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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SAEED-UR-REHMAN FARRUKH
MR. JUSTICE S. A. RABBANI

CRIMINAL APPEAL NO. 6-K -2002
Cr.Revision No.8-K of 2002
Cr.S.M.Notice No.1-K of 2002

Dr. Waseem Ansari son of Qamaruddin Ansari,
R/o Bungalow No.1, Block E Unit No.6, Latifabad,
Hyderabad. Appellant

Versus

The State

Respondent

For the appellant

Mr. Shaukat Hussain Zubedi,
Advocate

For the State

Mr. Muhammad Arshad Lodhi,
A.A.G. Sindh

FIR No., date & P.S.

No.46 dt.22-9-1999
P.S. -B Section Latifabad.

Date of judgment
of trial court

31-1-.2002

Date of Institution

13-2-.2002

Date of hearing

5.3. 2004

Date of decision

5.3.2004

JUDGMENT

SAEED-UR-REHMAN FARRUKH, J.- By this judgment we propose to dispose of the following three matters, as these arise out of common judgment dated 31.1.2002 passed by the Vth Additional Sessions Judge, Hyderabad:-

- 1) Cr.A.No.6-K of 2002 (Dr.Waseem Ansari Vs. The State)
- 2) Cr.Rev.No.8-K of 2002 (Mst.Atiya Jamil Vs.Dr.Waseem Ansari)
- 3) Cr.S.M.Notice No.1-K of 2002 (State Vs.Dr.Waseem Ansari)

Vide impugned judgment dated 31.1.2002, the appellant Dr.Waseem Ansari was convicted by the learned trial Judge under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979,, hereafter called "The Ordinance", and sentenced to suffer R.I for five years and a fine of Rs.5000/-, to be paid to the victim Mst.Atiya Jameel as compensation, or in default to further undergo R.I for one year.

Through his appeal, Dr.Waseem Ansari has assailed the legality and correctness of the impugned judgment and sought acquittal; Mst.Atiya Jamil

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complainant, through her revision, has prayed for enhancement of sentence imposed upon the convict, while this Court had also issued suo moto notice to the appellant Dr.Waseem Ansari to show cause as to why, in the event of dismissal of his appeal, the sentence awarded to him by the trial Court be not enhanced.

2. Briefly stated the prosecution case is; Mst.Atiya Jamil (P.W.1) appeared before S.H.O, Police Station 'B' Section Latifabad, Hyderabad on 22.9.1999 and lodged F.I.R(Ex 4/A) in respect of an occurrence that allegedly took place on 5.8.1999. According to the complainant, she was not feeling well and her Bhabhi Mst.Rukhsana (P.W.2) called the appellant for treatment, he being family doctor and on visiting terms in the house. It was alleged that the appellant went to the house of the complainant at 08.30 p.m and asked Mst.Rukhsana P.W.2 to arrange for hot water. She left the room and finding the complainant alone the appellant, allegedly, committed zina-bil-jabr with her. It was alleged that the appellant was more powerful and the complainant could not successfully resist the sexual assault. After commission of this heinous offence, the appellant left the house and when

Mst. Rukhsana came to the room she saw the complainant lying naked, who narrated the incident to her.

It was further alleged that the matter was brought to the notice of Mujeeb Ansari, brother of appellant, who tried to pacify them with the assurance that the matter would be sorted out by mutual consultation. Since no fruitful result came out of this assurance, therefore, the complainant was forced to lodge the F.I.R on 22.9.1999.

3. Investigation was initiated and after completion thereof challan was submitted in Court.

The appellant was charge-sheeted by the learned Additional Sessions Judge under section 10(3) of "The Ordinance". He denied the allegation and claimed trial.

4. At the trial, the prosecution produced seven witnesses, in all.

Mst. Atiya Jamil, complainant, entered the witness box as P.W.1. She gave her age as 30 years and deposed that she was living in the house of her parents. On the day of occurrence she was not feeling well and her Ehabi

Mst. Rukhsana Tariq (P.W.2) called the appellant on telephone for her check

up. The appellant on reaching her residence asked Mst.Rukhsana to arrange for hot water who left the room and in his absence the appellant allegedly committed zina-bil-jabr with her. She deposed that the appellant caught hold of her by her hands and put off her shalwar and shirt and then raped her. On the hue and cries raised by her Mst.Rukhsana came to the room but, in the meanwhile, the appellant had succeeded in making good his escape.

