

# THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 72 of 2010, Criminal Acquittal Appeal No. 80 of 2010 &  
Criminal Acquittal Appeal No. 161 of 2014

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Present: Justice Mrs. Rashida Asad

Date of Hearing: 20.02.2020

Date of judgment: 15.04.2020

Appellant/Complainant;  
(in Cr. Acq. Appeal Nos.80/10 & 161/14) Through Ms. Amna Usman Advocate

Appellant (in Cr. Appeal No. 72/10) Anwar Hussain through Mr. Habib Ahmed, Advocate, Respondent (in Cr. Acq. Appeal No.80/10) & (in Cr. Acq. Appeal No.161/2014) through Mr. Muhammad Jiwani & Mr. Shahid Mushtaq Advocates

Cr. Acq. Appeal No.80/2010) through

The State: Through Syed Meeral Shah, Additional Prosecutor General Sindh

## JUDGMENT

1. **Mrs. Rashida Asad, J.-** Through this single judgment, I intend to dispose of all above three captioned appeals which are tied by a common thread. Criminal Appeal No. 72 and Criminal Acquittal Appeal No. 80 of 2010 are preferred against the judgment dated 23.01.2010, whereas, Criminal Acquittal Appeal No. 161 of 2014 is preferred against the judgment dated 05.05.2014, arisen out of FIR No. 07/2007 registered at Police Station Ubaro at 6.30 pm for offences under sections 376(2), 354-A, 452, 337-A(i), 337-F(i), 147,148, 149 P.P.C.

2. Precisely the facts of prosecution case are that Nasima Lubano (alleged victim of rape), on 27.01.2007 at about 1:00 p.m., was at her home having lunch with her brothers, sisters and mother. At this moment eleven (11) accused persons, namely Anwar Hussain armed with rifle, Abdul Sattar armed with shotgun, Khadim Hussain, Shah Baig, Ali Hassan, Loung, Munawar, Bashir, Morezada, Shahzado and Jabbar, illegally trespassed into the house of victim and by beating and use of criminal force and weapon caused injuries to her and other occupants of the house, and dragged her to



Abdul Sattar's house, where accused Abdul Sattar and Anwar Hussain stripped off her clothes and committed Zina-bil-Jabr with her in a separate room. Thereafter, she was brought out of the room, where all 11 accused tickled her body and exposed her naked to public view. It is the further case of the prosecution that cries of the victim attracted P.Ws Jamaldin and Sattar who rescued her. Thereafter, she ran away at her home where she put on the cloths and informed his brother Asghar Ali about the incident, who informed to his father at work place. Thereafter, her father (complainant) lodged the F.I.R as referred hereinabove, stating therein that accused Abdul Sattar along with 10 co-accused persons in order to take revenge of a quarrel, took place between him and accused persons on a petty matter, committed Zina-bil-Jabr with his unmarried, virgin daughter Nasima aged about 18/19 years.

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Sattar

3. Criminal Appeal No. 72/2010 is preferred by appellant Anwar Hussain, against the judgment dated 23.01.2010, whereby learned trial Court convicted him under sections 376(2) and 337-A(i) P.P.C., whereas, Criminal Acquittal Appeal No. 80/2010 is preferred by complainant against acquittal of accused Anwar Hussain from charges punishable under sections 354-A, 453, 337-F(i), 147, 148, 149 P.P.C., and also against the acquittal of co-accused Khadim Hussain, Shah Baig, Ali Hassan, Bashir, Shahzado and Jabbar. Initially this case was being tried by learned III-Additional Sessions Judge, Mirpur Mathelo from where it was transferred to the learned Sessions Judge Karachi South under an order passed by this Court in Transfer Application. Accused Loung Khan died during trial and as such the proceedings against him were abated vide order dated 17.01.2009, whereas, absconder accused Munawar and Ghulamullah @ Morzado were declared proclaimed offenders and their case was kept on dormant file. However, after judgment dated 23.01.2010, both of them surrendered before the trial Court and after usual trial they were acquitted vide judgment 05.05.2014. Their acquittal is impugned by the complainant through Criminal Acquittal Appeal No. 161 of 2014.

4. All the accused persons pleaded not guilty and claimed trial.

5. At trial, prosecution examined eight (8) witness namely (i) Nasima (Victim) (ii) Hamza, (iii) Dr. Zaib-un-Nisa, (iv) Asghar Ali, (v) Jamaldin, (vi) Mehrab, (vii) SIO Aftab Hussain, (viii) Muhamad Islamul Haq Arain J.



