IN THE FEDERAL SHARIAT COUERT

(Appellate Jurisdiction)

PRESENT

HON.MR.JUSTICE DR.TANZIL-UR-RAHMAN - CHIEF JUSTICE

CRIMINAL APPEAL NO.48/K OF 1991

Kashif Nadeem alias Pappi son of Syed Rashidul Islam r/o opp.B-618, Malir Colony, Karachi	...	Appellant
	Versus	
The State	...	Respondent
Counsel for the appellant	...	Mr.Karamatullah, Advocate.
Counsel for the State	...	Syed Sarfaraz Ahmad, Addl.Advocate General Sindh
FIR No.,date and police station	...	33/87, 17-3-1987, Malir, Karachi.
Date of order of trial Court	...	10-8-1991
Date of institution	...	27-8-1991
Date of hearing	...	7-1-1992
Date of decision	...	7-1-1992

JUDGMENT:

DR.TANZIL-UR-RAHMAN, CHIEF JUSTICE.- This Criminal Appeal arises out of judgment dated 10-8-1991 in Hudood case No.319/87, passed by the learned Ist Additional District and Sessions Judge (East) Karachi, whereby the learned Judge convicted the appellant for committing sodomy with a boy of about five years old and sentenced him to R.I., for five years, fine of Rs.2,500/- and thirty stripes. In default of payment of fine to suffer further R.I., for one year.

2. The facts briefly stated are that on 17-3-1987 at about 3.30 p.m., the appellant who lives in the neighbourhood of the victim, Rizwan, took him to his house and after bolting the door from inside committed sodomy on him forcibly, after striping off the trouser of the victim which caused him pain and he started weeping. The appellant after committing the act of sodomy released the victim from his house. The victim came to his house, narrated the incident to her mother who, on arrival of her husband, repeated the same to the complainant, Muhammad Akhtar, father of the victim, who took the boy to the Police Station and lodged the FIR against the appellant the same day at about 6.00 p.m. The Police after usual investigation submitted the challan against the appellant on 23-4-1987 for trial under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

3. The prosecution produced in all six witnesses. P.W.1 Muhammad Hanif stated that about four years back at about 8.00 p.m.

when he returned from his business, he saw the police standing at the door of the appellant. The police called him and obtained his L.T.I. He, however, stated that he did not know anything about the incident. The said witness was declared hostile. In cross-examination he, however, denied the suggestion that he has resiled from the evidence at the instance of the appellant.

4. P.W.2 Khan Bahadur, S.I., Police Station Malir, deposed in the Court that on 17-3-1987 he was posted as S.I., P.S. Malir. He was at the police station where the complainant Muhammad Akhtar came and lodged his report. He had come alongwith his son, P.W.5 (the victim). He had told him that the appellant, Kashif Nadeem alias Pappi had committed sodomy with his son PW Rizwan. He then recorded his FIR which was produced by him as Ex.7. He further stated that he had accompanied the complainant to the place of incident and visited the same in the presence of Mushirs, namely, Mahtab and Muhammad Hanif and prepared the Mushirnama (Ex.8). He also recovered one 'Chadar' from there and sealed the same in the presence of the Mushirs, recorded the statements of the witnesses, arrested the appellant in the presence of the same Mushirs, prepared the Mushirnama of arrest, obtained their signatures and produced the same as Ex.9. He referred the victim to the Medical Officer and sent clothes of the appellant and 'Chadar' to the Chemical Examiner for examination and report(Ex.10) and after completing the investigation he challaned the appellant and

sent him up for trial. In cross-examination he, however, denied the suggestion that he had demanded rupees one thousand from the appellant's father for letting off his son. P.W.3 Dr.Captain Shaukat Hussain, Medico Legal Officer, Civil Hospital Karachi, deposed that on 17-3-1987 at about 11.10 p.m. Malir Police Station produced one Kashif Nadeen son of Syed Rashidul Islam, aged about 14 years, male with history of sodomy as an acting agent. On examination of the appellant he found his weight to be 110 pounds and of 5'-1$\frac{1}{4}$' in height. On general examination of the culprit he was, inter-alia, found to be "a young boy aged about 14 years, conscious, co-operative, well oriented in time and space..... secondary sexual character well developed, clothes not changed on prostatic massage. There is erection of penis". The witness stated that in his opinion "he (the culprit) is potent and can perform the sexual act." He produced M.L.No.875/87 dated 17-3-1987 (Ex.11) which bears his signatures.

