

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

**MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH**

CRIMINAL APPEAL NO. 95/I OF 2009

Umair son of Razaqat, resident of Sir Syed Colony, Abbottabad

..... Appellant

Versus.

1. The State
2. Haji Muqarab Khan son of Haji Lal, resident of Ali Mera, presently Shamah Bakery, Abbottabad

..... Respondents

Counsel for appellant Mr. Saliheen Mughal,
Advocate

Counsel for State Ch. Muhammad Sarwar Sidhu,
Additional Prosecutor
General

FIR. No. Date & 121, 10.07.2006
Police Station Bagnotar, Abbottabad

Dated of judgment of 19.06.2009
trial court

Date of Institution 20.07.2009

Date of hearing 20.01.2011

Date of decision 20.01.2011

JUDGMENT

SYED AFZAL HAIDER, Judge.- This appeal has been preferred by appellant Umair against the judgment dated 19.06.2009 delivered by learned Additional Sessions Judge-I, Judge Juvenile Court, Abbottabad whereby the appellant was convicted under section 302(b) of Pakistan Penal Code and sentenced to life imprisonment and to pay Rs. 100,000/- as compensation to the legal heirs of the deceased and in default whereof to further suffer six months simple imprisonment. He has further been convicted under sections 11 and 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. On the former count he has been sentenced to life imprisonment with a fine of Rs. 5000/- or in default thereof to further undergo sentence of one month simple imprisonment while on the second count he has been awarded 03 years rigorous imprisonment and further fine of Rs. 5000/- and in default thereof to suffer another term of one month simple imprisonment. He has also been convicted under section 337-L of Pakistan Penal Code and ordered to pay Rs. 10,000/- as Daman and in

default whereof to further suffer one month simple imprisonment. Sentences on all counts were ordered to run concurrently.

2. The facts leading upto this appeal are that Haji Muqarab Khan, complainant/P.W.5 laid information with Police Station Bagnetar on 10.07.2006 at 3.00 p.m. that his daughter Mst. Hina Bibi and his niece Mst. Saiqa Bibi had gone to Sir Syed Colony to extend invitation of the marriage ceremony of their sister at the house of Yasir, the absconding accused, on the same day. On their return Yasir and his friend, who was later on identified as Umair, were standing by a car, registered number 508 HF. Yasir accused offered a lift to both the girls upto Shamah Bakery near their house. Umair appellant drove the car. The appellant did not stop the car at the appointed Bakery. The vehicle drove towards Harno at a faster speed. The girls reportedly raised noise and during the struggle the driver lost control of the car with the result that the vehicle skidded and overturned near old toll plaza. Both the girls sustained injuries. Mst. Hina Bibi succumber to her injuries in DHQ hospital. It was alleged that the girls were abducted for committing Zina. The police, consequent upon receiving the crime report, registered case FIR No.121/06 under section 279/337-G/320 of Pakistan

Penal Code read with sections 11/16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Section 320 was converted in section 302 after confirmation of death of Mst. Hina Bibi.

3. Investigation ensued as a result of registration of crime information. Javed Khan Inspector undertook investigation. He visited the place of occurrence, prepared site plan Ex.PB and took into possession car vide recovery memo Ex.PW.2/1. He also took the last worn blood stained clothes of deceased Mst. Hina Bibi. He arrested the accused and sent the accused to the judicial lock up after the request for their remand was refused. Mst. Saiqa Bibi was then produced before the Magistrate where she got her statement recorded under section 164 of the Code of Criminal Procedure. The Investigating Officer also recorded statements of witnesses under section 161 *ibid*. After completion of all legal formalities a report under section 173 of the Code of Criminal Procedure was prepared and submitted in the court requiring the accused to face trial.