6. Statements of all accused under section 342 Cr.P.C., were recorded, wherein they denied the allegations leveled against them. They neither examined themselves on oath nor examined any witness in their defence. Learned Trial Court after hearing the arguments of learned counsel for the parties passed judgment dated 23.01.2010 and 05.05.2014.

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7. Prosecution's evidence in both trials is almost same. Evidence of alleged victim Mst. Naseema is of so much significance and almost entirety of the prosecution case revolved around her evidence. She deposed that the incident took place on 27.01.2007 at 1:00 p.m when she was present at her house with her brother Asghar Ali, Kamran, Imran, sisters Piyaro, Azeema and mother Naziran and was having meal. Suddenly, 11 persons namely Abdul Sattar, armed with gun, Munawar Hussain armed with gun, Anwar armed with rifle and remaining carrying sticks entered the house. Accused persons after beating family members, dragged her to the house of accused Abdul Sattar where inside a room accused Abdul Sattar torn her cloths and she was subjected to Zina by him and accused Anwar Hussain. Thereafter, she was brought outside the room where all accused played with her body. In the meanwhile she raised cries which attracted P.Ws Jamaldin and Sardar, who reached at the scene and finding a chance she ran away towards her home in naked where she put on the cloths and narrated the incident. Later, when her father returned home she also disclosed him the fateful incident and then he took her to the police station Obaro for lodging of FIR. She was then brought to Taluka Hospital, where after her medical examination, the Doctor informed her that she was already pregnant to which she informed the Doctor that she was subjected to Zina by accused Munawar even prior to the reported incident. Her statement under section 164 Cr.P.C was recorded before the Magistrate. She identified the accused in Court. In cross examination she admitted that she lived in a joint family and her maternal uncle and grandfather also lived with them. She further admitted that there were houses of other people between her house and the house of accused Abdul Sattar. It is also admitted by her that on her cries none from neighbourhood came forward to rescue her while she had been taken to the house of accused Abdul Sattar by accused persons. She denied that Jamal and



Sardar are her relatives and that there was no gate to the courtyard of her house.

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8. P.W-3 Dr. Zaibun Nisa WMLO deposed that on 27.01.2007, she examined Nasima and on her physical examination found her to be healthy, normal mental status, cloths changed, behavior normal. She found following abrasions on her body.

1. Abrasion 4cm x 2 cm on anterior aspect mid left upper arm
2. Multiple abrasions on back of chest measuring 5 cm x 5 cm, 3 cm x 3 cm, 3 cm x 1.5 cm, 2 cm x 0.5 cm
3. Abrasion 7 cm x 3 cm on left scapular
4. Abrasion 1.5 cm x 0.5 cm on left buttock

On genital examination, the WMLO found V/V normal, hymen torn and healed, cervix soft, uterus enlarged, two fingers passed easily, no genital violence seen.

*PATHOLOGICAL REPORT: Pregnancy Test Positive*

*ULTRASOUND REPORT: A single alive fetus with gestational age of 08 weeks plus/minus 01 week. According to WMLO, no bonilien was seen in X-Rays. However, it was disclosed in Chemical Analyzer Report that human blood and human semen were detected in internal and external vaginal swab.*

In her opinion, the nature of injuries was Ghayr-Jaifah Damiya, caused by hard and blunt substance and were fresh. She stated that in view of chemical examiner's report the act of Zina was committed upon her. During her cross-examination, she admitted that semen may be detected even up to three months of sexual intercourse.

9. P.W-4 Asghar Ali (brother of the victim) deposed that on 27.01.2007 at 1:00 p.m., he was having lunch along with his family members, suddenly 11 persons entered into their house with weapons namely Abdul Sattar, Shahzado, Morezado, Abdul Jabbar, Anwar Hussain, Khadim Hussain, Shah Baig, Ali Hassan, Bashir Ahmed, Munawar Hussain and Loung. The offenders after beating all the family members including his mother took away Mst. Nasima (victim) towards the house of accused Abdul Sattar. He tried to rescue his sister, but they beat him up and closed the door of Abdul



Sattar's house. He raised cries and asked the people for help. He also heard cries of his sister then Sardar Ali, Jamaldin and other villagers came there. Sardar Ali and Jamaldin helped him to rescue his sister from the clutches of accused persons. He further deposed that he saw his sister naked while running towards home where she put on her the cloths. Thereafter he went to Dharki at about 3:00 pm and met his father who was working in a factory. He further disclosed that he narrated the incident to his father. On reaching home her sister also narrated story to his father. He identified the accused in Court. During cross-examination, he admitted that although he received injuries but he did not go for medical examination.

