IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE DR.FIDA MUHAMMAD KHAN

MR.JUSTICE MUHAMMAD ILYAS

CRIMINAL APPEAL NO. 212/ L OF 1992

1. Abdul Hameed son of Bashir Ahmad, and 2. Nadeem son of Ghulam Ahmad; Both residents of Chak No.68/RB, Tehsil Jaranwala District Faisalabad;	...	Appellant
	Versus	
The State	...	Respondent
Counsel for the appellant	....	Mr.Muhammad Saleem Akhtar, Advocate
Counsel for the State	...	Ch.Muhammad Ibrahim, Advocate.
FIR No., date & Police Station	...	249, 24.8.1991, Khurrianwala, Tehsil Jaranwala, Faisalabad.
Date of order of trial Court	...	4.5.1992
Date of institution	...	21.5.1992
Date of admission	...	16.6.1992
Date of hearing	...	22.2.1993
Date of decision	...	18-4-93

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JUDGMENT:

MUHAMMAD ILYAS,J.- Abdul Hameed and Nadeem have preferred this appeal against judgment, dated the 4th May, 1992, passed by Mehr Mumtaz Hussain Lali, Additional Sessions Judge, Faisalabad, whereby he convicted them under sub-section(3) of section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, hereinafter referred to as the said Ordinance, and sentenced each of them to undergo rigorous imprisonment for fifteen years and to whipping by thirty stripes on the charge of subjecting Mst. Jannat Bibi (P.W.3) to zina-bil-Jabr.

2. Prosecution case is that on 23rd August, 1991, at about 1.30 p.m., Mst.Jannat Bibi was present at a Dhari in the area of Chak No.68/RB when the appellants dragged her to a nearby field in which sugarcane crop was growing and forcibly committed zina with her. On hearing her hue and cry, Anwarul Haq (P.W.2), Naseer (not examined) and Asghar Ali (D.W.1) reached the place of occurrence and saw that Abdul Hameed appellant was holding the hands of Mst.Jannat Bibi while Nadeem appellant was committing zina-bil-jabr with her. On seeing the witnesses, the appellants made good their escape. The said witnesses then brought Mst.Jannat Bibi to the Dhari where she told them that the appellants had committed zina-bil-jabr with her. On the following day, the incident was reported by Anwarul Haq (P.W.2), who is brother of Mst.Jannat Bibi, at

the Police Station Khurrianwala, District Faisalabad, whereupon formal FIR, Ex.PC, was drawn up. On the same day, namely, 24th August, 1991, Dr.Navida Rashid (P.W.4) examined Mst.Jannat Bibi and observed as follows:-

"1. Breasts atrophied.

2. Axillary hair, pubic hairs are scanty.

3. No mark of violence on other parts of body.

4. Hymen was torn, tears were fresh all around orific, which were bleeding profusely.

5. Vagina admitted one finger tightly on examination."

It was also stated by the lady doctor in her medico legal report, Ex.PE, that Mst.Jannat Bibi was "extremely tender and a tear was present on posterior vaginal wall and vagina was full of clots." She took two vaginal swabs for examination by Chemical Examiner, Lahore. It was opined by the Chemical Examiner that the vaginal swabs were stained with semen. His report in this regard is Ex.PG.

3. P.W.1 Dr. Muhammad Imtiaz Rubbani, examined the appellants and stated that they were fit to commit sexual intercourse. His reports in the matter are Exs.PA and PB.

4. After necessary investigation, the appellants were sent up to face trial. They were charged under section 11 and sub-section(3) of section 10 of the said Ordinance, but they did not plead guilty and claimed to be tried.

5. The prosecution produced as many as six witnesses to prove its case. Thereafter, in their statements under section 342

of the Code of Criminal Procedure, the appellants pleaded that the prosecution version regarding commission of zina-bil-jabr by them was not correct. Abdul Hameed gave the following reason for his involvement in this case:-

> "This case has been made out against me due to party Baradari faction in the village. Mst.Jannat Bibi did not name us in the commission of offence at her first version and thereafter the complainant lodged the FIR in accordance with his own choice and the statement of victim was also got recorded by the victim in order to support the complainant version."

6. Explanation furnished by Nadeem appellant for the charges levelled against him is to the following effect:-

> "I have been buying the milk from complainant party. A short ago, a dispute arose between us and I stopped to buy the milk from complainant party, whereupon they become angry with me and due to this fact they falsely involved me in this case merely on conjecture and surmises. Although victim did not name us at her first version deposed before the PWs as we heard lateron."

