IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CRIMINAL APPEAL NO. 59 OF 2023
(Against the judgment dated 07.03.2023 passed by the High Court, in Criminal Appeal No. 06 of 2017)

Aftab Ali s/o Mehmood Azam, caste Mughal r/o Nai Abadi Barotiyan Chaksawari, Tehsil and District Mirpur, presently confined in judicial Lockup Mirpur.

…Convict-appellant

VERSUS

The State and another.

…Complainant-respondents

Appearances:

For the convict-appellant: Mr. Zulfiqar Ahmed Raja, Advocate.

For the State: Ch. Shakeel Zaman, Addl. Advocate-General.

For the Complainant: Mr. Babar Ali Khan, Advocate.

Date of hearing: 13.06.2023

ORDER

Raza Ali Khan, J:- This appeal, by leave of the Court, has been directed against the judgment of

the High Court dated 07.03.2023, whereby, the appeal filed by the convict-appellant has been dismissed.

2. The facts briefly stated are that the complainant, respondent No. 2, herein, filed a written application at Police Station Chaksawari on 27.05.2012 alleging therein, that he is the resident of Nai Abadi Brootian. It was stated that one Maulvi Mehmood Hussain runs a shop in the neighborhood. On 26.05.2012, at 1700 hours, his son aged as 4½ years, went to his shop, where the accused Aftab s/o Maulvi Mehmood took his son to a room and committed unnatural offence with him. On this report, F.I.R. No. 25/2012, was registered at Police Station Chakswari, in the offence under section 377, APC, on 27.05.2012 and after formal investigation challan was presented in the Court of competent jurisdiction. The charge was framed under section 242, Cr.P.C. The accused pleaded not guilty and claimed innocence, whereupon, the prosecution was asked to lead evidence to prove the guilt of the accused. Upon completion of prosecution evidence, the statement of the accused under section 342, Cr.P.C. was recorded. The accused again pleaded not guilty and produced witnesses in defence and also got his statement recorded on oath under section 340(2), Cr.P.C. The learned trial Court at the conclusion of the trial convicted the accused and sentenced him to ten years' rigorous imprisonment along with a fine of Rs.50,000/-. He was also ordered to pay Rs.50,000/- as compensation to the victim under section 544-A, Cr.P.C. The convict-appellant, herein, preferred an appeal before the learned High Court against the judgment of the trial Court, which was dismissed through the impugned judgment dated 07.03.2023 by the learned High Court.

3. Mr. Zulfiqar Ahmed Raja, the learned counsel for the convict-appellant submitted that the impugned judgments of both the Courts below are against law, and the facts of the case. He submitted that the FIR was lodged after an inordinate delay and the prosecution witnesses in their statements also admitted that the FIR was lodged after a delay of two days of the alleged occurrence. He further submitted that the clothes of the victim were sent for chemical examination after a delay of 27 days, but no explanation in this regard has been furnished. All the witnesses admitted that the evidence produced by them is hearsay evidence which is not reliable under law, therefore, the conviction recorded by both the Courts below is liable to be set-aside. The learned Advocate argued that the convict-appellant has falsely been implicated in the case with mala-fide intention. The witnesses produced by the prosecution are related witness, the testimony of whom cannot be relied upon. The convict-appellant also took the plea of alibi and a verification in this regard issued by the Principal of the College where the convict was present at the time of occurrence, was also produced, but none of the Courts below considered this plea and ignored the same. The convict-appellant also showed no-confidence against the SHO who conducted the investigation but despite this the investigation was carried by the same officer and the report under section 173, Cr.PC, was presented which is against the principle of natural justice. He contended that there are major contradictions in the statements of the witnesses which cannot be reiled on for conviction.. The learned Advocate in support of his submission referred to and relied on the case reported as *Imran Akhtar vs. The State and others* [2020 SCR 340] and submitted that

while accepting this appeal, the impugned judgments of the Courts below may be set-aside as the convict-appellant deserves for acquittal.

4. Conversely, Mr. Babar Ali Khan, the learned counsel appearing for the complainant-respondent, submitted that the impugned judgments of the Courts below are passed quite in accordance with law and the facts of the case. Both the Courts below after detailed deliberation and appreciation of evidence have passed the judgments which are not open for interference by this Court. He further submitted that the prosecution successfully built up the case against the convict-appellant and the learned trial Court as well as the first Appellate Court rightly declared him guilty of the offence under section 377, APC. He further argued that the learned counsel for the convict-appellant although, pointed out some discrepancies in the statements of the witnesses but the same are very minor in nature and such discrepancies are pretty much natural to crept into the statements however, the same are not fatal for the prosecution case. The learned counsel referred to and relied upon the judgment of this Court reported as *Istikhar Hussain vs. Shahbaz and others*, [PLJ 2013 SC (AJ&K) 106), wherein, the Court has given the maximum punishment to the accused on the solitary statement of the victim. Th learned counsel further relied upon the cases reported as *Kamran alias Kami vs. The State through Additional Advocate-General, Mirpur and another* [2012 SCR 125] and *Muhammad Haroon vs. The State* [1988 SCMR 1063].

