

N THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQL KHARI, CHIEF JUSTICE
MR. JUSTICE SALAHUDIN MIRZA

CRIMINAL APPEAL NO.245/L OF 2005 (linked with)
CRIMINAL APPEAL NO.259/L OF 2005

1. Umar Din son of Moj Din --- Appellants respectively
2. Ishaq son of Muhammad Ramzan
Both residents of Harpalkay, P.S.
Barki, Lahore

Versus

The State	---	Respondent
For the appellants	---	M/s Muhammad Farooq Chishti, Ashraf Ali Javed and Umar Pasha Chaudhry, Advocates respectively
For the State	---	Mr. Pervaiz Alamgir, Deputy Prosecutor General
FIR, Date and Police Station	---	98/1999, 8.5.1999 P.S. Barki, Lahore
Date of the Order of Trial Court	---	4.7.2005
Date of Institution	---	3.8.2005
Date of Hearing	---	20.4.2007
Date of Decision	---	6-2007

JUDGMENT:

HAZIQU L KHAIRI, CHIEF JUSTICE.- By this judgment we propose to dispose of two appeals filed by appellant Umar Din being criminal appeal No.245/Lof 2005 and appellant Muhammad Ishaq being criminal appeal No.259/L of 2005 whereby they have impugned the judgment dated 4.7.2005 passed by the learned Additional Sessions Judge, Lahore, in which they were convicted and sentenced under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, (hereinafter referred to as "the said Ordinance") to life imprisonment each, 10 stripes each and fine of Rs.50,000/- each or in default to further suffer 3 months S.I. each.

2. Brief facts as appearing from the record are that on 6.5.1999 at 7.00 a.m., Mst. Amina Bibi (PW.4) sister of complainant Shahbaz Khan (PW.2) told him that her daughter Mst. Sadaf victim aged 15/16 years (not produced) was missing from the house in the night and had not returned. When he went out in search of her, Abdul Hainid PW (not produced) and Masood Akhtar (PW.3) informed him that at about 4.00 a.m. while deboarding at Lidher Bus Stop from Bhatta Chowk, they saw that Muhammad Ismail, Muhammad Ishaq, Yaqoob, Ibrahim, Imran and Mst.

Nusrat Bibi accused along with Mst. Sadaf were standing at the said bus

stop. According to the complainant the victim was enticed away by Ismail

etc. for committing zina with her.

3. Subsequent to the registration of FIR on 14.5.1999 the alleged

abductee Mst. Sadaf Bibi appeared before the police and she got her

statement recorded on oath under section 164 Cr.F.C. by a Magistrate

wherein she implicated Ismail, Muhamnad Yaqoob, Umar Din and

Muhammad Ishaq sons of Moj Din for her abduction. During investigation

by police appellants Muhammad Ishaq and Umar Din were found guilty and

their challan was submitted for trial. Formal charge against them for

commission of offence under section 11 of "the said Ordinance" was made

to which they pleaded not guilty and opted for trial.

4. During trial the prosecution examined Dr. Lubna Naseem (PW.1) who

medically examined abductee Mst. Sadaf Bibi and produced MLR, PWs.

Khursheed Ahmaa C/3144, Muhammad Arham SI, Muhammad Riaz, HC,

Muhammad Jamil Constable and Sher Muhammad Pasha were formal

witnesses and their depositions relate to investigation process of the

recording of FIR, despatch of swabs for chemical examination and of other

formal nature and they had not been cross-examined by the defence.

5. The testimony of Shahbaz Khan complainant (PW.2), Masood Akhtar

Khan (PW.3) and Mst.Amina Bibi (PW.4) relates to the factum of abduction

of Mst. Sadaf Bibi by appellants Muhammad Ishaq and Umar Din. While

PW.4 deposed that when she got up in the morning her daughter Sadaf Bibi

was missing, she informed PW.3 her brother about it who went out in search

for her and was told by Masood Akhtar (PW.3) and Abdul Hameed (not

produced) that while they deboarded a Wagon coming from Bhatta Chowk,

they saw the appellant Muhammad Ishaq, Muhammad Yaqoob, Muhammad

Ibrahim, Muhammad Ismail (but not appellant Umer Din) with Mst. Nusrat

Bibi at the bus stop at about 4.30 a.m. Masood Akhtar (PW.3) confirmed this

position in his deposition. Mst. Amina Bibi (PW.4) testified that the

appellants had been visiting her house she came to know through Hameed

and Maqsood that they had seen Mst. Sadaf Bibi along with the appellant

Ishaq, Mst. Nusrat Bibi and Muhammad Yaqoob. What is pertinent to note is

that PW.2 Shahbaz Khan and PW.3 Masood Akhtar Khan who saw the

victim alongwith the accused persons at the Bus Stop were not cross-

examined on this point and were simply asked if the victim had died to

which they replied in affirmative. Similarly PW 4 Mst. Ameena Bibi, mother

of the victim was not cross-examined at all so also other witnesses produced

by the prosecution although opportunity was provided to the appellants.

