IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

(21) 31

PRESENT

MR.JUSTICE AFTAB HUSSAIN	CHAIRMAN
MR.JUSTICE ZAHOOR-UL-HAQ	MEMBER
MR.JUSTICE KARIMULLAH DURRANI	MEMBER
MR.JUSTICE CH.SIDDIQ	MEMBER
MR.JUSITCE MALIK GHULAM ALI	MEMBER

CRIMINAL APPEAL NO.79/I OF 1981.

Kameer	.....	Appellant
	Versus	
The State	.....	Respondent
For the Appellant	.....	Malik Rab Nawaz Noon, Advocate
For the Responcent	.....	S.A.Rehman,Advocate
Date of hearing	.....	6.10.1981

JUDGMENT:

KARIMULLAH DURRANI, MEMBER: Mr.Muhammad Zaman Khan, Additional Sessions Judge-I, Sahiwal, vide his judgment, dated 14.5.1981, found Kameer son of Murad, aged about 45 years, milk seller, resident of Chak No.104/7.R, Tehsil and District Sahiwal, guilty of offence of Zina-bil-Jabr with the prosecutrix, Mst.Zaiban wife of Anwar, resident of the same Chak and convicted him under Section 10(3) of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979. He was sentenced to 5 years' imprisonment with whipping numbering 30 stripes. Being aggrieved of the judgment the accused above named has preferred this appeal.

2. Briefly stated prosecution story as gleaned from the First Information Report, is that during the night between Ist and 2nd July of 1980, at about midnight Mst.Zaiban, the informant, was sleeping in her house while her husband was absent having gone to Chak No.105 Ghakhranwala. Kameer accused-appellant arrived and committed forcible sexual intercourse with her. The prosecutrix offered resistance and had raised alarm which attracted PWs 5 and 6, Baqir and Allah Ditta, her close

Contd...P.2

(22)

neighbours to the spot, who caught hold of the accused coming out of the house. The accused was kept in custody by the villagers and was handed over to P.W.2, Aurangzeb, Head Constable who came to the village after having recorded the First Information Report at the instance of Mst.Zaiban Prosecutrix who had gone to the Police Station on 2.2.1980 at 3.00 P.M.for this purpose. This Head Constable arrested and sent the accused on the same day for medical examination. Accused was medically examined by Dr.Gulzar Ahmad P.W.3, for injuries who found the following injuries on his person:-

1. A laceration oblique 9 x i C.M. skin deep on lateral parietal eminence, swelling round about 5 x 5 C.M.
2. A contusion 3 x I C.M.on the back of left shoulder.
3. Abrasion 1½ x I C.M. on the front of left knee.

This examination took place on 2nd February,1980 at 11.00 P.M. on 6.2.1980. The accused was, once again, sent for medical examination to P.W.8,Dr.Khalid Mahmood for ascertaining his potency as a male and was found capable of committing sexual intercourse. In the opinion of Medical Officer the accused looked about 50 years old.

3. P.W.I,Dr. Zubaida Khatoon, Women Medical Officer Civil Hospital, Sahiwal, on 5.2.1980 at 1.10 P.M., medically examined the prosecutrix on the request of the Police for rape and submitted her medico-legal report, Ex.P.B. In this examination no injury was found on the person of the prosecutrix who looked of an age of about 35 years. Her labia Majora and labia minora were well developed. Her hymen was torn. Old tears were present. The vagina admitted two fingers easily.

4. Apart from the above, the ocular evidence against the accused-appellant of the offence consisted of the statements of the prosecutrix, Mst.Zaiban who appeared

Contd...P.3

(23) 33

as P.W.4 and the two above named neighbours Baqir and Allah Ditta, P.Ws 5 and 6, respectively. Shah Nawaz Assistant Sub Inspector P.W.7 investigated the case and submitted Challan.

5. The accused in his statement under Section 342 Code of Criminal Procedure denied the charge against him. His defence was that he was innocent and was falsely implicated by the prosecutrix in the case as he had been demanding a sum of Rs.400/-, from the prosecutrix which was due to him on account of supply of milk to her household. He has 4/5 buffaloes and sells their milk. According to him on the evening of the occurence Mst.Zaiban had asked him to visit her house to collect his dues on which he went accordingly where P.Ws Baqir and Allah Ditta and Anwar the husband of the prosecutrix were present. The money was not paid to him and instead he was given beating by all of them.

6. Amir son of Jhanda and Muhammad son of Machia, both residents of Chak No.104/7.R were produced in defence as DWs 1 and 2.

