

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT:

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO. 58-Q of 1999

Allah Dina S/O Haji Ali Muhammad Caste Abro, R/O Mohalla
Abro Tehsil Bhag, District Sibi, Balochistan.

..... Appellant

Versus

1. Inayatullah S/O Muhamad Bakhsh Caste Abro, R/O Kechi Baig, Sariab Road, Quetta.
2. Ghous Bakhsh S/O Mitha Khan Caste Abro, R/O Wadh, Turbat.
3. Abdul Fateh S/O Mitha Khan Caste Abro, R/O Wadh, Turbat.
4. Shafi Muhammad S/O Mitha Khan Caste Abro, R/O Wadh, Turbat.
5. Mitha Khan S/O Shafi Muhammad Caste Abro, R/O Bhag.
6. The State

... Respondents

For the respondent	...	Sardar Ahmed Haleemi, Advocate for the respondent No. 1.
For the state	...	Mr. Yahya Baloch, DPG, Balochistan.
No.& date of FIR	...	No.06/1998, dt.26.01.1998 Police Station Bhag, Quetta.
Date of order of trial court	...	18.03.1999
Date of Institution in this Court	...	18.05.1999
Date of hearing	...	27.03.2018
Date of decision	...	27.03.2018
Date of Judgment	...	28.03.2018

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- On Conclusion of trial learned Additional Sessions Judge, Sibi Division, Sibi by means of judgment dated 18.03.1999 in Hudood Case No. 22/98 (FIR No. 06/1998 of PS Bhag), recorded acquittal of the respondents Inayatullah and Ghoush Bakhsh, whereas the case was kept dormant till the arrest of co-accused namely Abdul Fateh, Shafi Muhammad and Mitha Khan as they were declared proclaimed offenders.

Being aggrieved from the judgment of acquittal impugned herein, the appellant Allah Dina being complainant of the aforesaid FIR has preferred the instant appeal with the prayer to set aside impugned judgment dated 18.03.1999 authored by learned Additional Sessions Judge, Sibi Division, Sibi and in the light of the evidence available on record to award conviction and sentence to the respondents Nos. 1 and 2 in accordance with law.

2. In brief, the facts of the prosecution case are that PW-2 Allah Dina (complainant) on 26.03.1998 at about 07:30 p.m. lodged an FIR vide Crime No. 06/1998 with Police Station Bhag, contending therein that Mst. Mumtaz wife of Saiful resides near his house, whose husband had died about six months back. According to him, his sister has three sons and three daughters, one of whom is married whereas a daughter is about 16-17 years of age, while the other is about seven years old; as such

he is looking after them as their guardian. He further narrated that 7-8 months ago, one of his relative Shafi Muhammad and Ghous Bakhsh asked for the hand of his sister's daughter namely Mahi Aziza, but his late brother-in-law Saiful refused and that on the fateful evening, while he was in bazaar, PW-1 Allah Waraya, who is his neighbor informed him that his niece has been abducted in a car by accused persons, thus he rushed to his house, where his sister PW-3 Mst. Mumtaz, apprised him that at about 06:30 p.m., Shafi Muhammad, Ghous Bakhsh, Alla Dina and Mitha Khan came in a car and abducted his niece Mst. Mahi Aziza for the purpose of forcible marriage.

3. After registration of FIR, PW-8 Muhammad Iqbal went to the place of abduction, prepared site plan as Ex.P-4/A and Memo of site inspection, produced as Ex. P/1-A. According to him, he recorded statement of witnesses on the spot. On 13.03.1998 respondent No. 1 Inayatullah was arrested from Quetta and after recovery of abductee, she was got examined at Civil Hospital Dera Murad Jamali and got her statement recorded under section 164, Cr.P.C. by P.W.7 Assistant Commissioner Bhag, whereafter respondent No. 2 was arrested from Quetta, whereas the remaining nominated accused persons were placed in column No. 02 of the Challan.

4. That after receipt of the challan, the accused persons, who succeeded to escape, were formally declared as proclaimed offenders.

5. On commencement of the trial, both the respondents namely Inayatullah and Ghous Bakhsh were charged, who denied their culpability and claimed trial.

The prosecution in order to substantiate the accusations produced as many as eight witnesses, whereafter, on conclusion of prosecution side; the respondents were examined under section 342, Cr.P.C., who denied the allegations put to them.

