IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT:

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

CRIMINAL APPEAL NO.12/I OF 1980.

Iqbal Shah	.....	Appellant
Versus		
The State	.....	Respondent
For the Appellant	.....	Ch.Muhammad Tofail Basraa, Advocate.
For the Respondent	.....	Ch.Iltaf Hussain, Advocate.
Date of hearing	.....	10.5.1981.
Date of decision	.....	27-5-1981

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JUDGMENT:

KARIMULLAH DURRANI, MEMBER: Mr.Ghulam Sarwar Sheikh, Additional Sessions Judge, Gujranwala, by his judgment in trial No.25 of 1980, delivered on 7.10.1980, convicted the appellant Mohammad Iqbal Shah son of Ali Akbar Shah, Caste Syed, aged 24/25 years, resident of Mohallah Mubarik Shah, Dhop Sarri, Kamoke Town, District Gujranwala for kidnapping Mst.Nusrat Parveen and committing 'zina-bil-Jabr' with her under Section 10(3) and 11 of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 and sentenced him to under-go rigorous imprisonment for a term of 10 years with whipping by 30 stripes on each count. The sentences of imprisonment were however, ordered to run concurrently. Being not satisfied with the judgment the above named accused has perferred this appeal.

2. The prosecution story in brief is that Mst.Nusrat Parveen daughter of the complainant Ghulam Nabi (P.W.3), aged about 14 years was enticed away by the accused on 4.1.1980 at about Isha prayer's time when she had gone out of her house to ease herself in the adjoining fields with the intention of compelling her to marry the accused or for committing forcible sexual intercourse with her.The complainant alleged in the First Information Report that after waiting for a pretty long time for the return of his daughter from the fields he alongwith his brother, Abdul Majeed (not produced as a P.W.) went in search of his missing daughter. When they returned to their place after this vain attempt they learnt that their neighbour Iqbal Shah accused was also missing from his place of abode which gave cause

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of suspicion of his involvement in the disappearance of the girl. On the following day P.W.4, Mohammad Ramzan and one Mohammad Tufail (also not produced as a P.W.) came to the complainant and informed him that they had seen his daughter Nusrat Parveen and Iqbal Shah accused boarding a bus bound for Lahore. On receiving this information the complainant approached one Ibrar Shah, a brother of the accused with the request for restoration of the girl who, after making promises on several occasions to comply with the request, finally refused to help in this regard. Hence the lodging of report after two days of the occurrence i.e. on 6.1.1980 at about 10.45 A.M. in the Police Station Kamoke Mandi. According to prosecution the abductee was produced before the Police in the Police Station Kamoke on or about 7th of January by Azra Batool (D.W.1), the wife of the accused-appellant.

3. The accused pleaded not guilty to the charge and was therefore, put to trial. The abductee Mst.Nusrat Parveen P.W.7, Ramzan, P.W.4, and Ghulam Nabi P.W.3, were produced as ocular witnesses of the occurrence. Dr.A.S.Qureshi, P.W.5, carried out medical examination of the abductee while Dr.Gulzar Ahmad, P.W.6, performed the same examination on the accused. Abdul Qayum and Mohammad Ashraf P.Ws 1 and 2 are the marginal witnesses of the Memos. and Police Officers Sikandar Hayat and Noor Din Saleem P.Ws.9 and 10 conducted the investigation one after the other. Ramzan Ali, Assistant Sub Inspector, P.W.8, had recorded the First Information Report. Azra Batool was given up by the prosecution on the plea of having been won over by the accused and was produced

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by defence as their witness. The trial ended in the conviction and sentencing of the accused as stated earlier. The age of abductee prosecutrix Nusrat Parveen, who was stated in the First Information Report as of an age of 14 years, was later on given as 18 years in the parat of her Nikah, Ex.D.D. which was performed with someone during the pendency of the trial. P.W.5, Lady Dr.A.S.Qureshi on her observation has recorded the age of the prosecutrix as of about 20/22 years in her statement. It therefore, can safely be gathered that in any case the prosecutrix is above the age of 16 and therefore, an adult by virtue of Section 2(a) of the Offence of Zina (Enforcement of Hadood) Ordinance (VII of 1979) (hereinafter called the Ordinance).

