

IN THE FEDERAL SHARIAT COURT.

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE ZAFAR PASHA CHAUDHRY, JUDGE.
MR.JUSTICE S. A. RABBANI, JUDGE.

CRIMINAL APPEAL NO.136/I OF 2002 LINKED WITH
CRIMINAL APPEAL NO.179/I OF 2002 LINKED WITH
CRIMINAL APPEAL NO.206/I OF 2002.

1. Muhammad Ashraf son of Hakim Khan,
resident of Orangzabad:
2. Taj Mehmood son of Jahandad,
resident of Bhal Gulial, & Appellants.
3. Muhammad Arif son of Shahinchi Khan,
resident of Orangabad, Tehsil Jhand,
District Attock.

VERSUS

The State.	.....	Respondent.
Counsel for the Appellants.	..... .....	Mr.M.Abdul Hayee Alvi, Sardar Abdul Razzaq Khan, & Manzoor Hussain Mughal, Advocates, respectively.
Counsel for the Respondents.	..... .....	Mr.Muhammad Sharif Janjua, Advocate.
Case F.I.R. No, date & Police Station.	..... .....	FIR No.50, 19.6.2000, Police Station Jand.
Date of Order of trial Court.	.....	29.5.2002.
Date of Institution	.....	19.6.2002, 25.7.2002 & 22.8.2002, respectively.
Date of Hearing.	.....	10.09.2003.
15 Date of Decision	.....	<u>12-09-2003.</u>

JUDGMENT

ZAFAR PASHA CHAUDHRY. J: - This judgment will dispose of

Cr.A.No.136/I of 2002 on behalf of Muhammad Ashraf son of Hakim Khan,
Cr.A.No.179/I of 2002 on behalf of Taj Mehmood son of Jhandad and Cr.A.
No.206/I of 2002 on behalf of Muhammad Arif son of Shahinchi Khan, as all the
three arise out of the common judgment dated 29.5.2002, passed by Mian
Muhammad Anwar, Additional Sessions Judge Attock.

2. Brief facts relevant for disposal of these connected appeals are that
Muhammad Arif, Muhammad Ashraf and Taj Mehmood, appellants were sent up to
face trial before Mian Muhammad Anwar, Additional Sessions Judge Attock in case
FIR No.50 dated 19.6.2000 registered with Police Station Jand district Attock under
section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979
(hereinafter referred to as the said Ordinance) and under section 377 Pakistan Penal
Code, who, on conclusion of the trial, convicted Taj Mehmood, appellant under
section 12 of the said Ordinance and sentenced to imprisonment for life and to pay a
fine of Rs.25,000/- or in default thereof to further undergo S.I for one year. All the
three appellants, i.e. Taj Mehmood, Muhammad Ashraf and Muhammad Arif were
convicted under 377 P.P.C and sentenced ^{to} ~~them~~ suffer 10 years R.I each with a fine
of Rs.10, 000/- each, in default thereof each of the appellant to undergo S.I for six
months. On recovery of fine half of it was to be paid to the victim Arif Hussain.

Sentences of Taj Mehmood, appellant recorded under section 12 of the said Ordinance and under section 377 P.P.C were ordered to run concurrently.

All the appellants were granted the benefit of section 382-B, Cr.P.C.

3. The allegations as spelt out from the F.I.R recorded on the application are of Imam Din, uncle of Muhammad Arif victim, that the father of Muhammad Arif was employed in Tando Walayar Haiderabad Sugar Mill. On 5.6.2000, Muhammad Arif left his house on motorcycle for shopping. He parked his motorcycle outside a shop and thereafter did not turn up. The complainant made inquiries from the people in the vicinity who informed him that Muhammad Taj (appellant) along-with Bahram and Amir Khan were seen together. The complainant went to the wooden stall and inquired from Muhammad Ramzan who told that victim Muhammad Arif alongwith Taj had stopped for some time at his stall, but, left for some place not known to him. It was informed that Arif, who worked on the wooden stall, would provide further information. About two weeks expired but no clue of Muhammad Arif could be found. It was apprehended that Muhammad Arif might not have been done away with. The investigation was carried out wherein it was found that Taj Mehmood appellant had kidnapped Arif Hussain (Muhammad Arif), the victim with the object of subjecting him to sexual intercourse. He was taken to Jhelum and thereafter to Gadoon. During abduction of the victim Taj Mehmood, Muhammad Ashraf alias Bukhari and Muhammad Arif, all the three appellants, committed

sodomy with him one after the other. They were found guilty and sent up to face trial as noted above.