7. Coming to the evidence against the accused, the prosecutrix repeated the same story as was averred by her in the First Information Report which was proved as Ex.P.C. She further elaborated that P.W. Baqir reached the spot a little before the arrival of P.W. Allah Ditta and the accused was caught by these P.Ws when he was coming out from the Chapper. She had identified accused when he was committing Zina-bil-Jabr with her as it was a moonlit night and a lamp was also alight in the Chapper and alleged that she had also sustained some bruises on her arms during the resistence put up by her to the accused. She denied having ever purchased milk from the accused or owing any sum of money to him on this account. The

Contd...P.4

(24) 34

prosecutrix remained persistant in her allegations against the accused-appellant and could not be shaken even in a minor detail. Similarly, the two P.Ws, one out of whom, namely Allah Ditta resides adjacent to the house of the proxecutrix while the other lives at a distance of about 4 Kanals from the said house, fully supported the prosecution version in every detail and no discrepancy could be brought out in their statements. None of the three witnesses has contradicted the other in any manner whatsoever even in the details brought out in the cross-examinatcn. It was suggested to P.W. Allah Ditta that they were motivated on the instigation of one Falak Sher, a contestant in the local Elections for registration of false case against the accused as he had voted against the said candidate. The same motive for false accusation was also suggested to Baqir P.W. but strangely enough in his case the name of the contestant in the elections and the instigator to the false involvement of the accused was suggested as Hafiz Yaseen to whom it was alleged that the accused had not voted. Both the P.Ws vehemently denied these suggestions but the fact remains that with the change of the personalities of the elction candidates, the whole episode sought to be built on these suggestions falls to the ground and the pleas become mutually distructive. Moreover, even the accused did not attribute this motive to the prosecution in his statement under Section 342 Code of Criminal Procedure.

8. Mr.Shah Nawaz Assistant Sub Inspector of Police who appeared as P.W.7 [illegible] seems to have gone out of his way

Contd...P.5

(25) 25

in alleging that he arrested the accused on 5.2.1980 frcm the Railway Station, Hurrapa probably with the intention of demolishing the prosecution case of apprehension of the accused at the spot by P.Ws 5 and 6 and their co-villagers. This statement becomes pulpably false on his own answers to the cross-examination and from the statement of P.W.2 Aurangzeb Head Constable. It would be of interst to note that it was defence itself who brought out the real facts from this witness during the course of cross-examination and which are to the effect that the accused was handed to Aurangzeb, Head Constable by the P.Ws 5 and 6 and that it was on 2.2.1980, and also that on the following day P.W.I, Shah Nawaz had gone to the High Court and had returned on 5.2.1980. He admits having it within his knowledge that the accused was apprehended by the P.Ws at the spot of occurence and was handed over by them to P.W.2 Aurangzeb Head Constable. The latter in his statement positively asserts that after getting accused medically examined he handed him over to P.W.7 on 2.2.1980. When confronted with the date of the medical examination of the accused by P.W.3, Shah Nawaz, P.W.7 made a feeble attempt in justifying his story of the arrest of the accused on 5.2.1980, by alleging that at the time of arrest

Contd.....P.6

(25) 26

the accused had the medicolegal report, Ex.P.E., on his person. Needless to state the absurdity of this assertion in view of the fact that the accused was sent for medical examination on the day of his arrest i.e.2.2.1980 by ~~xxx~~ P.W. Aurengzeb, Head Constable to whom the medical Report Ex.P.E. was sent by P.W.3, Dr.Gulzar Ahmad. It is most unfortunate that in many a case some one from the Investigation Agency goes out of his way to wrongfully help a party to the proceedings in one way or the other. But here the attempt was so transparent as it did not require any effort to come to conclusion that, to say the least, it was not honest.

9. Malik Rab Nawaz, the learned counsel for the appellant assailed the conviction of the appellant on more than one ground. According to him the delay of almost 15 hours after the occurence in lodging the report casts much doubt on the authenticity of the prosecution version of the case. But this contention is without force. The village of the prosecutrix is situate at a distance of about 4 miles from the Police Station Harrappa where First Information Report was lodged. According to the prosecutrix the occurence took place in the midnight. A lonely lady who had been ravished in her house in the