4. The prosecutrix as P.W.7, stated before the Court that on the fateful night when she came out of the fields after easing herself the accused approached her and asked her to accompany him to Lahore for a pleasure trip . On the refusal of the girl to comply with the request the accused pulled out a knife from his clothes and forced her to accompany him. He then took her to a place opposite Sabzee Mandi, Kamoke, wherefrom he made her board a bus for Lahore from where she was taken by the accused to Multan by another bus. On reaching Multan, she alleges to have been taken to a havalee towards the Eastern side of the City, where the accused kept her for 2 nights and subjected her to sexual intercourse for a number of times. Thereafter she alleges that the wife of the accused, namely Azra Batool (D.W.1) arrived and brought her back to Kamoke where the said lady handed her over to the

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local Police whereafter she was medically examined and also produced before a Magistrate who recorded her statement, Ex.P.D. under Section 164 of the Code of Criminal Procedure which she says was read over and explained to her. She admitted having thumb impressed the same. This witness was confronted with her statement recorded under Section 161 of the Code of Criminal Procedure by the Police and that recorded by the Magistrate under Sectio 164 Code of Criminal Procedure whereby the defence was successful in bringing to light a number of omissions in the earlier statements of the material aspects of her version of the events given in the Witness Box. Some of these were that she did not mention in the earlier statements that when she came out of the fields after easing herself the accused came to her or that she declined to accompany him on a pleasure trip for the fear of her father or that on her refusal the accused pulled out a knife from his clothes. In her statement during trial she says that she saw two persons standing on a place where she was made to board a bus by the accused and that she wanted to call and inform them of her plight but could not do so out of the fear of the accused. This does not find mention in her statement Ex.D.C. Similarly, the assertion of being, once again, threatened of dire consequences by the accused at the Multan Bus Stand was also not recorded in the said statement. The use of words "a number of times" and "two nights" in relation to the commission of Zina by the accused in her statement in Court does not find place in the said statements. Similarly, in her examination-in-chief she asserts that the accused came to her when she came out of the fields but in the cross-examination changes this too in that the accused asked her to accompany him while standing in the door of his house and that this house is adjacent to the house of her parents. She admits that she had not raised any alarm or did not call anybody for help for her rescue at the various bus stands and the buses all of which were crowded by people.

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5. Out of two persons named in the First Information Report who are alleged to have seen the prosecutrix in company with the accused at the time of occurrence, only Mohammad Ramzan P.W.4, has been produced who has vehemently asserted in his statement before the Court that at Isha prayer's time i.e. at about 8/9 P.M. on the night of occurrence, while standing on the G.T.Road in front of the vegetable market, he saw the prosecutrix in company of the accused and that in his presence they boarded a bus bound for Lahore. He was confronted with his earlier statement recorded under Section 161 Code of Criminal Procedure (Ex.DB) and was found to have stated therein that he saw a burqa clad woman with the accused and presumed her as his wife. This compels one to keep completely out of consideration the deposition of this witness as even if he had seen a burqa clad woman with the accused at the stated time and the place, he did not at that time recognize the lady as the prosecutrix. This is an improvement made during trial from what was stated earlier by him. The conduct of the prosecutrix in passively accompanying the accused, as alleged by her and by not raising any alram at the crowded places like bus stands and buses would take out the case from the pale of Section 11 of the Ordinance. Without any corroboration of the statement of the prosecutrix it would also be very difficult to hold that it was not a case of elopement but of abduction. The conviction of the accused-appellant under Section 11 of the Ordinance therefore, cannot be sustained.

