IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeals No.39/I of 2008

Roshan Lal son of Jagoo Mal resident of Near Post Office Ghotki Sindh

.... Appellant

Versus

The State	....	Respondent
Counsel for appellants	....	Mr. Imdad Ali N. Awan, Advocate
Counsel for complainant	....	Mr. Aftab Ahmad Khan, Advocate
Counsel for State	....	Raja Shahid Mehmood Abbasi D.P.G.
FIR. No. Date & Police Station	....	242, 25.11.2004 Ghotki District Ghotki
Date of judgment of trial court	....	12.04.2008
Dates of Institution	....	18.04.20089
Date of hearing	....	26.05.2008
Date of decision	....	30.5.2008

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JUDGMENT

SYED AFZAL HAIDER, JUDGE:- This appeal is directed against judgment dated 12.04.2008 passed by learned Additional Sessions Judge-II Ghotki in Sessions Case No. 63/2004 whereby appellant Roshan Lal has been convicted under section 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 07 years rigorous imprisonment with a fine of Rs. 30,000/- and in default thereof to further undergo 03 months rigorous imprisonment. Benefit of section 382-B of the Code of Criminal Procedure has also been given to the appellant.

2. FIR. No.242 was registered at Police Station Ghotki on 25.11.2004 at 12.30. p.m. on the statement of P.W.1 Gobind Ram, complainant regarding an occurrence that took place on 16.5.2004.

3. Brief facts as narrated in the FIR by complainant P.W.1 Gobind Ram resident of Ghotki Town are that he was married to Smt. Patolan d/o Hiranand on 21.12.2001. Complainant is custodian of "Tikano", Nandi Shrine. The house of the complainant is adjacent to the darbar and all the Hindus of the town who are followers of the complainant visit the shrine for religious purpose. Accused Roshan Lal was also one of

the followers. On 16.5.2004 complainant found his wife Smt. Patolan missing from his house. Complainant came out of his house to search Smt. Patolan and he was told by P.W.3 Bashoo Ram that he saw "Smt. Patolan and Roshan Lal with a bag going ahead." At this point the complainant raised hue and cry which attracted the brother of complainant Aneel Kumar P.W.2 and Sundar Dass who were informed of the occurrence and then all the three ran towards the road where they saw accused Roshan Lal alongwith Smt. Patolan boarding a biscuit colour car bearing registration No.ACY-643. The purpose, the complainant stated was to commit zina. They followed but could not reach the car. In the meanwhile Bhajan Dass came on motorcycle from whom the complainant obtained motorcycle and followed the car alongwith his brother Aneel Kumar but they failed to catch the same. On return the complainant searched his house and found that golden ornaments weighing 15/16 tolas, cash valuing Rs.40,000/- and expensive clothes were also missing. After that the complainant went to Mukhi Keeka Ram alias Kirshan Dass and narrated all facts who called the relatives of the accused Roshan Lal and asked for return of his wife. After 08 days his wife was handed over to Mukhi who also requested them for

return of the stolen articles but the same were not returned. Smt. Patolan was handed over to her father Hiranand but the matter was not decided in Punchait as accused refused to abide by the decision of the Punchait when he had admitted his guilt, thereafter the present FIR was lodged.

4. The investigation of the case was conducted by Abdul Rashid ASI (Investigation) PW 07 who on 25.11.2003 recorded statement of complainant for registration of crime report. He proceeded to the place of occurrence and prepared mashirnamas in the presence of Tara Chand and Ghansham Dad the marginal. He, in the company of the said two witnesses went to Qadir Abad bye pass and effected the arrest of appellant. On 28.11.2004 the investigation was transferred. Ilahi Bux Inspector Police appeared as PW 8. He stated that on 01.12.2004 he recorded statements of P.Ws Aneel Kumar, Bashoo Ram,Keeka Ram and Lachmandas under section 161 of the Code of Criminal Procedure. The complainant produced before him a video cassette of his marriage with Smt. Patolan which was taken into possession vide mashirnama Ex.10/A. He visited Jaccobabad alongwith police party to recover Smt. Patolan. After completion of

investigation the report was sent to the Court for the trial of appellant alongwith Smt. Patolan.