She was seen by Mst.Rukhsana in naked condition.

She further deposed that her mother was present in the house but she was not feeling well and was asleep in another room. Immediately, attempt was made by Mst.Rukhsana to contact Tariq Jamil, brother of the complainant, at Karachi but he was not available. Faced with this situation Mujeeb Ansari, brother of the appellant was contacted who visited their house same day. He paid number of visits to their house and kept on holding promise for settlement and "giving us assurance that he would do for me as possible and would get my marriage with the accused.....". Since no settlement could be made she was forced to lodge report with the police.

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The witness was cross-examined by the defence at some length. She deposed that she was unable to use her leg or bite the appellant (to resist his assault) as he was so powerful and had caught hold of her hands. She stated that she was already lying sick and feeling weak. According to her the appellant was "like a family doctor" and they used to visit his clinic also. She conceded that her clothes were washed after the incident. The bed sheet was not handed over to the police as it was also washed due to stain. She took up the plea that her clothes were torn (during the occurrence). She denied the suggestion that she and her brother had torn her shalwar, afterwards, with the help of police. A suggestion was put to her that she intended to marry the appellant and since he had married some where else she was annoyed and concocted a false story. She refuted this suggestion.

5. Mst.Rukhsana wife of Tariq Jamil P.W.2 deposed that Mst.Atiya was sister of her husband and they were residing in the same house. According to her, on 5.8.1999, since Mst.Atiya was not feeling well due to blood pressure and was semi unconscious hence she called the appellant on telephone who reached the house at 8.30 p.m. After examining Mst.Atiya

the appellant directed her (witness) to arrange hot water. She accordingly

went (to prepare) hot water and after about ten minutes she heard cries from

the room of Mst.Atiya and rushed there. She found her lying in naked

condition. On her inquiry she was informed by the Mst.Atiya that appellant

had committed zina-bil-jabr with her. By that time the appellant had gone

away.

She supported the complainant with regard to her assertion that

Mujeeb Ansari, brother of the appellant, was contacted by them who held

out a promise that he would get the complainant married with the appellant

but the promise did not fructify.

During cross-examination she took up the plea that her husband, on

his arrival in Hyderabad on next day of occurrence, contacted Mujeeb

Ansari and brought him to their house. She conceded that she had not

witnessed the incident of zina. According to her the police visited their

house after about one week of the incident. She, too, refuted the suggestion

that a false case had been foisted upon the appellant by Mst.Atiya Jameel

P.W as he had married elsewhere.

6. Third prosecution witness, Tariq Jamil deposed that on the fateful day he was at Karachi and on his return home on 7.8.1999 he was informed by his wife Mst.Rukhsana (P.W.2) about the incident. He contacted Mujeeb Ansari, elder brother of the appellant at his house. It was alleged that the appellant came out from the house and issued threats that he would get his sister(complainant) abducted and that he was keeping his revolver loaded with him. Apprehending mischief he came back and did not pay another visit to the house of Mujeeb Ansari.

In cross-examination he denied the suggestion that he returned from Karachi on 5.8.1999.

7. Statement of Mst.Naseem Begum P.W.4, mother of the complainant, is more or less in the nature of hearsay evidence. She deposed that she was not feeling well and had taken sleeping pills. When she woke up she was informed about the alleged occurrence by the complainant and Mst.Rukhsana.

8. Statement of Aziz-ur-Rehman P.W.5 is not material as he merely deposed about having signed mashirnama in respect of the clothes of the

complainant, taken into possession by the police. As per his statement it was a blank paper which was got signed from him by the investigating officer.

9. Dr. Sittara Lakho P.W.6 deposed that on 22.9.1999 she, while posted as Women Medicolegal officer at L.M.C.H Hyderabad, examined Mst. Atiya Jamil. She found no external mark of violence on her body. As per internal examination, she found that the hymen was not intact and vagina admitted one finger loosely. She obtained vaginal slides and vaginal swabs for reference to the Chemical Examiner. From the examination of Mst. Atiya Jamil she formed the opinion that she was used to sexual intercourse. She produced her medical report as Ex 9/B, which bore her signature.

