

(24)

IN THE FEDERAL SHARIAT COURT  
(Appellate Jurisdiction)

PRESENT

Mr. Justice (Retd) Salahuddin Ahmad	Chairman
Mr. Justice Agha Ali Hyder	Member
Mr. Justice Aftab Hussain	Member
Mr. Justice Zakauallah Lodi	Member
Mr. Justice Karimullah Durrani	Member

CRIMINAL APPEAL NC.9/R OF 1980

Muzaffar Khan	..	..	..	Appellant
Versus				
The State	..	..	..	Respondent
For the Appellant	..	..	..	Mr. Nasir Ahmad Sheikh, Advocate
Date of Hearing	..	..	..	23.2.1981

JUDGEMENT

MR. JUSTICE AGHA ALI HYDER, MEMBER

This appeal from the judgement of the learned Sessions Judge, Mianwali, convicting the appellant for an offence under Section 10(2) of the Offence of Zina (Enforcement of Hadood) Ordinance 1979, and sentencing him to undergo R.I. for 3 years, flogging of 30 stripes and a fine of Rs:500/- or in default four months further R.I. arises in the following circumstances.

2. Sher Khan the informant, hails from village Swans in the District of Mianwali. He had a daughter by the name of Mst. Alam Khatoon aged 15 to 16 years. Muzaffar the appellant was living with his family members, opposite their house. The prosecution story in brief is, that on the evening of the 12th of March, 1980 at about 7.00 P.M. Sher Khan and his family members were sitting in their house, when Mst. Lalan the sister of the Appellant since acquitted had turned up, and beckoned to Mst. Alam Khatoon. Once Mst. Alam Khatoon accompanied by Mst. Lalan, had stepped out of the house, the Appellant and his father Nasir Khan, also acquitted who were, armed with guns, had forcibly taken her inside their house. The incident is alleged to have been witnessed by Gul Baig and Aslam. It is said that Sher Khan tried to persuade the culprits to restore Mst. Alam Khatoon but realising that the efforts did not bear any fruit, he went to Mochh Police

Station and lodged the F.I.R. on 14.3.1980, at about the Mid day.

3. The F.I.R. was recorded by S.H.O. Rab Nawaz . It is stated that the appellant had taken away Mst. Alam Khatoon on a taxi to village Dab, where they had stayed together for the night. The next day they had proceeded to Faisalabad where they had stayed for a week. Later they boarded a Bus, and proceeded to Mianwali. No sooner they had alighted, than a Police Party headed by A.S.I. Ali Ahmad nabbed them. The appellant was arrested and Alam Khatoon was produced before a Magistrate the same day for her statement being recorded under Section-164 of the Cr.P.C. Thereafter she was produced before Dr.Mrs. Arjumand Bano, who medically examined her. After due investigation, the case came to be challaned before the Session Judge, Mianwali against the appellant, Mst. Lalan and Nasir Khan. In this very context it must be mentioned that the last two accused were acquitted by the learned Sessions *Judge*.

4. The appellant in his statement at the trial denied the various allegations made against him and maintained that he was maliciously involved in the case only because Mst. Alam Khatoon was keen about marrying him though he had spurned her proposal. He went on to say that he was already married and had a number of children living with him.

5. The details of the incident have been furnished by Sher Khan and Mohammad Aslam, apart of the prosecutrix herself. A sister of P.W. Aslam was married to Fateh Khan, a brother of Mst. Alam Khatoon, and there was an exchange marriage. Apart from this Mohammad Aslam was living a mile away from the "Wardat". On his own showing he was saying prayers alongwith Gul Baig in a near ~~by~~ Mosque when they had been attracted by the commotion. There was no body-else near about, as the congregation prayers had finished earlier and the crowd had dispersed. However nothing was done by them, or for the matter by Sher Khan, except sending two persons by the names of Ata Mohammad and Gul Mohammad to the culprits for the restoration of Mst. Alam Khatoon. Ata Mohammad and Gul Mohammad have however not been examined. This is also the version furnished by Sher Khan.

6. Mst. Alam Khatoon however in her statement under Section 164 Cr.C.P. duly brought on the record was totally reticent about the presence of these persons. She had not

mentioned their presence even in her statement under Section 162 Cr.C.P. The time of the incident mentioned by her in the statement referred to earlier is 10.00 P.M. Patently they were not witnesses of the incident. Had they been present as they alleged, these witnesses and Sher Khan would not have taken the abduction of Mst. Alam Khatoon so stoically, and refused to move <sup>even</sup> their little fingers for full two days.

7. Mst. Alam Khatoon, looking to the tenor of her statement had walked away from the house of her parents of her own free will and volition. She was whisked away on a Taxi to village Dab. Two or three passenger were already sitting in the Taxi, and she does not state that she had even opened her lips for help. At Dab she had lived with the women of her host while the appellant had slept out-side with the menfolk. At Faisalabad also she had lived in the female apartment of a lawyer for as many as 8 days. There was not a word of reproach or accusation against the appellant, let fall by her. It appears that there she had filed a declatory suit against one faujdar, who claimed to be her husband. Again she had travelled on a Bus to Mianwali where she ~~was~~ stated to have been secured alongwith the appellant by the Police Party. There is nothing to indicate that she was not a free agent during all these movements.

8. On her own showing no overtures had been made by the appellant to her after the first night. This <sup>also</sup> she conceded very grudgingly after repeated questions. She had not chosen to speak about it at all, before the Magistrate, or in her statement before the Police. It is true that the chemical Examiner's report indicates the presence of semen in the vaginal swab but Dr. Arjumand Bano has clearly stated that semen remains in the vagina normally for a period of 72 hrs and in exceptional circumstances for a week. Even this requirement is not ful-filled in this case. However it is not necessary to dilate on this aspect to the matter looking to the findings of the learned trial Judge though the inference drawn by him is totally indefensible.

9. Looking to the circumstances disclosed in the case, it cannot even be said that Mst. Alam Khatoon had been secured along with the appellant at Mianwali Bus Stand. There was no Mashir Nama prepared and no independent witness ~~is~~ examined in support of this fact. There

was also interpolation in the statement of Mst. Alam Khatoon before the Magistrate, as the earlier version to be found there was that she had been secured at Faisalabad. The Investigating Officer failed to explain this blemish to the Trial Judge who <sup>by</sup> probed into the matter. The case as put forward <sup>by</sup> the prosecution under the circumstances is riddled with doubt and the benefit thereof will accrue <sup>to</sup> the appellant.

10. As a result I will set aside the conviction and sentence awarded to the appellant and allow the appeal. He will be released forthwith unless wanted in connection with some other case.

*Approved for reporting on  
domicile by Hon'ble Member?  
23/2/81  
AS/MS*

*aqe ul haq*  
MEMBER-I

*Jagoo*  
CHAIRMAN

*H. H. Khan*  
MEMBER-II

*M. Arshad*  
MEMBER-III

*H. H. Khan*  
MEMBER-IV

Islamabad, the  
23rd February, 1981