5. The trial court framed charge against Roshan Lal on 18.05.2005 under section 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and section 380 of the Pakistan Penal Code and also framed charge against both Roshan Lal and Smt. Patolan under sections 8 and 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 on 18.05.2005 to which they did not plead guilty and claimed trial.

6. Prosecution produced as many as 08 P.Ws to prove its case. After close of the prosecution evidence the trial court recorded statements of both Roshan Lal and Smt. Patolan wherein Roshan Lal took up the plea of innocence and stated that complainant has a dispute with his nephew on a wall dispute and the accused was supporting his nephew therefore he has been falsely involved in this case. Smt. Patolan in her statement under section 342 of the Code of Criminal Procedure took up the plea that complainant and his family members were not behaving properly with her and that was the reason she left the house of her husband much before the alleged incident and she was living with her parents at Jaccobabad. She

further alleged that complainant party insisted upon her to depose against the accused Roshan Lal which she refused and hence she has also been involved in this false case otherwise she was innocent. After recording the evidence of P.Ws and completing all formalities the trial court convicted and sentenced the appellant Roshan Lal as noted above. Hence the present appeal. Smt. Patolan was found innocent and she was acquitted vide the same judgment.

7. I have perused the evidence and seen the record of this case with the able assistance of both the learned counsel for the parties. Learned counsel for the appellant urged that inordinate delay has demolished the prosecution case which is otherwise not worthy of credence. There is no independent corroboration of the factum of enticement. The evidence, according to the learned counsel, is tainted and the judgment of learned trial Court lacks cogent reasons. The conclusion arrived at by the learned trial Court are not based upon facts and as such no conviction, learned counsel also contended, can be based upon suppositions.

8. After considering the entire evidence and related material placed on record learned trial court in a lengthy judgment came to the

conclusion that appellant did not steal the valuable property as mentioned in the crime report and secondly the appellant was also not found guilty of committing zina with accused Smt. Patolan. However, the third conclusion of the trial Court was that the appellant was guilty under section 16 for enticing Smt. Patolan with criminal intent. The period for which an accused may be sentenced under section 16 extends to seven years and fine and the appellant has been awarded the maximum sentence of seven years rigorous imprisonment with a fine of Rs.30,000/- and in case of default to further undergo *internment* for a period of three months rigorous imprisonment. The learned trial Court acquitted Smt. Patolan on the ground that "a woman can not be made accused of her own enticement because section 16 of the Ordinance is providing punishment for a person who takes or entices any woman and not the woman who is subjected to such taking or enticement".

9. The statement of Smt. Patolan the acquitted accused, in response to the questions put to her by the learned trial Court on 20.09.2006, has not been considered by learned trial Court. She had categorically stated that; a) on 16.05.2004 she was not enticed away by the appellant; b) that she was not returned by appellant to Messers Lachmandas

and Mukhi Keeka Ram at Dharamsala in Sukkur on 23.5.2004; c) she did not steal ornaments worth Rs.1,50,000/- along with appellant on 16.05.2004; d) the witnesses have deposed falsely against her because she did not support them in their case against Roshan Lal and finally that e) "complainant and his family members were not behaving me properly it is why I left their house much before the incident and was residing with my parents at Jecobabad. Complainant party insisted upon me to depose against Roshan Lal that I refused. It is why they also involved me in this case falsely. I am innocent."