Respondent No.1 did not opt to make statement on oath, however, respondent No.2 Ghous Bakhsh pleaded, while recording his statement under section 340(2), Cr.P.C., that PW-5 Mst. Aziza is his legally wedded wife and that DW-1 Molvi Mohammad Hayat performed 'NIKAH' between the spouses and maintained that he did not abduct PW-5 Aziza. In support of his defence, Ghous Bakhsh produced DW-1 Molvi Mohammad Hayat, who stated to have had performed 'NIKAH' in the presence of witnesses DW-2 Abdul Nabi and DW-3 Peeral, between respondent No. 2 Ghoush Bakhsh and PW-5 Mst. Aziza.

6. After hearing the parties, the learned Sessions Judge Sibi Division, Sibi by means of judgment dated 18.03.1999, while extending benefit of doubt to the accused persons recorded acquittal in favour of respondents Nos. 1 and 2, however, the case was kept in dormant till the arrest of proclaimed offenders.

The appellant/complainant being highly aggrieved and dissatisfied from the aforesaid Judgment impugned herein, preferred the

instant appeal before this court for conversion of acquittal into conviction.

7. On receipt of the appeal on 05.10.2000, the appeal was admitted for regular hearing on the ground of re-appraisal of the evidence thus consequently, process in the form of Bailable Warrants to the tune of Rs.20,000/- with two sureties were issued against respondents Nos. 1 and 2, which after non-execution of Bailable Warrants were followed by Non-Bailable Warrants on 07.10.2015. Respondent No. 1 was brought before the court, who was admitted to bail in the sum of Rs.50,000/- with a surety in the like amount to the satisfaction of trial court with the direction to make his appearance on each date of hearing before this court.

8. Furthermore, several efforts were made for the arrest of respondent No. 2 Ghous Bakhsh for execution of Non-Bailable Warrants of his arrest, but could not be executed and lastly on 26.03.2018, process server of Police Station Bhag came up with the report that the respondent No. 2 could not be arrested as he had shifted from the mentioned addresses to some unknown place. Henceforth, the process server namely Khamisa Khan was examined by this court with regard to non-execution of the warrants, issued against the respondent No. 2, who in categorical words, stated that there is no probability of the service upon the aforesaid respondent due to the reason, that he has been shifted to some unknown place.

9. In such view of the matter, this court was left with no option but to proceed with the appeal pending since year 2000. The reasons for proceeding with the appeal has been enumerated in the forgoing paras.

10. The impugned judgment and the evidence put forth by the prosecution as well as defence has thoroughly been analyzed with the assistance of learned counsel for respondent No. 1 Sardar Ahmed Haleemi, Advocate and Mr. Yahya Baloch, learned DPG for the State.

11. It was contended by Mr. Sardar Ahmed Haleemi appearing counsel on behalf of the respondent No. 1, that prosecution has miserably failed to prove the charge and that the statement recorded under section 164, Cr.P.C. by PW-5 Mst. Aziza cannot be read in evidence as the same is inadmissible and that even otherwise, she has not given any incriminating role of zina to respondent Inayatullah. He further added that there is no independent evidence of the occurrence and that the story narrated by her on the face of record is contradictory and improbable. He also maintained that since the respondents have been acquitted of the charge, therefore, the presumption of dual innocence is also attached therewith.

Learned DPG Mr. Yahya Baloch representing the State, frankly supported the judgment of the trial court and conceded to the argument advanced by the counsel for respondent by adding, that there is no illegality in the impugned judgment, thus the appeal merits to be dismissed.

12. Before appraisal and analysis of the evidence on record, the paramount question, which irresistibly came into our mind was, as to whether in absence of the respondents No. 2, the appeal can be heard or not.

Admittedly the appeal is pending since 2000 and despite issuance of repeated Bailable and Non-Bailable Warrants, the attendance of the respondent No. 2 could not be procured, henceforth, in the attending circumstances, we felt that the delay in the disposal of the appeal amounts to abuse of process of law, for the appeal cannot be kept pending indefinitely, particularly when the respondent No. 1, is appearing before the court for several years but due to non-appearance of the respondent No. 2, the appeal is lying undecided. Moreover, after several opportunities given by this court and the hectic efforts made by the law enforcement contingents, the respondent No. 2 could not be brought before this court, thus the statement of process server was recorded as court witness, who categorically maintained that the accused/respondent has shifted to some unknown place and their present whereabouts are unknown and on their mentioned addresses, there is even no probability of service upon them.