4. The learned trial court on receipt of the said report framed charges under six heads against the absconding accused Yasir and appellant Umair under sections 279, 302/34, 337-A(i) read with section 337-L/34 of

Pakistan Penal Code as well as sections 11 and 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case produced 09 witnesses at the trial. The gist of deposition of witnesses is as under:-

- i. Muhammad Nawaz, Head Constable appeared as P.W.1 and stated that on receipt of Murasala Ex.PA./1 he registered FIR. Ex.PA;
- ii. Muhammad Nawaz, Constable No. 46 appeared at the trial as P.W.2 to depose that on 10.07.2006 the car used in the occurrence was taken into possession vide recovery memo Ex.PW.2/1 which was duly attested by him.
- iii. Khurshid, Constable No.60, appeared at the trial as P.W.3 to state that he signed the memo of recovery Ex. PW 3/1 of Blood stained were garments of deceased of which were taken into possession by the Investigating Officer;
- iv. Sardar Jehangir Khan, SHO Police Station City, Abbottabad was produced by the prosecution as P.W.4. He stated that he was posted at Police Station Bagnetar during the days of occurrence and on receipt of information regarding the occurrence, he proceeded to District Headquarter Hospital, Abbottabad. Haji Muqarab Khan reported the occurrence to him and thereafter he prepared murasala Ex.PA/1 and sent the same

to the police station for formal registration of FIR. He added that after completion of investigation report Ex.PW.04/1 under section 173 of the Code of Criminal Procedure was submitted to the court;

- v. Haji Muqarab Khan appeared as P.W.5 and endorsed the facts recorded in the murasala Ex.PA/1 on his statement. . He is however not eye witness of the occurrence;
- vi. Mst. Saiqa Bibi victim appeared as P.W.6 and gave details of occurrence. She corroborated the statement made by P.W.5;
- vii. Statement of Dr. Nusrat Ara, Women Medical Officer, DHQ Hospital, Abbottabad was recorded as P.W.7. She deposed that post mortem was conducted by her on the dead body of Mst. Hina Bibi on 10.07.2006. She further deposed that Post Mortem report Ex.PW.7/2, consisting of 06 pages, was issued by her;
- viii. Muhammad Anwar, MVE appeared as P.W.8 and deposed that he was well acquainted with the handwriting and signatures of his predecessor Engineer Mostakeem Ahmed who had prepared the mechanical examination notes of the damaged car Ex.P.W.8/1 on the application; and lastly
- ix. The statement of the Investigating Officer Javed Khan, Inspector, was recorded as P.W.9. The details of his investigation have already been mentioned in an earlier paragraph of this Judgment.

6. The learned trial court after close of the prosecution evidence recorded statement of accused Umair under section 342 of the Code of Criminal Procedure. The latter in answer to question, "why the P.Ws have deposed against you" stated as under:-

"There is no legal and plausible evidence against me. No identification parade was held to prove my culpability nor the owner of motor car No.508/HF was produced to depose to whom the said vehicle was handed over and who was driving the same nor it is proved that the said vehicle was damaged during any accident. The complainant most probably in order to save his own skin from the murder of Mst. Hina fabricated this story of abduction and accident in connivance with Mst. Saiqa and the police and I was made an escape goat. Moreover, my residential address is neither given in the FIR nor in the statement of Mst. Saiqa recorded under section 164 of the Code of Criminal Procedure. Complainant is not the eye witness of the occurrence. Mst. Saiqa P.W.6 was not knowing the person who was allegedly accompanying accused Yasin at the time of occurrence nor any identification parade was held to fix my culpability in the commission of offence beyond reasonable doubt. The police

officials tried to distort the real facts in connivance with the complainant party”.

7. After completing the codal formalities of the trial the learned trial court on 19.06.2009 returned a verdict of guilt against Umair appellant. He was convicted and sentenced as mentioned in the opening paragraph of this Judgment. The co-accused Yasir was proceeded against under section 512 of the Code of Criminal Procedure and perpetual warrants were issued against him. The present appeal has been filed by Umair to challenge convictions and consequent sentences.