10. The statement of Lachman Das PW5 is to the effect that Smt. Patolan was restored in the presence of her father and brother. It is also in evidence of the prosecution witnesses that she refused to accompany them to Ghotki and instead wanted to go to her parents and was given to her parents as "Amanat". The father of Smt. Patolan reportedly told PW 5 that she was not at all inclined to go back to her husband and insists upon marrying Roshan Lal and in case she cannot do it she will commit suicide. This part of the prosecution version supports the statement of Smt. Patolan that she was not ready to join her husband and there was aversion in her

mind for her husband to such an extent that she was preferred to do away with her life.

11. Lachman Dass, PW 5 states that Smt. Patolan was restored by the appellant and she was given as "Amanat" to her father and that there was a Panchait with few sessions to resolve this controversy. Not only was his statement under section 161 of the Code of Criminal Procedure recorded on 01.12.2004 i.e. almost six months after the incident and about seven days after recording of the crime report but he admitted having been convicted in an election matter and was also involved in a case under section 365-A of the Pakistan Penal Code. He has been successfully confronted by defence on a few basic points regarding his delayed statement recorded under section 161 of the Code of Criminal Procedure. He also admitted that since accused was not co-operating with the Panchait, as regards return of property, so the matter was reported to police. This sort of evidence in which the emphasis is on return of ornaments and not vindication of honour does not inspire confidence in our society.

12. Bashee Ram, a Masaat of the complainant, appeared as PW 3. He lives at a distance of 25 k.m. away from the residence of complainant

but states that on 16 May 2004 he told complainant that Mst.Patolan was taken away by accused along with a bag. Details of the alleged enticing away are not at all referred to by this witness. He does not mention any car. He also states that his evidence was not recorded by police hence he could not be confronted. This sort of evidence too is not reassuring. Aneel Kumar PW, 2 brother of the complainant supported the version of complainant. However he stated that they saw the car from a distance of one furlong. PW 1 states however that there " were shops and houses between us and the place where car was going". This sort of evidence, when in a thickly populated place the prosecution witness claims to have seen" Mst. Patolan as well as her paramour, and he also discovered the registration number of the car from a distance of one furlong in a street with shops and house in between is not worthy of credence at all. We are now left with the complainant Gobind Ram PW 1 who stated what was written in the FIR. This witness admits that Mst. Patolan was with her parents for three months since the incident. He also admits that one Vinod Kumar, nephew of appellant, lodged an F.I.R. against him and he was therefore annoyed with Roshan Lal. He also admits consultation before lodging the FIR. The

delay of over six months in a case of enticing away a married woman, remaining unexplained, is not understandable. What is more significant is that the complainant according to his story was more eager to recover the ornaments his wife had taken. The crime report was made only because according to him the appellant did not give the ornaments. The learned trial court, as indicated above, did not find the appellant guilty of theft. Under these circumstances the deposition of the complainant does not arouse belief in his part of the story. The repeated suggestions in the cross examination, the statement of Mst. Patolan and even the statement of PW 5 indicates that Mst. Patolan was in her parent's house and was not at all interested in joining her husband because of ill treatment given to her. The evidence of the car owner is not on file to prove that at the crucial time a particular car belonging to Ali Asghar was used. Ali Asghar has not appeared to support the prosecution version. Gobind Ram, Keeka Ram, Balchand, Heera Nand, Nanak Ram, and Bhajan Ram, who are mentioned as characters in the story have also not been offered by the prosecution. The link of chase of car by PW 1 and PW 2 on the motor cycle belonging to Bhajan Lal is also missing. There is no credible corroboration to the

