IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF, CHIEF JUSTICE

CRIMINAL APPEAL NO.235/L OF 2005

1.	Saeed Ahmad son of Haji Muhammad Nawaz, Caste Arain, Resident of Basti Mohabbat Pur,Mauza Kotla Bahlol, Tehsil Mailsi, District Vehari.	--	Appellants
2.	Ijaz Hussain son of Mehr Manzoor Hussain Shah Caste Syed, Resident of Basti Mohabbat Pur, Mauza Kotla-Bahlol, Tehsil Mailsi, District Vehari.		

Versus

The State	--	Respondent
Counsel for the appellants	--	Malik Rab Nawaz Noon, Advocate
Counsel for the State	--	Sardar Ahmad Abid, Advocate.
No.date of FIR and Police station	--	No.100 dated 6.8.2001 P.S.Karampur,Vehari.
Date of the judgment of trial Court	--	8.7.2005
Date of institution	--	13.7.2005
Date of hearing	--	17.3.2006
Date of decision	--	17.3.2006

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JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 8.7.2005 passed by the learned Additional Sessions Judge, Mailsi District Vehari whereby appellants Saeed Ahmad son of Haji Muhammad and Ijaz Hussain son of Mehr Manzoor Hussain were convicted under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Ordinance") and sentenced to undergo five years R.I. alongwith a fine of Rs.20,000/-each or in default thereof to further suffer S.I. for six months each. Appellant Saeed Ahmad was also convicted under section 10(3) of "the Ordinance" and sentenced to undergo R.I. for ten years. Both the substantive sentences of imprisonment inflicted on appellant Saeed Ahmad were ordered to run concurrently. Benefit of section 382-B Cr.P.C. was, however, extended to the appellants.

2. Facts of the case, in brief, are that on 30.7.2001 complaint was lodged by one Hasnaat Bibi P.W.4 with P.S. Karampur wherein, it

was alleged that 15 days prior to lodging of the report while the complainant was sitting in the house of her maternal aunt in Mauza Hari Chand a jeep driven by Ijaz Shah accused stopped outside the house. Rab Nawaz Tractor Driver of Saeed Ahmad was sitting in the rear seat whereas, an unknown person was sitting by his side. Saeed Ahmad accused alighted from the jeep, entered her house and told her that since, having been hit by an ass Cart, her grand-father had sustained injuries and was admitted in Kikri Hospital, therefore, the complainant's father has sent him i.e. said Saeed Ahmad to bring her. The complainant believing his statement accordingly accompanied him and boarded the jeep. It was further alleged that as the jeep reached near the metalled road Muhammad Zafar "phopha" of the complainant and her relative namely, Muhammad Ahsan saw them. They signaled to stop the jeep but the accused drove the same away. She was taken to the 'dera' of Saeed Ahmad and was confined in a room. Saeed Ahmad accused committed zina-bil-jabr with the complainant twice. However, on the next morning at about 8.00 a.m.

the complainant was handed over to her father and "phopha' who took her to Hari Chand. It was also alleged that the complainant was returned to her father and phopha on the condition that she would not inform the police about the occurrence and since accused Saeed Ahmad constantly watched them, therefore, they could not lodge the report at the very outset. However, on feeling some relief, the complainant contacted the police. On the stated allegation formal FIR, Exh.PE, bearing No. 100 dated 6.8.2001 was registered under section 11 of "the Ordinance at police station Karampur District Vehari and investigation was carried out in pursuance thereof. On the completion of investigation the accused persons were challaned to the Court for trial.

3. Charge was accordingly framed against the accused persons to which they pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegations leveled against the accused persons produced eight witnesses, in all. P.W.1 Dr.Sajida Almas had, on

7.8.2001, examined the victim and found the following injuries on her person:-

"On external examination.

Following signes of violence were seen:-

1. There were multiple blackish bruises seen on medial sides of both thighs.
2. Multiple blackish bruise seen on both hands and forearms.
3. A blackish bruise ½ x ½ c.m on upper medial quadrant of right breast.
4. A blackish bruise 1 x 1 c.m on the right side of labia majora.