Contd....P.7

(27) 37

dead of the night can reasonably not be expected to take upon herself to travel during the night a distance of 4 miles immediatley after the occurence for reporting the incident to the Police. It was but natural for her to wait for the arrival of her husband or for the dawning of the day before taking upon herself the journey to the Police Station. The month of February falls at the peak of the winter season in these parts of the Punjab when enough day light breaks only 3 or 4 hours before the noon. There is no suggestion in the evidence of the availability of any mechinical means of tranportation in the Chak where the occurence took place. She had most probably made journey by foot. The exact time of registarion of the report is not clear from the copy of the document Ex.P.C. It is alleged that it was at 3.00 P.M. on the following day. Some time must naturally have been consumed in travelling the distance. In this view of the matter the delay was not inordinate. This delay becomes immaterial also for the reason that the accused was caught hold of at the spot immediatley after the occurence by the villagers and was kept in custody till he was handed over to P.W.2 on his arrival to the village after the registrarion of First Information Report. Exception has also been taken to the fact of P.Ws 5 and 6 having not accompained the prosecutrix to the Police Station for making the complaint on the authority of a decision of the Lahore Bench of High Court of West Pakistan in "The State Vs.Jamalan" (PLD 1959 LAH 442) by the learned counsel for the appellant in that the ommision on the part of eye-witness to report the matter to the Police would make him an accomplice, [redacted]

Contd....P/8

(28)

9. With due deference to the learned Judges of the High Court the case cited as a precedent is of a murder and is on entirely different facts. Also learned Judges have not laid down that preposition of law which the learned counsel has propounded before us. As a matter of fact, this was propounded by the learned counsel in that case, but the learned Judges of the Division Bench repelled this contention in the following words:-

> "Aru (P.W.10) is not proved to have any motive to give false evidence against Jamalan, and the fact that he did not go to the police to make a report, which omission is explained in the first information report wherein it is said that Aru had told Jamalan that he should himself go to the police station to make the report, cannot be looked at as seriously as it would be in an ordinary case. According to the extrajudicial confession Aru (P.W.10) had been told by Jamalan that Mst.Gamni was being done to death because she was bringing a bad name to the family of her husband and Aru's omission to go to the police to make report would not be unnatural. Technically, however, Aru is no better than an accomplice, and prudence requires that his statement should be corroborated in material details before it can form the basis of the conviction of the accused."

10. Mere absence of the eye witness at the time of reporting of the occurence to the Police can in no manner adversely affect his credence if he is

Contd...P.9

29 35

mentioned in the FIR to have witnessed the incident. Rather in certain cases even omission of the mention of an eye witness in the First Information Report does not necessarily lead to discarding of his evidence if his witnessing the occurrence is proved by the strength of his evidence. It has also been urged that because the site plan does not show the place where from the witnesses saw the occurrence, their presence at the spot becomes doubtful. For this contention reliance has been placed on the minority judgment of Cornelius, C.J. in "Mehr Ali Vs. State" (1968 SCMR 161) in that case which was also of murder, the distance from where shots were fired was found by the Court somewhat different then what was described by the two eye-witnesses and also each of the two had stated a different one. On these facts, the omission to indicate in the plan where the eye witnesses were, was, therefore, held reflected on the possibility that they were not there at all. In the instant case facts are entirely different. A rough site plan of occurrence prepared by the Investigating Officer, Ex.P.D, has clearly marked the spot of occurrence which is in complete conformity with what was stated by the prosecutrix. The omission of making place of the presence of witnesses in the rough site plan would not be fatal to the prosecution case, as the comission of the offence by the accused is proved even without the help of the site plan. Here the case is that when PWs 5 and 6, reached the house of the prosecutrix the accused was coming out of it with his loin cloth in his hand and the prosecutrix was raising noise. He was caught hold of by these PWs in this state of semi-nakedness.

11. As P.W.1 Dr.Zubaida Khatoon did not find any mark of injuries or any other sign of rape on the person of the prosecutrix in her medical examination,

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it was urged on the authority of "Mumtaz Ahmad Khan Versus The State" (P.L.D 1967, S.C. 326) that the story of rape did not stand corroborated and therefore was to be disbelieved. The falacity of this argument would be apparent from the fact, firstly that the apprehension of the accused at the spot by PWs.5 and 6 furnishes necessary corroboration to the statement of the prosecutrix and secondly that the concerned lady is aged about 35 years. She is also a married one and that she was examined on 5-2-1980 i.e. after about 3 days of the occurrence. If she had received bruises in the resistence put up by her to the rape, these could have disappeared during the interval of 3 days after the occurrence where-after her medical examination took place. It is also in the testimony of the prosecutrix that she did not show her injuries to the lady Doctor..Probably the Medical Officer had remained concerned with the private parts of the body of the prosecutrix. Now a married woman when ravished would not have such signs of aggression on her private parts as of swelling or redness, etc. which ordinarily would be visible in case of a virgin girl of a tender age. This argument therefore also does not come to the aid of the appellant.