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10. P.W-5 Jamaldin deposed that on 27.01.2007, he along with Sardar Ali was sitting in the street of their village. They heard cries and followed the same. The cries were coming from the house of Abdul Sattar. He also saw Asghar Ali who told them that Nasima was taken away by accused persons. They entered in the house of Abdul Sattar and saw 11 persons in the courtyard naughty tickling Nasima's naked body. Accused pointed their weapons towards them but they requested to leave the girl in the name of Allah. Nasima ran away from the place of incident in same state. He further deposed that his statement under section 164 Cr.P.C was recorded before Judicial Magistrate. He identified the accused present in Court. During cross-examination, he admitted that he is maternal uncle of Mst. Nasima. He admitted that there were houses of other persons in between the houses of Mst. Nasima and Abdul Sattar.

11. Complainant Hamza (PW-2) deposed that on 27.01.2007 the incident took place and prior to the incident a quarrel took place between him and Abdul Sattar over a matter related to children and Abdul Sattar had threatened him that he would disgrace him. He further disclosed that on the day of incident he was present at his job at Angro Fertilizer Company, when at about 3:00 p.m., his son Asghar Ali came to his Company at Dharki and informed him about the incident. He rushed towards the house where he found Mst. Nasima weeping who informed him about the incident. He further deposed that thereafter he went to Police station and lodged the FIR. Thereafter, police took Nasima to Taluka Hospital Dharki for medical examination and after examination she was allowed to go home. During his



cross-examination he admitted that he had not lodged any report regarding quarrel between him and Abdul Sattar. He admitted that Jamaludin is his brother-in-law. He further admitted that his daughter did not inform him or his wife about her pregnancy and they came to know about it after her medical examination.

12. P.W-6 Mehrab is Mushir of memo of securing of scissor from the room of the house of accused Abdul Sattar and arrest of accused persons. His evidence is formal in nature.

13. P.W-7 Aftab Hussain is I.O of the case, who deposed that 27.01.2007 he received FIR No.07/2007 for investigation, recorded statement of Mst. Nasima, the victim girl, inspected the place of incident in presence of Muhsirs and secured and sealed the scissor in presence of Mushirs. On 01.02.2007 he arrested accused Loung, Ali Hasan, Anwar, Shah Baig, Shahzado and Abdul Jabbar nearby the bridge of Nara canal situated at Lango Road in presence of Mushirs. On 04.02.2007, he recorded statements under section 161 Cr.P.C., of P.Ws Asghar, Manzoor Hussain and Mehrab. On 07.02.2007, he produced P.Ws Mst. Nasima, Sardar and Jamaludin before Judicial Magistrate Obaro for recording their statements under section 164 Cr.P.C. After completing all formalities, he submitted the chalian before the competent court of law. On 03.04.2007, he arrested accused Bashir from Rasoolabad District Khairpur in presence of Mushirs and on 03.06.2007 arrested accused Khadim from Gudu Link Road in presence of Mushirs and submitted the supplementary challan against the arrested accused Bashir and Khadim Hussain separately. During cross-examination, he stated that when he visited the house of Abdul Sattar no one was present there and he himself opened the door. He admitted that he had not recovered any gun, rifle or danda (stick) from any of the accused. He further admitted that he did not recover the perished cloths and dress of victim for chemical examination and analysis.

14. P.W-8 Mr. Muhammad Islam-ul-Haq Arain Judicial Magistrate deposed that on application dated 07.02.2007 of I.O SIP Aftab Hussain Farooq of PS Obaro he recorded the statements of P.Ws Mst. Nasima, Jamaludin and Sardar Ali under section 164 Cr.P.C.



