

IN THE FEDERAL SHARIAT COURT
(Appellant Jurisdiction)

PRESENT

MR. JUSTICE HAZIQL KHAIRI, CHIEF JUSTICE

CRIMINAL APPEAL 48/L OF 2005

1. Muhammad Noman son of
Muhammad Ramzan and
2. Muhammad Lateef son of --- Appellants
Muhammad Siddque
Both residents of Basti Gabarwah,
Tehsil Taunsa, District D.G. Khan

Versus

The State --- Respondent

For the appellants --- Malik Mumtaz Akhtar,
Advocate

For the State --- Syed Faisal Raza Bukhari,
Deputy Prosecutor-General

FIR No., date and Police Station --- 26/04, 21.2.2004 P.S.
Taunsa Sharif

Date of Order of the Trial Court --- 29.1.2005

Date of Institution --- 18.2.2005

Date of Hearing --- 21.4.2008

Date of Decision --- *30-5-2008*

JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.- Appellants

Muhammad Noman and Muhammad Lateef have challenged the judgment, dated 29.1.2005 passed by the learned Additional Sessions Judge, Taunsa Sharif, District Dera Ghazi Khan whereby they were convicted under section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the said Ordinance") read with section 34 PPC and sentenced to two years R.I. each with fine of Rs.10,000/- or in default thereof to further suffer S.I. for two months each. Both of them were also convicted under section 294 PPC and sentenced to undergo R.I. for three months each with fine of Rs.1,000/- or in default thereof to further suffer S.I. for 15 days each with benefit of section 382-B Cr.P.C. Both the sentences were to run concurrently.

2. As per FIR, dated 21.2.2004, complainant/victim PW.1 Mst. Sajida Rahim, age 16/17 years, student of 8th class she was returning from her school on 12.2.2004 at 3.30.p.m. in the company of her class fellows namely, Mst. Shama Reheem (not produced), Mst. Humaira

Kanwal (PW.2) and Mst. Husna Aziz (not produced) when appellants Muhammad Noman and Muhammad Lateef emerged from the bushes and appellant Muhammad Noman took their snaps from his camera. Her friends raising noise succeeded in running away but the appellants caught hold of her and laid her down on the ground and attempted to commit zina with her after removing her shalwar. On her hue and cry Haji Saleem (PW.3), uncle of the victim and Anwar Ali (not produced) reached there and saw the occurrence. The appellants fled away on seeing them. The appellants tried to compromise with her but she declined and lodged the FIR.

3. The appellants were charged under section 18 of "the said Ordinance and under section 354 read with section 34 PPC to which they denied and claimed trial.

4. PW.1 Mst. Sajida Raheem in her deposition stated that the appellants were hiding in the cluster of Tuhlas and Sarkandas. Appellant Muhammad Noman caught hold of her by the collar and snatched her Dopatta, whereas appellant Lateef removed her shalwar and he tried to commit zina-bil-jabr with her. She resisted and raised

alarm. In the meantime Anwar and her uncle Muhammad Saleem (PW.3) reached there. Seeing them the appellants fled away from the place alongwith the camera. Her uncle gave the shalwar to her. She told him the whole story. The appellants tried to force compromise with them, but she did not agree. She made statement to police which Thanedar recorded and she signed it in token of its correctness. The same day i.e. 21.2.2004 she presented her Dopatta and torn shirt to the Tanedar vide memo Exh. PB in the presence of witnesses Anwar and Saleem. In cross-examination she stated that the place of occurrence is 10/15 miles away from her school. The schooling hours ended at 2.30 p.m. They waited for half an hour and it took them half an hour to reach the place of occurrence from school. Next day she did not go to school and her friends named-above also did not go to school. Appellant Noman was wearing a white coloured dress and Lateef had sky blue clothes. The camera was black. She was not bruised on any part of her body. The appellants had never teased them before. She voluntarily clarified that she did not know how long a mile is.