4. The learned trial judge framed charge under two heads, firstly under section 12 of the said Ordinance against Taj Mehmood for kidnapping Arif Hussain and secondly under section 377 P.P.C, against all the three appellants who committed sodomy with the victim. The appellants pleaded not guilty to the charge and the trial ensued.

5. The prosecution examined eight witnesses in support of the charge, out of them evidence of PW.4 Arif Hussain aged about 14/15 years being victim, is the most important. According to him, Taj Mehmood, appellant approached him while he was sitting in the shop of Allah Ditta. He was taken to a hotel; thereafter he alongwith Taj as well as his two companions Amir and Bahram proceeded for Rawalpindi in a Wagon. Taj took Arif to a wooden stall. The victim asked him to permit him to leave for his house but he was not allowed. Arif and Ashraf, appellants who were present over there, committed sodomy with him one after the other. The victim was kept for three days; thereafter Taj took him to Jhelum where he committed sodomy with him. From Jhelum he was taken to Gadoon, he was again subjected to sexual intercourse by Taj Mehmood. He was with Taj in Gadoon where Munir and Arif PWs reached there after 4/5 days of abduction and brought him back. The victim was produced at police station Jhand where his statement was recorded.

PW.5 Imam Din, the complainant, reiterated the version already taken by him in his application before the police. Tariq Mehmood (PW.6) is brother of the victim Arif Hussain. He kept on search for Arif Hussain. On finding clue that his brother Arif Hussain (victim) had been taken by Arif, Taj and Ashraf, he reached Gadoon and brought him back and produced him before the police. PW.7 Ghazanfar Ali ASI carried out the investigation and on finding the appellants guilty sent up them to the court to face their trial. Rest of the witnesses except doctor Zafar Iqbal (PW.2), are all formal. The doctor examined Taj Mehmood aged about 23 years, Muhammad Arif aged about 17/18 years and Muhammad Ashraf aged about 23 years and found all of them potent and capable of committing sexual intercourse. The victim was also examined whose age in the medical report was recorded as 16/17 years. The victim looked depressed and had abrasion 2 x 1 c.m. on right knee joint. No mark or abrasion was observed in parianal region. He complained pain where slight tenderness was present. A slight laceration on the inner side of the anus at 9' O clock position was noted. Three anal swabs were taken which were found to be stained with semen by the Chemical Examiner.

6. The appellants during their examinations under section 342 Criminal Procedure Code came ^{up} with a defence of denial and pleaded that the complainant and PWs who are related interse had falsely implicated them.

The appellants were found guilty on trial and were convicted and sentenced as detailed above.

7. The appellants have been separately charged. Taj Mehmood, appellant was charged under two heads, i.e. under section 12 of the said Ordinance and under section 377 P.P.C. The remaining two appellants were not charged for kidnapping or abduction, as there was no allegation or evidence against them in this regard. Taj Mehmood was ultimately found guilty under both the charges, i.e. under section 12 of the said Ordinance and under section 377 P.P.C.

8. In the first instance, the charge under section 12 of the said Ordinance against Taj Mehmood, is being discussed in order to determine ~~that~~ whether this offence is proved from the evidence brought on record, or not. Before referring to the evidence it will be relevant to examine section 12, which is reproduced hereunder for reference: -

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"Kidnapping or abducting in order to subject person to unnatural lust. Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to the unnatural lust of any person, or knowing it to be likely that such person will be subjected or disposed of, shall be punished with death or rigorous imprisonment for a term which may extend to twenty-five years, and shall also be liable to fine."