15. Mr. Habib Ahmed, the learned counsel for appellant Anwar Hussain argued that F.I.R is noticeably delayed by about 5.30 hours which signifies to have been lodged after consultations and deliberations and there are material contradictions in the evidence of the prosecution witnesses. He argued that the prosecution witnesses had differed with each other over the material points like their arrival at the scene of occurrence and individual role of offenders. He argued that as per prosecution case, the alleged incident took place in brought day light but no independent person from the locality was associated as witness; that all the private witnesses are related inter-se, hence no reliance can be placed upon their evidence; that victim was already pregnant hence in order to justify her previous pregnancy entire story has been concocted by her and she is not a virtuous lady; that even no genital violence seen by WMLO on her examination soon after the incident; that torn cloths of victim were not produced before the police nor recovery of cloths has been affected from accused nor footprints were noticed at the place of incident; that in the present case conviction of appellant under section 376(2) and 337-A(i) P.P.C., is not sustainable in view of the fact that no semen grouping or DNA test was undertaken and co-accused have been acquitted by the trial Court on same evidence and even two absconding accused whose cases were kept on dormant file have also been acquitted from all the charges, hence he prayed for setting aside the conviction and sentence of the appellant Anwar Hussain recorded under sections 376(2) and 337-A(i) P.P.C., and his acquittal from these charges too. He further argued that accused was rightly acquitted by the learned trial Court in remaining offences and therefore the findings of learned trial Court on that score are not sustainable.

16. Mr. Muhammad Jiwani and Mr. Shahid Mushtaq Advocates for the respondents (acquitted accused) while supporting the judgment argued that learned trial Court acquitted the respondents after properly evaluating the evidence brought on record; that nothing incriminating articles had been recovered from the possession of the respondents and the two families had been roped in by the complainant to cover up the illegitimate pregnancy of his daughter.

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17. Conversely, learned Additional Prosecutor General Sindh supported the conviction of appellant Anwar Hussain and acquittal of remaining accused.

18. Ms. Anna Usman Advocate for the complainant at very outset submitted that to the extent of conviction of appellant Anwar Hussain, the complainant supports the judgment dated 23.01.2010 and contended that the ocular evidence of victim as well as other prosecution witnesses is corroborated by medical evidence confirming the offence of zina with the victim; that as per chemical examiner report human blood and semen was also detected; that sole testimony of victim is confidence inspiring, which alone is sufficient for conviction of the accused; that victim has specifically named accused Abdul Sattar and Anwar Hussain who committed Zina with her; that admittedly the eye witnesses are related inter-se, but their evidence is consistent and confidence inspiring and it is well settled principle of law that quality of the evidence must be considered and not its quantity; that victim had not disclosed about previous rape committed upon her by accused Munawar because of fear, as she was unmarried and naturally had considered its future repercussions against her father; that merely on the basis of a petty matter nobody would like to stigmatize her daughter for her entire life which would have certainly substantial bearing on her future; that when evidence of victim is convincing, confidence inspiring and truthful, defect if any in the investigation cannot prejudice the case of the victim; that delay in case of such like cases is normal phenomenon; that absence of marks of violence on the private parts does not exonerate accused of gang rape; that through the impugned judgment dated 23.01.2010, learned trial Court has failed to appreciate that confidence inspiring evidence was brought on record against accused Anwar Hussain for commission of gang rape and co-accused facilitated the main accused in commission of such a heinous offence; that learned trial Court has failed to appreciate the evidence brought on record by the victim girl duly corroborated by the medical evidence against co-accused; that the judgment of the trial Court to the extent of acquittal of appellant Anwar Hussain under sections 354-A, 453, 337-F(i), 147, 148, 149 P.P.C., and acquittal of co-accused Khadim Hussain, Shah Baig, Ali Hassan, Bashir, Sattar, Shahzado and Jabbar from all the charges as well as acquitted accused Munawar Hussain and Ghulamullah alias Morezado is not sustainable under





the law hence all the accused may be punished and convicted accordingly and the criminal appeal filed by appellant Anwar Hussain may be dismissed and acquittal appeals filed by the complainant may be allowed. In support of the contentions, reliance has been placed upon the cases reported as 2002 SCMR 1009, PLD 1991 SC 412, 2005 SCMR 1936, 1999 P.Cr.L.J 699, PLD 1950 Baghdad-ul-Jadid 71, 2007 SCMR 473, 2006 NLR (AC) 537, 2011 SCMR 1665, 1981 SCMR 448, PLD 1977 SC 529, PLD 2005 SC 252, 2010 SCMR 222, PLD 1968 Karachi 853 & 1996 P.Cr.L.J 620.

19. I have heard the learned counsel for the parties and with their able assistance have gone through the entire evidence adduced at trial by the prosecution.