Internal examination.

On P/V admits two fingers easily. Hymen was absent. Uterus was of normal size two external two internal vaginal swabs were taken."

After consulting the Chemical Examiner's report i.e. Exh.PB. she stated that the swabs were found stained with semen. In the course of her cross-examination, she admitted the suggestion as correct that bruises found on the body of Mst. Hasnaat Bibi might be 4/5 days old. P.W.2 Muhammad Ashraf had on 7.8.2001 taken Mst.Hasnaat Bibi for medical examination. He having received the sealed envelope containing vaginal swabs of the victim handed the same over to the I.O. vide memo Exh.PD. P.W.3 Qasim Ali, Muharrir had, on the receipt of the complaint, incorporated contents thereof into the formal

FIR i.e. Exh.PE besides, keeping in safe custody the envelope said to contain vaginal swabs in "malkhana', before handing the same over to Noor Muhammad P.W.8, for its onward transmission to the office of the Chemical Examiner, Multan, intact. P.W.4 Mst.Hasnat Bibi, at the trial, reiterated the version contained in the report/FIR. P.W.5 Zafar Iqbal stated that he had, on the day of occurrence, seen the accused persons taking away the victim in a jeep. P.W.6 Muhammad Afzal, ASI had initially investigated the case.P.W.7 Gul Hassan, Inspector/SHO had investigated the case later on. P.W.8 Noor Muhammad had taken the parcel said to contain swabs of the victim to the office of the Chemical Examiner and delivered the same on 18.8.2001, intact.

5. After close of the prosecution evidence the accused persons were examined under section 342 Cr.P.C. In their above statements both the accused persons denied the charge and pleaded innocence. In answer to the question as to why the case against him appellant Saeed Ahmad stated that father of Mst.Hasnat Bibi, namely, Muhammad

Ramzan alongwith other family members were living in his land. Muhammad Ramzan had borrowed sums of Rs.30,000/- and Rs.50,000/- through cheques and on demand to pay the same back the instant case was foisted on him. He pleaded that PW Muhammad Zafar being 'phopha' of Mst.Hasnat Bibi too, wrongly deposed against him. Appellant Ijaz Hussain adopted the same plea as of Saeed Ahmed. Both the appellants did not opt to appear as their own witnesses under section 340(2) Cr.P.C. nor they produced any evidence in their defence.

6. After hearing arguments of the learned counsel for the parties the learned trial Judge convicted the appellants and sentenced them to the punishments as mentioned in the opening para hereof.

7. I have heard Malik Rab Nawaz Noon, Advocate for the appellants, Sardar Ahmad Abid, Advocate, learned counsel for the State and have also perused the entire record with their assistance.

8. Malik Rab Nawaz Noon, Advocate, learned counsel for the appellants has contended; that inordinate delay of 24 days in lodging

the FIR was fatal towards the prosecution case; that solitary statement of the victim which, in pith and substance, was contradicted by the medical evidence, was not sufficient to bring home charge against the appellants without corroboration from any independent source; that report of the Chemical Examiner, in view of the delay in the medical examination as well as delay in analysis, has lost its evidentiary value and that; on account of material contradictions as well as inherent improbabilities, the prosecution evidence was not worth reliance.

9. Sardar Ahmad Abid, Advocate, learned counsel for the State, on the other hand, has stated that though there was a delay of 24 days between the occurrence and the report yet, it was, at the trial, duly explained and it was categorically pleaded that since 'gundas' deputed by the appellants remained on constant watch, therefore, report could not be lodged earlier. However, candidly conceded that corroboration to statement of the victim, on this point, from any independent source was not available. He has also conceded that since vaginal swabs were analyzed after a month of the occurrence, therefore, detection of

semen on the swabs, could not have been possible. He has also not been able to furnish any answer to the question that the abductee having been allegedly subjected to zina-bil-jabr only twice as to how her vagina, if she was not habitual to sexual intercourse, admitted two fingers easily at the time of her medical examination, which was conducted after a month of the occurrence.