allegation of taking away Mst. Patolan by the appellant. True picture is not being presented and it appears the complainant did not take the police initially or the trial Court later on in confidence about the true facts. A family dispute between the spouses has given rise to an ugly situation. This Court has no jurisdiction to settle private domestic disputes of married couples or settle the issue of ownership and right of custody of ornaments. Whatever be the true picture the prosecution story is not credible. Even the story that the appellant filed a Habeas Corpus petition, though alleged by the prosecution, has not been proved. No question was put to the appellant while recording his statement, as regard the petition moved under section 491 of the Code of Criminal Procedure. I have however seen the uncertified copy of the Habeas Corpus petition. It is dated 8th November, 2004. If, as stated by prosecution, Mst. Patolan was recovered on or about 23.05.2004 then why should a Habeas Corpus petition be moved six months after the alleged recovery. There is no proof that appellant in fact moved the petition. This could have been maneuvered by some one to lend strength to the crime report which was lodged on 25.11.2004 i.e. sixteen days after the filing of Habeas Corpus petition. Learned counsel for the

appellant has shown certified copies of the affidavits submitted on behalf of Smt. Patolan and her father Heero Mal in the High court of Sindh at Sukkar in Cr. Bail Application No.6 of 2005, wherein it is affirmed that the contents of FIR 242 Police Station Ghotki are totally false and fabricated. It was also averred that Smt. Patolan was driven out of the house by her husband due to family disputes. Be that as it may the whole of the prosecution story read in juxtaposition with the defence version smacks of a domestic conundrum.

13. Another important aspect needs consideration. Can a charge of enticing or taking away a woman be leveled when on the face of it the women is found to be a consenting party? Is not the case against the appellant demolished when Mst. Patolan herself and the prosecution witness state that she was not willing to join her husband at all. A woman, who is maltreated, has a right to seek divorce and contract another marriage. Hindu women have already acquired the right of divorce and re marriage. Even the right of Hindu married women to a separate residence and maintenance was granted by Act XI of 1946. Sub section (2) of section 2 of Act XI of 1946 provides relief to a Hindu wife if the husband is guilty

of such cruelty towards the wife as renders it unsafe or undesirable for her to live with him. There is therefore no element either of detention or concealment when the woman leaves the house of her husband as a result of family dispute and takes up residence with her parents or elsewhere where she feels secure.

14. The prosecution story is the foundation on which edifice of the prosecution case is raised. The story of the prosecution occupies a pivotal position in the trial. It should, therefore, stand to reason and must be natural, convincing and free from inherent improbabilities. No conviction can be sustained on implausible account of events. Judicial discretion has to be exercised with due care and caution in the leager interest of justice. Unexplained and a protracted delay warrants that the crime report be examined judiciously. Such a story should be considered and weighed with due care and careful appreciation of the facts and circumstances of a particular case.

15. It is note worthy that in the present episode it is not the case of the prosecution and it is nowhere stated that a Mst. Patolan left her house and acted under the influence of the appellant or she was detained by him

or she was actually subjected to sexual intercourse as a result of enticement. It is nowhere mentioned that appellant would visit her and persuade her to leave her house. No connection between the two has been suggested either. The only evidence brought on record, if it is to be believed, consists of Mst. Patolan being seen with the appellant. This fact alone is not covered by the mischief of section 16 of Ordinance VII of 1979. Mst. Patolan could have herself gone to the appellant or they could have incidentally been present in the street at the same time just as we find countless people walking side by side in the streets.

16. The other element relating to allegation of Zina is very significant. Even though the appellant has been acquitted of the charge under section 10 of Ordinance VII of 1979 but the fact of the matter is that Mst. Patolan, presuming that she was restored to her parents by the appellant, never complained of even an indecent gesture on the part of Roshan Lal. There is no evidence on record about Zina having been committed by Roshan Lal with Mst. Patolan. There was no medical examination of Mst. Patolan on or about 23.05.2004 when she was supposedly restored by the appellant. The complainant party would have

sought medical report and registration of crime report immediately upon her restoration if the fact of restoration or Zina were true. Zina cannot be presumed. The law is very clear on this point. The law jealously guards the honour of individuals, male or female. It is extremely immoral and highly irresponsible conduct to attribute Zina without proof. The Courts would not permit such an insolent act on the part of any person.

