS. Her statement U/S 161 CrPC was recorded by police. She was also taken to hospital for medical examination. She identified the accused present in the court and stated that he is same, who committed rape with her.

During her cross-examination, she has deposed that they alongwith present accused and his family, as well as elder brother of his husband and his family used to reside in one house for about two years prior to incident. Vol. stated they resided with the present accused and his family for about one week prior to incident, as the elder brother of his husband shifted to another residence, therefore, they also shifted to the house, where the incident took place. She admitted that during the period of two years the present accused did not misbehave with her. Vol. stated because their elder brother also used to reside with them with his family. She admitted that the present accused did not misbehave her during the period of two years prior to incident, even her husband and his elder brother used to go for work. Vol. stated because the wife of elder brother of present accused remained alongwith her in the same house. She admitted that it is her second marriage with the complainant. She denied that there is no main gate of the first floor, where they used to reside. She admitted that Noorani Masjid is situated near their house. She admitted that the labors were working at Noorani Masjid on the day of incident. She admitted that in her statement U/S 161 CrPC read over to her by learned DDPP for the State in open court there is no mention that after the incident she went to house of her sister. Vol. stated but she had informed such fact to police. She admitted that in her statement U/S 161 CrPC read over to her by learned DDPP for the State in open court that she narrated the incident to her sister. Vol. stated but she had informed police about such fact. She admitted that in her statement U/S 161 CrPC read over to her by learned DDPP for the State in open court that there is no mention of any Charpai in her statement U/S 161 CrPC. She admitted that she had no mark of violence on her body. Vol. stated he took her from armpits and committed rape

with her. Their house is situated in Korangi No. 5, but he did not know the house number. Vol. stated they reside in a rented house. She did not know as to whether or not the amount of Rs. 250/- was given to police during investigation. Vol. stated she had given the said amount to the complainant. She went to hospital on the next day of incident. She denied that she did not hand over her wearing clothes to police. Vol. stated she had not received his wearing clothes from police till today. The complainant brought her to house from the house of her sister. Sometimes her husband returns from work at 1900 hours and sometimes at 2000 hours, depending upon his nature of work. She admitted that there is no mention in her statement U/S 161 CrPC read over to her by the learned DDPP for the State that her Bhabhi had also gone for her work in the company on the day of incident. She admitted that their landlord resides on the ground floor of same house and he also had Karyana shop outside the house. Vol. stated she raised cries at the time of incident, but no one heard. She denied that there is no mention in her statement U/S 161 CrPC read over to her by the learned DDPP for the State in open court that she raised cries at the time of incident. She denied that there is any dispute/problem of her husband with the present accused over a house situated in their village. She denied that no such incident has taken place, as alleged; therefore, there is not witness of the incident except herself and her husband.

13. The P.W No.3 WMLO Noor Un Nisa, has deposed in her evidence at Ex:05 that On 11.11.2017, she was posted as WMLO JPMC. At about 1.14 p.m. she received an injured Naziran w/o. Anwar, aged about 30 years alongwith her husband alongwith police letter for P.S. Zaman Town for medical examination with the history of rape committed on 8.11.2017. She produced such letter at Ex. 6/A and stated it is same and correct.

Mark of Violence.

No mark of violence and injury seen anywhere on body at the time of examination. On asking history, the lady was married since five years, as per her abdominal examination, she found her abdomen soft and non-tender, per vaginal examination she found her external genital normal, vestibule Normal, vagina normal in shape admits two fingers, milt radish discharged (6th day of mensucycle), Hymen old and torn, urine and stool passed, organ washed, clothes of incident were brought by lady which were sealed and labeled and handed over to I.O. for chemical examination. She gave her opinion as keeping view of above examination lady was not virgo intacta, there is no evidence or sign of fresh act of sexual intercourse, however, case was reserved for chemical and DNA report. She issued provisional certificate, which she produced as Ex.6/B and stated it is same, correct and bears her signature. She also produced OPD Slip, at Ex.6/C and stated it is same and correct. So far has not received chemical examiner report as well as DNA report and also did not issue final medical certificate for want of the reports.

