

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN

MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No. 316/I of 2005.

Hashim son of Qasim,  
R/o. Darkhast Jamal Khan Gharbi, No.1,  
Tehsil and District, Dera Ghazi Khan ... Appellant/petitioner

Versus

1. Gul Muhammad  
2. Muhammad Rafique  
3. The State .... Respondents

Counsel for appellant ... Mr. Allah Bakhsh Khan Kulachi,  
Advocate

Counsel for respondent ... Mr. Ghulam Mehboob Khokhar  
Advocate

Counsel for State ... Mr. Asjad Javed Ghural  
Deputy Prosecutor General

FIR No. Date &  
Police Station ... 112, 24.10.2000  
Darkhast Jamal Khan, D.G.Khan

Date of judgment of  
trial court ... 19.11.2005

Date of Institution of Appeal ... 29.12.2005

Date of hearing of Appeal ... 26.8.2008

Date of decision by  
Federal Shariat Court ... 26.8.2008

JUDGMENT

SYED AFZAL HAIDER, JUDGE.- Appellant

Hashim has through this appeal challenged the judgment dated 19.11.2005, passed by learned Additional Sessions Judge, Dera Ghazi Khan whereby the trial court acquitted respondents namely Gul Muhammad and Muhammad Rafique under section 12 of Offence of Zina(Enforcement of Hudood) Ordinance, 1979 read with section 377-PPC.

2. Brief facts of the case are that Hashim son of Qasim, aged 11/12 years, on 24.10.2000 appeared before Abdul Majeed, ASI at 5.35 p.m. and made an oral complaint to the effect that he earned his livelihood by grazing goats and that at 4.00.p.m. on the same day he was grazing his cattle in the field of Rasool Bakhsh Chandia at a distance of 12/13 bighas of land from his house when Gul Muhammad and Rafique respondents came there who over powered him and took him by force to the adjoining rice field where he was made to lie prone on the ground. He tried to raise hue and cry but Rafique

respondent put his hand on his mouth and Gul Muhammad respondent un-fastened the string of his shalwar and committed sodomy upon him. Thereafter Gul Muhammad respondent caught hold of the complainant/victim and Rafique respondent took his turn of committing the un-natural act upon him. His hue and cries attracted his father Muhammad Qasim and Yousaf son of Ghulam Muhammad. The respondents took their heels as soon as they saw them coming. Complainant's father helped him to put on the shalwar and they proceeded to lodge a complaint with the police. Hence the complaint.

3. The statement of complainant Hashim was recorded by Abdul Majeed, ASI who forwarded the application for registration of a criminal case under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 read with section 377 of the Pakistan Penal Code. Accordingly FIR. No.112/2000 was registered at Police Station Darkhast Jamal Khan, District Dera Ghazi Khan by Muhammad Jaffar Muharrar/ Constable.

4. Investigation ensued as a consequence of the registration of the case. However the police found the complainant's version

doubtful and a cancellation report was submitted to the Court on 29.08.2004 as the SHO had on 30.04.2001 declared the accused innocent. The complainant contested this report before the Illaqa Magistrate who sent the cancellation report to the Anti Terrorist Court, Dera Ghazi Khan for further proceedings. On 3.7.2001 the Anti Terrorist Court, Dera Ghazi Khan found that the accused have been declared innocent as the case was untraced. He therefore directed the file to be consigned to record. Aggrieved by this order the minor victim-complainant filed a Constitutional Petition in the Lahore High Court, Multan Bench which was registered as Writ Petition No.2437/2004. The Honourable Judge of the High Court on 15.7.2004 passed the following Order:-

“Hence, by following the dictum laid down by the August Supreme Court of Pakistan, which is binding by all the courts and authorities, the respondent-SHO/I.O. is directed to submit the report U/S.173 Cr.P.C. whatever the result of the investigation was, even if the accused are innocent within, a fortnight before the learned Magistrate, who shall pass appropriate orders after affording proper opportunity of hearing to the petitioner as well as the accused without being influenced by the earlier orders passed by him and the learned Addl:

Sessions Judge within 30 days after submission of the report. Disposed of'.

5. As sequel to this Order passed by the Honourable High Court learned Sessions Judge, Dera Ghazi Khan entrusted the case to Magistrate Section 30, Dera Ghazi Khan on 23.5.2005. The learned Magistrate on 2.6.2005 summoned the parties and after hearing both the sides and perusing the record through a detailed order came to the conclusion that he did not agree with the findings of Investigating Officers. Consequently he sent the report under section 173 of the Code of Criminal Procedure to the court of District & Sessions Judge for trial by the court of competent jurisdiction. Thereafter the case was entrusted to the Additional Sessions Judge, Dera Ghazi Khan who passed the impugned order.