20. I now proceed to evaluate every piece of evidence produced by the prosecution in the sequence of events statedly unfolding in this case. Nasima Lubano (P.W-01) and Asghar Ali (P.W-04) were produced by the prosecution as witness of the incident which allegedly took place initially at their house and then at the house of accused Abdul Sattar. The said witnesses are sister and brother inter se. The other prosecution witnesses Jamaldin (PW-5) is maternal uncle of the said witnesses who stated that on hearing cries he reached at the scene of occurrence along with one Sardar Ali (given up). Nasima has deposed before the Court that on the fateful day, in front of her brothers, sisters and mother, she was dragged by all nominated 11 accused persons from her house to the house of co-accused Abdul Sattar, situated at a distance of 100 paces. Admittedly, there were some houses situated in between the said two places, but none from the neighbourhood has come forward or acted as witness. She has not disclosed about Asghar's appearance at the house of accused Abdul Sattar. Moreover, she has also not deposed to corroborate statement of her brother, PW Asghar Ali who stated that he visited his father at his work place to report the matter and then they both came back home together. Whereas, PW Asghar deposed about her arrival at the accused's house and watching, along with Jamaluddin and Sardar Ali, of scene of teasing her naked sister at the hands of 11 accused persons. Nasima disclosed that she ran back to her house naked. She has also not corroborated statement of his brother about his arrival at the scene of occurrence. It is unbelievable that none from the surrounding residents witnessed the

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occurrence. Though, as per statement of P.W Asghar Ali some mohallah people also gathered in the street but no one was examined during investigation. It is also observed that other material witnesses, brothers, sisters and mother of victim were also not examined. It is settled principle of law that despite availability of natural and best witnesses their non-examination provides lawful inference as envisaged under Article 129(g) of Qanun-e-Shahadat Order 1984, that in case such witnesses had been examined, they would not have supported the prosecution. In the case of Bashir Ahmed alias Manu Vs. The State reported in (1996 SCMR 308), it was held that despite presence of natural witnesses on the spot they were not produced in support of the occurrence and adverse inference under Article 129(g) of Qanun-e-Shahadat Order could easily be drawn that in case they were produced, they would have not supported the prosecution version. In another case reported as Mohammad Shafi v. Tahirur Rehman (1972 SCMR 144), it was held that large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested witness in support of its case, no implicit reliance could be placed on evidence of interested eye-witnesses. The statement of complainant P.W-02 is based on hearsay evidence, therefore, it is not helpful to the prosecution. Nasima and Asghar Ali in their evidence alleged that the accused persons were armed with different weapons when they allegedly trespassed into the house, however, no weapon was recovered from any of the accused persons though they remained in police custody for considerable period. There is no denial of the fact that the FIR was lodged with delay of about 5.30 hours which is undeniable. The only explanation given by the prosecution is that after the fateful occurrence at 1.00 pm, PW Asghar Ali went to his father at his work place at about 3.00 pm and then they came back to their home where victim disclosed entire incident to her father and then the complainant went to Police Station along with the alleged victim for registration of FIR. However, the alleged victim who remained at home till she went with her father for registration of FIR has not disclosed that her brother PW Asghar Ali went to bring his father. So in such eventuality the material contradiction, inconsistencies and infirmities in the statements of the witnesses are tantamount to cast doubt on the coherence of evidence pertaining to the questions set out below: -

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- a.) Whether there was an act of trespass committed to drag and rape the victim at the house of accused Abdul Sattar;
- b. Whether PW-1, Naseema was raped and exposed naked to public view;

21. Record shows that after initial statement of victim recorded under section 161 Cr.P.C on 27.01.2007, her statement under section 164 Cr.P.C was recorded after about ten days, on 07.02.2007. In her evidence she deposed about her presence at home along with brothers, sisters and mother, having their meals, trespass and her forcible removal to the house of accused Abdul Sattar after beating her other family members. It is observed that her statement under section 164 Cr.P.C is completely silent about act of trespass into her house, so also availability of other siblings, having her meal with family and act of violence and beating by the accused persons. I have also minutely examined the Memo of inspection of place of incident, which did not indicate regarding any boundary wall or periphery around the house of the complainant. It is mentioned in the Memo of the place of incident that no foot prints were found in the house of complainant or in open space and the adjacent street. Even no traces of having meal etc., were mentioned in the said memo, hence trespass of the accused persons into the house of the complainant is not free of serious doubts. It is further observed that allegation and charge of exposing her publicly alleged commission of rape have not been substantiated through any reliable evidence. Rather there is no other evidence to this affect except the evidence of alleged victim girl whose evidence is not worthy of reliance as lacks credibility and confidence. To lend support to the evidence of the alleged victim of rape and violation/breach of her modesty, the prosecution cited three eye witnesses P.Ws Jamaldin, Sardar Ali (Given Up) and Asghar Ali. P.W-Jamaldin in his statement under section 164 Cr.P.C did not state the time of occurrence as well as reasons of his presence in the street. As per his statement he was attracted by the cries of victim girl coming from inside the house of Abdul Sattar. It is worthy noted here that one important factor was missing which is the family of victim girl, who all were said to be with her when she was taken away forcibly from her house by accused persons. It should have prompted them to naturally cause havoc with an outburst reaction, calling attention of neighborhood. A

