IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE

CRIMINAL APPEAL NO.55/K OF 2006 (LINKED WITH)

1. Ahmad Khan son Nawab, resident of Village Jindo Dera Taluka G.Y. District Shikarpur
2. Abdul Karim son of Nebahoo, Caste Luhar, resident of Village Dodapur Taluka Garhi Khairo, District Jaccobabad --- Appellants

Versus

The State --- Respondent

JAIL CRIMINAL APPEAL NO.51/K OF 2006

1. Sher Muhammad son of Mirzan, resident of Village Deha Taluka, District Sukkur
2. Abdul Karim son of Ghulam Fareed, Caste Leghari, resident of Deha Taluka, District Sukkur --- Appellants

Versus

The State --- Respondent

For the Appellants	---	Ms Nasreen Zafar and Mr. Mehmood Hussan, Advocates respectively
For the State	---	Mr. Arshad H. Lodhi, Assistant Advocate-General Sindh
FIR No, date and Police Station	---	62/1999, 14.9.1999 P.S. Madeji
Date of the Order of the Trial Court	---	8.9.2006
Date of Institution	---	7.10.2006 and 2.10.2006 respectively
Date of Hearing	---	3.11.2006
Date of Decision	---	3.11.2006

JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.- Appellants Ahmad Khan son of Nawab Bhutto and Abdul Karim son of Nobhau Luhar have filed criminal appeal No.55/K of 2006 while Sher Muhammad son of Mirzan and Abdul Karim son of Ghulam Fareed have filed Jail criminal appeal No.51/K of 2006 and are aggrieved by the judgment, dated 8.9.2006, passed by the learned Additional Sessions Judge Court No.II, Shikarpur Sindh in Sessions Case No. 238/2000 whereby they were convicted under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the said Ordinance") and sentenced them to undergo R.I. for five years each with whipping numbering twenty stripes each and a fine of Rs. 5,000/- each or in default thereof to further undergo R.I. for six months each extending benefit under section 382-B Cr.P.C. each. As both these appeals arise out of the same judgment therefore, the same are being disposed of by this single judgment.

2. Brief facts of the case are that on 14.9.1999 at about 1500 hours the complainant namely Shafi Muhammad had lodged FIR

No.62/1999 that on 13.9.1999 at about 4.00 p.m. he was in his house alongwith Mst. Amiran his wife and brothers, P.Ws. Nasarullah and Ghulam Mustafa when accused Abdul Karim son of Ghulam Fareed, Sher Muhmmad son of Mirzan, Mirzan son of Amir Bux, Karim Buk son of Amir Bux, Nabi Bux son of Ali Bux, Abdul Razzak son of Wali Muhammad and Taahu entered into his house armed with guns and lathies and accused Sher Muhammad forcibly dragged his wife, took her out and put her into the car parked outside the house and thus abducted her with an intention to commit zina with her. His minor son Ibrar Hussain, aged 1 ½ years, was also with her.

3. The complainant in the company of P.Ws. Nasrullah and Ghulam Mustafa informed Ghulam Rasool Kalhoro the headman at his village, Nabiabad about the incident and on his advice the complainant lodged F.I.R. at Police Station, Madeji, the next day.

4. On 14.6.2000 the police arrested appellant Sher Muhmmad, accused Nabi Bux and appellant Abdul Karim Leghari and recovered from them Mst. Amiran, the abductee, alongwith her minor son and produced her before the Judicial Magistrate, Garhi Yaseen, the same

day for her statement recorded under section 164 Cr.P.C. whereby she admitted to be a consenting party to zina. She made this statement in presence of accused Abdul Karim Laghari, Sher Muhammad and Nabi Bux. After completing the investigation the police filed the challan of the case before the Court of Law wherein accused Nabi Bux was shown in column No.2 because of insufficient evidence against him, whereas the names of accused Ahmad, Abdul Karim Luhar, Mirzan, Karim Bux Khoso, Abdul Razzak and Taahu were shown in the column of absconders. Subsequently, appellants/accused Ahmad Khan and Abdul Karim Luhar were also arrested and sent up to stand trial accordingly.

5. At the commencement of trial charge against accused Sher Muhammad, Abdul Karim son of Ghulam Fareed, Mst. Amiran (abductee), Ahmad Khan and Abdul karim son of Nebahoo was framed in respect of offences punishable under sections 11, 10(2) of "the said ordinance" and 342, 364, 361 and 34 PPC at Ex.3 to which they pleaded not guilty and claimed to be tried.

6. The prosecution examined complainant Shafi Muhammad at Ex. 9, he produced FIR, Ex.9/A. PW. Nasrullah at Ex.10, PW. Ghulam Mustafa at Ex.11, PW. Shahmir at Ex.12 he produced the memo of place of incident at Ex.12/A and the memo of the arrest of four accused including Mst. Amiran, abductee, at Ex.12/B. PW. Muhammad Ishaque Lakho, the learned Magistrate at Ex.13, he produced the police letter at Ex.13/A and original statement of Mst. Amiran, the abductee, at Ex.13/B, PW. Abdul Rasheed, the Medical Officer at Ex.14. He also produced the medical certificates of accused Sher Muhammad, Mst. Amiran, abductee, and police letter at Ex.14/A, 14/B and 14/C respectively. Muhammad Ali SIP at Ex.15 and ASI Abdul Sattar at Ex.16. Thereafter the learned Public Prosecutor closed his side vide his statement Ex. 17.