She further deposed that according to final opinion no semen was detected on the vaginal swabs and slides.

2 We were rather surprised to note that large number of questions were put by the Court to the witness which is rather unusual practice in criminal cases. Be that as it may, in reply to a Court question the witness deposed that she was of the opinion that incident of sexual intercourse committed upon her was of about one month old. According to her, semen can remain

available in the posterior vaginal fore nesses upto the period of more than

one month but in case, in the meantime, the process of menstruation had commenced then every thing would be washed out. She took the history of menstruation from victim who informed her that she had passed through the process of menstruation about 10 days prior to the examination by her.

It will not be out of place to mention here that according to the report of the Chemical Examiner (Ex 10-A), the shalwar and qam eez of Atiya Jameel, sent to him in a sealed parcel by the S.H.O, were found to be not stained with semen. (pages 43-44 of the paper book).

10. Last witness produced by the prosecution is Sardar Khan P.W.7 who was posted as S.H.O at Police Station 'B' Section Latifabad Hyderabad at the relevant time. He recorded the F.I.R as per statement of Mst.Atiya Jameel P.W.1, and carried out necessary investigation, during the course whereof the complainant produced her shalwar and qameez before him which was taken into possession. Finally he submitted the challan in Court. In cross-examination he admitted that there was no reason for delay in lodging of F.I.R. He conceded that the complainant was referred to him by the S.S.P

though there was no written order in this regard and he verbally directed

him (witness) to hear the complainant. He conceded that the complainant

had not contacted him "in between 5.8.1999 to 22.9.1999". He deposed

that the clothes which were procured from the complainant were in

'washable condition' and there was no blood stained mark on the shalwar

and qameez. The complainant did not produce the bed sheet before him.

Towards the end of his cross-examination he deposed that from the statement of the complainant, witnesses and accused, he had reached the conclusion that the complainant wanted to marry with the accused who was not willing to do so, therefore, she has filed this case.

11. After conclusion of the prosecution evidence, statement of the appellant, under section 342 Cr.P.C., was recorded. He denied the prosecution story in toto. In reply to question as to whether he wanted to say any thing in defence, he stated that the complainant might have interest "towards him" for marriage and she had 'conspired false case against him'. He produced copy of his nikahnama and card of valima ceremony dated 11.7.1999.

He stated that he did not intend to examine himself on oath under section 340(2) Cr.P.C to vindicate his position nor he wished to lead any evidence in defence.

12. We have heard learned counsel for the parties and perused the record with their assistance.

It is contended by the learned counsel for the appellant that the complainant was, admittedly, desirous of marrying the appellant. On finding her hope frustrated due to his marriage with some one else ^{she} hatched a plan to falsely implicate the appellant in this case and succeeded in her design. It was urged that there was inordinate delay of 47 days in lodging the F.I.R which spoke volumes about the falsity of the prosecution story. It was lastly argued that the complainant stood exposed to be a woman of easy virtue and her statement could not be relied upon, unless supported by strong corroborative evidence, which was lacking in the instant case.

13. Mr.Arshad Lodhi, learned Assistant Advocate General, has very fairly conceded that apart from the bald assertion of the complainant about zina-bil-jabr there was no material on record to justify his conviction.

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Mr. Muhammad Masood Ghani, Advocate, learned counsel appearing for the complainant merely urged that in case the conviction of the appellant is maintained his sentence should be enhanced, keeping in view the gravity of the offence.

14. We find merit in this appeal.

As noticed herein before there is an extra-ordinary delay of 47 days in lodging the FIR. A perusal of the same shows that only a lame excuse has been put forth by the complainant that since there was a lingering hope in her mind that she would be able to marry the appellant, therefore, the matter of reporting the incident to the police was delayed. This is hardly a justifiable excuse for the delay in getting the case registered. Significantly, it is in the evidence of Mst. Rukhsana PW-2 that police had visited their house five days after the alleged occurrence, meaning thereby that the matter was brought to the notice of the police before that visit. No explanation, whatsoever is forthcoming as to why FIR was not got registered so as to set the machinery of law in motion.

In fact the delay in lodging the FIR was not merely result of inaction on the part of the complainant. It was with a purpose, as discussed in the sequel.

15. Mst. Atiya Jamil complainant claimed under oath to have never indulged in major sin (see the opening part of her statement in court).