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Other witness not

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material serious question arises, why they all did not follow her and just left their young girl at the mercy of miscreants. Even P.W Jamaldin who was present in the street did not hear the cries of victim girl while she was being dragged by the accused persons towards the house of accused Abdul Sattar. Such short comings, infirmities, discrepancies and contradictions creates serious doubts regarding appearance of accused at the house of victim, committing violence, beating victim, her siblings and her forcible removal to the house of an accused at distance of 100 paces. Absence of minimum natural reaction of calling for help from the neighbours and villagers is sufficient to cast a shadow of doubt on the prosecution's version of facts. P.W Asghar Ali in his evidence has deposed that he tried to rescue his sister but accused after beating him closed the door of the house of Abdul Sattar whereas, P.W Jamaldin deposed in his evidence that after hearing noise, he saw Asghar Ali who told him about dragging of Nasima, thereafter, they entered into the house of Abdul Sattar and saw 11 persons in the courtyard, playing with the body of Mst. Nasima. It is not understandable that how both P.Ws entered into the house, when according to the evidence of Asghar Ali the iron gate was closed. As per statement of complainant they are old habitant of the locality as he was living in the house for the last 12 years. P.W Asghar Ali deposed that there were other people standing at some distance whereas P.W Jamaldin stated that he and Sardar Ali after hearing the noise, coming inside the house, came at the place of incident where they saw Asghar Ali standing outside the house of the accused Abdul Sattar, therefore, from such piece of evidence it cannot be threshed out that whose version is correct. P.W-02 Complainant Hamza and P.W-04 Asghar Ali admitted that P.W Jamaldin was real maternal uncle (Mamo) of the victim similarly P.W Sardar (given up) was also close relative of the victim. Apart from the unrealistic fact that if a young girl is forcibly removed and dragged away in presence of her family members they all would at least raise outburst to call for help from natives and to put in their efforts to save modesty of their girl, it is noted that the victim categorically denied her relationship with PW Jamaldin which brings a question about veracity and credibility of her statement. The cloths of the victim allegedly torn, could not be recovered by the police and even there is no evidence available on record that the same were lost. As regards the recovery of scissor is concerned, the same has no link at all with the alleged offence or even with the accused persons as the alleged victim has not



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disclosed use of scissor for tearing and stripping off her clothes. Admittedly, no name of any person from public/mohallah who had witnessed the episode of exposure of victim girl is available on record. Further the alleged rescuers when entered to intervene, the victim was alleged to be remained inside the house, therefore, there is no evidence of her being dragged in the street or open space in naked condition nor did striping of her cloth in open space. Even no impartial person was cited who was present nearby and had seen the victim in such a condition. It is worthy to note that if brother, real Mamo, and uncle have reached inside the house of accused and found her in naked condition none had tried to immediately cover her from his own shirt and let her go outside the street in same condition. It is further observed that all accused have very closed relations to each other as accused Loung with his four real sons and accused Budhal alias Budho with his four sons have been nominated in the crime with allegation of playing with the body of victim does not appeal to the prudent mind and therefore possibility of their false implication cannot be ruled out.

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Mst. Nasima  
Mst. Nasima

22. Now the core point involved in the present case is whether victim girl was subjected to Zina-bil-Jabr by accused Abdul Sattar and Anwar Hussain as alleged and reported. In order to prove zina upon victim Mst. Nasima, prosecution examined victim, and WMLO. Here, I would like to accept and mention that there is no cavil or contrary view to well established principle of law that in such like cases the evidence of victim is to be placed at a very high pedestal being the only and a 'star witness' since the evidence of such a witness controls the fate of case, provided it inspires confidence and finds necessary corroboration from an independent source. In the case of Atlas Khan alias Attasi v. State and another which is reported at 2014 PCr.LJ 1280, (relevant page 1288), it is observed as under:

.....it is pertinent to mention that even a solitary statement of a victim is sufficient, for conviction under Ta'zir, if it inspires confidence and finds necessary corroboration from an independent source.....