12. Now coming to the defence evidence, which consisted of the depositions of the two witnesses, namely Amir and Muhammad in which both of them had alleged that on the night of occurrence they had gone to the Ration Depot of one Yaseen for obtaining their sugar quotas. Although Muhammad does not state the time, Amir gives it as 7.30 P.M. Both of them had heard alarm from the house of the prosecutrix and were attracted thereto. They alleged that Kameer accused was being beaten there and was held by the people. While Muhammad PW.2 alleged that on his enquiry the people

Contd.....11

(31) 44

who had collected at the house of the prosecutrix had told him that Kameer accused had gone there to collect the price of milk, the other PW, namely Amir stated that on his enquiry the people who were giving beating to the accused told him that the accused had committed Zina bil Jabr with Mst.Zaiban. Muhammad belongs to the same sub-caste to which the accused belongs. His version of the allegation of people against the accused at the spot of occurrence will therefore, have to be taken with reservation. Amir has denied any friendly relations with the accused for making a false statement. The availability of Rations from a Depot in a village at 7.30 P.M. in the winter season for giving cause of presence at the spot to the DWs, even if believable, the fact remains that one of the defence witnesses in an attempt to shift the time of occurrence from the midnight to 7.30 in the evening has unwittingly furnished corroboration to the prosecution story in that immediately after the occurrence the appellant was being accused of the same offence for which he was proceeded against. The learned counsel for the appellant has also urged for discarding of the Chemical Examiner's report Ex.P.G on the presence of the semen on the vaginal swabs taken from the prosecutrix on the ground that these were taken 3 days after the occurrence and the prosecutrix, being a married woman, was accessible to her husband during this time. We find some substance in this argument, but the rest of the evidence in the light of what has been stated above goes a long way to fully prove the guilt of the accused even without the analysis of the Chemical Examiner of the substance on the swabs.

13. The learned counsel has lastly urged for the reduction of sentence on the plea that the accused has been shown to be of an age of 60 years and that

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(32)

time spent in custody by him during the trial should be allowed to be counted towards the sentence of imprisonment. We do not find ourselve in a position to concede to this request as we find that the sentence of 5 years imprisonment is on the lighter side as compared to the maximum punishment admissible under Section 10(3) of the Ordinance VII of 1979, The sentence of whipping is also a legal requirement under the said provision of law. The evidence does not show the accused to be of 60 years of age rather he looked 50 years old to P.W.8, Dr.Khalid Mahmood. Moreover, there could be no question of age in the award of punishment as the same did not prevent him from comitting rape on the prosecutrix. It also seems that the learned trial Court was not unmindful of the time spent by the accused in custody before pronouncement of judgment as was required of him under Section 382-A of Code of Criminal Procedure from the fact that quite a light sentence of imprisonment had been passed against the accused appellant.

14. As a result of the above discussion, we find no merit in the appeal which is dismissed accordingly.

15. Before parting with the case we would like to put on record our concern on the moral depravity of some of the public servants who for reasons best known to them transgress limits of impartiality and integrity by taking sides and becoming a cause of injustice to the public of whose servants they claim to be. No harm could be greater to the welfare and tranquility of the citizens than to take away their confidence in the Law enforcing agencies of the State. This lack of confidence which makes them shy to come forward before such agencies to help in prevention of crime ultimately results in miscarriage of justice. As our finding on the quality of the

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(33) 43

evidence of P.W.7, Shah Nawaz, Asstt:Sub Inspector of Police the Investigating Officer in this case reflects on his un-truthfulness, it would be in his interest as well as in the interest of justice and the public at large, if a thorough probe is carried out by due judicial process into his conduct in order to assertain whether he has perjured himself before the learned trial court and has thus gone out of his way in the discharge of his duty. We would, therefore, direct the learned Additional Sessions Judge-I, Sahiwal to take up proceedings under Section 193 of the Pakistan Penal Code against the said witness and, if found guilty of the offence, to punish him suitably. Nothing in this judgment shall affect the decision of the case against him which will be decided strictly on law and evidence available therein.

MEMBER II

CHAIRMAN

MEMBER I

MEMBER III.

MEMBER IV.

Islamabad dated
6th October, 1981

Approved for reporting in law journals.

14/11/81