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

Criminal Acquittal Appeal No. 135 of 2013

PRESENTED
29-4-2013

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

SEAL OF THE HIGH COURT

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

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

CR. ACQUITTAL APPEAL NO.135/2013

Date	Order with signature of Judge

For hearing of case.

21.05.2021

Ms. Amna Usman advocate for appellant.
Mr. Ghulam Mustafa Memon advocate for respondent No.2.
Raja Mir Muhammad advocate for respondents No.3 and 4.
Mr. Faheem Hussain Panhwar, DPG.

....

SALAHUDDIN PANHWAR, J: Precisely relevant facts are that complainant Bashir Ahmed lodged FIR stating that he came from Punjab alongwith his other family members on two buses to Sehwan Sharif for *ziarat* purpose. On 15.03.2008 they visited Karachi at Mazar of Qaid-e-Azam Muhammad Ali Jinnah where they were visiting the *mazar* and their buses were parked outside. At about 2100 hours his son in law Fayyaz Muhammad alongwith Fida Hussain and his daughter Razia Kubra (victim) and other 12 women went to see the museum whereas his daughter at the instance of her husband stood there. Her husband disclosed to her that he would bring other family members and after 15 minutes when he came back she was not present there, his son in law informed the complainant to make efforts to search her but she could not be found. Complainant suspected that employees of museum as well as employees of mazar-e-qaid kidnaped his daughter with intention to commit zina.

2. At the outset learned counsel for appellant has referred page 73 which is that :-

"The learned counsel for the complainant's side did not differ with the requirements for production of four witnesses in a Zina case, but went on to state that the offence was, anyhow, liable to Ta'zir.

Islam was not opposed to science and its achievements, rather it encourages pursuit of knowledge and research and the DNA test, which forms an important basis for determining genetically about a biological father, has a place in evidence. But the question is, can such an evidence be used against an evidence be used against an offence of zina under the Islamic Law which has prescribed a standard of proof for that purpose.

The DNA can be extracted from the cells of a variety of body fluids and tissues. While the majority of tests are carried out using DNA from blood cells, cells obtained from the lining of the cheek using a mouth wash or cells in the roots of a person's hair.

The DNA test may help in establishing the legitimacy of a child for several other purposes, its utility and evidentiary value is acceptable but not in a case falling under the penal provisions of Zina punishable under the Hadood Laws having its own standard of proof. Otherwise who launch a charge of Zina are required to produce four witnesses to support their allegations and upon failure are liable to suffer punishment as prescribed in Ayat No.4 of Surah Al-Noor.

In this case the prosecution evidence which rest over the interested as well as independent evidence which or apparently no favoured to the prosecution and rendered one of setup story as in the light of above discussion. Prosecution has failed to produce four eye witness of the incident.

In the circumstances mentioned above I am fortified in my view by the case reported in 1996 SCMR 188, 2003 YLR 2958 (6) it has been held reproduce the same as under:-

> "When ocular or direct evidence had stood the test of proof, supporting or corroborating evidence would lend support to prosecution case. If prosecution would fail to lead or produce direct evidence or connectivity or circumstantial evidence was not mentioned, the corroborative or supporting evidence would become immaterial. Rule of circumstantial evidence was that failure of prosecution to prove one link of the chain of circumstances would destroy all links. When conviction was based on circumstantial evidence alone, the facts proved must be incompatible with the innocence of accused and were incapable of being explained upon any reasonable hypothesis other than the guilt of accused. Burden lying on

> prosecution would never shifts. Duty of the court was to require prosecution to prove every part of its case affirmatively by evidence on which it had built up its case. Prosecution would not be given edge to shift otherwise when it felt that evidence relied upon was not supporting it. Prosecution had to display its weapon before. The court and then leave it to court to judge. Even if the court would find that proof adduced by prosecution had led to some suspicion and fell short of the assertion, it had made, case would be doubtful and its benefit would go to the accused".

