IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No.277/I of 2005

Nosherawan son of Muhammad Shah
R/o Kheshki Mohallah Lali Khel,
Police Station Pabbi Tehsil & District
Nowshera (NWFP) .... Appellant

Versus

The State .... Respondent

Counsel for appellant	....	Khawaja Azhar Rasheed, Advocate
Counsel for the State	....	Mr. Muhammad Sharif Janjua. Advocate
FIR. No. Date & Police Station	....	1005, 25.12.2000 Pabbi, Nowshera
Date of judgment of trial court	....	25.10.2005
Dates of Institution	....	14.11.2005
Date of hearing	....	29.05.2008
Date of decision	....	29.05.2008

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JUDGMENT

SYED AFZAL HAIDER, JUDGE.- Through this appeal Nosherwan has challenged the judgment dated 25.10.2005 passed by learned Additional Sessions Judge-III, Nowshera in Hudood Case No.69 whereby he was convicted under section 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 10 years rigorous imprisonment with 30 stripes and also with fine of Rs.20,000/-. The appellant has further been convicted under section 11 of the said Ordinance to life imprisonment with 30 stripes and fine of Rs.20,000/-. Both the sentence have been ordered to run concurrently. The five co-accused namely Inayat Ali, Muhammad Riaz, Malook Shah, Faiz Ullah and Sardar Ali tried along with the appellant Nosherwan were acquitted vide the same judgment.

2. This case arises out of a crime report FIR. No. 1005 registered on 25.12.2000 at police station Pabbi at 11.00.a.m. on the statement of Mst. Saeeda, complainant P.W.5. The brief facts as given out in the said crime report are that about 2 or 2 ½ years back Mst. Saeeda complainant was married with one Mamoor and she got divorce from her husband a year back due to strained relations and since then was living with her parents. A

daughter was also born out of this wedlock. On the night of occurrence she was asleep in her parent's house when accused Nosherwan, Malook Shah, Muhammad Riaz, Inayat, Sardar Ali and Bacha, after entering her room, covered her mouth and abducted her alongwith minor daughter and took her to Rawalpindi where they confined her in the house of their relatives. Accused Nosherwan committed zina-bil-jabr with her. On 24.12.2000, during morning time when accused Nosherwan was away from the house she managed to escape and came back to her parents house alongwith her minor daughter. Thereafter she charged all the accused and prayed for initiation of criminal proceedings against accused including Nosherwan for abduction and zina-bil-jaber. Investigation and trial ensued after the registration of the complaint with police.

3. The case was partly investigated by Hussain Khan, Sub Inspector. He had drafted the FIR, visited the place of occurrence, prepared site plan Ex.PB, recorded statements of witnesses under section 161 of the Code of Criminal Procedure, arrested the accused and got the victim medically examined. Thereafter charge report was submitted to the learned trial court against the accused persons.

4. The learned trial court framed charge on 21.09.2002 against the accused under section 11/16 of offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution produced as many as 11 witnesses to prove its case including the other incriminating material i.e. Medico Legal Report, Ex.PM of the victim, and positive report of the Chemical Examiner Ex.PW.1/3. Mst. Rukhsana mother of victim, appeared as PW1. She supported the version of the complainant PW.5. She is however not an eye witness of the occurrence. Abdul Baqi Khan, Inspector appeared as P.W.2. He arrested the accused Nosherwan from General Bus Stand, Nowshera on 10.02.201 while he was incidently present at the Bus Stand during Gasht. He handed him accused Nosherwan to officers of Police Station Pabbi. P.W.3, Mushtaq constable was entrusted with the warrants of arrest of accused Nosherawan and Safdar Ali. He was also entrusted with the proclamation notice of other accused named above. Sardar Hussain constable appeared as P.W.4 in whose presence the victim was got medically examined by the lady doctor. P.W.5 is Mst. Saeeda, the complainant herself who by and large repeated the same facts of her abduction and Zina. She however did not allege Zina bil Jabr

either to the appellant or any other accused. She was also examined on 21.05.2005 as C.W. Statement of Hussain Khan, S.I. was recorded by the trial court as P.W.7. He had partly investigated the case whose details have already been given above. Statements of remaining witnesses for prosecution are more or less of a formal nature.

6. Learned trial court after close of the prosecution evidence recorded statements of accused on 19.03.2005 under section 342 of the Code of Criminal Procedure wherein he denied the prosecution case and claimed innocence. The other accused in their statement under section 342 of the Code of Criminal Procedure endorsed the plea of Nosherwan. The learned trial court after appraisal of evidence and listening to the arguments of the parties came to the conclusion that there was "no sufficient proof of involvement of the remaining accused in either of the offences" and acquitted five accused except the appellant as noted above.