14. The P.W No.4 SIP Majid Anwar Khan, the investigation officer, in his evidence at Ex:07 has deposed that on 09.11.2017, he was posted at P.S. Zaman Town Investigation from 8.00 a.m. to 8.00 p.m. On that day he received one FIR No.655/2017, u/s. 376 PPC for investigation. He called complainant and abductee at P.S. and left P.S. for JPMC for medical of abductee under entry No.40. where he produced abductee in emergency ward/WMLLO. He produced emergency slip at Ex.7/A and stated it is same and correct. At JPMC the WMLO was not available, therefore, he returned back to P.S. without medical examination of abductee. He also made such entry in this regard. He produced departure and arrival entry at Ex.7/B and stated it is same and correct. On 10.11.2017, at about 9.00 a.m. he contacted with complainant and then proceeded to place of incident where inspected the place of incident on the pointation of complainant at about 9.30 a.m. and prepared such memo, he verified Ex.4/C on record and stated it is same correct and bears his signature as well as of complainant. On 11.11.2017, he again took the complainant and abductee to JPMC where the medical examination of alleged abductee was conducted by WMLO. He verified Ex 6/A on record i.e. letter to WMLO and stated it is same correct and bears his signature. He also produced emergency slip at Ex.7/C and stated it is same and correct. The WMLO handed over him the wearing clothes of abductee and two Jars for chemical examination. On 13.11.2017, he sent such jar for chemical examination under letter, which he produced as Ex.7/D and stated it is same, correct and bears his signature. He then obtained chemical examiner report, which he produced as Ex.7/E and stated it is same and correct. On 23.11.2017, the accused Ghulam Mustafa appeared at P.S. after obtaining his interim pre-arrest.bail. He interrogated him. He also issued notice u/s. 160 Cr. P.C. for his medical examination but he did not reach at P.S. he produced such notice at Ex.7/F and stated it is same and correct. Then after completing the investigation he submitted challan of this case for trial. Accused present in Court is same.

During his cross-examination, the I.O. has admitted that except the victim there is no any other eyewitness of the alleged incident. He denied that during the investigation the accused and his family members disclosed him that the accused is falsely booked in this case due to dispute over the ancestral property. He denied that during the investigation the witnesses have also disclosed that no such incident has taken place. He admitted that he has not recorded the statement of any independent person from the place of incident. He denied that he has not conducted fair and proper investigation and submitted false challan against the accused.

15. It is reflected from the perusal of record and hearing from both the sides that on 09.11.2018 at about 1630 hours, FIR No. 655/2017, under sections-376 PPC was lodged by the complainant Muhammad Anwar at Police Station Zaman Town against the present accused Ghulam Mustafa as nominated accused on the basis of allegation that he has forcibly committed rape/zina with his wife Mst. Nazeeran Bibi. It is fact that the alleged incident has taken place in daytime in a residential house and on the ground floor of the said house shop and house of the landlord are situated. The alleged victim during her cross-examination has specifically admitted the fact that "It is correct that our landlord resides on the ground floor of same house and he also had Karyana shop outside the house...." Similarly, the complainant during his cross has also admitted such fact that "we reside on the first floor of the house, while our landlord resides on ground floor. It is correct that there is open courtyard in our house...." It is also fact that there is no other independent witness of the alleged incident except the alleged victim, whereas the evidence of complainant is hearsay. As per the evidence of the complainant at about 2100 hours when he returned back from his work his wife (alleged victim) informed him about the alleged incident but he did not reported the matter promptly at P.S. on the same date and has reported the matter on the following day on 9.11.2017 at about 1630 hours. The complainant during his cross-examination has specifically admitted the fact that "It is correct that I did not report the incident to P.S. on 08.11.2017 and has lodged report on 09.11.2017." It is also fact that the accused alongwith his family as well as the complainant being brothers were residing in the same house since long. The complainant during his cross has admitted such fact that "We four persons i.e. myself, my wife, the present accused and his wife reside in our house. I have been residing with present accused and his family for about two years prior to this incident." Similarly, the alleged victim during her cross-examination has deposed that "We alongwith present accused and his family, as well as elder brother of my husband and his family used to reside in one house for about two years prior to incident.....She has further admitted the facts that "It is correct that during the period of two years the present accused did not misbehave with me.....It is correct that the present accused did not misbehave me during the period of two years prior to incident, even my husband and his elder brother used to go for work....." It is pertinent to mention here that there is specific allegations of the alleged victim against the accused that he has forcibly committed rape and the alleged victim during her evidence has also deposed such fact but her evidence is not supported with any corroborate piece of evidence, specifically the medical evidence i.e. medico legal certificate, produced by the P.W-3 WMLO Dr. Noor un Nissa during her evidence as Ex.6/B, is not in support with the allegations / evidence of the alleged victim leveled against the accused as in the said exhibit it is specifically mentioned that "No mark of violence and injury seen anywhere on body at the time of examination.....there is no evidence or sign of fresh act of sexual intercourse...". It is pertinent to mention here that only solitary statement of victim without any supporting and corroborative evidence specially non-supporting medical evidence is in sufficient to establish the case of prosecution under the circumstances, when incident happened in day-time at thickly populated and residential area. Thus, these facts of the case itself look to be imaginary and un-believable under the circumstances.