10. I have given my anxious consideration to the respective contentions of the learned counsel for the parties. In order to supplement his first contention that inordinate delay in lodging the report was fatal towards the prosecution case, the learned counsel for the appellants has vehemently urged that since no evidence except bald statement of Mst.Hasnat Bibi on record, was available to prove that "Gundas" allegedly deputed by the accused persons were having a constant watch, therefore, the complainant was precluded from lodging the report, could not have been believed. It may be, in this regard, noted here that the occurrence, in the instant case, is stated to have taken place 15 days prior to 21.7.2001 whereas, the report

Exh.PF, was lodged on 30.7.2001 and the FIR was registered on 6.8.2001 a week thereafter. If the time elapsed between lodging of the report and registration of the FIR, which may be on account of procedural formalities, is over-looked, even then, there is a clear delay of 24 days in lodging the report which, in view of the fact that as per prosecution version, hand of the alleged abductee was given back to her father on the next day of the occurrence at 8.00 a.m., appears to be inordinate. Explanation offered, in this regard, simply is that since "gundas" deputed by the appellants were keeping an eye, therefore, the complainant was prevented from lodging the report. I am afraid the reason advanced does not appear to be cogent because in these days, when modern ways of communication are available even in villages, it is not conceivable that the complainant party was made hostage and was thus prevented to have an access to the law enforcing agencies. Further, neither any evidence in support of the explanation so offered was produced at the trial nor names of the "gundas" were disclosed nor it was explained that if complainant or her father were

kept under surveillance as to why other near relatives including P.W.5 who was "phopha", and witness of the occurrence, were prevented from lodging the report earlier or at least send an application to the law enforcing agencies or file direct complaint in the Court. In the case of Sarja Vs. The State 1993 P.Cr.L.J. 156 the FIR was lodged after delay of 54 hours despite the fact that the Police Station was at a distance of 4/5 squares from the house of the victim and her husband had also returned in the evening. It was held that since in the given situation prompt action should have been taken to report the matter to the police therefore, no reliance could have been placed on the solitary statement of the prosecutrix, which though was corroborated by the medical evidence as her examination was conducted on the following day of the occurrence. In the case of Sanaullah alias Sanata Vs. The State, PLD 1983 Federal Shariat Court 192 the report was lodged by Mst. Safia Bibi, the prosecutrix, on the next day of occurrence and she was got medically examined on the next day of lodging the report. Keeping in view the fact that during the whole period the prosecutrix

remained with Muhammad Yousaf, ASI, it was held that the delay of first information report that some sort of compromise between accused and father and brother of the prosecutrix was going on was beyond comprehension. In the case of Azmat Khan Vs. The State 1982 PSC 246 there was a distance of 7 to 8 kilometers between the place of occurrence and the Police Station. It was held that 10 hours delay was enough for the complainant to concoct the story. In the case of Zulqarnain Vs. The State PLD 1994 Federal Shariat Court 34 there was a delay of 5 hours in lodging the FIR. It was held that since report of the occurrence could have been made immediately, therefore, lodging of the FIR after more than 5 hours was not understandable. Obviously, the period was utilized to fabricate the false story. Hence, the plea that since after feeling some relief the complainant was encouraged and then lodged the report appears to be patently after thought. The contention, therefore, has force in it.

11. As to the next contention of the learned counsel for the appellants that since medical evidence was at variance with the

prosecution version, therefore, the statement of the alleged victim, could not have been believed, it may be noted here that as per P.W.4's own statement, she was subjected to zina-bil-jabr only twice by appellant Saeed Ahmad. At the time of her medical examination, which took place after 30 days from the occurrence, her vagina was still admitting two fingers easily which means that she was habitual to sexual intercourse. Had she, as per prosecution version, been a virgin, the position of her genetalia especially the vagina, would have been other way round. Further, admission by the lady doctor to the effect that small injuries and bruises found on the body of the prosecutrix might be five days old also greatly mars evidentiary value of the prosecutrix's statement.