7. Learned counsel for the appellant was asked to tabulate the main points that he wished to agitate in support of his contention that the conviction and sentence recorded under sections 10 and 11 of Ordinance VII of 1979 cannot be maintained. It was contended inter alia that a) on the same

set of evidence five co-accused were acquitted but the appellant was convicted. He should also have been acquitted; b) that conceding for the sake of arguments that complainant had been abducted or had disappeared then there should have been some sort of police report to that effect. The absence of a report by the family member is a pointer to the fact that the complainant had left her house on her own; c) that the element of delay of sixteen days is fatal to the prosecution story; d) that Rehmat Shah, the fiancé of the complainant never moved the police for her recovery. Had there been abduction, Rehmat Shah would not have remained silent; e) the story of intoxicant having been administered is not believable. The intermediary link through whom the family was doped has not been produced by the prosecution. This means that this part of the assertion that at the time of abduction the entire family was unconscious and therefore was unable to witness the incident does not stand to reason; f) the trial Court did come to the conclusion that offences under section 5 and 6 were not proved within the meaning of section 8 of Ordinance, VII of 1979. Consequently conviction under sections 10 and 11 of the said Ordinance was not maintainable; g) that the element of medical evidence does not corroborate

her story of Zina bil jabr; h) that the story of her being removed by 'tonga' is not proved as no 'tonga' driver has deposed to that effect; i) that the defence plea that the appellant was in fact married to the complainant has not been considered in its true perspective. The trial Court not only held the Nikahnama to be fraudulent because the parents of the parties did not participate in the ritual of Nikah, but the learned trial court exceeded its jurisdiction in determining status of Nikah as fraudulent which however is the sole jurisdiction of the family Courts; j) in the end learned counsel prayed for reduction of sentence. On being asked as to the grounds for reduction of sentence the learned counsel submitted that contrary to the judicial practice the appellant has been awarded maximum punishment both under section 10 and 11 of Ordinance VII of 1979.

8. Learned counsel for the Sate however took issue with learned counsel for the appellant and averred that the conviction and sentence should be maintained because the learned trial court has not only assessed entire evidence but there is nothing averse or fanciful in the impugned judgment. He also stated that by raising the plea of Nikah the appellant has accepted that he had sexual relations with the complainant. Since the Nikah was not

genuine, so sentence under section 10 was justified. He further contended that the appellant never moved the Family Courts to challenge the marriage of Mst. Saeeda with Rehmat Shah performed subsequent to her recovery after the incident. It was stated that had the Nikah of the appellant with Mst. Saeeda been genuine, the appellant would have at least filed a suit for restitution of conjugal rights.

9. During the course of arguments, when the evidence of complainant recorded as C.W. on 21.05.2005 was read, which statement she gave almost two and a half years after her testimony was recorded as PW 5, we confronted the learned counsel for the parties to assist us on the legality of the second statement. Could a witness for the prosecution be re-examined as court witness after such a long time and should not there be an order stating reasons for calling a prosecution witness for re-examination? Another question relevant to the controversy would be that during her examination in chief an objection about her competence to appear again as a court witness was raised which objection though recorded was not decided for or against by the learned trial court. Is it possible to read such evidence as part of record at the appellate stage? Did the learned trial court forget to consider

the objection or did not consider it worth the while. Whatever be the reason such an attitude is not fair because the purpose of section 540 of the Code of Criminal Procedure is neither to rectify an error nor to fill in lacunae in the prosecution case. The law was not codified to give a licence to the prosecution party to ask for the recall a witness because there was an omission in his previous statement. It is not understandable that the witness is not only being re-examined on 21.05.2005 after a long period of two and a half year but the re-examination is taking place two months after the statement of accused, which was recorded on 19.03.2005 under section 342 of the Code of Criminal Procedure and little over four month after the prosecution case was closed on 17.02.2005. There are no detailed reason in the application to disclose the reasons for re-examination no speaking order of Court which could throw light on the reasons that prevailed upon him to exercise discretion at such a last stage. As a result thereof we are not inclined to consider this statement of C.W. recorded on 21.05.2005 as part of record. The obvious purpose, as is apparent from her examination-in-chief was to fill in the gap in the prosecution case as she had not stated in her previous statement recorded on 05.11.2003 as P.W.5 that F.I.R. Ex.PA bears

her thumbs impression. In fact there is no crime report proved in this case which is a serious omission.