6. The complainant although asserts that the abductee was produced before the Police by the wife of the accused, he also admits that it did not happen in his presence.P.W.9, Sikandar Hayat who was entrusted with the investigation of the case by the Station House Officer on

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9.1.1980, claims that the prosecutrix was produced by the wife of the accused from Multan and denies the suggestion that she was recovered by the Police. According to the prosecutrix she was constantly journeying from Kamoke to Multan without any break after her abduction and that thereafter she had spent two nights in Multan when she was brought by the wife of the accused to the Police Station Kamoke. Now, this whole business would at the most consume 3/4 days from the time of start of her alleged abduction. Her production before the Police was, therefore, on or about 7th xxxx of January. But she was produced before the Magistrate for the recording of her statement under Section 164 Code of Criminal Procedure on 9.1.1980 and to the Lady Doctor for Medical Examination still a day later i.e. on 10.1.1980. This delay on the part of the Police and the whereabouts of the Prosecutrix during this period do not stand explained. On the medical examination, wherein the girl was found by P.W.5, Dr.A.S.Qureshi, to have been subjecced to sexual intercourse, no mark of violence was seen by the witness on the person of the girl. Hymen was found thick, ruptured at several places and elastic. Vagina admitted two fingers and was loose. The correctness of the opinion given by the Medical Officer (P.W.5) to the effect that the examinee was habitual to sexual intercourse would for this reason seem plausible. The four swabs taken from vagina of the girl and sent for Chemical examination were found stained with semen.

7. The accused pleaded innocence in his statement recorded under Section 342 Code of Criminal Procedure and alleged that the prosecutrix had illicit relations with one Mukhtar, the son-in-law of her uncle, Ghulam Rasool and that he had forbidden

her and her father Ghulam Nabi from these activities. The prosecutrix and her father, therefore, according to the accused, were nursing grudge against him and had him involved in a false case with the connivance of the local Police. A further cause for nursing grudge was stated that one Hameed who is brother of the complainant abducted one Mst.Jamila daughter of Shabir Ahmad in which case he helped the said Shabir Ahmad who in his turn spoiled an eye of the complainant. Although, the wife of the accused, D.W.1 has supported him in this contention no attempt was made to establish any relationship between the said Shabir Ahmad and the accused in the cross-examination of the P.Ws. The story of complainant nursing grudge or having enmity with the accused on this score, therefore, does not seem relevant to the prosecution of the accused by the complainant.

8. The learned counsel for the appellant, Ch.Muhammad Tofail Basraa, Advocate, has assailed the conviction of the accused on a number of grounds. His main attack against the same is that the prosecution evidence brought before the Court was not sufficient for proving the offence of Zina against the accused. The learned counsel while relying on Verses 4 and 5 of Chapter XXIV (Al-Noor) of the holy Quran has stressed that the minimum number of witnesses to prove the offence of this sort could not be less than four as is ordained in the Quranic Injunctions under reference. According to learned counsel the conviction merely on the basis of the evidence of the prosecutrix therefore, cannot be sustained. When confronted with Section 10 of the Ordinance, wherein it has been made

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discretionary for the Court to base conviction of and award Tazir to an accused charged for the offence of Zina or"zina-bil-jabar" on any evidence recognized by general law in the absence of that which is required for the proof of the offence under Section 8 of the Ordinance, the learned counsel made a verbal request to the Court to strike down the said provision of law as repugnant to the Injunctions of Islam. Before meeting the objection of the learned counsel on this point, I would like to mention here that the Verses of Chapter XXIV quoted by the learned counsel do not pertain to the offence of Zina but relate to the accusation of honourable women by such persons who do not bring four witnesses to substantiat the charge (Kazif). What the learned counsel should have referred to is the 15th Verse of Chapter IV. This Verse has been rendered into English by Marmaduke Pickthall as under:-

> "As for those of your women who are guilty of lewdness, call to witness four of you against them. And if they testify (to the truth of the allegation) then confine them to the houses until death take them or (until) Allah appoint for them a way (through new legislation)".