5. PW.2 Mst. Humaira Kanwal, a class-fellow of the victim (PW.1), deposed that on 12.2.2004 at 3.30 p.m. she alongwith Mst. Shama Reheem, Husna Aziz and PW.1 were returning home from Bindi School. When they reached the bed of river, there were cluster of Tohlas and Sarkandas. Appellants Lateef and Noman appeared all of a sudden. Appellant Noman took snaps of all of them with his camera. They tried to catch all of them. She and her two colleagues fled away but Mst. Sajida Raheem was caught by Lateef. In cross-examination she corroborated the statement of PW.1 Mst. Sajida Raheem that schooling hours ended at 2.30 p.m. and they had waited for half an hour in school and then left for home. She further stated that ordinarily Chacha Saleem (PW.3) and Anwar used to escort them. However, she contradicted PW.1 by stating that the next day they went to school so also Mst. Sajida Raheem (PW.1). She apprised the Headmistress of this occurrence but she did not take any action.

6. In his testimony PW.3 Haji Saleem stated that on 12.2.2004 while he and Anwar were going to bring back the girls from school at the bed of hill torrent, they heard the shrieks of girls whereupon they

rushed to the place of occurrence and found appellant Noman was holding Mst. Sajida and appellant Lateef was removing her shalwar. Lateef had also put off his shalwar and was trying to commit zina. Seeing them, the appellants fled away. Noman had a camera which he took away with him. He gave the shalwar to Mst. Sajida Bibi, who narrated the whole story to him. She handed over Dopatta and shirt to police at the Police Station. In cross-examination he stated that Bindi School is at a distance of 3 Kilometers from their house. They had informed the police on 14.2.2004 but the police visited the spot on 21.2.2004. The place of occurrence is not a busy place round the clock. Appellant Noman was wearing white clothes and appellant Lateef was in green coloured dress.

7. PW.4 Zafar Iqbal 128/C Naib Moharir, Police Station Taunsa deposed that on 21.2.2004 he chalked out FIR. PW.5 Imtiaz Ahmad 610/C-1 stated that on 16.3.2004 Muhammad Ramzan, the father of appellant Noman, handed over the camera to the I.O. Muhammad Ghaffar, ASI attested by him and Abdul Sattar (not produced).

8. PW.6 Muhammad Ghaffar, ASI/IO, P.S. Kot Mubarak deposed that on 21.2.2004 at 1.15 p.m. Mst. Sajida Raheem alongwith three other persons Shabbir, Anwar Ali and Saleem approached him and made statement and she signed it as token of its correctness and handed over her Dopatta and Qameez. He recorded the statements of the PWs, prepared the rough site of the spot and arrested both the appellants on 13.3.2004. The camera was produced by Noman's father. No snaps were recovered. The appellants were less than 18. In his view of the matter Anwar Ali and Haji Saleem (PW.3) were not eye witnesses of the occurrence. The school was 2 miles away from the place of occurrence. The house of the complainant is about 4 Furlongs away. There is Basti Gurchani near the place of occurrence.
9. In their statements under section 342 Cr.P.C. both the appellants stated that they were victims of political differences while they supported Khawaja Sheeraz and the complainant's side was activists of Khawaja Dawood.
10. Learned counsel for the appellants, Malik Mumtaz Akhtar, raised two fold contentions, firstly, both the appellants were 15 years

of age and as such "Child" within the meaning of section 2(b) of the Juvenile Justice System Ordinance, 2000 and they could only be tried by a Juvenile Court under section 4 thereof, secondly, there was no attempt to commit rape by the appellants within the meaning of law.

In support of his first contention, learned counsel for the appellants placed reliance on a Division Bench case of Lahore High Court namely *Aleem Ashraf Vs. The State* 2005 MLD 1028 in which it was held as under:-

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"By vesting exclusive jurisdiction in Juvenile Court to try cases of accused who was a child/minor all other Courts would lose their jurisdiction to try such cases---Judicial Officer might hold powers, but unless he was posted or declared as Judge of a Juvenile Court, he could not entertain, hear or adjudicate cases with regard to a juvenile under Juvenile Justice System Ordinance, 2000".