This section has two ingredients, firstly kidnapping or abduction of a person; and secondly intention or purpose that he may be subjected to unnatural lust of any person. On proof of these two ingredients the sentence has been prescribed. The word "kidnapping" or "abduction" has not been defined in the Ordinance therefore

we have to fall back upon the definition of kidnapping or abduction as contained in the Pakistan Penal Code. Section 361 defines kidnapping from lawful guardianship as follows: -

“Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, — without the consent of such guardian, said to kidnap such minor or person from lawful guardianship”

Similarly section 362 defines the abduction in the following terms: -

“**Abduction.** Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person”

9. Perusal of these sections show that to constitute the offence of kidnapping if victim is a male he has to be under 16 years of age. For abduction no age limit has been laid down. Further, any person if he is compelled by force or by deceitful means is induced to go from any place against his will, is said to have been abducted. In the present case the only evidence on record is that of the victim Arif Hussain, PW.4. His statement comprises two parts; firstly relating to kidnapping or abduction and secondly regarding commission of unnatural offence. His statement in respect of kidnapping or abduction is not supported by any other piece of evidence or by any other circumstance. Safe administration of justice requires corroboration of a statement except where the evidence of a witness is of unimpeachable character and inspires confidence the same can be relied upon without corroboration. In the present case although the witnesses do not have any enmity or motive to falsely implicate the appellants yet to discharge onus of proving the charge, it is imperative

for the prosecution to prove all its ingredients. At the moment the charge under section 12 of the said Ordinance is being adjudged. For kidnapping the age of a male victim should be less than 16 years. In the present case according to the medical evidence the age of Arif Hussain has been noted as 16/17 years. In his own statement, Arif Hussain has given his age as 15/16 years. In view of this description it cannot be safely held that victim was less than 16 years of age at the time of alleged kidnapping, the charge of kidnapping is therefore not proved. Regarding offence of abduction, the necessary ingredient of force or any deceitful means where under the victim was compelled to accompany the accused or was induced to follow him is not proved. Even if the whole statement of the victim is believed, it cannot be found that any force or deceitful means was employed to compel him to accompany Taj Mehmood, appellant. Although the narration of facts may be suggestive of the fact that the victim was not willing to accompany Taj Mehmood yet mere impression gathered from his statement, which remains uncorroborated from any other source, is not sufficient to discharge the onus. The charge of abduction is also not proved against Taj Mehmood.

10. Next comes the second head of charge, i.e. under section 377 P.P.C.

The victim has made categorical statement that all the three appellants, i.e. Taj Mehmood, Muhammad Arif and Muhammad Ashraf committed unnatural offence with him. This part of his (victim's) statement can safely be relied upon because he

has no motive or reason to falsely implicate the appellants and also in this respect, the medical evidence amply supports his statement, i.e. medical report by Dr Zafar Iqbal, M.O (P.W.2) establishes that victim was subjected to sodomy. Observation is further supported by the fact that anal swabs obtained by the Medical Officer at the time of his examination, were found to be semen's stained. Arif Hussain, had therefore been undoubtedly subjected to sodomy, he has expressly nominated the three appellants as culprits. There is no reason to disbelieve his testimony in this behalf. The prosecution has thus successfully proved the charge under section 377 P.P.C against all the appellants.

10. As regards the quantum of sentence, we have carefully examined the case from all angles, the prosecution version, conduct of the victim and especially the fact that victim is quite mature seemingly more than 16 years of age. One appellant, i.e. Muhammad Arif, is a young boy of 17/18 years as noted by the doctor, other two are also young men aged about 23 years each. All the three are stated to be first offenders. Therefore we are of the opinion that a lenient view be taken. We think that sentence of five years R.I each under section 377 P.P.C will meet the ends of justice.

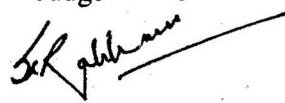
11. As a result of the above discussion, the conviction and sentence of the appellant Taj Mehmood under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 is set-aside and his appeal to that extent is allowed. The

Cr.A.No.136/I of 2002 linked with 10
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conviction of all the three appellants, namely Taj Mehmood, Muhammad Arif and Muhammad Ashraf under section 377 Pakistan Penal Code is upheld, in the light of the above observations, their sentences of 10 years R.I each is reduced to 5 years R.I, each. Their sentence of fine of Rs.10, 000/- each is upheld and maintained in default of payment of fine each of them shall suffer six months S.I. The benefit of section 382-B, Cr.P.C is extended to all the three appellants. All the three appeals are disposed of accordingly.




(ZAFAR PASHA CHAUDHRY)
Judge



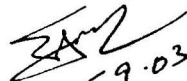
(S. A. RABBANI)
Judge.

Announced at Islamabad on 12.9.03


12/9/03

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Approved for reporting.


15.9.03