23. At this juncture, it would be pertinent to add that a distinction should always be kept in mind while dealing with a case of forcible zina



by abducting the victim from isolated place and the one like instant alleged offence. The former would entirely rest on statement of victim girl, but later would require proof on each part or if some parts of prosecution case are disbelieved then before convicting the accused for zina (376, P.P.C.) alone strong corroboration would always be requirement for safe Criminal Administration of Justice. Reference in that respect may be made to the case of Ghulam Mohay-ud-Din alias Baoo v. State and others which is reported at 2012 PCr.LJ 1903 wherein at relevant page-1906 it is observed as under;

*".....It is true that the such offences are committed in loneliness so the absence of the eye-witnesses is not material and statement of the victim corroborated by the medical evidence is sufficient to prove the charge but if the statement of victim does not inspire confidence on her own character appears to be doubtful, then her solitary statement cannot be deemed to be sufficient to prove the allegation of commission of rape punishable under section 376, P.P.C....."*

24. The evidence of alleged victim girl has been adequately deliberated thread barely in the preceding paragraphs of this judgment, and found it to substandard, feeble, flimsy, untrustworthy but contaminated with some ill motivation. In such entirety, the evidence of PW-3, Dr. Zaibunissa, who carried out medical examination of the alleged victim girl got much more significance to sift the grain from chaff before discrediting and discarding of alleged victim girl. According to the statement of this witness she examined the victim on very same day of the incident and issued provisional medico legal certificate (Ex. 12/A). Firstly, she had noted behavior and mental status of victim girl as NORMAL. It is observed that a girl of 17/18 years old, after such traumatic experience, how could behave normally, which certainly reflects that there were no signs of any psychological symptoms like prominent fear, shock, nightmare, tenseness, anger, embarrassment, shame, guilt or combination were available during her physical examination, as noted by the Medical Officer. The situation becomes more vulnerable when the victim girl was found already pregnant of 8 weeks which fact was not disclosed by her to the Doctor or even during recording of her statement under section 164 Cr.P.C., before the concerned Magistrate. P.W- Dr. Zaibunnisa further observed that on her genital examination no genital violation was seen and she also found

*Medical Evidence*



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her hymen torn and healed. Record further shows that the swabs, taken from her vagina allegedly on 27.01.2007, were delivered to the chemical examiner for chemical analysis on 01.02.2007 with approximate delay of four days. What was done with those vaginal swabs for four days? No explanation is offered by the prosecution. It is further observed that though pregnancy was opined upon examination of the victim girl, but it is very strange to note here that complainant party did not lodge any separate FIR against Munawar, who was nominated for previous act. It is pertinent to note the observation of WMLO, disclosing that her vagina admitted two fingers easily and hymen had got healed tears, prima facie and simply gives different story as regards to the character of the victim girl in juxtaposition with her normal behavior observed during her examination that the real story could have been totally different from that which was being alleged. It also does not appeal to prudent mind that an unmarried girl while living in village could conceal her pregnancy from her mother and sisters living with her in same house. As regards to the detection of human semen is concerned, it is clarified by the WMLO herself that semen may be detected even after passing of urine and even the dead sperms can be detected up to three months of intercourse. In these circumstances, when even no DNA test had been conducted nor any semen matching was undertaken so as to conclusively establish that the semen found on the vaginal swabs of the alleged victim belonged to appellant, co-accused or someone else, therefore, it would be difficult to blindly rely on the evidence of the alleged victim girl. In the wake of peculiar circumstance of alleged victim girl being used to sexual intercourse and pregnant, the DNA and group semen test in this case, which would have been strong supporting to the testimony of the alleged victim, was of immense importance which could have scientifically determined as to whether the intercourse with the prosecutrix was committed only by a specific person or by a group of persons and in the absence of such exercise and evidence the allegations and charges sink in doubts as it is a well settled principle of law that one who makes an assertion has to prove it. Thus, the onus rests on the prosecution to prove guilt of the accused beyond reasonable doubt. Presumption of innocence remains throughout the case until such time the prosecution on the evidence satisfies the Court beyond reasonable doubt that the accused is guilty of the offence alleged against him. Two



