

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

(19)

PRESENT

Mr. Justice (Retd) Salahuddin Ahmad	Chairman
Mr. Justice Aftab Hussain	Member
Mr. Justice Karimullah Durrani	Member

CRIMINAL APPEAL NO.31/I OF 1980.

Muhammad Arshad and others	.....	Appellants
Versus		
The State	.....	Respondent
Date of hearing	.....	28-3-1981
For the Appellants	.....	Sh. Zahur-ul-Haq Advocate.
For the Respondent	.....	Nemo.

JUDGMENT

KARIMULLAH DURRANI, MEMBER, This is an appeal from the judgment of Mian Habib-ur-Rehman, Additional Sessions Judge, Gujrat dated 26th November, 1980 whereby Mohammad Arshad son of Ghulam Haider, resident of Dinga, Tehsil Kharian District Gujrat, accused-appellant, was convicted under Section 18 of the offence of Zina (Enforcement of Hadood) Ordinance (VII of 1979) and sentenced to three years R.I.

2. The prosecution story as transpires from the First Information Report is that, on 13-8-1979, at the evening time, during the month of fasting, Mst. Shahida Perveen, P.W.1 aged about 10/11 years was sent by her parents to the bazar from the house to fetch ice. The girl after making purchase from a vendor started towards her house. The accused-appellant

Contd. ...P/2.

at that time was standing in the door of his house which was situate on the way. The accused caught hold of the left arm of the girl when she was passing the door of his house and asked her to get inside so that a message be delivered to her. On her refusal she was lifted up by the accused and taken by force inside the 'baitak' of the house. The accused laid the girl on the cot and started kissing her and made attempts to take off her trousers. On the cries of the girl one Nasar Ullah (not produced as a prosecution witness), Ali Muhammad son of Imam Din, P.W-2 and Ghulam Fatima P.W-3, all residents of the village, were attracted to the spot. P.W. Ghulam Fatima entered the house and got the girl freed from the clutches of the accused. The accused decamped towards the roof of the house and in spite of the effort of Nasar Ullah and Ali Muhammad to apprehend him succeeded in making good his escape. In the meanwhile, Ghulam Rasul P.W-4, the father of the abductee, also reached the lane and was informed of what had happened. This P.W. then took the girl to the Police Station Dinga, where the First Information Report was lodged on the same day at 8.00 P.M. by the abductee herself.

3. Ali Ahmad P.W-2, Ghulam Fatima P.W-3 and Ghulam Rasul P.W-4 besides the prosecutrix, Shahida Parveen as P.W-1 and the Investigating Officer Abdul Razaq, Sub Inspector Police as P.W-5 were examined in the trial. Out of the above named three ocular witnesses Ali Ahmad P.W-2, made a complete somersault from what he had stated earlier before the learned Magistrate seized with the matter in its trial before the transfer of the case to the file of the

learned Additional Sessions Judge. He was, on the request of the Public Prosecutor, declared ~~hostile~~ witness and as such subjected to cross-examination by the prosecution as well as ~~the~~ defence. The prosecutrix although a girl of ~~xx~~ tender age was very specific in narrating the details of the incident without any material variation from what was reported ^{by her} to the Police. P.W-3, Ghulam Fatima stated that on the day and time of occurrence she was going to the bazar from her house at about 'Sham Wela' when she heard noise near the door of the house of the accused and on reaching there saw P.W-Shahida Parveen weeping in the lane wherefrom she took her towards her house and that ~~while~~ on the way about 2 or 3 yards away from the place of occurrence ~~xx~~ met P.W Ali Muhammad and one Nasrullah. A little further on P.W- Ghulam Rasul, the father of the girl also came up to whom Shahida Parveen narrated the details of the occurrence. According to this witness she did not see the accused while reaching the girl and that the girl had told her that Arshad had taken her towards the 'dawari' of his house. Ghulam Rasul P.W. the father of the girl stated that on hearing noise he rushed towards the lane where he found his daughter Shahida Parveen who was weeping being brought by P.W. Fatima Bibi towards his house. His daughter told him that Arshad took her inside the house and laid her on the cot whereafter he started kissing her. According to this witness the girl also told him that the accused ran away on the arrival of P.W. Ghulam Fatima and the other P.Ws.