She had been proved to be liar in this regard. She was unmarried at the time of her medical examination. Lady Dr. Sittara Lakho OW-6 has deposed that the complainant was used to sexual intercourse. What weight could safely be attached to her testimony about the occurrence? Obviously her ipsi dixit could not be accepted, on the face of it.

It is proved on record that the complainant had a motive to falsely involve the appellant in the case. If the chastity of the complainant is violated by a sex-maniac, in normal course of human behaviour her deep hatred and abhorrence towards the culprit would be etched in her mind for ever. The complainant, instead, adopted un-natural / abnormal course of contacting the brother of the appellant on the same day of occurrence and thereafter had been expecting the fulfillment of the promise made by him to

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arrange her marriage with the appellant. She admitted in her cross-examination that it was only after her hopes to marry the appellant fizzled out that, after lapse of 47 days, she went to the police with a story of rape by the appellant. Why should an abused girl long to marry her tormentor? This explains the real cause for delay in the lodging of the FIR.

16. As regards the alleged commission of zina-bil-jabr by the appellant upon the complainant, apart from her own statement, there is no direct evidence to support her version. Mst. Rukhsana PW-2, admittedly did not witness it, she having left the room ten minutes earlier to prepare hot water and when she went there she saw only the complainant lying naked.

h 17. The story of sexual assault, as set up, is not only improbable but borders on absurdity. According to the prosecution, Mst. Rukhsana, on direction by the appellant, went away to prepare hot water and Atiya Jameel was left with him in the room. According to Mst. Atiya Jameel she was sick and feeling weak and the appellant held her by her hands and then stripped her naked. It is strange that she did not even try to push him away, on the initiation of obscene overtures by the appellant. Even if she had felt

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physically helpless, no explanation is forthcoming as to why she did not immediately raise hue and cry. Though her mouth was not gagged yet she kept quiet. It is after ten minutes that Mst. Rukhsana PW heard her cries and rushed there. There is thus a strong possibility that nothing objectionable happened during those ten crucial minutes and after the appellant had gone away, the complainant undressed herself and started crying to create evidence of having been seen naked by Mst. Rukhsana PW, in support of her plea of rape by the appellant. The initial call for medical assistance by the appellant might also have been motivated.

18. Whether or not Tariq Jameel PW-3 brother of Mst. Atiya Jameel reached Hyderabad from Karachi on the next day of the occurrence (per Mst. Rukhsana PW-2) or on 7-8-1999, as claimed by Tariq Jameel PW-3 is immaterial for the reason that prior to his arrival contact had already been, allegedly, established with Majeed Ansari brother of the appellant. The complainant has stated in reply to question in cross-examination that “ Mujeeb Ansari had come on the same day to our house after incident and hold talks with us”. Why the ladies in the house did not await the arrival of

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the male member of the family and took this extra-ordinary step. This is yet another circumstances which belies the prosecution story of zina-bil-jabr.

19. Sardar Khan Investigating Officer, PW-7, after thorough investigation, reached the conclusion that the complainant wanted to marry the appellant and finding that her hope could not materialized she got this case registered. It is true that the opinion of the Investigating Officer is not binding on court, however, it does not means that he is not entitled to form his own opinion and if questioned during his evidence, depose about it in a forth right manner. The learned trial Judge in all fairness, should not have passed strictures against him due to his expression of opinion about the case and even gone to the extent of ordering his prosecution under section 193 PPC and initiation of department proceedings. These observations / directions were wholly uncalled for and are struck down.

20. The upshot of the above discussion is that the prosecution has miserably failed to prove its case against the appellant. His conviction and sentence under section 10(3) of the Ordinance was wholly unjustified. Consequently, while accepting this appeal, the conviction and sentence of

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the appellant is set aside and he is honourably acquitted. He shall be released from jail in this case.

The revision petition for enhancement of the sentence (Cr.Revision No.8-K of 2002) is dismissed. Likewise, suo moto notice No.1-K of 2002. issued to the appellant for enhancement of sentence is recalled.

21. The above are the reasons for our short order passed on 5-3-2004.



(S. A. Rabbani)
Judge



(Saeed-ur-Rehman Farrukh)
Judge

APPROVED FOR REPORTING



Karachi, 5-3-2004
M. Akram