17. In the end learned counsel for the appellant relied upon the case of:

(A) Manzoor Hussain Versus The State reported as 1992 P.Cr.L.J. 155 decided by a learned Single Judge of the Federal Shariat Court in which it was held that conviction cannot be recorded in the absence of convincing evidence that the woman co-accused was enticed or taken away with the intention that she might be subjected to sexual intercourse with the accused/appellant.

(B) The learned counsel then relied upon another Single Bench authority of the Federal Shariat Court in the case of Yousaf & another Versus The State reported as 1995 P.Cr.L.J. 1739. In this case no evidence was available on record to prove either elopement of female accused with her

co-accused or her enticement by him. The case was registered with delay although elopement was within the knowledge of husband from the first day of occurrence. There was also the defence plea of the female accused that she was neither abducted nor enticed away by the co-accused and that she had herself left the complainant's house on account of maltreatment. In such a situation the accused may be acquitted if the plea appears to be convincing.

(C) The learned counsel for the appellant also referred to the case of Tasawar Ali Versus The State decided by a learned Single Judge of the Federal Shariat Court reported as 2004-P.Cr.L.J. 1433 under section 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The learned counsel then referred to the case of Nazir Hussain Versus The State decided by a learned Single Judge of the Lahore High Court reported as 2005-YLR 827 wherein the proceedings against the accused before the trial court were quashed on the ground that there was a delay of two and a half months in making the crime report and the female co-accused had categorically denied that she was abducted. It was found that the woman accused was living with her parents and even if it was believed that she was

seen by witnesses while she was riding a motorcycle driven by the accused it could not be presumed that the accused had enticed away the co-accused with intent to commit zina with her. There being no cogent incriminating element available against the accused to warrant his conviction, continuation of proceedings against the accused before the trial court would be an exercise in futility and abuse of the process of court.

(D) Learned counsel for the appellant thereafter relied upon the case of Mst. Naseem Mai Versus Station House Officer decided by learned Single Judge of the Lahore High Court reported as 2005-P.Cr.L.J. 1770 in which it was held that the petitioner could not be forced to live with her husband against her wishes. It was further held that woman could not be accused of her own abduction, enticement or elopement.

(E) Learned counsel furthermore referred to the case of Abid Hussain Versus The State reported as 1997 SCMR 548 in which the apex court was pleased to grant leave to appeal to the accused to consider the contention that mere having seen the abductee in the company of the accused did not make out a case under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 in the absence of evidence that the accused had

taken her away as the girl herself could also have gone to him and that even the evidence of having seen the girl with the accused was not worth reliance. It was further found that evidence has to be brought on record by the prosecution to show that the alleged abductee had left her house acting under the influence of accused and that she was retained by him or was subjected to sexual intercourse. The fact that the abductee was seen in the company of the accused, by itself, did not constitute the commission of any offence.

18. I am conscious of the fact that the Hon'ble Supreme court in the case of Hashim Khan Versus State reported as PLD 1991 Supreme Court, 567 at page 568, held:

> " The word "taking" does not mean taking by force. It implies to get into possession or cause to go with the accused. An accused may exert some influence on the woman. There may be some kind of inducement or seduction by the accused to attract the provision of section 16 of the Ordinance but where any woman has been taken by force a person against her will, the provisions of section 11 of the Ordinance would be attracted. It is always a question of fact which is to be determined on the material on record whether the case falls under section 11 or 16 of the Ordinance".

In the present case there is no allegation of abduction and in order to bring the case within the mischief of section 16 some sort of evidence pointing towards inducement or elopement should have been produced. The record is absolutely silent on this important ingredient of section 16 of the Ordinance VII of 1979.

19. Learned counsel for the State on the other hand supported the conviction recorded by the learned trial court and stated that the ingredients of section 16 having been fulfilled, the conviction and sentenced should be maintained.