concepts i.e., "proof beyond reasonable doubt" and, "presumption of innocence" are so closely linked together that the same must be presented as one unit. If the presumption of innocence is a golden thread to criminal jurisprudence, then proof beyond reasonable doubt is silver, and these two threads are forever intertwined in the fabric of criminal justice system. As such, the expression "proof beyond reasonable doubt" is the fundamental importance to the criminal justice: it is one of the principles which seeks to ensure that no innocent person is convicted. Where there is any doubt in the prosecution story, benefit should be given to the accused, which is quite innocent with the safe administration of criminal justice. Reliance is placed upon the case reported as **Tariq Pervez v. The State (1995 SCMR 1345)**. I am also fortified of recent case law, a very authoritative pronouncement on the criminal administration of justice reported as PLD 2019 SC 64. Relevant Head Notes are reproduced as below: -

.....  
 (f) Criminal Trial.....

*.....Benefit of doubt....Scope....For the accused to be afforded the right of benefit of the doubt, it was not necessary that there should be many circumstances creating uncertainty....If a single circumstance created 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 matter of grace and concession, but as a right.*

.....  
 (j) Criminal trial.....

*.....Presumption of innocence.....Scope....Such presumption remained throughout the case until such time the prosecution on the evidence satisfied the court beyond reasonable doubt that the accused was guilty of the offence alleged against him.*

25. To the arguments of the learned counsel for the complainant, that on account of investigating authorities, the innocent victim should not suffer, it is to say that it should also be true for the defence, rather with more vigour and force. Violating the sanctity and chastity of a woman is a sordid, despicable, squalid act, which is considered abhorrent in any civilized society; any language falls short of vocabulary to condemn such heinous act and cases of this taxonomy must be strictly construed and dealt with. However, at the same time under criminal jurisprudence for the safe administration of criminal justice, the courts are required to follow





certain settled principles, such as the innocence of the accused must have presumed, till he is proved guilty; sifting "the grain out of the chaff". There are certain salutary principles of the criminal justice system which should be adhered to by the courts, in letter and spirit and there is no exemption to these rules, even in gang rape cases for, otherwise, due to departure therefrom, the innocent person may suffer class of cases, usually independent ocular evidence is not available, therefore, apart from giving due weight to the statement of the victim buttressed by medical evidence, and strong attending circumstances shall suffice to warrant the conviction.

**Reliance is placed on case law PLD 2011 SC, 554 (famous Mukhtaran Mai**

**Case).** Dealing with the evidence of this case it seems expedient to note that the semen in the vagina was available till the date of her examination apart from she being pregnant, I am at a loss to see, to support the testimony of the alleged victim, what prevented the prosecution to seek the chemical examiner's opinion to confirm. If the view of the sole testimony of the victim as sufficient evidence, is accepted, as absolute without any exception thereto, what shall be the outcome of a case, where a lady claims being raped or gang raped, but the medical evidence negates it, what/who should be believed then, the point is, that it is not in every gang rape case, that the sole testimony should be accepted and relied upon, but each case should be assessed and adjudicated on its own facts.

Sole  
evidence  
✓

26. The court shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence, such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his acquittal. Interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the court in arriving at the decision, which could result into grave miscarriage of justice. Judgments relied upon by the learned counsel for the complainant for any of the preposition involved in this case are distinguishable and not helpful to seek conviction of the accused persons.



27. For what has been discussed above a conclusion is inescapable and irresistible that the prosecution had failed to prove its case against the accused persons beyond reasonable doubt in terms of questions set out as the prosecution evidence is inconsistent, suffering from material and glaring contradictions, contaminated with serious doubts, flimsy and as such not trustworthy. Criminal Appeal No. 72/2010, therefore, is allowed and the impugned judgment of learned trial court to the extent of conviction and sentence of appellant Anwar Hussain is set aside and he is acquitted of the offences for which he was charged, tried and convicted. He shall be released forthwith if not required in any other case. However, Criminal Acquittal Appeal No.80/2010 and Criminal Acquittal Appeal 161/2014 being devoid of merits are hereby dismissed.

28. The instant appeals are disposed of in the above terms.

Sd/- Mrs: Rashida Asad  
 JUDGE JUDGE 25/4/22

Amended by me  
 Sd/- A. Abbas  
 JUDGE

15.04.2022



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