

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

(17)

PRESENT

MR. JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE

Criminal Appeal No.10/P of 1995

Wajid Ali son of Abdul
Qayyum, r/o Village
Suleman Khel, Teh. and
Distt. Peshawar ... Appellant

Versus

The State ... Respondent

For the appellant ... Khawaja Muhammad Khan,
Advocate

For the State ... Mr. Shahzad Akbar, Advocate

F.I.R. No., date and
Police Station ... 170, 3.3.1993 P.S.
Bada Ber

Date of the Order of
the Trial Court ... 5.12.1994

Date of Institution ... 29.1.1995

Date of hearing ... 24.8.1995

Date of decision ... 24.8.1995

JUDGMENT:

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- Wajid Ali, appellant

herein, has been convicted under section 10 read with section 7 of the Offence of Zina (Enforcement of Hudood Ordinance, 1979 by Additional Sessions Judge, Peshawar by judgment dated 5.5.1995 and has been sentenced to undergo rigorous imprisonment for 5 years and to suffer 7 stripes. He has challenged his conviction and sentence by the appeal in hand.

2. Mst.Gul Sabira, resident of Suleman Khel took her minor daughter Mst.Ajmina aged about 6/7 years to Polcie Station, Bada Ber on 3.3.1993 at 1530 hours and reported that on 2.3.1993 at about 'Degar-wela' she had sent her daughter to the house of Hayat to bring clothes but after some time the girl came back weeping and informed her that the appellant had subjected her to rape after taking her into the field of Karim on the pretext of plucking peas for her. The complainant further stated in the F.I.R. that the delay in recording the F.I.R. was that she was a widow and her brother-in-law Aslam was also not present.

3. The victim Mst.Ajmina was medically examined by P.W.2 lady Dr.Shamim Farooq on 3.3.1993 at 7.00 p.m. The lady doctor found a blood stained dressing covering the private parts of the girl which was removed. The lady doctor found the labia

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majora normal. A first degree perineal tear was noted by traction of the labia minora which were found swollen and tender. The posterior vaginal wall was also found bruised and the hymen was torn posteriorly and was extremely painful. For that reason the lady doctor did not introduce vaginal speculum. However, swabs from the pre and post hyminal areas were collected. The lady doctor also collected the blood stained shalwar of the victim. In cross-examination the lady doctor admitted that hymen could ~~xxx~~ be ruptured by a finger or thumb but it will be a complete rupture. The lady doctor also admitted that the hymen could also be ruptured with an instrument like pen etc. The lady doctor further gave the opinion that in case of rupture with thumb or finger the hymen could be ruptured posteriorly and there will be no congestion. However, Mst.Ajmina was examined under section 161 Cr.P.C. on 12.3.1993.

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4. Appellant Wajid ali was arrested on 7.3.1993. His ~~militia~~ coloured shalwar was taken into possession on the same date and was sent for chemical examination. The appellant made a confessional statement on 11.3.1993 which was recorded by P.W.8 Yarsaid Khan, M.I.C.

5. After investigation the appellant was sent up for trial before the learned Additional Sessions Judge, Peshawar, who charged

him under sections 6/10 of the Hudood Ordinance to which he pleaded not guilty and claimed trial.

6. Mst.Ajmina appearing as P.W.6 stated that she knew the appellant who had committed the offence and had taken her to the fields. In her cross-examination she admitted that prior to the present occurrence she used to abuse the appellant and he had told her not to do so. She also admitted that on the day of occurrence the appellant had hit her with a pen and she got injured. P.W.3 Dr.Zahid Hussain Khalil, Serologist had carried out chemical analysis of the clothes of Mst.Ajmina, the sticking plaster removed from her private parts by the lady doctor and the vaginal swabs. He deposed that the aforesaid articles were found stained with human blood but no traces of semen were found on any of the said articles. He further stated that Mst.Ajmina was 7 to 8 years old.

7. In his confessional statement the appellant stated that the victim and other girls used to abuse him whenever he would pass by them. He further stated that on the day of occurrence the victim and the other girls were present and abused him but on his threats the other girls ran away and he caught Mst.Ajmina and hit her with a pen. He denied the commission of the offence. He had disclosed his age as 13/14 years on the day when his confessional statement was

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recorded. His militia coloured shalwar taken into possession on 7.3.1993 was sent to the Forensic Science Laboratory where its chemical analysis revealed the presence of semen of human origin and blood stains of human origin. In his statement under section 342 Cr.P.C. he againer denied the commission of the offence. He further stated that he had not made any confession of the guilt but had narrated the truth before the Magistrate and he adhered to it. He further stated as follows:-

Me "I am innocent and falsely charged. I have given a detailed statement before the Magistrate during investigation. I am not adult and in support of my age I rely on the report of Medical Board already available on the file, the attested copy of which is Ex.AW.1/1."

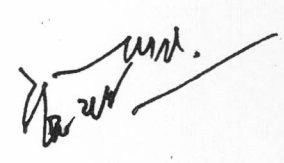
8. The medical examination of Mst.Ajmina would show that her hymen was freshly torn and there was congestion of labia minora although the labia majora was normal, but the vaginal swabs taken by the lady doctor at the time of her examination and the clothes worn by her at that time were found containing blood of human origin but no traces of any semen were found on any of these articles. The appellant pleaded that at the time of occurrence he was only 13/14 years of age and was not adult and had not committed sexual intercourse with Mst.Ajmina. His plea was that since the girl used to abuse him often, he took the offence on the day of occurrence and injured her body with a

pen. No evidence was brought on the record to prove that the appellant was an adult and had attained puberty or was capable of performing sexual intercourse. Although his shalwar was found stained with semen and blood, both of human origin, but it is to be seen that this was not the shalwar which he was wearing at the time of occurrence as also it was taken into possession 5 days after the occurrence. So it could not be stated with certainty that the appellant had committed rape with Mst.Ajmina or he was capable of performing sexual intercourse. Actually there was no evidence available on the record to show that the appellant could perform sexual intercourse. The confessional statement and deposition under section 342 Cr.P.C. of the appellant would clearly show that he had not subjected Mst.Ajmina to sexual intercourse but he injured her by a pen. The lady doctor had also given opinion that such an injury could be caused by an instrument like a pen. There was no evidence available on the record to positively conclude that the vagina of Mst.Ajmina had been penetrated by male organ. There was no cogent, clear and convincing evidence on the record to bring home the guilt of the appellant.

9. Consequently the appeal is accepted. The conviction and sentence of appellant Wajid Ali son of Abdul Qayyum are set aside and he is acquitted of the offence for which he was

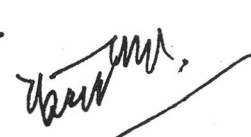
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convicted and sentenced by the learned Additional Sessions
Judge, Peshawar on 5.12.1994. He shall be set at liberty forthwith
if not wanted in any other case.



CHIEF JUSTICE

FIT FOR REPORTING.



CHIEF JUSTICE

Peshawar,
24th August, 1995.
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