She further contested that prosecution's evidence was credible coupled with DNA report positive with regard to commission of crime however trial court while relying upon standard of proof of witness under Islamic law (*Tazkiatus-shuhood*) that prosecution failed to produce four eye witnesses. She further agitated that trial judge ignored the evidence while referring the Islamic law whereas matter was proceeded under PPC as stated by the learned DPG and accused were to be convicted and sentenced under Tazir. Learned judge failed to examine this aspect and law taking the plea of *Tazkiatus-shuhood*.

3. In contra, learned counsel for respondents contends that this was night time incident; four eye witnesses were not produced; DNA report cannot be considered as conclusive proof. They have referred unreported judgment dated 26.02.2019 in Criminal Appeal No.24-K/2018 for re-writing of judgment as learned trial judge instead of conviction has mainly relied upon standard of proof (*Tazkiatus-shuhood*).

4. The manner, in which, the learned trial Court has recorded the judgment appears to be in ignorance of the importance of the DNA testing and its *evidentiary* value, as was detailed in the

case of *Salman Akram Raja v. Govt. of Punjab* (2013 SCMR 203). The operative parts thereof are reproduced hereunder:-

> '.. In the case of *Muhammad Azhar v. The State* (PLD 2005 Lahore 589) the Court has accepted the admissibility of DNA test results in the following words:-
>
> > In *Muhammad Shahid Sahil's case* (supra) the Federal Shariat Court has laid great emphasis on the administration of DNA test in rape cases. The Court has also overruled the finding of the High Court in *Muhammad Azhar's case* to the effect that DN A test has no evidentiary value in a case falling under the penal provisions of Zina punishable under the *Hudood Laws* having its own standard of proof. Relevant paras from the said case are reproduced here-in-below:-
> >
> > > 10. In criminal cases the identity of the actual accused is an element of primary importance. A lot of pre-meditation, improvements and tactical delays on the part of complainant party can be checked if scientific analysis is resorted to. Apart from saving time and ensuring quick disposal of cases particularly of sexual assault, such an exercise can act as a deterrent in future. Many genuine complaints remain unresolved due to stereotype method of investigation. From the point of view of a new born it is his right to be born with known paternity. The law, be it enacted or judge made, must come to the rescue of the aggrieved.
> > >
> > > .....
> > >
> > > 12. Article 164 of Qanun-e-Shahdat Order, 1984 has resolved the problem by enacting that in such cases that the Court may consider it appropriate it may allow to be produced any evidence that may become available because of modern devices or techniques."

I would also add that if the view of learned trial Court is stamped, it would amount nullifying another well-established principle of law that *normally* the statement of prosecutrix, if appears confidence inspiring and trustworthy, is always sufficient to hold conviction. Reference is made to case of *Shahzado @ Shaddu & Ors v. State* (2002 SCMR 1009) wherein it is held as:-

> "7. We have..... Generally speaking the statement of prosecutrix if considered trustworthy no corroboration would be needed and such need only arise in the circumstances indicating the possibility of

her being consenting party to sexual intercourse which is a rare phenomena in cases of Zina-bil-Jabr. .."

I would also add that since there can be no denial to normal conduct of a *prudent* mind that he, *normally*, would never attempt to commit act of Zina while allowing four persons to witness such act rather would always prefer to commit such act in *loneliness* therefore demanding four witnesses, qualifying test of *Tazkia-ul-Shahood*, would result in rejection of all such complaint (s) of *Zina*. I am to make clear that such requirement only provides an escape to *Hudood* punishment but punishment under *Taz'ir* can well be recorded, per settled principles for appreciation of evidences in such like cases. Reference is made to case of *Ghulam Mohay-ud-Din alias Baoo v. State & Ors* (2012 P Cr.L.J 1903) wherein at Rel. P-1906, it is held as:-

" ..... 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 full, then her solitary statement cannot be deemed to be sufficient to prove the allegation of commission of rape punishable under section 376 PPC ...."

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 passing fresh judgment strictly in accordance with law after hearing the parties without being influenced by impugned judgment as recorded by the trial court. However, district court shall decide the same preferably

within three months. Since accused were on bail therefore they shall be consicered on bail on same bail bonds.

Sd/- Salahuddin Panhwar
Judge