16. Material lacunas and discrepancies also found at the part of prosecution as the investigation officer remained miserably failed to associate any other private witness from the place of incident which is the residential area other houses and shops are also situated there. It is also fact that the alleged incident has taken place on the upper floor of the house where the complainant alongwith his wife Mst. Nazeera, the alleged victim as well as the accused alongwith his four children and wife is residing whereas on the ground floor of the said house the landlord is residing and also running his shop of Karyana. The investigation officer during his cross-examination has specifically admitted the fact that "It is correct that except the victim there is no any other eyewitness of the alleged incident.....It is correct that I have not recorded the statement of any independent person from the place of incident, which created serious and meaningful doubt in the case of the prosecution. However, the accused has taken plea during his statement recorded u/s 342 Cr.P.C that there was dispute between the complainant and the accused over the ancestral property situated in their village due to which the complainant has falsely booked him in this case. This fact

also created reasonable and meaningful doubt in the case of the prosecution and somewhat supports to the plea taken by the accused. It is also fact that no any physical marks of violence on the alleged victim noticed during the examination as conducted by the lady doctor to show and prove the alleged forcible attempt to commit rape with the alleged victim by the present accused, hence there is no legal admissible evidence available against the accused except the presumption but it is settled principle of law that in the criminal cases the sentence cannot be awarded on presumption. It is also well settled principle of criminal jurisprudence that no one shall be construed into the crime in the absence of legal admissible evidence. There is no scope and space for surmises conjectures even with high presumptions. **Reliance in this respect may be placed on the view taken by the apex Court in the case *Miyan Muhammad Latif v. the State (PLD 1966 S.C.2001)*. It has also been held in *2010 P. Cr. L J Karachi Page-461* and *SCMR 2008 Page-1221* that it is duty of the prosecution to establish its case beyond any shadow of reasonable doubt. It is apparent from the above discussion that the prosecution remained miserably failed to prove and establish its case through solid and confidence inspiring evidence against the present accused, hence I answer Point No.1 as not proved/doubtful.**

POINT NO.2.

17. Under the attending circumstances and appreciation of evidence and keeping in view the material contradictions/discrepancies in the case of the prosecution as highlighted above, it is my humble opinion that the prosecution remained miserably failed to establish and prove it's case through concrete, solid and confidence inspiring evidence beyond reasonable doubt against the above named accused, therefore, I extend benefit of doubt to the accused namely Ghulam Mustafa son of Fateh Khan and acquit him from the charge of this case under section-265-H(1) Cr.P.C. He is present in judicial custody and remanded back to jail with the direction to concerned jail authorities to release him in this case, if he is no more required in any other case or crime.

Announced in Open Court

Given under my hand and seal of the Court, this 29th day of May, 2019.

(JAVED IQBAL)

V-ADDL. SESSIONS JUDGE,

KARACHI EAST