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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

(28)

PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI

CRIMINAL APPEAL NO.65/K OF 1992

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| Raees Ahmad son of Mehar Ellahi, r/o 139/12, Sector 11-B, New Karachi. | ... | Appellant |

Versus

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| The State | ... | Respondent |
| For the appellant | ... | Mr.Ghulam Mustafa Memon, Advocate. |
| For the State | ... | Sh.Aziz-ur-Rehman, Advocate. |
| No.& date of F.I.R Police Station | ... | No.90/88, dt.7.3.1988, P.S New Karachi. |
| Date of order of the trial court | ... | 16.8.1992. |
| Date of Institution in this Court | ... | 16.9.1992. |
| Date of admission | ... | 1.10.1992. |
| Date of hearing and decision. | ... | 14.12.1992. |

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JUDGMENT

NAZIR AHMAD BHATTI,J.- Appellant Raees Ahmad has been convicted by the Ist Additional Sessions Judge (Central) Karachi under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to undergo rigorous imprisonment for 10 years, to pay a fine of Rs.5000/- or in default to further undergo rigorous imprisonment for 6 months, and to suffer 10 stripes by judgment dated 16.8.1992. He has challenged his conviction and sentence by the appeal in hand.

2. Aas Muhammad complainant had accused the appellant of committing carnal intercourse against the order of nature with his minor son Akram aged about 8 years on 3.3.1988 at about 1.00 P.M in the F.I.R No.90/88 recorded in Police Station New Karachi on 7.3.1988 at 1205 hours. The complainant also accused the appellant for taking his minor son to his house for commission of the said offence.

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3. The appellant was arrested on 4.6.1988 and after investigation he was sent up for trial. The learned trial Judge charged the appellant under section 12 of the Hudood Ordinance and section 377 PPC to which the appellant pleaded not guilty and claimed trial.

4. The complainant, appearing as P.W.1, deposed that his wife Mst.Kausar came to his place where he worked and informed him that their son Akram had been taken away to his house by the appellant at about 1.00 P.M and when the boy returned he disclosed that the appellant had committed sodomy with him forcibly after administering him some narcotic. The witness further disclosed that the boy had been taken to private Hospital for treatment. Mst.Kausar, appearing as P.W.3, corroborated the aforesaid testimony. The victim of the alleged occurrence Akram, appearing as P.W.2, stated that on the day of incident at about 4.00 P.M he was playing out-side of his house and the appellant, who is his first cousin called him and

took him to his house which is adjacent to his house and gave him Biryani and one tablet and asked him to eat them and then the appellant put off his shalwar and committed unnatural offence with him. The boy further stated that after the incident he went to the house and informed his mother who took him to Rashidullah Hospital where he remained under treatment for about 3 days. The boy admitted in cross-examination that he was not unconscious after taking Biryani and the tablet. P.W.5 Mst.Haseena Begum, a sister of mother of the boy, was present in his house and she took the boy to a hospital near the house. She stated that she had noticed blood and semen on the clothes of Akram.

5. P.W.4 Dr.Aftab Azizi examined Akram on 7.3.1988 at about 1610 hours and on local examination his anus was found patulous and congestion was present around the anus. The doctor also found a tear half inch in length with red inflammed margins at 12'O clock position which was tender on touch. The doctor also found tenderness on separation of buttock. The doctor

gave the opinion that the boy had been subjected to the act of sexual intercourse. However, the doctor did not find any mark of injury all over the body surface.

6. P.W.6 Muhammad Suleman was associated with the investigation. He stated that he was called by the complainant to his house on the day of incident and the investigating officer was sitting there. He further stated that in his presence the investating officer prepared mashirnama of the wardat and the investigating officer secured one chaddar and trouser of the accused. In cross-examination he stated that a police constable had gone to the house of the accused and had brought the clothes of the accused and mashirnama was also prepared in the house of the complainant. This witness further stated that the chaddar was secured from the house of the complainant. This witness had attested the mashirnama.

7. It transpires that the complainant had submitted a written report on 5.3.1988 in the same police station at 2220 hours which was recorded in the daily diary of that police station at serial No.82. A copy of the said report is Ex.24.

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It discloses that on the said day at about 7.00 P.M an altercation had taken place between the complainant and the appellant as a result of which the latter had beaten the former and the cause of that altercation appeared to be that the appellant had allegedly beaten Akram on the said day.

8. The appellant in his statement under section 342 Cr.P.C contradicted both the allegations against him. He also made a deposition on oath wherein he said that he had strained relations with his uncle Aas Muhammad complainant over their business and as a result thereof he had been falsely implicated.

9. According to the prosecution case the occurrence took place on the 3rd of March and the boy was admitted in a private hospital where he remained under treatment for atleast 3 days and thereafter the report of the occurrence was made in the police station on 7th of March. No explanation has been furnished for a delay of 4 days in making the report in the police station.

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It is also interesting to note that the complainant made a report in the same police station on 5th of March but no such allegation was disclosed against the appellant therein. The perusal of that report shows that some altercation took place between the complainant and appellant. However, the allegation is that the latter had beaten the son of the complainant. There has been furnished no explanation as why the incident of sodomy was not disclosed in the report made on 5.3.1988, if it had actually taken place and why after another 2 days this incident was disclosed for the first time.

10. The appellant is a son of the real brother of the complainant and lives in the house adjacent to his house. There was already bad blood between both the parties about their business. In such a situation if the appellant had really committed the offence for which he has been tried, the complainant would have disclosed it at the first available opportunity. Not only that but he could have disclosed it on the 5th of March when he had submitted an application

tc the police station against the appellant. There is not only a delay of 4 days in the disclosure of the occurrence but it has also not been explained as to why it could not be disclosed on the 5th of March when an application had actually been given by the complainant against the appellant in the police station.

11. There is another aspect of the matter. The appellant was charged for committing 2 offences. Abduction of the minor boy under section 12 of the Hudood Ordinance and the commission of the act of sodomy with him under section 377 of PPC. Whereas the learned trial Judge convicted and sentenced the appellant only under section 12 of the Hudood Ordinance, although he was of the opinion that the appellant was guilty of both the offences for which he was charged. The learned counsel for the State contended that the learned trial Judge had convicted and sentenced the appellant for both the offences while on the contrary the learned counsel for the appellant contended that the appellant has not been convicted

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and sentenced under section 377 PPC.I have considered this aspect of the matter very anxiously. It is a fact that the appellant was charged for both the offences. However, the learned trial Judge convicted him under section 12 of the Hudood Ordinance and no conviction was recorded for the offence under section377 PPC. It is not open to a court to pass no order on a charge framed against an accused person because the inference which would follow from not recording a conviction would be that the accused was found not guilty and was acquitted. The failure of the learned trial Judge to record any conviction under section 377 PPC would clearly disclose that the accused stood acquitted of that offence. Obviously no order can be made in appeal regarding this aspect of the matter because the impugned judgment in so far as it was silent with regard to the charge under section 377 PPC has not been challenged by the State in any revision or appeal.

12. The house where the boy was allegedly taken by the appellant is adjacent to the house of the complainant and they are close relatives interse,

the question of abduction as such does not arise. No sufficient evidence was brought on the record to prove the allegation of abduction of the minor boy against the appellant. This appeal is,therefore, accepted. The conviction of the appellant is set aside and he is acquitted of the offence for which he was convicted and sentenced. He shall be set at liberty forthwith if not wanted in any other case.

JUDGE

Karachi, the 14th
of December, 1992.
M.Akram/

Fit for reporting.