8. In the meantime compromise proceedings between the legal heirs of deceased and Umair appellant commenced in this Court. A direction was issued by this Court to the learned Additional Sessions Judge-I, Abbottabad to verify the factum of compromise. A direction was also issued to ascertain whether the deceased was married and had left heirs other than her parents. Evidence in this regard was duly recorded by the learned trial court and on being satisfied that there was no other heir except the aggrieved parents, reported that the compromise in this case had been effected with “free consent.” We are therefore, under these circumstances, inclined to

accept the compromise which ought to be given legal effect to. The consequence of the completion and the consequent judicial acceptance of the compromise between the appellant and the legal heirs of the deceased is acquittal of the former as the offences have been compounded in terms contemplated by sub section (6) of section 345 of the Code of Criminal Procedure. However this acquittal will be operative only to the extent of convictions recorded under sections 302(b) and 337-L of the Pakistan Penal Code. The fate of convictions and sentences recorded under other offences will hereafter be discussed.

9. Learned counsel for the appellant under these circumstances has raised the following points for consideration of Court:-

- i. That the conviction recorded by the learned trial court under section 11 and section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 about the same transaction is not sustainable in law;
- ii. That in the facts and circumstances of this case an offence under section 365 of Pakistan Penal Code at best would be made out;
- iii. That the evidence on record of the case does not disclose any offence;

iv. That in cases where compromise has taken place in the major offence the Courts normally adopt a lenient view in so far as minor offences are concerned; and

v. Lastly that the appellant was of tender age at the time of incident and has improved considerably during this period of internment and he is devoting his time to education in the prison house. Such a person needs moral support.

10. Learned counsel appearing on behalf of the State however submitted that convictions should be maintained but in view of the facts and circumstances of the case the Court may take lenient view in order to help the appellant in becoming a responsible citizen.

11. We have gone through the record. The evidence produced by the prosecution as well as the statement of accused have been perused. The factum of compromise as regards the offence under section 302(b) and 337-L of Pakistan Penal Code on the direction of this Court has been verified by Additional Sessions Judge, Abbottabad and consequently the said offences have been compounded with the permission of this Court in the light of section 345 of the Code of Criminal Procedure.

12. We have considered the points raised by the contending parties. After hearing the arguments and pondering over all the facts as well as examining the legal position we accepted the appeal partially and announced the following order in the Court:-

“For reasons to be recorded later, this appeal is partly accepted. The conviction under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is set aside while the conviction under section 16 ibid is maintained. However the sentence awarded under section 16 ibid is reduced to one already undergone as the appellant has already served almost two years in jail. In so far as his conviction and sentence recorded under sections 302(b) and 337-L of the Pakistan Penal Code is concerned the appellant has earned an acquittal on the basis of a compromise effected between him and the complainant. Consequently he is acquitted on both the said counts. The appellant was also awarded mandatory fine of Rupees five thousand under section 16 of Ordinance VII of 1979. This punishment is being maintained. The appellant had not been granted the benefit of section 382-B of the Code of Criminal Procedure. He is now being awarded the same so

that the period spent by him in jail during trial may be adjusted against the alternative punishment extending to one month under section 16 of Ordinance, VII of 1979. The appellant will be released forthwith if the Superintendent Jail is satisfied that the period of one month awarded to the appellant in lieu of payment of fine under section 16 ibid had been suffered by the appellant during trial. In case the appellant has suffered imprisonment for less than one month then he will undergo the balance of days to complete the term of one month awarded to him in lieu of the fine awarded under section 16 ibid”.

This short order was announced to facilitate release the appellant if he had completed the term of imprisonment, if any, in lieu of payment of fine awarded under section 16 of Ordinance VII of 1979 and also because he is a young man who has apparently realized the nefarious consequences of his youthful venture. The path of repentance must be supported, particularly in the wake of forgiveness by the aggrieved party.