5. Dr.Captain Shaukat Hussain (P.W.3) also examined Rizwan son of Muhammad Akhtar, (the victim) aged about five years. He deposed in Court that on 17.3.1987 at 10.30 p.m. the boy Rizwan was brought to him by a constable of Malir police station with history of sodomy as passive agent. Time of occurrence, he stated, would be during 3.30 p.m. — 5.00 p.m. on 17-3-1987. On general examination of the child he found his height to be 3'-4" and weight 36 pounds. The said victim was "a little boy, his clothes were not changed

and was found stained with blood(Paijama). There was congesion in the anal region. There was also tearing and laceration. Rectal slides were taken and sent for chemical examination." In his opinion, sexual act was performed on boy (sodomy), duration was fresh. In cross-examination he stated that the Paijama of the victim boy was taken by him in custody and it was sealed. It was then handed over to P.C. Muhammad Yousuf. He denied the suggestion that he had not examined the accused and/or obtained Rs.1000/- from the father of the complainant and manipulated the present Medical Certificate.

6. The chemical examiner's report was also brought on record wherein, inter-alia, the description of articles contained in the parcel sent for chemical examination of victim, Rizwan, listed as:

> "1. Dirty white colour paijama of victim Rizwan... in parcel.
> 2. Light green colour shalwar of Accused Kashif Nadeem... in parcel.
> 3. White and Blue striped colour chaddar from spot..... in parcel.
> 4. Two rectal slides with swab of victim Rizwan...in packet.
> 5. Two Urethral slides with swab of Accused Kashif Nadeem... in packet."

The result of chemical analysis by Dr.Abdul Hady Khan Sherwani, Chemical Examiner to the Government of Sindh, Karachi, reads as under:-

> "Human semen belonging to group "O" detected in the above said article No. three only.
>
> Semen not detected in the above said remaining article No. one, two, four and five.
>
> Human blood belonging to group "O" detected in the above said article No. one and four."

7. P.W.4 Muhammad Akhtar, the father of the victim, deposed

that on the day and time of the occurrence he had gone to visit to his sister at her house and returned back at about 4.00 p.m. On return he was informed by his wife about the incident. He further deposed that he as well as his wife had seen the anus of Rizwan which was badly injured and bleeding was continued from his anus and his Shalwar was stained with blood. Due to pain in his anus he was weeping. He then took him to police station Malir colony and lodged the FIR against the accused. The police referred his son (the victim) for medical examination to hospital. P.W.5 Rizwan (the victim) who was examined on 10-6-1991 after about four years of the incident and so reached the age of nine years, was in the first instance, put to certain questions by the Court to test his intelligence. He was then examined by the A.P.P. for the State. The said witness stated that on the day and time of the incident he had gone to call his elder sister from the Gali where the victim used to reside. At that time when he was calling his elder sister. Pappi came out from his house and said to him that he had brought a ball and called him to come and play with him. He took him to his house and laid down on the coach. He raised cries and the accused tied his mouth with the cloth and forcibly took off his trouser and started committing sodomy on him. After committing the sodomy, he unlocked his room and left him outside his house. He then returned back to his house with weeping eyes and that due

to the act of the accused he was feeling great pain in his anus. He informed about the incident to his mother. The Doctor at the hospital had examined him. The police had also recorded his statement. In cross-examination he stated that he had also made complaint about the incident to his father after he had returned back home after seeing his sister. He also stated to him that the act of sodomy was committed with him by Pappi. P.W.6 Mst.Shahida Begum, the mother of the victim, deposed that the accused Pappi used to reside at a distance of one house from her house. On 17-3-1987 at about 3.30 p.m. the incident took place. At that time she was washing the clothes at her house. She heard the voices of weeping of her son Rizwan, coming from door side and then she immediately rushed towards the door of the house and inquired from him about his weeping. He informed her that the accused Pappi had committed sodomy on him. She saw the trouser of her son, so also his anus both were stained with blood and semen. At that time her husband had gone to his sister. On his return, she informed him about the incident. Rizwan was taken to police station. She had not gone to police station at that time. Police had recorded her statement under section 161 Cr.P.C. In cross-examination, she denied the suggestion that her son had not disclosed the name of the accused Pappi. She categorically stated that the name of accused was disclosed by her son as offender.