5. Ch. Shakeel Zaman, the learned Additional Advocate-General appearing for the State adopted the arguments advanced on behalf of the learned counsel

for the complainant-respondent and stated that the impugned judgments of both the Courts below are quite in accordance with law and facts of the case which have been passed after detailed scrutiny of evidence. He prayed for dismissal of the instant appeal.

6. We have given our dispassionate thought to the arguments advanced on behalf of the learned counsel for the parties and gone through the record of the case. It transpires from the record that the complainant submitted a written report on 27.05.2012 at Police Station Chakswari, alleging therein, that the convict-appellant has committed the act of sodomy with his son aged 4 ½ years old on 26. 05.2012, when he went to the shop which was owned by the convict-appellant's father.

7. The prosecution in order to prove its case produced four witnesses including the victim. Muhammad Khan-complainant (pw1), who is the father of the victim stated during his examination-in-chief that his wife told him about the incident and he went to the police station and later on, he went to the doctor who examined the victim. During cross-examination, he deposed that in the past the convict-appellant had also committed sodomy with his elder son.

Similarly, Tariq Mehmood (pw2), stated that on 26.05.2012, at about 4:45 pm, he found the victim while weeping who told him that the convict-appellant committed unnatural offence with him. He further stated that the trousers (*Shalwar*) of victim was stained with semen; he knocked the door of Muhammad Khan (father of the victim) and handed over the victim to a woman (victim's mother).

8. The third prosecution witness, the mother of victim (pw3), deposed that on 26.05.2012, her son Hamad Ali went to he shop of convict-appellant. Tariq Mehmood knocked her door and told about the incident with which her son was met. She stated that her son was in bad condition and his clothes were stained with blood; on inquiry, the victim told her that convict-appellant committed sodomy with him. She told the whole story to her husband and then they lodged the report.

9. The Victim of the incident also got his statement recorded before the Court and while identifying the convict-appellant, he deposed that convict-appellant had committed the act of sodomy with him. He further stated that a person brought him to his house, and he unfolded the whole story before his mother. During cross-examination, the victim stated that he changed the dress and his mother washed his anus.

10. The appraisal of the statement of the witnesses transpires that all the witnesses remained unanimous and no major discrepancy is found in their testimonies, hence, their statements are confidence inspiring. These statements are also supported by the Medico-legal report, wherein, the doctor has opined as under: -

> "There are four bruises around his anus, pain and tenderness is present. Some hardness of anus and irregularity of anus found. A small tear seen. Some glistening around the anus seen. Findings are consistent with the penetration of penis into anus. So act of sodomy is done".

11. The above reproduced medico-legal report makes it clear that the child was victimized by the act of

sodomy. The trouser of victim stained with semen was also recovered on 27.05.2012, in presence of the two recovery witnesses i.e. Mehrban Hussain and Nisar Ali who appeared before the Court and got their statements recorded and supported the recovery memo Ex-PC. The trouser of the victim was also proved to be stained with semen by the chemical examiner.

12. During the course of arguments, the learned counsel for the convict-appellant raised several points for acquittal of the convict-appellant which would be dealt with one by one. The same are as follows: -

i. That, there are major discrepancies/ contradictions in the statements of the witnesses;
ii. That the FIR has been lodged after a delay of 24 hours of the alleged occurrence;
iii. That the clothes of the victim were sent for chemical examination after a delay of 27 days;
iv. That the statements of all the witnesses are hearsay which cannot be relied on for conviction.
v. That the convict-appellant has falsely been implicated in the case;
vi. That the witnesses produced by the prosecution are related witnesses, and;
vii. That the plea of alibi has not been considered by the Courts below.

13. The first point argued by the learned counsel for the convict-appellant was that there are major contradictions/ discrepancies in the statements of the witnesses which also fatal for the case of the prosecution. This argument of the learned counsel has no force, as it is now a settled principle that the minor contradictions in the statements of the witnesses do not affect the prosecution story as a whole. There is overwhelming evidence on record to prove that the

incident had taken place and once the genesis of the occurrence is proved, the discrepancies which are minor in nature and do not in any way prejudice the case, would not be sufficient to dispel the entire prosecution case. We have gone through the statements of the prosecution witnesses and did not find any major discrepancy or contradiction. The learned counsel for the convict-appellant has endeavoured hard to highlight certain discrepancies among the testimony of the witnesses, but in our considered opinion, these discrepancies are absolutely natural and minor in nature hence, do not discredit the cumulative evidence, therefore, the argument of the learned counsel to this extent lacks substance.