13. Our reasons for the said short order are as follows:-
- i. After the conclusion of compromise between the appellant and the complainant party and the compounding of offences with

the permission of this Court the appellant has been acquitted of the major charge under section 302(b) as well as section 337-L of Pakistan Penal Code. We are therefore left only with the portion of the convictions recorded under section 11 as well as section 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979;

- ii. Section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is attracted when a woman is kidnapped or abducted with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. In this case there is not an iota of evidence to bring the appellant within the mischief of kidnapping or abduction. It is the basic principle of criminal jurisprudence that conviction can be recorded only after ingredients of the offence complained of have been established by the prosecution beyond shadow of reasonable doubt. In the instant case the surviving victim Mst. Saiqa Bibi, who appeared at the trial as P.W.6, did not say a single word about the criminal intention of accused. It was not even hinted that the girls were being taken to be married with any person against their will or were about to be forced to have illicit sexual relationship either in her statement recorded under section 164 of the Code of Criminal Procedure and when she appeared as PW.6 at the trial. On both occasions she was under oath.

covered by the term deceitful means. In the case of kidnapping, the element of minority of victim is the essential ingredient though the element of force or fraud is not a necessary constituent of the offence of kidnapping. Taking or enticement is another component of the offence of kidnapping. These two terms are not synonymous because *taking* is independent of the mental attitude of the person being kidnapped while *enticement* means inducing a minor to leave the protection of his/her guardian. There has to be some sort of allurement or persuasion to bring about the necessary willingness in the mind of the minor. In the instant case however the basic condition i.e. minority is lacking and hence the case is not covered by the mischief of kidnapping either.

- vi. The element of "*taking*" does not necessarily involve the use of force on the part of accused. However it must be proved that the latter took some initiative or active part in persuading the woman to accompany him. In this case the accused Yasir made an offer which was accepted by the two girls who consequently boarded the car on the assurance that they will be dropped at a certain point near their home but unfortunately the car met an accident after the entreaties of the girls to drop them at the Shamah Bakery had fallen on deaf ears. The offer made by the accused to drop the girls near their residence was certainly an allurement which is covered by the mischief of section 16 of Ordinance VII of 1979.

vii. Conviction on both counts simultaneously would mean that the appellant;

- i. kidnapped or abducted the two girls;
- ii. with intent that they may be compelled to marry against their will/or forced or seduced to illicit intercourse (as provided in section 11)

AND THE APPELLANT CONCURRENTLY

- i. enticed or took away the very same girls;
- ii. with intent that she may have illicit intercourse with any person (as provided in section 16)

But it is not possible that any accused will be simultaneously conducting himself in a manner which will expose him to the hazards of these two different offences. It is, therefore, not viable to record conviction simultaneously under both the sections while adjudicating upon the same transaction. This trend of recording convictions contemporaneously under sections 11 and 16 of Ordinance VII of 1979 must be eschewed. It has been held by a Full Bench of the Federal Shariat Court in the case of Muhammad Ishaque and another Versus The State and another and Mst. Safia Versus Muhammad Ishaque 1985 P.Cr.L.J. 142 that the ingredients of section 11 and section 16 ibid do not overlap. Following this Full Bench ruling a learned Single Bench of this Court in the case of Muhammad Bakhsh and 03 others Versus The State also found that it was not possible to record conviction both under sections 11 and 16 of Ordinance VII of 1979 as the ingredients of both the sections

are district. Notwithstanding these reports we come across cases in which the direction and guidance provided by this Court is not followed. A copy of this Judgment will consequently be sent to the Registrars of the Provincial High Courts including Islamabad High Court so that necessary instructions are conveyed to the trial courts to follow the aforementioned dictum pronounced by this Court while dealing with charges under sections 11 and 16 of Ordinance VII of 1979. It may not be out of place to recapitulate the text of Article 203GG of the Constitution which reads as under:-

“Subject to Article 203D and 203F, any decision of the Court in exercise of its jurisdiction under this Chapter shall be binding on *a High Court and on all Courts subordinate to a High Court*”.(Emphasis added)

- viii. The trial court should not have been persuaded by a report sent by the police sent under section 173 of the Code of Criminal Procedure requiring the accused to face trial under different categories of offences particularly when the grounds of holding that opinion is withheld from the Court or are absolutely non-existing. The trial court should also be not influenced by *ipse-dixit* of police. The trial court in such circumstances must apply its own judicial mind to determine whether the case falls under section 11 or is covered by the ingredients of section 16 of Ordinance VII of 1979. Application of section 11 should not be a routine matter as it involves the penalty of life imprisonment.