20. Learned counsel for the complainant, however, contended that the appellant had moved an application under section 491 of the Code of Criminal Procedure before the 2nd Additional Sessions Judge, Ghotki on 18.11.2004 in which he admitted the existence of marriage between himself and Mst. Patolan since 22.03.2003. The learned counsel argued that this claim on the part of appellant implies the existence of carnal relationship between him and Mst. Patolan as they were living peacefully as man and wife at the residence of the appellant. At this stage I asked the learned counsel to read Question No. 4 put to the accused in his statement

under section 342 of the Code of Criminal Procedure recorded on 20.09.2006. Question No.4 and the reply of the accused is being reproduced as under:-

Q.No.4 "It is further alleged that during course of investigation police has secured C.D/VCD cassette signifying the fact that Mst.Patolan was legally wedded wife of complainant Gobind Ram, copy of petition U/S.491 Cr.P.C. filed before Sessions Judge, Jacobabad and the car whereby you taken away Mst. Patolan. What you have to say?

Answer: No sir, I have no knowledge of it.

In response to my question whether the said application dated 18.11.2004 for habeas corpus under section 491 of the Code of Criminal Procedure was produced in evidence of the prosecution particularly when the evidence of the first witness was recorded on 28.06.2006 and the evidence of the last witness P.W.8 was taken down on 02.09.2006 and whether the accused was confronted with the contents of the application allegedly moved by him under section 491 of the Code of Criminal Procedure and any order passed upon it? We are also not aware as to what order was passed by the learned Sessions Judge on the said application. The learned counsel's reply was in the negative. The record of the case does not show any application moved by the complainant or the prosecution for summoning either the original

application moved by the appellant before the learned Sessions Judge under section 491 of the Code of Criminal Procedure or the order passed thereupon.

21. In support of his contention learned counsel relied upon the case of:

(A) Mst. Hannan-ul-Haq & Shafqat Rasool Versus The State reported as PLD-1982 FSC 126. This is a Full Bench decision but relates to a case where a woman accused claimed in her statement at the trial that the accused committed zina-bil-jabr with her. The Court came to the conclusion that it was not a case of rape but was a case of consent and consequently both the accused were rightly convicted. This case is not applicable to the facts of the present case, as even consensual relationship has not been admitted by the accused.

(B) Learned counsel then referred to the case of Shera & another Versus the State decided by a learned Single Bench of the Federal Shariat Court reported as PLJ-1983 FSC 95. In this case the first appellant had enticed away the wife of his brother and both were living together apparently as

husband and wife. The appellants in the circumstances were rightly convicted for committing zina but in the present case there is no such evidence at all that the appellant and Mst.Patolan were living with each other as husband and wife.

(C) Next the learned counsel placed reliance on the case of Sher Ali Khan Versus The State decided by a learned Single Judge of the Lahore High Court reported as NLR 1984 Cr. 703. The learned counsel sought support from this case on the question of delay. His contention was that delay in filing of the complaint is only a suspicious circumstance which puts the court on guard. By itself delay is not enough to reject evidence in support of the complaint which may otherwise be entitled to credence. In the reported case it was held that under the circumstances the foundation of rape case based on a complaint filed one year and three months after the occurrence was however concrete. This finding was based on the consistent conduct of the complainant in pursuing the matter before various authorities for about one and a quarter year against a person who happened to be a Deputy Superintendent of Police. This case is, therefore, not helpful to the appellant.

(D) Next the learned counsel placed reliance on the case of Bahadur Shah Versus The State reported as PLJ-1987 FSC 4. In this case the learned Division Bench of the Federal Shariat Court held that where there is an element of consent of the prosecutrix the conviction may be sustained under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 particularly when the statement of the prosecutrix indirectly charging the accused is fully corroborated by medical and other evidence. In the present case I find that there is neither any medical evidence to support the charge nor has Mst. Patolan stated or alleged even intimacy.