14. The next point raised by the learned counsel for the convict-appellant was that the FIR was lodged after an unexplained delay of 24 hours. After thoroughly examining the entire record, it is clear that the incident occurred around 05:00 pm. Following the release of the victim by the convict-appellant, the pw3 encountered the convict-appellant and handed the victim over to his mother. The witness then told the details of the incident to the mother of the victim who disclosed the same to the victim's father before deciding to file a report. It should be noted that in our society, the people are often hesitant to report such incidents where family reputation is involved or the defamation of a child is at stake because of the societal pressure. Therefore, it is reasonable to assume that the victim's father sought advice from his relatives before ultimately deciding to file a report. Even from the other perspective, it is hard to believe that a father would falsely implicate somebody in such a case where his 4 ½ year old son would suffer

for a lifetime in the society. The delay in reporting is a natural consequence in these circumstances and should not be considered significant. Reliance may be placed on the case reported as Kamran alias Kami vs. The State through Additional Advocate-General, Mirpur and another[1], wherein, identical proposition came before this Court, and the Court observed as under: -

> "We have examined the whole record. From the record it is evident that the occurrence took place at about 05:00 pm and when the convict-appellant released the victim, pw3 met him who handed over the victim to his mother. He then narrated the incident to his mother who talked to the father and then they filed the report. It may be observed that in our society, such like incidents where family prestige or respect is involved and child of someone is defamed,. people are reluctant in filing reports to the Police. It is a natural course that the father of victim must have consulted his relatives whether, to file report or not and after consultation he filed the report. In the matters of family honors where a child of 4 ½ years can be defamed for whole life, no father will involve an innocent person in a false case. The delay is natural and such delay is not material to the case."

15. The third point raised by the learned counsel for the convict-appellant was that the clothes of victim were sent for chemical examination after a delay of 27 days. Be that as it may, however, the same cannot be made a basis for the innocence or guilt of the convict-appellant particularly, in the circumstances where the time, place of occurrence and manner of occurrence is proved from the cogent and reliable evidence produced by the prosecution.

16. The learned counsel for the convict-appellants submitted that statements of all the

[1] [2012 SCR 125]

witnesses are hearsay which cannot be relied upon for conviction. We do not agree with this contention of the learned counsel as all the prosecution witnesses are credible and reliable. The prosecution has proved the case against the convict-appellant beyond any shadow of doubt. However, if for the sake of argument, the contention of the learned counsel is presumed that the statements of witnesses are hearsay, even then it does not benefit the convict-appellant. It may be observed here that it is not the number of witnesses but quality and credibility of the evidence which is to be considered. In cases of Zina and sodomy, there are hardly any witness other than the victim, as it is very rare that such offence takes place among people or at a public place. That is why, the Courts have attached great sanctity to the statement of the victim and it has been repeatedly laid down that the sole testimony of victim would be sufficient to base conviction thereon if it inspires confidence. We are fortified in our view from the judgment of this Court reported as *Istikhar Hussain vs. Shahbaz and others*[2], wherein, it has been held as under: -

> "The standard of proof in every case is to be considered in the light of the case story. Ordinarily, in rape and sodomy cases, except the statement of victim, no other direct evidence is possible. While considering this aspect, the Courts always attached great sanctity to the solitary testimony of the victim and deem it sufficient for passing the conviction order."

The Federal Shariat Court in a case reported as *Saleem Khan & others vs. State & others*[3], has enunciated the following principle of law:

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[2] [PLJ 2013 SC (AJ&K) 106]
[3] [PLJ 2001 FSC 46]

> "... In cases of Zina and sodomy, there are generally hardly any witnesses other than the victim, as it is very rare that such offence takes place in view of others or at public place. That is why, the superior Courts in this country have attached great sanctity to the statement of the victim and it has been repeatedly laid down that sole testimony of the victim would be sufficient to base conviction thereon if it inspires confidence."

The principle (supra) has also been reiterated in another case, titled *Mudassir Hussain vs. The State*[4], that the solitary statement of victim if found trustworthy, reliable and confidence inspiring, is sufficient for maintaining the punishment.

17. Here one more thing is to be worth understanding that in such like cases, the false implication is not possible because no one would like to level such an allegation to falsely implicate any other at the cost of his own harm and damage. Our this view finds support from the case reported as *Nasrullah Khan us. The State*[5], wherein it is observed as under:--

> "10. Besides no reasons whatsoever have been stated for the victim a young student of college agreeing to implicate them falsely at the cost of his own ignominy and injury to his reputation. The preferring of the charges against appellants involve injury to the male ego and dignity of the victim beside making him the object of ridicule and pity."