ix. We are convinced that it is a case which is covered by the mischief of section 16 alone because there is an element of persuasion for the females to go somewhere or to put it in other words a representation was made to the girls to accompany the accused by offering a lift upto their abode. This is precisely what is meant by enticement. The result of this line of argument is that the conviction recorded by the learned trial court under section 11 of Ordinance VII of 1979 cannot be sustained and it is hereby set aside. The appellant consequently is acquitted of this charge. However as mentioned in our short order, the sentence awarded under section 16 ibid has been reduced to already undergone. The precise reasons for reduction of sentence and grant of benefit of section 382-B of the Code of Criminal Procedure are that a compromise has been legally finalized and given effect to the major offence, so it would be in the fitness of things to give weight to the consensus documents of the parties in the larger interest of peaceful co-existence. However we are conscious that Islam recognizes the right of an aggrieved person to forgive an offender involved in offences relating to human body. In this view of the matter legal effect and sufficient space should be given to the declaration of forgiveness announced by complainant. The other reason that prevailed upon us in taking a lenient view was the assurance given at the Bar that the appellant has improved considerably and is at present studying in jail. The change for the better in young people in particular should be appreciated

and encouraged. Resultantly the appellant should no more either remain in the company of hardened criminals or suffer apprehensions about his future. Thirdly, we have noted that the offer to use the conveyance was made by Yasir accused to the girls who obviously knew him and relied upon what he had said. The girls were trapped due to his offer. The present appellant was on the driving seat. His case is in fact covered by Islamic provisions relating to attempts. His contribution was during the car in which Yasir accused in his presence had asked the girls to board the car. According to Islamic principle of administration of criminal justice if the intention to commit the offence is completed the accused can be visited with the prescribed punishment but if the intention was frosted by some event, beyond his control, he will then be liable for half the punishment because he had commenced or aided in the commencement of the culpable action. It is for this reason that Islamic jurisprudence provides almost half the punishment than the prescribed punishment that may be awarded to a person who has completed the offence. Element of attempt in this case is attracted because there was instant intention to commit the crime of enticing, coupled with the performance of driving the car and speeding it up near the Bakery and the inability to consummate the actual commission of offence on account of car accident which was a factor beyond his control.

x. We will no more dilate upon the submission that at best this case is covered by provisions of section 365 of Pakistan Penal Code.

xi. A half hearted effort was made to urge that on the given facts and circumstances of the case no case was made out against the appellant. We are not impressed by this argument because the learned counsel agreed that the appellant sought forgiveness. He received pardon from a person aggrieved of their unlawful act. The fact of the matter is that the two girls were in the car and the car did not stop at the Shamah Bakery as per promise. The accident took place after the car had gone ahead of the said Bakery. The accident was result of a scuffle between the inmates of the automobile. The information on the basis of which SHO P.W.4 reached the hospital and recorded the crime report was not questioned in cross-examination by the appellant.

14. As held above the charge under section 11 of Ordinance, VII of 1979 has not been proved against the appellant. On the basis of evidence brought on record we had also to examine the applicability section 16 *ibid*. The ingredients of section 16 *ibid* read with section 18 *ibid* have been proved in this case.

15. In this view of the matter and for reasons recorded above,

Criminal Appeal is accepted to the extent that the appellant:-

- i. is acquitted of the charges under sections 302(b) and 337-L of Pakistan Penal Code; and
- ii. is also acquitted of charges under section 11 of Ordinance VII of 1979. Convictions on both the counts are consequently set aside.

BUT

- i. his conviction under section 16 of Ordinance VII of 1979 is converted to conviction under section 16 read with section 18 *ibid*;
- ii. however the sentence awarded to the appellant is reduced to the one already undergone; and
- iii. he is awarded the benefit of section 382-B of the Code of Criminal Procedure to enable him to cover the period of one month simple imprisonment prescribed in lieu of payment of fine.

JUSTICE SYED AFZAL HAIDER

JUSTICE SHAHZADO SHAIKH

Dated Islamabad the 20th January, 2011
*Umar Draz Sial/**

Fit for Reporting

JUSTICE SYED AFZAL HAIDER