We are mindful of the legal propositions that the apex Court has time and again appreciated the decision on merits. In such like situation, where attendance of appellant or respondent against whom appeal against acquittal is filed cannot be procured, we are guided by

judgment reported in PLD 1981 SC 265 titled as "Hayat Bakhsh and others v. The State" where the Court was also confronted with similar situation to decide as to whether after acquittal of the accused, the appeal against acquittal can be heard in his absence or otherwise. The principle settled in the said judgment is reproduced herein below for ready reference:

"It would not be possible at all to adjourn an appeal against acquittal even against a single acquitted accused/absconding respondent for an indefinite period, although the office of the Court would make efforts to ensure his surrender/arrest in obedience to the process of the Court, for a reasonable period before fixing the appeal for hearing; and if he remains fugitive, the Court would proceed to determine the appeal in his absence. If after the examination of the case the acquittal merits to be reversed, there would be no impediment to decide the appeal accordingly, but in case the judgment of acquittal merits to be maintained, the same would not be reversed on account of the abscondence of the accused/respondent. This would apply to both the situations whether the appeal is against one acquitted or more."

(Underlining is ours)

The dictum laid by the Hon'ble Supreme Court is that the accused either appellant or respondent, in case of acquittal or conviction, if reluctant to surrender or appear, loses right of audience and the appeal can be determined in his absence. Such principle was furthermore carried on, in the judgment reported in 1985 SCMR 614 titled as Nazar Hussain v. The State as well as in the judgment reported in 2015 SCMR 1002 titled as Ikramullah and others v. The State.

13. Thus, the crux of the above reasoning are, that this court has ample power to proceed with the instant acquittal appeal on merits against the respondent, who is even not before the court as he has lost his right of audience.

14. Now, while scanning the evidence, it appears that the prosecution primarily relies upon the testimony of PW-3 Mumtaz, mother of the prosecutrix PW-5, Mst. Aziza as well as on the statement of PW-5 abductee herself and PW-4 Allah Waraya. In so far, as PW-2 Allah Dina is concerned, although he is the maternal uncle of the abductee, who lodged the FIR but his testimony is based on hearsay evidence, as he was informed about abduction, while he was in Bazar, as such his deposition is immaterial regarding abduction.

15. It is imperative to mention that respondent No. 1 Inayatullah was not nominated amongst the culprits, in the FIR, who had abducted PW-5, Aziza, whereas PW-3, Mumtaz who claimed to be the eye-witness of the occurrence, nominated respondent Inayatullah to be along with culprits, who abducted her daughter. She re-iterated that she got injured in the occurrence by the culprits, but surprisingly, there is no medical certificate available on record regarding injuries sustained to her. In cross-examination PW-3, Mumtaz, mother of alleged abductee stated that SHO came to her house on the 4th day and that her statement was neither recorded earlier nor till date, which fact infer us to believe that she is not a prosecution witness as she has not got recorded her

statement under section 161, Cr.P.C., as such it would be unsafe to place reliance upon her testimony. As far as the statement of PW-4, Allah Waraya is concerned, he stated that at time of 'Roza Iftari', he heard the noise of a car stopping outside his house, whereupon he rushed outside, where the brother of PW-5 Aziza was crying and was saying that his sister has been taken away and then he met PW-3 Mst. Mumtaz, who told her to contact Allah Dina, where-after, he lodged the FIR PW-4 Allah Waraya, in his statement has referred to the brother of PW-5 abductee, who allegedly witnessed the occurrence but said brother has not been associated as prosecution witness, which further causes doubt in the prosecution case. According to the statement of PW-4 Allah Waraya, while he was at home, he heard a vehicle being stopped outside his house and rushed outside, which likely suggest him to be first independent person to have seen the occurrence but he did not say anything about abduction and he has not seen anyone on the crime scene, therefore, his testimony is helpless to the prosecution case rather on the contrary casts doubt.

As a star witness of the entire episode of abduction and commission of ZINA, the prosecution case mainly rests upon the testimony of PW-5 Mst. Aziza. It is claimed that she has recorded her statement under section 164, Cr.P.C., but she herself does not claim to have recorded her statement under section 164, Cr.P.C.

Moreover, since the accused persons had been arrested earlier and were in custody at the time of alleged recording of statement under section 164, Cr.P.C. of the abductee, therefore, it was incumbent upon the Assistant Commissioner to have had issued notice to the accused persons to afford them opportunity of cross examination, upon PW-5 Mst. Aziza as required under section 164(1-A), Cr.P.C. Since no fair opportunity of cross-examination has been provided to the respondents upon, the so-called abductee PW-5 Aziza, therefore, no explicit reliance can be placed upon such statement recorded under section 164, Cr.P.C. The relevant portion of section 164(1-A), Cr.P.C. is reproduced hereinbelow:

"164, Power to record statements and confessions:
"(1) Any Magistrate of the First Class and any Magistrate of the Second Class specially empowered in this behalf by the Provincial Government may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial."