(E) The learned counsel moreover referred to the case of Aman Ullah Versus The State decided by the Honourable Shariat Appellate Bench of the Supreme Court reported as PLD-1988 SC 710. In this case, arising out under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, it was held that the sighting of the abductee with the accused for over a month and half without any protest is indicative of consent. Such a conduct suggests that the abductee had gone to the accused of her own. Learned counsel submitted that it should be presumed

that Zina has taken place. I am afraid no such presumption can be drawn legally.

(F) Reliance on the case of Ali Nawaz Gardezi Versus Muhammad Yousaf reported as PLD-1963 SC 8 was also placed by the Court in the case of Aman Ullah and consequently it was held that the male accused is liable when it is established that the woman had gone to him of her free will. I am afraid even this case is not applicable to the facts of the case because nowhere it is in evidence that Mst. Patolan lived with appellant Roshan Lal for a short or a considerable time as husband and wife or had sexual intercourse with him or that she had gone even of her own to the accused.

(G) Learned counsel for the complainant likewise relied upon the case of Manzoor Hussain Versus The State decided by the Honourable Shariat Appellate Bench reported as 1986 SCMR 740. This was a case decided under sections 18 and 10 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The learned counsel on the basis of this authority wanted to show that the element of penetration or the evidence of eye

witnesses was not necessary for recording conviction. The Court can presume the relationship and award sentence as Tazir. Even this reported case is not applicable to the facts of this case because the appellant has already been acquitted under section 10 of Ordinance VII of 1979 and even otherwise there is no evidence on record and mere suspicion or resumption cannot become legal basis of conviction.

(H) Learned counsel moreover relied upon another Shariat Appellate Bench case of Aman Ullah Versus The State reported as 1993 SCMR 1806 in which it was held that taking away a woman with intent to commit sexual intercourse with her is sufficient to constitute an offence under section 16, even if it is done with the consent of that woman or on her request. In this reported case the facts of the case were different because it was in evidence of the complainant that his wife had developed illicit relations with the accused. In this report it was held that the word "take" used in section 16 does not require any force or compulsion on the part of the accused nor was it necessary for the establishment of an offence under this section that the victim should a minor. The august court had referred to the case of Aman Ullah Versus The State reported as 1988 SC 710 where it

was held that taking away a woman with intent to commit illicit sexual intercourse with her consent was sufficient to constitute an offence even though it is done with the consent of that woman or on her own request. I am afraid the facts of the instant case are absolutely different from the facts of the case relied upon by learned counsel for the complainant. There is no allegation whatsoever by the complainant that there existed any intimacy between the appellant and his wife nor is there any evidence to indicate that the appellant exercised influence or persuasion over Mst. Patolan or that Mst. Patolan of her own went to the house of the appellant. The fact of the matter is that the evidence produced by the prosecution shows that Mst. Patolan was in the house of her parents and had left the house of her husband because of maltreatment. She being sui-juris, has a right of abode of her choice.

(I) Learned counsel additionally relied upon the case of Dr. Aziza & Five others Versus Muhammad Sarwar decided by a learned Single Judge of the Sindh High Court, Karachi, (His lordship Justice Rana Bhagwandas, as his Lordship then was) which is reported as MLD-1997 2013. It was a case of rash and negligent driving on the part of defendant No.1. It was

held that since the statement of the witness on material points was not challenged and rebutted in the cross-examination in the absence of any circumstance to the contrary it would be legally presumed to have been accepted by defendant.