8. The appellant's statement under section 342 Cr.P.C., was recorded. As usual, he denied the incident and stated that he has been falsely implicated due to enmity. He, however, declined to examine himself on oath under section 340(2) Cr.P.C. or lead any evidence in his defence.

9. I have heard the learned counsel for the appellant as well as the State.

10. Learned counsel for the appellant at the out-set took a plea that the appellant being a minor is protected under the Sind Children Act, 1955, and is liable to no punishment as provided under sections 68, 69 and 70 of the said Act. In the alternative it was submitted by him that though the appellant was charged under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, he appears to have been convicted and sentenced under section 7 of the said Ordinance. At best, he was liable to be convicted under section 377 PPC.

11. As regards the first plea, that the appellant being a minor is protected under the provisions of Sind Children Act, 1955, and is not liable to any punishment, it seems pertinent to reproduce the relevant provisions of Sections 68, 69 and 70 of the said Act which read as under:-

"S.68. Sentences that may not be passed on child.-- (1)Notwithstanding any thing to the contrary contained in any law, no youthful offender shall

be sentenced to death or transportation or imprisonment."

(2) When a child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient or when the Court is satisfied that the child is of so unruly or of so depraved a character that he cannot be committed to a certified school or detained in a place of safety and that none of the other methods in which the case may be legally dealt with is suitable, the Court shall order the offender to be kept in safe custody in such place or manner as it thinks fit and shall report the case for the orders of the Provincial Government."

"S.69. Expressions "conviction" and "sentences" not to be used in relation to children.- Save as provided in this Act, the words "conviction" and "sentence" shall cease to be used in relation to children dealt with under this Act and any reference in any enactment to a person convicted, a conviction or a sentence shall in the case of a child be construed as a reference to a person found guilty of an offence, a finding of guilty or an order made upon such a finding as the case may be."

"S.70. No proceedings under Chapter VIII of Criminal Procedure Code against child.-- Notwithstanding any thing to the contrary contained in the Code no proceedings shall be instituted and no order shall be passed against a child under Chapter VIII of the said Code."

12. The Sind Children Act, 1955, is a consolidated statute relating to the law for the custody, protection, treatment and rehabilitation of children and youthful offenders and for trial of youthful offenders in the Province of Sind. By section 1 of the said Act, it was extended to the whole of the Province of Sind including Khairpur District. However, as to its commencement, section 2 provided that section 1 of the said Act shall come into force at once, whereas the rest of the Act, or any provision thereof, shall come into force

in any area on such date as the Provincial Government may, by notification in the official Gazette, specify. The Sind Children Act, 1955 was, thus extended to Karachi by the Sind Act XIV of 1975 and was made applicable to the said area by notification dated 5-3-1976 published in the same Government Gazette, 1976, Part I, page 772 with effect from 5-3-1976. Such notification has been produced by the learned counsel for the appellant in Court on 7th of January, 1992. The plea as to the question of the applicablity of the provisions of sections 68, 69 and 70 of the said Act as raised in this Court was taken up before the learned trial Judge, who rejecting the same, observed that "the provisions of section 67, 68 and 69 of the Sindh Children Act, 1955, are not applicable to the facts and circumstances of the present case. If any authority is needed reference may be had to Niaz Mohammad Vs. State reported in 1985 Pakistan Criminal Law Journal, 1030, in which it has been observed as under :-

> "This punishment is to be awarded to an offender irrespective of his age. Thus the said ordinance does not make any discrimination in respect of age of an offender so far as the sentence laid down in the above section, whether he is a child or an adult. Thus the provision of Children Act, being contrary to the provision of section 12 of the said Ordinance, shall be deemed to be inoperative or having been superseded by the provision of the said Ordinance."