In the case of Abid Hussain vs. The State, 1983 PSC 725, Mst.Sattan, the prosecutrix had claimed that she was subjected to sexual intercourse on the day of occurrence. In view of lady doctor's statement that she was accustomed to sexual intercourse it was held that she being a woman of easy virtue, her statement in the absence of

medical evidence, could not have been believed. In the case of Amir Muhammad vs. The State 1987 SCMR 1167 the prosecution case was that Mst.Parveen Akhtar, aged about 13 years, was subjected to zina by the appellant, who had left her in the field subsequent to commission of the offence. Medical examination of Mst. Parveen Akhtar was conducted on the next day by the lady doctor who opined that no marks of violence on her body were present, hymen was also found torn, there was no fresh tear, vagina was not tender and admitted two fingers easily, keeping in view the fact, that she was already used to sexual intercourse and had remained in the field from 2.00 p.m. till after sun-set, it was held that all the factors when taken together cast a serious doubt about prosecution case itself. Appellant was consequently, acquitted. In the case of Muhammad Sharif vs. The State, 1993 P.Cr.LJ 1692, medical examination of the prosecutrix, who claimed herself to be a virgin, revealed that she was used to sexual intercourse. Tears of her hymen were old and vagina admitted two fingers easily. Vaginal swabs taken by the lady doctor were not

produced in evidence. Except solitary statement of the prosecutrix nothing was available on record to show that she was subjected to zina-bil-jabr by the accused. Accused was acquitted in the circumstances. In the case of Juma Gul and another vs. The State 1997 P.Crl.LJ 1291, it was held that no implicit reliance can be placed on the statement of woman of easy virtue unless some other evidence of commission of zina by the accused with her is available on record. In the case of Sudhansu Sekhar Sahoo Vs. State of Orissa, 2003(1) Supreme 522, Sessions Judge and High Court both found the appellant guilty of raping Ms. X on sole evidence of victim who had no motive to falsely implicate the appellant. On appeal to the Supreme Court it was held that since there was delay in lodging the FIR, element of forcibly taking away the prosecutrix by the appellant was lacking, her clothes allegedly worn at the time of offence did not have any stain either of blood or semen though she was an unmarried woman, there was no mention of nail marks or any other sign of violence on her body, she had asserted that she was a virgin till the

alleged incident but the medical evidence supported by her physical features revealed that she was habituated to sex. It was held that the appellants, in the circumstances, were entitled to the benefit of doubt. In the case of Muhammad Sabir vs. Abdul Qayyum and others 1986 SCMR 125, three persons were charged by Majida the prosecutrix under sections 10(3) and 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The learned trial Judge, in view of the medical evidence that her hymen was found altogether absent and only there were two bruises one each on both the thighs, acquitted the two accused persons and convicted one only, namely, Abdul Qayyum under section 10(2). While hearing the appeal against conviction and revision of the complainant against acquittal of the others, the Federal Shariat Court came to the conclusion that since Mst. Majida was habitual to sexual intercourse, as stated by the lady doctor and no semen was detected from the swabs taken and it was not safe to convict and sentence even Abdul Qayyum on the material that was placed before the trial Court. The Shariat Appellate Bench of the

Hon'ble Supreme Court of Pakistan while refusing grant of leave to appeal observed that the way in which, the prosecutrix gave evidence created an impression that she was a person of easy virtue and conscience. Testing the instant case on the touchstone of above authorities I find that the infirmities, pointed out herein above cast serious doubt on the prosecution case.

12. Further, the Chemical Examiner's report too, in view of the long delay in her examination and sending of the samples to the Chemical Examiner has lost its evidentiary value because the presence of sperm atoza in the vagina can be detected upto 17 days, at the most and in the present case the analysis of the swabs took place after about more than 43 days. It may be noted here that as per prosecution version the occurrence in the instant case took place 15 days prior to 21.7.2001 i.e. on 6th or 7th July, 2001 the medical examination of the alleged victim was conducted on 7.8.2001. Swabs were received in the laboratory on 18.8.2001 and were examined some where prior to 25.8.2001 on which date the report was signed by the Chemical

Examiner. Hence, if the time is computed from the day of occurrence and even if it is presumed that the analysis was conducted on 19.8.2001, i.e. on the next day of receiving the report in the laboratory, it would roughly come to 43 days.