10. A careful perusal of the record of this case disclosed that the appellant was charged on 21.09.2002only under section 11 and section 10 was omitted by the learned trial court but at the time of recording verdict of guilt the appellant was convicted for both the offences under section 10 and 11 of Ordinance VII of 1979. The wordings of section 233 of the Code of Criminal Procedure lay down the general principle that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 234, 235, 236 and239.

11. It is abundantly clear that the offence under section 10 of Ordinance VII of 1979 is distinct from the offence mentioned in sections 11 and 16 of the said Ordinance, even though they find mention in the same statute. There is however an exception mentioned in section 237 which empowers a court to convict an accused for an offence for which he was not charged if it appears in evidence that the accused has committed a different offence for which he might have been charged. This section which enshrines

an exception has to be construed strictly. Initially we were inclined to remit this case to the trial court for amending the charge but in view of the exception given in section 237 and the fact that quite a few years have elapsed between the registration of the crime report and decision on the appeal it would not be in the interest of justice to array the parties against each other once again, we decided to dispose of the matter at this stage.

12. The appellant was charged under section 11 but we find dearth of reliable evidence to support conviction under section 11 of Ordinance VII of 1979 for abduction. There is no element of force brought on record. The presence of five co-accused alongwith appellant has been disbelieved by the learned trial court and the five co-accused were in fact acquitted of the charge of abduction. But the evidence of Zina is available on record and according to section 237 of the Code the appellant could be convicted under section 10(2) of the Ordinance VII of 1979.

13. We also considered the possibility of convicting the appellant under section 16 which contemplates 'enticing or taking away or detaining with criminal intent a woman' but there is no evidence of any inducement or persuasion on the part of appellant. The Apex Court in the case of Hashim

Khan Versus State, reported as PLD 1991 Supreme Court 567 at page 573 held that "the word "take" does not mean taking by force. It implies to get into possession or cause to go with the accused. An accused may exert some influence on the woman. There may be some kind of inducement or seduction by the accused to attract the provision of section 16 of the Ordinance but where any woman has been taken away by force by a person against her will, the provision of section 11 of the Ordinance would be attracted."

14. In the present case, as already pointed out, the element of force is absent and at the same time there is no evidence to support even the element of seduction, inducement or persuasion employed upon Mst. Saeeda PW 5 on the part of appellant. The possibility of PW 5 herself going to the appellant cannot be ruled out and therefore we will consider it a case of consensual relationship between PW 5 and appellant. It means that conviction under section 10(2) of the Ordinance alone can be maintained.

15. Learned counsel for the appellant prayed for clemency on the ground that the appellant does not have a objectionable antecedents. It is a case of first offender and may be the girl herself seduced the appellant into

intimate relationship. It was further submitted that the appellant has already suffered imprisonment for over two and half years after the pronouncement of judgment and almost three months from the time he was arrested upto the day he was released on bail.

16. We have considered this case in the light of the ingredients of sections 10 and 11 under which conviction was recorded by the learned trial court. We have also examined the evidence of parties and thought over the points raised by learned counsel for the parties and carefully gone through the contents of the impugned judgment as well. As a result of this exercise we have come to the conclusion that case under section 11 is not made out at all. Therefore conviction recorded under section 11 of Ordinance VII of 1979 is being set aside. As regards the conviction under section 10 is concerned we are inclined to maintain it. The only question is the quantum of sentence. We are convinced that it was a case of consent and both the parties elected to suppress true facts. Neither any information was given to the police nor any effort made to lodge a complaint about her disappearance and secondly there is deliberate delay in making crime report even after Mst. Saeeda had reappeared around her ancestral home. However on her return

she opted to stay for the night with her fiancé before visiting the police station. In this view of the matter case for reduction of sentence is made out. The sentence awarded to the appellant under the circumstances is excessive and not in tune with the practice particularly in consent cases where parties are sui juris. Consequently the sentence imposed upon the appellant is being reduced to a period of two years and six months. Sentence of fine is reduced to Rupees five thousand only which amount has not been paid. In default of payment of fine we convert the imprisonment suffered by him after his arrest to have been undergone. The sentence of whipping is not maintainable. Resultantly the total sentences of fine and imprisonment recorded against Nosherwan son of Muhammad Shah recorded by learned Additional Sessions Judge-III Nowshera in Hadd case No. 69 as modified by this judgment is hereby converted to already undergone. The appellant shall be released forthwith unless required in any other case. The appeal therefore stands disposed of in the above terms.

JUSTICE SYED AFZAL HAIDER

JUSTICE MUHAMMAD ZAFAR YASIN

Announced in open Court
on 29.05.08 at Islamabad.
*Mujeeb ur Rehman/**

Fit for reporting.