IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE.

CRIMINAL APPEAL NO.357/L OF 1994.

Habib Sultan son of Muhammad Sultan,r/o Chak No.208/GB,Tehsil Samundri,at present, Pakistan Air Force,Shortkot.	...	Appellant

Versus

The State	....	Respondent
For the appellant	...	Ch.Muhammad Hussain Chachhar, Advocate
For the State	...	Malik Nusrat Mehal, Advocate
No.& date of F.I.R Police Station	...	No.166,dt.12.4.1993, P.S Samundri
Date of order of the trial court	...	8.12.1994.
Date of Institution	...	19.12.1994.
Date of hearing	...	24.5.1995.
Date of decision	...	17.7.1995.

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JUDGMENT

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- Mst.Rukhsana Kausar daughter of complainant Muhammad Tufail was alone present in her house on 11.4.1993 as the complainant had gone to his dera and his wife Mst.Irshad Begum had gone to Gojra for eye operation of her mother. When the complainant returned to house in the evening, Mst.Rukhsana Kausar informed him that on the same day at about 10.00 A.M she was washing clothes in the house when Habib Sultan alias Papu, appellant herein, knocked at the door. She opened the door and the appellant asked about her brother Shahbaz. She replied that her brother was not in the house and tried to shut the door. The appellant forcibly opened the door and entered the house and forcibly took Mst.Rukhsana Kausar inside the room and committed zina-bil-jabr with her. The victim raised alarm whereupon Waris Ali and Abdul Wahid, who were passing by, were attracted and they saw the occurrence from the window of the sitting room. The latter also entered the house of the complainant and tried to catch the appellant but he escaped. Muhammad Tufail made a written complaint of the occurrence on 12.4.1993 whereupon F.I.R No.166 was recorded in Police Station Samundri on the same day. The victim Mst.Rukhsana Kausar was aged about 14 years and was unmarried at that time.

2. Mst.Rukhsana Kausar was medically examined on 12.4.1993 at about 5.15 P.M by P.W.1 Lady Dr.Farkhanda Iqbal, according to which her hymen was torn, tears were bleeding on touch, and vagina was tight and tightly admitted one finger. The lady doctor also found multiple abrasions on medial and lower left fore arm in an area of 4" x 3" due to breaking of bangles. The lady doctor also took two vaginal swabs which were found stained with semen on chemical analysis.

3. The appellant was arrested on 22.12. 1993 from Air Force Base Shorkot, where he was employed as Junior Technition, and after investigation he was sent up for trial before Additional Sessions Judge Samundri. The learned Additional Sessions Judge Samundri charged the appellant under section 452 PPC and under section 10(3) of the Offence of Zina(Enforcement of Hudood) Ordinance,1979. The appellant pleaded not guilty to both the charges and claimed trial.

4. During the trial the State produced 8 witnesses in proof of the prosecution case, whereas the appellant made a deposition under section 342 Cr.P.C. He also produced 4 defence witnesses but he did not make any deposition on oath himself.

5. After the conclusion of the trial the learned Additional Sessions Judge convicted the appellant for both the offences under section 452 PPC and section 10(3) of the

Hudood Ordinance. For the offence under section 452 PPC the appellant was sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.5000/- or in default to further undergo rigorous imprisonment for one year. For the offence under section 10(3) of the Hudood Ordinance, the appellant was sentenced to undergo rigorous imprisonment for 7 years and to suffer 30 stripes. The convict has challenged his conviction and sentence by the appeal in hand.

6. I have heard learned counsel for the parties at length and have also gone through the entire record of the case very carefully.

7. From the prosecution evidence produced during the trial it had been established beyond any doubt whatsoever that Mst.Rukhsana Kausar had been subjected to rape on 11.4.1993. At that time she was aged about 14 years and was unmarried. The testimony of the lady doctor also established that the sexual intercourse committed with her on 11.4.1993 was the first as her hymen was freshly torn and was bleeding at the time of examination by the lady doctor. The latter also stated during the cross-examination that the tears of the hymen were fresh within a few hours less than 24 hours and the age of the tears might be within 6 to 10 hours. The report of the Chemical Examiner, Ex.PI, with regard to the swabs taken by the lady doctor at the time of medical

examination of the victim were found stained with semen. This report also corroborated the medical examination of the victim conducted by the lady doctor.

8. It was,therefore, established that Mst.Rukhsana Kausar had been subjected to sexual intercourse on 11.4.1993 and this was her first experience and before this occurrence she was virgin.

9. Mst.Rukhsana Kausar had clearly charged appellant Habib Sultan for subjecting her to rape. It is now to be seen whether there was brought on the record sufficient evidence to prove the said charge against the appellant. On the contrary the latter had taken up the plea of alibi in as much as his contention was that he was an employee of Pakistan Air Force and on the relevant date and at the relevant time he was present on his duty in Air Base Shorkot.