Abductee Mst. Sadaf Bibi in her statement under section 164 Cr.P.C. had

implicated accused Umar Din for her abduction along with other co-accused,

namely, Muhammad Ismail, Muhammad Yaqoob and Muhammad Ishaq.

6. According to learned counsel for the parties also the abductee died

during the trial. However her statement on oath U/S 164 Cr.P.C. was

recorded by Mr. Muhammad Usman Ghani (PW 11) after she came back.

She stated as under:

"On 5.5.1999 at about 9/9.30 p.m. I was watching T.V. in my house when there was a knock at our door. I opened the door because all others in the house were sleeping. Mst. Nusrat who is my neighbour asked me to accompany her to her house and on my inquiry she told me that she will let me know about it at her house. A car was parked in front of Nusrat's house. When I was passing by the car, Ishaq the brother-in-law (husband's brother) caught hold of me by my arm, whereas Ismail, Yaqoob (Ishaq's brother) and Umar (Ishaq's friend) forcibly pushed me into the car and administered something whose smell made me unconscious. In the morning Ishaq was sitting beside me. He asked me to get married to him which I refused. He then served me tea, where after I again became unconscious. When I regained my consciousness, I came to know that I was in a village and

many persons were gathered around me. They told me that they had left me with my parents. Our village is near the other village."

7. Thus there are two versions of the case before us. Admittedly there

was no eyewitness to the abduction of Mst. Sadaf from her house. PW.4

Amina Bibi, her mother found her missing from the house when she got up

in the morning. Prosecution witness P.W. Masood Akhtar saw her in the

company of accused persons at the Bus Stop on 6.5.1999 at 4.30 a.m. The

version of Mst Sadaf is that by deceit she was taken out from her house at

9/9.30 p.m. on 5.5.1999 by Mst. Nusrat, her neighbour, where after the

accused took her away in a car by administering something the smell

whereof made her unconscious. Both the stories are poles apart and not only

contradictory but also demolish one another on all material respects. If the

first version is accepted then PW.3 Masood Akhtar saw her in the company

of accused at a public place but she raised no hue and cry sought help from

him or others. It was held in the case of *State Vs Khuda Dad & another* (PLJ

2003 SC 716), that "simply by seeing the abductee in the company (of

accused) would not attract the ingredients of Section 11 of the Ordinance."

Again nowhere in her statement U/S 164, Cr.P.C. she has involved any of

the appellants for zina, however, appellant Ishaq had asked her if she would

marry him. The proposal of marriage would no by itself come within the

ambit of Section 11 of the Ordinance unless accompanied by force or

coercion which we do not find in her statement under section 164 Cr.P.C.

8. Learned counsel for the appellants Mr. Ashraf Ali Javed brought to

our notice the statement of Mst. Sadaf on oath and stated that the appellants

were not provided the opportunity of cross-examining her in terms of

Section 164 (1.A) Cr.P.C. Since section 164 Cr.P.C. does not contemplate

statement on oath it was the duty of the learned Magistrate to have told her

so but he did not. As regards providing opportunity to the accused to cross-

examine her it is not a mandatory requirement as the accused may not be

available at the relevant time. Failure to do so will not vitiate the confession

or its evidentiary value. It was further urged by him that Mst. Sadaf being 16

years old was an adult within the meaning of Section 2 of the Ordinance and

had attained puberty. In the case of *Abdul Jabar Vs. The State (PLD 1991*

SC 172 Shariat Appellate Bench), it was held that a female may attain

puberty even earlier. There were no mark of violence or injury on her

external genitalia nor there were any stains of semen on her body or clothes.

The swabs were stained with semen but there was no matching or grouping.

9. In view of what is stated above, the prosecution case has been torn apart by its own PWs. and the benefit thereof shall resultantly go to the appellants leading to their acquittal. We are, therefore, unable to endorse the impugned judgment passed by the learned Additional Sessions Judge, Lahore, and set aside the conviction and sentences of both the appellants, namely Umar Din and Ishaq with direction to jail authorities to release them if they are not required in any other case.

Sd/ JV
[REDACTED] 7/6/07
JUSTICE HAZIQU L KHAIRI

Chief Justice

Yr
[REDACTED]
JUSTICE SALAHUDDIN MIRZA

Announced at Jhelum
the 7th June 2007.

Approved for rehorts
[REDACTED] 7/6/07