

IN THE HONOURABLE HIGH COURT OF SINDH AT KARACHI
(Appellate Jurisdiction)

Criminal Acquittal Appeal No. SB7 of 2021

Razia Kubra
Wife of Fayaz Rahim Hussain,
Muslim, Adult,
Resident of Mauza Juthala,
Lodhran, Punjab
Through Lawfully Appointed Attorney.....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
4. Raja Muhammad Arif
Son of Raja Muhammad Afzal
Muslim, Adult,
Resident of House No.61, Street No.2,
Sector D, Qayyumabad, Karachi.....Respondents

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

It is most respectfully and most humbly submitted that being aggrieved and dissatisfied by the Judgment dated: 05th October, 2021 [hereinafter referred to as the 'Impugned Judgment'], passed by the IInd Additional District & Sessions Judge, Karachi (East), in Sessions 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 the Respondents No.2 to No.4 were acquitted from

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the offences under Sections 365-B and 376(ii), P.P.C., 1860, The Appellant abovenamed most respectfully and most humbly prefers this Appeal on the following inter alia, facts and grounds.

A copy of the abovementioned Impugned Judgment dated: 05.10.2021 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 [hereinafter 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: 10.05.2008, was filed. It is submitted that on 02.08.2008, the learned Trial Court was pleased to frame Charge against the Respondents No.2 to 4 under Sections 365-B and 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.

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

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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 340(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-02, 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 the arguments of the prosecution, and defence counsels, the Learned IInd Additional District & Sessions Judge, Karachi East, through 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. The said Judgment dated: 06.04.2013 was challenged before this Honourable Court by filing Criminal Acquittal Appeal No. 135 of 2013 ['Razia Kubra Versus The State and Others']. Through Judgment dated: 21.05.2021 in the Criminal Acquittal Appeal No. 135 of 2013, passed by this Honourable Court, the aforementioned Judgment dated: 06.04.2013 was set aside, in the following terms:

"Since, the learned trial Court has mainly recorded judgment on requirement of Tazkia-ul-Shahood which, per settled principles of law, is not proper. Accordingly, I am in agreement with the learned DPG that this is a fit case to be remanded for passing fresh judgment in accordance with law. Thus, without touching merits of the case, the impugned judgment is hereby set-aside and case is remanded back to learned trial Court for

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passing fresh judgment strictly in accordance with law after hearing the parties without being influenced by impugned judgment as recorded by the trial court”.

A copy of the abovementioned Judgment dated: 06.04.2013, Memo of Criminal Acquittal Appeal No. 135 of 2013 and Judgment dated: 21.05.2021 is annexed and marked as Annex ‘E’ to ‘E-2’ respectively.

7. That after the above Criminal case was remanded to the Court of Learned IInd Additional District and Sessions Judge, Karachi East, the Appellant and the Respondents No.2 to No.4 were given an opportunity of presenting their final arguments. The Counsels for the Appellant and the Respondents No.2 to No.4 presented their arguments based on the evidence recorded as stated above. However, the Learned IInd Additional District and Sessions Judge, Karachi East, through Impugned Judgment dated: 05th October, 2021, acquitted the Respondents No.2 to No.4 from the offences under Sections 365-B and 376(ii), P.P.C., 1860.

8. That it is most respectfully and most humbly submitted that the Appellant is aggrieved and dissatisfied by the Impugned Judgment dated: 05th October, 2021. Therefore, the Appellant challenges the abovementioned Impugned Judgment through this present Appeal, filed through her lawfully appointed Attorney, on the, inter alia, following Grounds.

A copy of the Power of Attorney is annexed and marked as Annex ‘F’.

GROUNDS

A. That it is most respectfully and most humbly 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

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and the Honourable High Courts. It is also respectfully submitted that the Impugned Judgment is clearly contrary to and in negation of this Honourable Court's Judgment dated: 21st May, 2021, in Criminal Acquittal Appeal No. 135 of 2013, which primarily set aside the Judgment dated: 06.04.2013, of the Trial Court, on the ground that the principle of law applied therein i.e. Tazkiyat us Shahood for the acquittal of Respondents was not applicable in the case of offence under Section 376, PPC. However, by applying the same principle of law, which was applied in Judgment dated: 06.04.2013, of the Trial Court, as is evident from Page 19 of the Impugned Judgment, the Impugned Judgment is contrary to the law, and against the principles of natural justice. Therefore, the Impugned Judgment is liable to be set aside.

B. That it is most respectfully and most humbly submitted that the Impugned Judgment is clearly based on an incomplete reading and mis-reading of the entire evidence recorded by the Prosecution. The Prosecution examined 14 witnesses of which the evidence of prime importance was the testimony of the rape victim/Appellant, medical evidence and forensic evidence. However, without reading the evidence in its entirety, the Learned Trial Court has engaged itself in the exercise of pick and choose and has only selectively read certain lines of the testimonies of the witnesses and has failed to read the complete evidence. The Impugned Judgment wrongly states that there is material contradiction in the evidence provided by the prosecution witnesses, when in fact the Impugned Judgment is based on an incomplete reading and mis-reading of the entire evidence. Therefore, the Impugned Judgment is liable to be set aside.

C. That it is most respectfully and most humbly submitted that the Impugned Judgment is based on the presumption that the offence of Zina and the

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offence of rape, or gang rape, under Sections 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 8 of the Impugned Judgment does not refer 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.

- D. That the entire Impugned Judgment is based on the incorrect 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, are not 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.
- E. 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 365-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.

- F. 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.
- G. 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.
- 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 contradictions, 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. 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. Furthermore, the medical evidence conclusively showed that the Respondents No.2 to No.4 i.e. the accused persons are guilty of the above offences. 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

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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 Respondents No.2 to No.4 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 Respondents No.2 to 4, especially since there was no

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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 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:

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- (a) Allow this Appeal by setting aside the Impugned Judgment dated: 5th October, 2021 [**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.
- (b) Pass any other Order, or further Order, as may be just and proper in the facts of this Appeal and case.
- (c) Graciously grant the costs of this Appeal.

APPELLANT [Through Lawfully Appointed Attorney]

ADVOCATE FOR THE APPELLANT

Dated: _____, 2021

Karachi