7. The statements of accused Sher Muhammad, Abdul Karim Laghari, Ahamd Khan Bhutto and Abdul karim Luhar were recorded under section 342 Cr.P.C. at Ex. 18, 19, 20 and 21 respectively. The alleged abductee and victim Mst. Amiran, who was also charged alongwith other accused died during trial. However, accused denied

the allegations as levelled against them by the prosecution and claimed to be innocent. They did not adduce any evidence in their defence nor did they examine themselves on oath in disproof of the charge.

8. Mr. Arshad.H.Lodhi, learned Assistant Advocate-General, Sindh pointed out that in her statement under section 164 Cr.P.C. Mst. Amiran has specially stated that she was abducted by the appellants. However, the appellants were not found guilty of committing zina liable to Tazir but were convicted for abduction of Mst. Amiran with intention to commit illicit intercourse with her and compelling her to marry with appellant Sher Muhammad. In this regard he referred to the deposition of PW.1, Shafi Muhammad, PW.2 Nasrullah, PW.3 Ghulam Musafa which has remained irrebutable and unshaken despite lengthy cross-examination. All of them gave sufficient details of the abduction of Mst. Amiran naming the appellants as culprits whose names also appear in FIR lodged by PW.1. She was recovered from the house of Abdul Karim Luhar, appellant and remained with them for a number of days. This position is disputed by learned counsel for the appellants as she was recovered at a public place.

9. On the other hand, it was contended by Mr. Mehmood Hassan amd Ms. Nasreen Zafar the learned counsel for the appellants that FIR was lodged after three months of the alleged occurrence and after recovery of Mst. Amiran. Again the so called confession made by her under section 164 Cr.P.C. after 8/9 months of her recovery is of no legal effect since PW.6 Muhammad Ishaque Lakho, Magistrate, who had recorded her statement, in cross-examination had stated that he did not know if she had given her statement under compulsion or not. PW. Abdul Sattar, ASI also stated that the prosecution witnesses disclosed that Mst. Amiran had gone with the accused at her own sweet will. Even the husband of the abductee namely Shafi Muhammad, PW.1, categorically stated that he did not know if she had illicit relations with any of the accused persons. Lastly the learned counsel contended that no credibility can be attached to the deposition of PW.2, and PW.3 who are brothers of PW.1 and have supported him because they are interested witnesses.

10. The contentions raised by the appellant's counsel are of very serious nature and were either not taken into consideration or were not

given due weight by the learned trial court. There is not one but a number of contributing factors, which pave way to benefit of doubt in favour of the appellants. There was delay of three months in lodging FIR that too after the recovery of Mst. Amiran. The alleged confession was recorded after 8/9 months of her recovery and the Magistrate himself did not remember if she had made her confession under compulsion or not. The finding of investigating officer PW. Abdul Sattar is to the effect that Mst. Amiran at her own sweet will had gone with the appellant. Mst. Amiran's husband PW.1 in cross-examination had also stated that he did not know if she had illicit relation with any of the accused persons. The medical report of Dr.Naila Khoso also discloses that there were no marks of violence seen on her body nor any blood or semen stain was found anywhere. There was no recovery of guns or lathis from the possession of any of the appellants.

11. In order to succeed under section 16 of the Ordinance, the prosecution has to establish, firstly of taking or enticing away any woman and secondly the intention that she may have illicit intercourse with any person. Unless both these two conditions co-exist a conviction cannot be passed against an accused person under section 16 of the Ordinance. The learned trial Court had acquitted the appellants under section 10(2) and 11 of the Ordinance, the former in respect of Zina and the latter relating to kidnapping, abducting or inducing a woman to marriage etc. The prosecution has failed to establish that the appellants had enticed her away. She was seen going with them along with her minor child at a public place when she was arrested by ASI Abdul Sattar at the pointation of the complainant. If the intention of the appellants was to abduct her, they would not have taken her along with her child. Again the prosecution has failed to establish that appellant's intention was that she may have illicit intercourse with any person. The cumulative effect of the facts and circumstances of the case tantamounts to

failure of the prosecution to prove its case against the appellants under section 16 of the Ordinance, hence both the appeals are accepted and the impugned judgement dated 8.9.2006 passed by the learned Additional Sessions Judge-II, Shikarpur is set aside with direction to jail authorities to release the appellants Ahmed Khan son of Nawab, Abdul Karim son of Nabahoo, Sher Muhammad son of Mirzan and Abdul Karim son of Ghulam Fareed, forthwith if they are not required in any other case.

These are the reasons for my Short Order, dated 3.11.2006 for accepting the appeal and setting aside the impugned judgement dated 08.09.2006.

JUSTICE HAZIQUL KHAIRI
Chief Justice.

Karachi
November, 3 2006

Approved for reporting.

JUSTICE HAZIQUL KHAIRI
Chief Justice.