7. As indicated above, in their defence the appellants examined Asghar Ali (D.W.1), who was mentioned in the FIR as an eye-witness, and was given up by the prosecution. The appellants did not appear as their own witnesses.

8. Learned Additional Sessions Judge acquitted the appellants

of the charge under section 11 of the said Ordinance but convicted and sentenced them under sub-section(3) of section 10 thereof as stated at the out set.

9. It was contended by the learned counsel for the appellants that there were large number of contradictions, discrepancies and improbabilities in the prosecution case and, therefore, it did not justify their conviction. His submissions in this regard will be considered in due course. In reply to his argument, it was urged by the learned counsel for the State that the defects pointed out by learned counsel for the appellants were immaterial and did not justify the acquittal of the appellants.

10. The foremost factor which has created doubt in our mind with regard to the identity of the appellants is that it was stated by Mst.Jannat Bibi (P.W.3), who is the victim in this case, that after the occurrence when she had first contact with her brother, Anwarul Haq (P.W.2) she told him that according to her guess the offence had been committed by Manzoor and Murtaza. If it was a day-light occurrence, as stated in the FIR, and it is not the prosecution version that the culprits had muffled their faces, the question of her making a guess would not have arison. It is in the statement of Mst.Jannat Bibi that both the appellants were known to her and they were also identified by the witnesses. A little later she changed her position and said that she knew Nadeem appellant previously but Hameed

appellant was seen by her for the first time on the day of occurrence. Although she had denied the suggestion that the actual culprits were Manzoor and Murtaza yet her statement regarding the aforesaid guess in respect of Manzoor and Murtaza has made the involvement of the appellants highly doubtful. It has, virtually, knocked the very bottom out of the case of the prosecution.

11. Further, according to the site plan, Ex.PF, prepared by investigating Officer, the place of occurrence is 28 karams from the Dhari from where Mst.Jannat Bibi was forcibly lifted. The eye-witnesses were at a distance of one killa when they heard her hue and cry. It is not the case of Mst.Jannat Bibi or of any one else that she raised alarm as soon as the culprits forcibly lifted her from the Dhari. What appears from the prosecution evidence is that she raised alarm only at the time of occurrence. Her silence during the period for which she was forcibly taken from the Dhari to the place of occurrence shows that either she was a consenting party or the incident did not take place as stated by the prosecution. Be that as it may , this factor also creates doubt in regard to the soundness of the prosecution version.

12. It is also amaizing that the three eye-witnesses could not apprehend either of the two appellants. If these witnesses had actually seen the occurrence, they should have succeeded in catching hold of at least one of the appellants because this abominable occurrence must have caused grave provocation to the witnesses, especially the

brother of the victim, who was also amongst them. It is also noteworthy that Asghar Ali (D.W.1), who, too, according to the FIR, had seen the occurrence alongwith the eye-witnesses cited by the prosecution, namely, Anwarul Haq (P.W.2) and Naseer (not examined), had stated that he contacted Mst.Jannat Bibi when she was weeping at her Dhari and on inquiry she told him that one Murtaza had committed zina with her. This indicates that he had not seen the occurrence and, therefore, there was need for making inquiry from her. We have already made a mention of the statement of Mst.Jannat Bibi in which she had guessed that she had been ravished by Manzoor and Murtaza. Thus, her statement to the extent of Murtaza tallies with the deposition of Asghar Ali. It was also stated by Asghar Ali that on hearing the alarm of Mst.Jannat Bibi, he, Anwarul Haq (P.W.2) and Naseer (not examined) rushed to the place of occurrence but it was not correct that when they reached the said place the appellants were molesting Mst.Jannat Bibi.

13. Keeping all this in view, we doubt that the persons named in the FIR as eye-witnesses had witnessed the incident giving rise to this case.

14. There is considerable delay in reporting the matter to the police. It is alleged that occurrence took place on 23rd August, 1991, at 1.30 p.m. Anwarul Haq (P.W.2), who is complainant in this case and a brother of the victim, said that after the occurrence they

continued sitting at the Dhari till evening. No explanation whatsoever is forthcoming as to why they remained at the Dhari for such a long time instead of going to the chak (village) and taking steps for making immediate report at the Police Station. It was explained by him that some persons tried to effect compromise and thus the making of the FIR was delayed. This is a usual explanation which is furnished to cover up delay in such like cases. It was stated by Anwarul Haq (P.W.2) that since their honour had suffered a serious set back, they did not agree to patch up the matter and reported it to the police. The pinch of the incident experienced by him soon after the occurrence would have been more than the one felt by him after the passage of several hours, and if he could not pocket the insult done to the family he should have hastened to report the matter to police. Delay in reporting the matter to the police also, therefore, indicates that the complainant party took time to decide as to who should be saddled with responsibility for the occurrence because according to one version Mst.Jannat Bibi was raped by Manzoor and Murtaza, and not by the appellants who were named in the FIR.