It is known phenomenon and scientifically proved as well, that spermatozoa, motile or non-motile, can, after intercourse, be detected in the vagina upto 17 days at the best. The following passage from the Modi's Text-Book of Medical Jurisprudence and Toxicology twenty-first Pakistani Edition would, in this regard, be relevant:-

> "The presence of spermatozoa in the vagina after intercourse has been reported by Pollak (1943) from 30 minutes to 17 days, by Morrison (1972) upto 9 days in vagina and 12 days in the cervix. However, in the vagina of a dead woman they persist for a longer period."

Dr.Alfred Swaine Taylor in his book "Taylor's Principles and Practice of Medical Jurisprudence" has, at page 79, opined as under:-

> "After motility has ceased, spermatozoa remain intact for as long as 48 h, and they then separate into heads and tails. In the living, identifiable portions of spermatozoa can be seen for up to four days after ejaculation into the vagina. In the rape-murder situation, where death has intervened before the natural vaginal cleansing process has proceeded, identifiable spermatozoa or

portions of spermatozoa can be found for many days if not many weeks after ejaculation (R.V.Christie)."

Dr.S.Siddiq Hussain in his book "A text Book of Medical Jurisprudence" and Toxicology has, at page 181, remarked as under:-

"In the living woman, motile spermatozoa in the vagina can be found over 100 hours after coitus and non-motile spermatozoa for as long as 17 days. In the dead they may even survive longer (Sharp No.1963, J.Canad. Med.Ass.89,513).

In the case of Riaz vs. The State 1994 SCMR 358, the swabs taken from the vagina of the victim, were proved to be positive. The report was not taken into account by the Court, because of the fact that medical examination of the victim took place after 26 days from the occurrence. It was held that the result of the swabs could not have been attributed to the appellant as it was merely impossible that semen remains in the vagina of the girl for such a long period. In the case of Mst.Sharman vs. The State 2002 P.Cr.L.J 831, the positive report received from the office of the Chemical Examiner was discarded by the trial Judge in view of the fact that the victim was examined after 18 days of the occurrence. In the instant case too, since there is clear

delay of more than 43 days in examination of the prosecutrix, therefore, result of the swabs, by no stretch of imagination, be attributed to the appellants.

13. Further, the alleged abductee was not recovered from the possession of the appellants. This is the prosecution version and it has also come on record through the statement of P.W.5 that soon after the occurrence a punchayat was convened and the victim was returned in consequence of the pressure exerted by the elders yet strangely neither any member of the punchayat was produced to prove the fact that she was abducted and if it was so then she was returned by the appellants subsequently. So much so, her father even, has not come forward to depose in her favour.

14. There is yet, another glaring improbability in the statement of P.W.5. Though he has claimed that on seeing the accused persons, taking the abductee away, he had immediately contacted Muhammad Ramzan father of the abductee and apprised him of the position yet, when confronted with his statement under section 161 Cr.P.C. which

too, was recorded after about 24 days of the occurrence, it was not found so written, hence, it was clearly an improvement at his part.

15. For the facts and reasons, mentioned above, I am satisfied that the occurrence in the case has not taken place in the manner as suggested by the prosecution. Prosecution has miserably failed to produce confirmatory evidence. In this case, there is room for doubt, benefit of which must go to the appellants. Convictions and sentences recorded against the appellants namely Saeed Ahmad son of Muhammad Nawaz and Ijaz Hussain son of Manzoor Hussain by the learned Additional Sessions Judge, Mailsi (Vehari) vide judgment dated 8.7.2005 are, therefore, set aside and they are acquitted of the charge. They shall be released forthwith if not required in any other case.

These are the reasons of my short order of the even date.

(Ch. Ejaz Yousaf)
Chief Justice

Islamabad,dated the
17th March, 2006
ABDUL RAHMAN/**

FIT FOR REPORTING

Chief Justice