(J) On this very point the learned counsel also relied upon the case of Chief Engineer Irrigation Department, NWFP, Peshawar and two others Versus Mazhar Hussain reported as PLD-2004 SC 682 in which it was held that the facts stated in examination-in-chief, when not subjected to cross-examination, then such part of statement given in the examination-in-chief shall be deemed to be admitted and accepted. On the same point learned counsel for the appellant relied upon the case of Rukhsar Ahmad Versus The State reported as 2005 P.Cr.L.J. 988. This case is from the Azad Jammu & Kashmir jurisdiction. In the case of Bashir Ullah & another Versus The State, decided by the Full Bench of Federal Shariat Court reported as 2002 P.Cr.L.J. 1183 at page 1196, it was held that it is well settled that if evidence given by a witness on certain points, in examination-in-chief is not challenged and authenticity of the fact alleged is not questioned in cross-examination, the legal presumption would be that

the said fact has been admitted by the party against whom the same was alleged and brought on record. The learned Bench referred to 11 precedents where this view was expressed. The list of these 11 precedents is recorded at page 1197 of the report.

(K) In continuation of his argument the learned counsel for the complainant stated that since the allegation of zina was made by the complainant and the complainant was not cross-examined on this question, so the conclusion would be that the allegation of sexual intimacy stood admitted by the appellant. I have gone through the examination-in-chief of the complainant who appeared as P.W.1. In this statement he has tried to make out a case of elopement but he has not for a single moment alleged zina to the appellant or to his wife. On the contrary in his cross-examination the complainant stated that Mst. Patolan " since three months to incident was residing with her parents at Jacobabad". He also stated that he had lodged the FIR after consultation with the elders of the city and it was lodged 2/3 months after the incident. He also admitted that "before this incident one Vinod Kumar lodged FIR against me at the instance of accused Roshan Lal. Vinod Kumar is nephew of accused Roshan Lal.

Accused Roshan Lal might have helped Vinod Kumar for initiating that criminal case against me. I was annoyed with accused Roshan Lal on that matter. It is incorrect to say that because of that annoyance I have involved accused Roshan Lal in this case falsely. I do not know whether after recording of this FIR I approached Heera Nand to insist upon Patolan to favour me and because of her refusal I also involved her in this case. It is incorrect to say that I was maltreating Mst. Patolan and she was not happy with me"

(L) In the end learned counsel relied upon the decision given in Cr. Appeal No.267/L of 1986 and Criminal Revision No.113/L of 1986 decided on 26.01.1987 reported as NLR-1987 SD 254 by a learned Division Bench of the Federal Shariat Court. In this case it was held that the charge under section 10(2) was fully established when a female and male accused claim to have married each other and were living as husband and wife at a time when the divorce from the first husband was not proved. I am afraid even this report has no bearing on the facts of the case under consideration because it is no where stated or even alleged that the

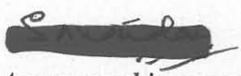
appellant and Mst. Patolan were living as husband and wife and the element of divorce from the husband of Mst. Patolan was not proved.

22. I had specifically asked the learned counsel for the complainant to provide authoritative pronouncements in support of his contention that when a man and a woman are seen together in the street the element of elopement or enticement should be presumed. I warned the learned counsel about the social consequences of his argument but he stuck to his argument of course without providing any precedent to nullify the effect of what was held in Hashim Khan's case reported as PLD-1991 SC 567.

23. In this view of the mater the ingredients of section 16 in the instant case are missing and hence no conviction can be recorded there-under. From the point of view of the prosecution I find that Mst. Patolan was restored to her parents and she lived there as "amanat" for almost six months. The charge of Zina has already been dropped by the learned trial Court and the conviction under section 16 of Ordinance VII of 1979 cannot be maintained for the reasons stated above. Resultantly appeal

No.39/I of 2008 succeeds. Conviction and sentence recorded in Session Case No.63/2004 by learned 2nd Additional Sessions Judge, Ghotki on 12.4.2008, whereby the appellant Roshan Lal son of Jagoo Mal was convicted under section 16 of Ordinance VII of 1979 for the term mentioned in para 1 of this judgment, is hereby set aside. The appellant is already on bail. His bail bonds shall stand discharged and he is free to move about.

JUSTICE SYED AFZAL HAIDER



Announced in open Court
on 30th May, 2008 at Islamabad
UMAR DRAZ SIAL/

Fit for Reporting