15. It was further submitted by learned counsel for the appellants that the appellants were aged about 16 years but the victim was about 40 years old. According to her brother, Anwarul Haq (P.W.2) she did not marry because she was sick. Her ailment has not been revealed. It is not the case of the prosecution that she was a crippled lady

and could, therefore, be easily subjected to zina-bil-jabr. We are conscious of the fact that a young boy, over-powered by sexual lust, can go to any extent to satisfy his lust but the picking up of an elderly and sick lady for such a purpose is somewhat unusual.

16. As already stated, of the three eye-witnesses cited in the FIR, Asghar Ali (D.W.1) has not supported the story embodied in the FIR. Another eye-witness, namely, Naseer has not been examined. The only eye witness who appeared to support the prosecution is Anwarul Haq (P.W.2). He is real brother of the victim and also the complainant. He did not catch hold of either of the two culprits. The victim suspected that two persons, who were not the appellants, had committed zina-bil-jabr with her. A little earlier, we have expressed doubts with regard to the presence of eye witnesses at the time of occurrence. In the circumstances, the statement of Anwarul Haq complainant is of little avail to the prosecution.

17. This leaves us with the statement of the prosecutrix. She, too, was not sure about the identity of the culprits inasmuch as on her first contact with her brother, Anwarul Haq, she told him that according to her guess she had been raped by Manzoor and Murtaza. She was not unacquainted with the appellants because in the first instance she categorically stated that they were known to her. A little later, however, she said that she previously knew Abdul Hameed appellant but had seen Nadeem appellant at the time of occurrence. We have

already noted, more than once, that she did not raise any alarm when she was lifted from her Dhari and taken to the place of occurrence at a distance of about 28 karams. Although there are rulings of the Superior Courts to the effect that in appropriate cases conviction can be based on the statement of the prosecutrix alone but in the circumstances of the present case her statement only does not justify the conviction of the appellants.

18. A technical objection raised by learned counsel for the appellants was that in the charge framed against the appellants, the date of occurrence was given as 23rd April, 1991, although at other places, in the record, the date of incident was mentioned as 23rd August, 1991. He pleaded that the said error in the charge had prejudiced the appellants' case. In reply, it was submitted by learned counsel for the State that the said discrepancy was of no consequence and the conviction of the appellants and sentences awarded to them could not be set aside on the basis thereof. In this connection, he placed reliance on section 537 of the Code of Criminal Procedure, which reads as follows:-

"537. Finding or sentence when reversible by reason of error or omission in charge or other proceedings. Subject to the provisions herein-before, contained no finding, sentence order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account -

(a) of any error, omission or irregularity in the complaint, report by police-officer under section 173, summons, warrants, charge, proclamations, order, judgment or other proceedings before or during trial or any inquiry or other proceedings under this Code, or

(b) of any error, omission or irregularity in the mode of trial, including any misjoinder of charges, unless such error, omission of irregularity has in fact occasioned a failure of justice.

Explanation.- In determining whether any omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

19. We feel that in the charge, the month of occurrence was wrongly mentioned due to typographical error. At other places, in the record, the date has correctly been stated. At no stage of the proceedings, appellants took exception to the date occurring in the charge although, in view of the explanation appended to section 537, they should have pointed out the said error at the earliest opportunity. Keeping all in this view, we are of the opinion that the mistake with regard to the month of occurrence, appearing in the charge, was of clerical nature and did not cause any prejudice

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to the appellants. In any case, this mistake, by itself, does not warrant the setting aside of the conviction and sentences awarded to the appellants. The error in question is, therefore, to our mind, of no avail to the appellants.

20. What emerges from the above discussion is that it is extremely difficult to uphold the conviction of the appellants because the prosecution has failed to establish its case beyond reasonable doubt. We have, therefore, no option but to acquit both the appellants of the charge under sub-section(3) of section 10 of the said Ordinance.

21. Resultantly, this appeal is accepted and conviction of the appellants under sub-section(3) of section 10 of the said Ordinance and the sentences awarded thereunder are set aside. They shall be set at liberty forthwith if not required in any other case.

(Muhammad Ilyas)
Judge

(Dr.Fida Muhammad Khan)
Judge

Announced in
Open Court.

18.4.1993
(MUHAMMAD ILYAS)

18.4.93
(FIDA MUHAMMAD)

Approved for reporting.

(Muhammad Ilyas)
Judge

Checked.
18-4-93

Naseer