13. It is noticeable that sub-section(a) of section 2 of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979, defines an "adult" means a person who has attained, being a male, the

age of eighteen years or, being a female, the age of sixteen years, or has attained puberty. In the instant case according to the medical evidence the appellant has attained puberty and thus in the eye of Shari'ah and Ordinance VII of 1979 is an adult. The provision of section 5 of the Sind Children Act, 1955 which prescribes that for the purpose of the Act, a person shall be deemed to be a child, if such person had not attained the age of 16 years, will be read subservient to the provision of the Ordinance VII of 1979 as by virtue of Article 143 of the Constitution in case of inconsistency between the Federal and Provincial law, the Federal law shall prevail to the extent of that repugnancy. Moreover, it has been provided under section 3 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, that the provisions of the said Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force. The plea of the learned counsel for the applicability of the provisions of sections 68, 69 and 70 of the Sind Children Act, 1955, in derogation of the provisions of Ordinance VII of 1979 is, therefore, devoid of any of merit.

14. As regards the question of conviction under section 7 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and the sentences passed thereunder, the learned counsel for the appellant submitted that the offence, if for the sake of argument is taken to have been proved, will not be that of zina but of

sodomy. Section 7 of the Zina Ordinance reads as under:-

> "Punishment for zina or zina-bil-jabr where convict not an adult. A person guilty of zina or zina-bil-jabr shall, if he is not an adult, be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both, and may also be awarded the punishment of whipping not exceeding thirty stripes:
>
> Provided that, in the case of zina-bil-jabr, if the offender is not under the age of fifteen years, the punishment of whipping shall be awarded with or without any other punishment."

15. Zina as defined in Islamic Law, generally speaking, is wilful sexual intercourse between a man and a woman without being validly married to each other, whereas a person is said to have committed zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, whom he or she is not validly married, against the will and without the consent of the victim. The facts as disclosed in the case are sufficient to indicate that the offence committed by the appellant is that of sodomy and not zina and, therefore, the provisions of section 7 of the Zina Ordinance are not attracted in the case. Reliance has been placed by the learned counsel for the appellant on 'Qawaneen-i-Hudood' by Dr.Tanzil-ur-Rahman, 2nd edition, pub. Qanoon-i-Kutub Khana, Lahore, pp. 84-85 and 86. I would, therefore, agree with the learned counsel for the appellant and so with the learned Additional

Advocate General, Sind, that the offence alleged to have been committed by the appellant falls under section 377 PPC and not under section 7 of Ordinance VII of 1979. The appellant, if at all, should have been punished under section 377 PPC. It is true that the appellant has been charged under section 12 of the Ordinance VII of 1979, but under section 237 Cr.P.C., when a person is charged with one offence, he can be convicted of another, read with Section 20 of the Ordinance.

16. It now seems advantageous to make a survey of the relevant case-law on the subject as laid down by this Court and the Shari'at Appellate Bench of the Supreme Court.

17. (i) In the case of Nazir Ahmad and another Vs. The State (PLD 1982 FSC 252), the accused was challaned under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and was found guilty under the same section for sodomy. The Prosecution version was proved by the victim, and four other witnesses. The accused, a 13 years old boy, was sentenced on account of slender age to one year R.I., ten whips and a fine of Rs.200/- and the other two accused, (the appellants) to four years R.I., each, 15 whips and Rs.200/- fine each. On appeal it was observed by this Court that sub-section(2)(a) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, defines adult as meaning a person who has attained, being a male, the age of eighteen years or being

a female the age of sixteen years, or has attained puberty. Thus a male or female of lesser age than prescribed above can also be an adult if he/she has attained puberty. In that case it was further observed that "it is clear from the medical evidence that Nazir Ahmad appellant has virtually been held to be an adult since he is capable of performing the sexual act which according to the evidence he performed."

(ii) In the case of Muhammad Naseer Vs The State (PLD 1988 FSC 58), a Full Bench of five Hon'ble Judges including the then Hon'ble Chief Justice observed that for probability that the offence may fall under the Hudood law and not the ordinary law, the trial of such an offence should always be conducted under the Hudood law and if need be conviction may be recorded in view of section 20 first proviso of the Hudood Ordinance.

(iii) The above judgment was referred to by a Division Bench of this Court in a recent case reported as Muzammil Shah Vs The State (1990 P.Cr.L.J. 1682). It was, however, observed that when the accused is charged under the provisions of Hudood Ordinance and any other law, the Federal Shariat Court has the jurisdiction. It implies that the charge before the trial court under the provision of Hudood law will give appellate jurisdiction to this Court, that is, if the accused is charged exclusively for an offence other than Hudood law, this Court has no appellate jurisdiction.

