

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT

MR. JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN

CRIMINAL APPEAL NO.19/I OF 1995

1. Muhammad Akram son of
Nizam Din,
2. Tahir Pervez son of Muzaffar ... Appellants
both r/o Mohallah Eidgah Lawa,
The Talagang, Distt. Chakwal

Versus

The State ... Respondent

For the appellants ... Mr. Razzaq A. Mirza, Advocate

For the State ... Mr. Muhammad Aslam Uns,
Advocate

F.I.R. No., date and ... 25, 26.3.1994 P.S. Lawa
Police Station

Date of the Order of ... 8.1.1995
the Trial Court

Date of Institution ... 17.1.1995

Date of hearing ... 7.2.1995

Date of decision ... 7.2.1995

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JUDGMENT:

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- Complainant Nasir Mehmud

and Tahir Pervez and Muhammad Akram, both appellants herein, were known to each other previously. On 23.3.1994 the appellants took complainant Nasir Mehmud to their village on the pretext to show him the Pakistan Day Parade on television. All the 3 reached the village of the appellants where they went inside the sitting room of appellant Muhammad Akram. The latter bolted the door of the room from inside. The complainant tried to escape but he was caught hold of by appellant Tahir Pervez and thrown on the cot. Thereafter appellant Muhammad Akram brought out a pistol and threatened the complainant to kill if he raised noise. Then appellant Tahir Pervez removed shalwar of the complainant and subjected him to sodomy. In the meantime there was a knock at the door of the sitting room whereupon the complainant started weeping and raised noise whereby Muhammad Ilyas and Jehan Khan were attracted, on seeing whom both the appellants released the complainant and went inside the house from the other door. The complainant went to his house and narrated the occurrence to his mother and since his father had died and his uncles had also gone outside the village and when they returned the complainant submitted a written complaint in Police Station, Lawa on 26.3.1994.

2. The complainant was examined by P.W.1 Dr.Tariq Pervez on 26.3.1994. Appellant Muhammad Tariq was arrested on 7.4.1994 and appellant Tahir Pervez was arrested on 9.4.1994. After investigation both the appellants were sent up for trial before Additional Sessions Judge, Talagang, who charged both of them under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under section 377 P.P.C. Both the appellant pleaded not guilty to the charges and claimed trial. In all 8 witnesses were examined by the State in proof of the prosecution case whereas both the appellants made depositions under section 342 Cr.P.C. but they neither produced any defence evidence nor made any deposition on oath.

3. After the conclusion of the trial the learned Additional Sessions Judge convicted both the appellants under section 12 of the Hudood Ordinance and sentenced each of them to undergo rigorous imprisonment for 25 years, to suffer 30 stripes and to pay a fine of Rs.5,000/- each or in default to further undergo rigorous imprisonment for one year. The learned Additional Sessions Judge also convicted appellant Tahir Pervez under section 377 P.P.C. and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/- or in default to further undergo rigorous imprisonment for one year. Both the convicts have challenged

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their conviction and sentence by the appeal in hand.

4. We have very minutely gone through the entire record of the case and have also heard learned counsel for the parties at length.

5. The complainant was medically examined 4 days after the occurrence. P.W.1 Dr.Tariq Pervez did not find any mark of violence or injury on external and internal examination of anus of the complainant. However, the two anal swabs taken were found stained with semen by the Chemical Examiner. The doctor could not form any opinion about the act of sodomy after examination of the complainant but he based his opinion on the report of the Chemical Examiner and stated that the complainant had been subjected to sodomy. Two witnesses were mentioned in F.I.R. as having seen the occurrence. Out of whom Jehan Khan appeared as P.W.7 but Muhammad Ilyas was not produced. Jehan Khan stated that he pushed the window and opened the door and saw appellant Muhammad Akram holding a pistol and appellant Tahir Pervez committing sodomy with the complainant and on seeing them the accused fled away. In cross-examination this witness stated that he had seen the occurrence for a second or two. The complainant had admitted in cross-examination that P.W. Jehan Khan was his co-villager.

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6. We have very minutely analysed the prosecution evidence in the case. P.W.7 Jehan Khan had no business to be present in the village of the appellants on the day of occurrence. He was also examined by the I.O. 3 days after the occurrence and he appears to be a chance witness. Moreover it was impossible for him to see the occurrence because the door was bolted from inside and the door of the window was also closed. It had also come in evidence that both the appellants had escaped from the room after hearing the knock at the door. There was, therefore, only the solitary statement of the complainant in proof of the prosecution case. However, there were many short-comings in his evidence xxx as well. He made the report with a delay of 3 days and the reason furnished by him to cover the delay does not seem to be sound and true. Not only that, his oral testimony is also not supported by the medical evidence. The doctor did not find any injury on the external and internal sides of the anus of the complainant. There was also no evidence available to show that any penetration had taken place. The possibility of finding semen inside the anus was also very remote because semen could not remain in the anus after 24 hours as the same would be washed away after the complainant had eased himself. In this connection the learned counsel for the appellant referred to us the opinion of Alfred Swaine Taylor, MD, FRS

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at page 96 of his book "Taylor's Principles and Practice of Medical Jurisprudence" Thirteenth Edition which is reproduced as under:-

"and it must be remembered that seminal traces within the bowel are difficult to identify if more than 24 hours have passed since the alleged act, and also lost in the majority of cases if there has been a bowel action between the time of the alleged incident and the medical examination. Wiping or washing of the anal verge will also tend to destroy any anal verge contamination by semen or lubricant."

The complainant had mentioned in the F.I.R. that he had worn the shalwar immediately after the occurrence but it was not handed over to the I.O. Without any proof of penetration having taken place, the opinion of the Chemical Examiner that anal swabs were stained with semen is meaningless and appears to have been procured. There was also no element of kidnapping or abducting of the complainant because he voluntarily accompanied the appellants to their village.

7. It shall thus be seen that none of the offences was proved against the appellants at the trial and they had been convicted and sentenced without any cogent any convincing proof.

8. For the aforesaid reasons the appeal is accepted. The conviction and sentences of appellants Muhammad Akram son of Nizam Din and Tahir son of Muzaffar awarded by the learned Additional Sessions Judge, Talagang on 8.1.1995 are set aside. They are acquitted of

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the offences for which they were convicted and sentenced. They shall be set at liberty forthwith if not wanted in any other case.

FIT FOR REPORTING.

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(Nazir Ahmad Bhatti)
Chief Justice

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(Dr. Fida Muhammad Khan)
Judge

Islamabad,
7th February, 1995.
Bashir/*