Next he referred to the case of *Ketno Vs. Judge, Anti-Terrorism Court, Special Court for ATA and another* 2005 MLD 353 in which a Division Bench of Sindh High Court held that under section 4 of Juvenile Justice System Ordinance, 2000 a Juvenile Court had exclusive jurisdiction for the trial of cases where a child was accused

of commission of offence. Similar view was taken in *Muhammad Hanif Vs. The State PLJ 2003 Cr.C (Lahore) 128*.

11. It was next urged by the learned counsel for the appellants that it was not a case of even attempt to commit zina. He referred first to the deposition of PW.1, the alleged victim Mst. Sajida Raheem, who had stated that appellant Lateef removed her shalwar and tried to commit zina-bil-jabr with her and then to the deposition of PW.3 Haji Saleem who had improved upon her version by stating that appellant Lateef had also put off his shalwar. There was also not a single word in the FIR that appellant Lateef had removed his shalwar. He referred to the judgment in *Ibrahim and another Vs. The State 1987 P Cr. LJ 284* a portion whereof is advantageously reproduced as under:-

“Now the question whether the appellants can be said to have attempted to commit zina with the child. In the FIR Mst. Sultan Bibi has stated that she was made naked and laid on the ground, but she did not say that any of the appellants had also removed his shlawar and had tried to mount upon her. In her deposition she does state that appellant Ibrahim had also removed his shalwar. She was, however, confronted with the relevant portion of the FIR in which there was no mention of Ibrahim having removed his shalwar. Under this circumstance it is

difficult to hold that the appellants intended to commit zina with the child. In several cases of this nature we have held that the offender at the most may be said to have outraged modesty of the female, which is an offence punishable under section 354 PPC”.

12. What emerges from the testimony of PWs. 1, 2 and 3 is that being eye witnesses of the occurrence all of them must have seen or noted each another but there is nothing in the deposition of PW.2 Mst. Humaira Kanwal that on hearing the shrieks of girls, she saw PW.3 Haji Saleem, uncle of PW.1 and one Anwar rushing towards PW.1 to save her from the clutches of the appellants, nor there is a word in the deposition of PW.3 that he saw PW.2 Mst. Humaira Kanwal and her two class-fellows running away when the appellants attacked the victim Mst. Sajida. I will therefore, discard the testimony of PW.3 Haji Saleem being concocted and after thought and also reject his accusation that appellant Lateef had also put off his shalwar in order to commit zina with the victim Mst. Sajida Raheem.

13. Having said so, the prosecution has successfully established that appellant Noman took snaps of the girls and held Mst. Sajida, while appellant Latif took away her shalwar. I, therefore, agree with

the learned counsel for the appellants that it was not a case of zina-bil-jabr but of outraging the modesty of complainant Mst. Sajida Reheem.

14. I am mindful that once it was brought to the knowledge of the learned trial Judge that the appellants were children under section 2(b) of the Juvenile Justice System Ordinance, 2000 their trial should have proceeded under section 4 thereof rather than under ordinary law. The conviction and sentences of the appellants tantamount to throwing them away in a prison for adults with R.I. in violation of section 12 of Juvenile Justice System Ordinance, 2000 which states that no child should be given corporal punishment at any time while in custody.

They must have suffered great deal of hardship and torture till such time bail was granted to them by this Court or the trial Court as the case may be. It may also be stated here that a child could only be detained in Borstal Jail under Rule 6 of Juvenile Justice Rules, 2001.

15. In view of the foregoing discussion, it is not a fit case for remand, as the prosecution has no other evidence available except what is on record of this case and discussed above. The case against the appellants falls thus under section 354 PPC. Accordingly the

conviction and sentences of the appellants by the learned Sessions Judge is set aside. The appellants are, however, liable to conviction under section 354 PPC but keeping in mind the mitigating circumstances, the appellants are sentenced to three months S.I. under section 354 PPC read with section 34 PPC. They are on bail. Their bail bonds shall stand cancelled. They shall be taken into custody to serve out their remaining sentence. The appellants shall be entitled to the benefit of section 382-B Cr.P.C.


JUSTICE HAZIQUL KHAIRI
Chief Justice

Announced at Islamabad on

30-5-2008

Bashir/*

APPROVED FOR REPORTING.


CHIEF JUSTICE