(iv) In the case of Muhammad Tufail Vs. State (PLD 1984 FSC 23), the appellant was convicted under section 377 PPC for committing sodomy with a boy aged about 9-10 years. The appellant was found to be 15/16 years old and that he had reached the age of puberty and was physically and mentally fit to perform sexual act. The sentence of imprisonment of two years R.I. under section 377 PPC as awarded to the convict was enhanced to four years R.I. The fine of Rs.2000/- was, however, maintained; in default to undergo further R.I. for six months was ordered by this Court.

(v) In the case of Abdul Waheed Vs. The State (NLR 1984 SD 400), the appellant was convicted by the learned trial Judge under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and sentenced to suffer R.I. for ten years and a fine of Rs.1000/- or in default further R.I. for three months and was also sentenced to whipping numbering ten stripes; was further convicted for the offence under section 377 PPC and sentenced to R.I. for a period of five years and was also to pay a fine of Rs.1000/- or in default to undergo R.I. for further period of three months. On appeal, this Court upheld the conviction and sentences and the appeal was dismissed.

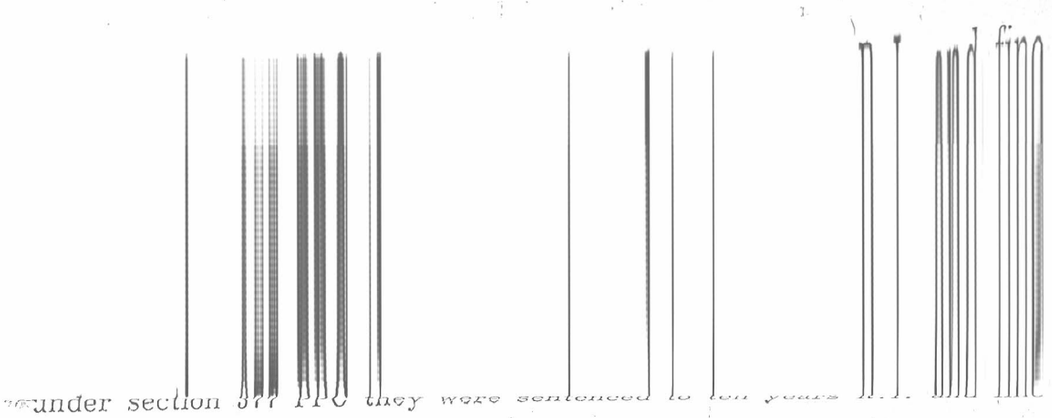
(vi) In the case of Tahir Shah Vs. State (NLR 1985 SD 113), the learned trial Judge convicted both the appellants under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under sections 377, 365 and 170 PPC and each was sentenced to five years R.I.,

whipping numbering 30 stripes and a fine of Rs.1000/- or in default to undergo three months R.I. under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and under section 377 PPC to five years R.I., under section 365 PPC to one year R.I. and fine of Rs.500/- or in default to undergo one and a half month R.I. and under section 170 PPC to one year R.I. On appeal to this Court, the offence under section 12 of the Offence of Zina(Enforcement of Hudood) Ordinance, 1979, and section 377 PPC stood proved to the hilt. Conviction and sentences in both the charges were maintained and the appeal, to that extent, was dismissed. They were, however, acquitted under sections 365 and 170 PPC.

(vii) In the case of Zulfiqar Vs. The State (PLD 1985 FSC 404), the appellant was found guilty and sentenced under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, to undergo R.I. for ten years plus whipping numbering ten stripes and fine of Rs.2000/- or in default of payment of fine further R.I. for three months. The accused was further convicted and sentenced under section 377 PPC to undergo ten years R.I. and fine of Rs.2000/- or in default of payment further R.I. for three months. Both the sentences were ordered to run concurrently. The appellant was further ordered to pay compensation of Rs.2000/- under section 544-A Cr.P.C. or in default to undergo further R.I. for three months. The victim, in that case, at the relevant time was 5/6 years of age whereas the appellant in the opinion of the

Doctor was found capable to perform sexual intercourse. On appeal the conviction and sentences of the appellant under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, were set aside. However, the conviction under section 377 PPC was maintained but the sentences were reduced to R.I. for three years and fine of Rs.1000/- or in default further R.I. for two months. The amount of compensation was ordered to be paid to the victim.