4. The accused in his statement under Section 342, Code of Criminal Procedure asserted that he was that innocent and one Ijaz Ahmad son of P.W. Ghulam Rasul had teased his sister at which the accused complained and that the said Ijaz Ahmad came to attack the accused in his house and in order to forestall a criminal case on this account by the accused against his son, Ghulam Rasul P.W. had falsely involved him in this case.

5. It is interesting to note that no such suggestion was put to Ghulam Rasul P.W. in the cross-examination rather an entirely different case was tried to be made out by suggesting to the said witness that he had falsely involved the accused on the asking of one Nasarullah who had enmity with the accused.

6. From the perusal of the statements of the P.Ws Ali Ahmad and Ghulam Fatima it becomes clear that both these witnesses seem to have been prevailed upon on behalf of the accused. While the former has turned completely hostile towards the prosecution the latter has also made an attempt to exclude the presence of the accused from her narration of the events. The prosecutrix on the other hand has remained persistent in giving one and the same narration of the occurrence throughout and, in spite of efforts, defence did not succeed in bringing about any contradiction in between her statement recorded in the earlier trial by the Magistrate and her deposition before the learned Additional Sessions Judge. This would not allow any ground to disbelieve the prosecutrix. The argument advanced on behalf of the

appellant before us that she was tutored by her father also does not find any basis on the record. As earlier stated, no inimical motive could be attributed to the father of the girl to contrive ~~xx~~ false accusation against the accused by involving his minor daughter therein.

7. Sh.Zahur-ul-Haq, the learned counsel for the appellant, has also urged that the allegations against the accused are easy to make. The contention is without substance as unless there is a very strong motive, which is absent in the instant case, it would not be easy for a father to stoop down to such a base depth as to slur the reputation of his minor girl by concoction of story of an unsuccessful sexual assault on her person. It was further urged on behalf of the appellant that during the trial before the learned Additional Sessions Judge the copies of the statements of the prosecution witnesses recorded under Section 161 Criminal Procedure Code and the site plan prepared by the Investigating Officer were not supplied to the accused and this omission, according to the learned counsel, vitiated the trial. This contention too is devoid of any force in view of the fact, that at the initial stage the Challan of the case was put in the Court of the learned Magistrate Ist Class wherein the trial proceeded after compliance with the formalities of the supply of copies of the evidence etc to the accused, and the statements of some of the prosecution witnesses were also recorded. After the amendment of the Offence of Zina (Enforcement of Haddood) Ordinance, 1979 by Ordinance XX of 1980, the case became transferred to the file of the learned Additional Sessions Judge and the trial started anew. Now, if at this later stage, the

copies were not, once again, supplied to the accused it would not result in mis-carriage of justice. The learned counsel, on our asking, has failed to point out any prejudice caused to the accused on this account. In this state of the matter a defect in the trial on this account, if any, stands cured under Section 537 of the Code of Criminal Procedure.

8. Now, coming to the nature of the offence and the conviction of the accused therefor by the learned trial Court, I fail to see justification of the conviction of the accused-appellant under Section 18 of Ordinance VII of 1979 as it was not a mere attempt on the part of the accused of an offence punishable under the Ordinance. Rather the ingredients of the offence under Section 16 of the Ordinance became available with the act of the accused. This Section reads as under:

16. Enticing or taking away or detaining with criminal intent a woman.

"Whoever takes or entices away any woman with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years and with whipping not exceeding thirty stripes, and shall also be liable to fine."

The bodily lifting of the prosecutrix by the accused and taking her inside the house and thereafter the indulgence of the accused in kissing

Contd.

...P/7.

-(7):-

23

the girl and his attempt to undress her are clear pointers to his intention to have forcible illicit intercourse with the girl.

9. In view of the above, the conviction of the appellant is therefore, altered to that under Section 16 of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 while the sentence of three years R.I. awarded to the accused-appellant is upheld. With this modification the appeal is dismissed.

[Signature]
MEMBER - III

[Signature]
CHAIRMAN

[Signature]
MEMBER - II

Dated Islamabad the
28th March 1986.