10. Two persons named Waris Ali and Abdul Wahid were mentioned as eye witnesses in the F.I.R but they were not produced as witnesses during the trial. However, the victim Mst.Rukhsana Kausar, appearing as P.W.5, clearly charged the appellant for subjecting her to zina-bil-jabr, when the plea of the appellant was that he was at that time present on his duty. The testimony of the victim about zina-bil-jabr is fully corroborated by her medical examination and the report of the Chemical Analysis. The victim had directly charged the

appellant for forcibly entering the house and then subjecting her to zina-bil-jabr while the plea of the appellant was that he was not present at the place of occurrence at the relevant time. In the circumstances the non-production of the other eye witnesses was not very material and had not made any adverse effect on the prosecution case.

11. In order to prove his plea of alibi the appellant produced D.W.3 Muhammad Boota Mujahid, Chief Technition, P.A.F Base Rafiqui,Shorkot Cantt who had brought the Roll call register of the base for 11.4.1993. According to the entries made in that register, the appellant was present on duty at the Base on 11.4.1993. This witness explained that according to their rules a technition, who performed duty before noon, had xxxx to attend the physical training in the evening. This witness further stated that on 10th and 12th April,1993 the appellant was present in the morning duty and according to their rule he was also present in the physical training in evening time. However, in so far as the date of 11.4.1993 is concerned, this witness only stated that the appellant was present on duty, but he did not explain whether the appellant was present on duty in the morning as well as in the evening. In so far as the dates of 10th and 12th April,1993 are concerned, this witness categorically stated that the appellant was present on duty in the morning as well as in the evening on

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both the dates. However, with regard to the date of 11.4.1993 he only stated this much that the appellant was present on duty. On the contrary the record produced by this witness showed that the appellant was present at the Base on his duty on 11.4.1993 with effect from 1.00 P.M and prior to that there was no proof that he was present at the Base. In respect of the latter dates this witness categorically stated that the appellant was present on duty in the morning as well as in the evening whereas he did not make any such categorical statement about 11th April, 1993. After careful consideration of the testimony of this defence witness I have come to the conclusion that there was available on the record no definite, conclusive and affirmative defence evidence to prove that the appellant was present on his duty at the Base for the whole day of 11.4.1993 and specially in the morning time.

12. Both the parties had some sort of relationship inter-se and defence evidence had been brought on the record to show that the parents of the girl wanted to marry her with the appellant. In the circumstances it is quite possible that the appellant may have gone to the house of the complainant party in order to meet the brother of the victim. From the impugned judgment I find that the distance between the place of occurrence and Shorkot, where the appellant was employed in the Pakistan Air Force Base, is only 50 miles and it was not difficult for the appellant to return from the

said village well before the time of his duty which was to start at 1.00 P.M. on that day.

13. Although this was not a defence plea at the earliest stages of the trial but defence evidence was produced to show that the victim Mst.Rukhsana Kausar was a student and on the said date she had attended the school and at the relevant time she was present in her class. However, this plea could not hold any water but also was on the contrary disproved by the medical evidence which clearly established that she was subjected to rape round about the time which is mentioned in the F.I.R. Even otherwise when the appellant had raised the plea of alibi, the burden shifted upon his shoulders to prove that he was not present at the place of occurrence on the said date and time. The defence evidence would clearly indicate that the appellant failed to discharge the said burden.

14. It was contended by the learned counsel for the appellant that there were many material contradictions in the prosecution story in as much as there were contradictions in the testimony of the victim and her father. This contention is without any force for the reason that the complainant was not an eye witness of the occurrence and he had narrated whatever was told to him by his daughter. His testimony was,therefore,

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not very material. In so far as the testimony of the victim herself is concerned, she made 2/3 minor improvements in her testimony. She stated that her mouth had been gagged and that the appellant had pushed and opened the door by force, which circumstances are not disclosed in the F.I.R. However, these are very minor contradictions and do not make any adverse effect on the over-all prosecution case.

15. From the evidence recorded during the trial it had been clearly established that Mst.Rukhsana Kausar was subjected to rape by the appellant for which purpose he forcibly entered the house of the complainant. Both the offences under section 452 PPC and under section 10(3) of the Hudood Ordinance were proved against the appellant beyond any doubt whatsoever. There is no merit in this appeal which is dismissed. The conviction and sentence of the appellant recorded on 8.12.1994 by the learned Additional Sessions Judge Samundri are maintained. Both the substantive sentences of imprisonment shall run concurrently and the appellant shall be entitled to the benefit under section 382-B Cr.P.C. He is on bail but not present today in Court. His bail is cancelled. He shall be taken into custody to serve out the remaining sentence.

CHIEF JUSTICE

Fit for reporting.

Announced on 17.7.1995
at Islamabad.
M.Akram/