(viii) In the case of Shamas Saeed Ahmad Khan Vs. Shafaullah (1985 SCMR 1822), the conviction by learned trial Court under section 377 PPC, being legal and proper, was restored. In that case the appellant aged about 15 years and a student of 10th Class was, as usual, returning to his village from the school. On way at the railway level crossing he was stopped by the two respondents. Shafaullah armed with pistol and dagger and his cousin armed with knife. They forced him under threat to move a few paces from there and in the depression of the water channel described as Khad, they committed sodomy on him one after the other. They were charged under section 12 of the Ordinance. They were also added to the charge under section 377 PPC. The learned trial Judge found that the prosecution case under section 12 of the Ordinance and under section 377 PPC stood proved against the respondents. For their conviction under section 12 of the Ordinance they were sentenced to ten years R.I. and fine of Rs.5000/- or in default one year R.I. and in addition ten stripes. For the offence



under section 377 PPC they were sentenced to ten years ... fine

of Rs.5000/- or in default one year R.I. The sentence of rigorous imprisonment was ordered to run concurrently. The entire amount of fine, if recovered, was to be paid as compensation to the complainant. On appeal this Court, on reappraisal of the entire evidence on record acquitted the accused. On special leave granted to the appellant, (victim), the Hon'ble Supreme Court (Shariat Appellate Bench), set aside the order of acquittal and the conviction under section 377 PPC was restored. Both the respondents were sentenced to three years R.I., a fine of Rs.20,000/- each or in default to undergo R.I. for two years. Half of the fine realized from each to be paid as compensation to the appellant. Benefit under section 382-B Cr.P.C. was also granted to them.

(ix) In the case of Muhammad Akhtar Vs. Muhammad Shafique (1986 SCMR 533), respondent No.1 was acquitted of the charge under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, but was convicted for the offence under section 377 PPC. In appeal, on a petition for special leave, the sentence under section 377 PPC was reduced to five years R.I. and fine of Rs.2000/- or in default one year R.I. with benefit of section 382-B Cr.P.C. The Shariat Appellate Bench of the Supreme Court maintained the judgment of acquittal by this Court on the charge under section 12 of the Ordi-

offender. Leave to appeal was, therefore, refused.

(x) In the case of Naib-Subedar Muhammad Ayub Vs. Muhammad Nawaz and 2 others (1987 SCMR 370), the appellant was convicted under section 377 PPC and sentenced to five years R.I., and a fine of Rs.5000/-. On appeal, this Court set aside the conviction and acquitted the accused. On appeal by the complainant the Shariat Appellate Bench of the Supreme Court reverting the judgment of this Court, set aside the acquittal of the respondents under section 377 PPC and convicted and sentenced to five years R.I. and fine of Rs.5000/- or in default R.I. for two years, upholding the trial Court's judgment.

(xi) In the case of Muhammad Akram Vs. The State (1990 SCMR 1962) the appellant was found guilty under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and was sentenced to 15 years R.I., twenty stripes and a fine of Rs.5000/- or in default to undergo further R.I. for one year. He was also convicted under section 377 PPC and was sentenced to ten years R.I. with fine of Rs.3000/- and in default to undergo further R.I. for six months. On appeal this Court acquitted the appellant under section 12 of the Ordinance, however, he was convicted under section 377 PPC but for being under age his sentence was reduced to two years R.I. The fine was, however, maintained. The Shariat Appellate Bench of the Supreme Court, on appeal did not interfere with it and maintained the judgment of this Court.

18. For the aforesaid discussion, the conviction of the appellant is altered to section 377 PPC, In view of the young age of the appellant and being first offender, he is sentenced to two years R.I., which is the minimum sentence prescribed under law for the offence under section 377 PPC. The sentence of fine will remain intact. In default of payment of fine to suffer further R.I., for six months. The sentence of whipping is set aside. With the above modification, the appeal is dismissed.

19. The appellant present on bail be taken into custody and sent to prison to serve out the remaining sentence. He will, however, not be entitled to the benefit under section 382-B Cr.P.C.

(Dr.Tanzil-ur-Rahman)
Chief Justice

Approved for reporting.

(Chief Justice)

Karachi, the
7th January, 1992.
Naseer.