18. As far as the argument that witnesses produced by the prosecution are related witnesses, is concerned, it is not worth consideration because none of the relatives are shown to be the eye-witness of the occurrence. It may be observed that a related witness is the most competent witness in cases like one in hand than any other, provided he is not inimical towards the

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[4] [NLR 2005 SD 827]
[5] [1985 P.Cr.L.J. 683]

accused and has the motive to implicate the accused in a false case.

19. The learned counsel for the convict-appellant forcefully argued that the plea of alibi was raised but both the Courts below did not consider this point. This argument has no force. We have gone through the judgment of trial Court which reveals that the trial Court considered this plea, attended to it and also resolved the same at page No. 10 of the judgment, also available at page 27 of the paper book. The perusal of the same also reveals that the learned trial Court resolved the point in legal fashion and we hereby endorse the finding recorded by the trial Court.

20. Before parting with, it is pertinent to mention here that in the cases where the sodomy with the minor child is proved, the convict does not deserve for any leniency rather, a harsh treatment must be ensured and the matter should be dealt with iron hands. Sodomy, particularly when perpetrated against innocent and vulnerable victims, is one of the worst forms. The physical, psychological and emotional scars inflicted upon such victims are indescribable and can have lifelong repercussions.

21. The gravity of these offences demand a firm response from the judicial system. By employing an iron-handed approach, we send a powerful message that such reprehensible acts will not be overlooked or treated lightly. The severity of the punishment serves as a deterrent to potential offenders, creating an environment where the safety of children is paramount. It is crucial to understand that the impact of child sodomy extends far beyond the immediate physical violation. The emotional trauma experienced by the victims can lead to long-lasting psychological scars,

affecting their self-esteem, interpersonal relationships and overall well-being.

22. Although, it is the offender who's reputation and dignity should be tarnished but unfortunately, victims fear the loss of reputation and fear the society. The physical, psychological and emotional harm caused to the victims makes their life miserable to the extent that they suffer for a lifetime. Societal biases and misconceptions are the reasons why offences like sexual assault, domestic abuse, bullying, rape, sodomy etc. are avoided to be reported and to be spoken about.

23. In cases where people fear of losing their family honor or respect due to societal fears and pressure, there is often a reluctance to report such incidents to the authorities. However, it is essential to emphasize that protecting the well-being of the child should always take precedence over social pressures and norms. By encouraging a culture of reporting and supporting victims, we can break the cycle of silence and ensure that justice is served. Like as in the case in hand, it is also on record that the convict-appellant has allegedly committed sodomy with the victim's elder brother earlier. Had the same been reported, the child in the instant case would not have been victimized. In this regard, we would suggest that the Government should initiate legislation for introducing suitable amendments in the relevant laws to make reporting of such like offences mandatory. Adequate trainings and awareness programs shall be conducted to enable teachers, parents, and others closely working with minors to recognize signs of abuse and report them promptly. Furthermore, revealing the name of the victim, his/her parents, family and any other identification should not be allowed through any forum

until and unless the victim or his/her family allows to do so. Support services may be introduced for victims and in that regard funds and support services i.e. counselling, therapy and rehabilitation for child victims and their families may be provided. Collaboration and coordination between various agencies, involved in child welfare, including law enforcement agencies social welfare and health care departments and education departments is the need of the hour. In this judgment, we deliberately have tried to conceal and not mentioned the name or identity of the victim and his family in honour to respect their privacy and protect their well-being. We hereby direct all the Courts of Azad Jammu and Kashmir to hide the identity of victims of such like heinous offences until the victim and his/her family permit to do so. No law journal shall mention name, identity of victim and his family while reporting any judgment of this Court or High Court. Till the reporting of the offence is made mandatory, the people should be aware and come forward in aid of law and report the matters so that this shameful act may be eradicated from the society. In this regard, an amendment has also been made in Pakistan by the National Assembly of Pakistan as Criminal law Amendment Act, 2016, whereby, section 376-A, has been added as under:-

> "Criminal Law Amendment Act, 2016. As per sections 354, 376, 377 and 377B of the Pakistan Penal Code (PPC) whoever prints or publishes name or any matter which may make known identity of the victim of an offence, commits a congnizable offence punishable under 376-A of PPC."

In the light of amendment (supra), , it is desired that it is requirement of the time to introduce suchlike amendment in the Azad Jammu and Kashmir.

24. By adopting a resolute and unwavering stance, we stand firmly in support of the victims and

their families. We acknowledge their pain and trauma and strive to ensure that justice is served. The protection of our children should be an unequivocal priority, and perpetrators of child sodomy must be held accountable for their actions. It is only through a collective commitment to safeguarding the innocence and well-being of our children that we can create a society free from such atrocities.

25. In view of the detailed discussion, the impugned judgments passed by both the Courts below and conviction recorded is hereby maintained. Consequently, this appeal, having no force of law, is hereby dismissed.

JUDGE **JUDGE**

Muzaffarabad:
21.06.2023.
To be reported.