[(1-A) Any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement.

(2) Any such statement may be....

(3) A Magistrate shall, before....

Explanation: It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case."

(Underlining is ours)

16. Even otherwise, the statement under section 164, Cr.P.C. is mainly recorded with the purpose, that in case the witness resiles from

her/his statement recorded under section 164, Cr.P.C., the witness could be confronted, with earlier statement, unlike prosecution witnesses whose statement is recorded under section 161, Cr.P.C., who cannot be confronted with such earlier statement.

17. Now coming to the testimony of PW-5 Aziza, who has reiterated the story of her abduction, therefore, we have given an anxious and thoughtful consideration to her testimony. In her examination in chief before the trial court, she did not mention to have been examined under section 164, Cr.P.C. by P.W.7, Assistant Commissioner Bhag. According to her, last year on 20th Ramdan, she was abducted by Ghous Bakhs, Shafi Mohammad, Fateh Mohammad and Mitha Khan on the gun point and kept in the house of Respondent No. 1 Inayatullah, where she was locked in a room and respondent No. 2 committed Zina, where after 40 days, in a police raid she was recovered from the house of respondent No. 1 and consequently, Inayatullah and Ghous Bakhsh were arrested. She admitted that there were several houses nearby, where she was kept and that nobody came while she was being abducted and added that there were several checkpoints on the way, but she did not make any hue and cry. She denied that Molvi Mohammad Hayat performed Nikah and categorically denied the suggestion that she is legally wedded with the respondent No. 2. She also made dishonest improvement which has made her statement worthless, as she had not stated in her earlier statement that Kalashnikov

were pointed at her, strangulated and was locked in a room at Quetta. The analysis of her statement seems to be highly improbable, which does not appeal to any prudent mind as there were several checkpoints, in between her house and Quetta but she did not make any hue and cry to attract any of the law enforcement officials. Furthermore, the dishonest improvement made by her instead of strengthening the case of prosecution, has destroyed her case contrarily.

18. The medical evidence is also of no help to the prosecution and does not add anything incriminating, as it does not lead or identifies culprit. PW-6 Dr. Zohra Baloch Medical Officer (female), Dera Murad Jamali, after examination has opined that hymen of PW-5 is not intact thus she is not a virgin. Furthermore, she also observed that there was no injury of any type on genital organ or any other part of her body.

In cross-examination, she affirmed that as per P.I.V examination of victim, every married women has the same signs and symptoms, thus, her statement is no help to connect the respondents in any way.

19. Above all, the prosecution has failed to associate any neighbour as witness either at Bhag, wherefrom she was abducted or from Quetta, wherefrom she was recovered, which further suggest us to believe that the story narrated by PW-5 Mst. Aziza is frivolous and concocted in nature, which by no stretch of imagination can be believed to be true and correct.

20. Even otherwise, we are also conscious of the legal proposition, that weight must be given to the finding of trial court, if conclusion drawn is based on fair reading of evidence and is not perverse or wholly unreasonable. Interference in acquittal for mere reason that another view of evidence is possible, is not permissible as after acquittal of accused, dual presumption of innocence is attached to such finding. In this regard, the dictum expounded in the case reported in PLD 2006 SC 465 is relevant titled as Mohammad Ashraf v. The State is relied upon.

21. Furthermore, the Hon'ble Supreme Court of Pakistan in its judgment reported in PLD 2011 SC 544 titled as Abdul Khalique and another v. The State, has reiterated the dictum that the scope of interference in appeal against acquittal is most narrow and limited because in an acquittal, the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that the accused shall be presumed to be innocent until proven guilty. In other words, the presumption of innocence is doubled.

22. The crux of the aforementioned discussion, suggest us to believe that, we did not find any illegality, perversity, misreading or non-reading of the evidence in the judgment impugned herein, which seems to have been based, in accordance with law by appraising the evidence in its true perspective by holding the case to be highly doubtful

and thus we have found no reason to interfere in the impugned judgment.

23. These are the reasons for the short order dated 27.03.2018.

JUSTICE SHAUKAT ALI RAKHSHANI

JUSTICE SYED MUHAMMAD FAROOQ SHAH

Dated, Quetta the

28th March 2018

Sharif*