The quantity of evidence required to prove lewdness by women is also xxxxxxx required for the proof of Zina liable to Hadd. Without entering into discussion on the permissibility of the award of Tazir in cases wherein the offence of Zina does not become liable to "Hadd" for the lack of required evidence or confession, this controversy, during the hearing of an appeal under Section 20 of the Ordinance cannot be raised for the simple reason that, this Court, while hearing these appeals, is nothing but a

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creature of the statute itself which in this case is the Ordinance. The Court would, therefore, have no jurisdiction to enter into the examination of the vires of the law wherefrom it derives jurisdiction. The matter would be different in case a petition was moved to this Court to examine this law or a provision thereof in the exercise of its original jurisdiction under Article 203-D of the Constitution. The appellant or for the matter of that any citizen of Pakistan is fully competent to invoke that jurisdiction of the Court through a petition for declaring a law or a provision of law repugnant to Injunctions of Islam but not under the proceedings when the Court is seized with the exercise of its appellate jurisdiction conferred by and under the Ordinance.

9. The main evidence in the instant case in regard to commission of offence of Zina consists of the statement of the prosecutrix who has charged the accused of having indulged in the sexual-intercourse with her on more than one occasions. This assertion of the prosecutrix as far as her being subjected to the sexual-intercourse by a person is concerned gets corroboration from the Medical Evidence, which has been referred to above and which clearly establishes that sexual-intercourse had been performed on her person within a short duration of time prior to the date of her examination. The vaginal swabs taken from the prosecutrix were found by the Chemical Examiner, as per his report, Ex.P.F., stained with humen semen. Whether, the accused is connected with this sexual intercourse, it would need further corroboration which in this case is forthcoming from the fact that the prosecutrix was produced before the Police by no other person than the wife of the accused himself, namely Mst.Azra Batool, D.W.1. Although this lady

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has vehemently denied having brought the girl to the Police Station, there seems no reason to disbelieve Sikandar Hayat, Assistant Sub Inspector, P.W.9, who has positively asserted that the prosecutrix was brought to the Police Station by the wife of the accused and that it was one or two days before the prosecutrix was produced before the Magistrate for recording of her statement under Section 164 Code of Criminal Procedure. The denial of Azra Batool, D.W.1, of this allegation would not be very much out of place as she, being the wife of the accused, could not be expected to depose against the interest of her husband. But at the same time it would stand to reason that on finding her husband in company with another woman she would try her level best to get her marital bed rid of such an intruder as that. While I would not be inclined to believe the prosecutrix in that it was the accused who had enticed her away from the house of her parents, I do find sufficient corroborative evidence of her statement regarding the commission of Zina by the accused with her in the fact that it was the wife of the accused who brought her to the Police Station. This coupled with the result of the medical examination does not leave any reasonable doubt in the guilt of the accused but whatever happened could not be said to be without consent of the girl as it was not a case of Zina Bil Jabar. The accused would be guilty of offence under Section 10(2).

10. It has also been urged on behalf of the appellant that delay of about two days in reporting the disappearance of the prosecutrix to the Police and a further delay thereafter caused by the Police in getting the girl medically examined go unexplained and throw much doubt on the correctness of the prosecution version of the case. A delay of two or

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more days in reporting the occurrence of this sort to the Police is not uncommon in this County. The natural wish and xxx desire of the parents in suc events as these usually are to make efforts to trace and recover the missing female without the glare of undesired publicity which such disappearance does usuall entail. It is only when these efforts fail that they resort to lodging a Report with the Police. The delay of one or two days on the part of the Police to get the girl medically examined although deplorable, is not fatal to the prosecution in the circumstances of the instant case. It cannot be said to have caused injustice to the accused.

11. As a result of the above discussion, the conviction of the accused under Section 11 of the Ordinance and the sentences awarded thereunder are set aside. His conviction under Section 10(3) of the Ordinance is converted to one under Section 10(2) of the Ordinance and the sentence is reduced to 7 years rigorous imprisonment with 30 stripes. The appeal partially succeeds in the above terms.

MEMBER - III

CHAIRMAN

MEMBER - II

Dated Islsmabad the
27th May, 1981.

Approved for reporting in law journals.