6. That during the trial an application under section 265-K of the Code of Criminal Procedure was moved on behalf of the respondents which application has however not been placed on record and we do not know the grounds agitated therein nor does the

impugned judgment make any reference to the grounds urged in the said application.

7. The learned trial court on 19.11.2005 accepted the said application moved by both the respondents Gul Muhammad and Rafique who were acquitted from the charges. The learned trial court while recording the reasons stated that a perusal of the FIR, which alleged that the accused took the victim in the nearby rice field to commit sodomy did not amount to kidnapping or abduction. In his view, therefore, section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was not applicable. The learned trial court also found that the doctor had not mentioned any injury on the person of the victim and the last reason for acquitting the respondents according to the learned trial court was the opinion of the police declaring the accused innocent. In this view of the matter the learned trial court came to the conclusion that there was no chance of conviction of the accused because the Investigating Officers had found both the accused innocent in this case.

8. Learned trial court has regretfully not identified the reasons why and how the police came to the conclusion about the innocence of the accused. Was this conclusion of innocence based upon the evidence of co-villagers who had neither witnessed the occurrence nor were witnesses of the alibi? The application before the learned trial court was not for post arrest bail where the accused would claim the concession of bail on account of a favourable report of the investigating officer. The legal effect of accepting of application under section 265-K of the Code is clean acquittal and not enlarging a person on interim bail to secure attendance at the trial. The relevancy of the opinion of an investigator is the soundness of the material on which it is based. The trial court must therefore rest its opinion on the nature of accusation and the quality of evidence that the prosecution intends to produce at the trial as well as other factors surrounding the occurrence or available on record of the case. The trial court should not be satisfied with the ipse-dixit of police. Material which satisfies an ordinary prudent mind must be available on record.

9. It is not possible to agree with the observations made by the learned trial court because he has failed to apply his mind while deciding a case under section 265-K of the Code of Criminal Procedure. The fact of the matter is that a bare perusal of the medico legal report show that the injury has been mentioned apart from the fact that swabs were also taken for onward transmission to the Chemical Examiner. The report of Chemical Examiner is positive as the swabs were found stained with semen. The medical test of the victim took place on the same day within four hours of the incident. In the presence of the two pieces of documentary evidence apart from the eye witness account of the ravished child it is not understandable as to how the learned trial court came to the conclusion that no injury was mentioned. It is significant to note that the trial court does not come to the conclusion that sodomy was not committed upon the victim. In so far as the allegation of abduction or kidnapping is concerned it is irrelevant whether section 12 is applicable or not so long as the accusation of unnatural offence has been made which the prosecution intended to support through documentary and oral



evidence which legal right was denied. It may be observed that the victim is only 11 years old and at this stage the unattended children are exposed to sexual abuse by boys of senior age. In so far as the ground that the respondents were declared innocent by the police in different investigations, the learned trial court failed to appreciate that the Illaqa Magistrate had not agreed with the report of innocence submitted by the police at the time the FIR was sought to be cancelled. Moreover the question of determination of the guilt under the Code of Criminal Procedure is the domain of the trial court. It has been held in the case of Nasir Abbas Versus The State, reported as 1995 SCMR 1333, "that the opinion of the Investigating Officer about the guilt or innocence of an offender is irrelevant and inadmissible in evidence. The Courts have to scrutinize the evidence produced by the parties before it and arrive at right conclusion. Courts are not to be influenced by the opinion of Investigating Officers. Opinion of the Investigating Officer plays important role for submitting report under section 173 of the Code of Criminal Procedure before the Court but not thereafter". The learned Illaqa

Magistrate as mentioned above, did not agree with the opinion of the police and proceeded to take cognizance of the case. In this view of the matter the trial court was not justified in giving credence to the police opinion and ignoring the order passed by the learned Magistrate. It is by now established that the court is not bound by the finding of the Investigating Agency even if different officers have given a consistent opinion. Reference may be made to the case of Umar Farooq Vs. State reported as 1993 P.Cr.L.J. 709. The trial court has to form an independent opinion on the basis of the available record and should not feel bound by the opinion of police. Judicial discretion cannot be made subservient to the dictates of police.

10. The Trial Court, under section 265-K of the Code of Criminal Procedure, has no doubt the jurisdiction to acquit an accused at any stage of the case but there is a big rider attached to the exercise of this discretion. Firstly both the parties have to be heard and secondly the court after considering the pros and cons of the controversy should come to the conclusion that there is no probability of the accused being convicted of any offence. The learned trial court

has neither come to the conclusion that it was a case of no evidence nor has he found that there is no material on record to connect the accused with some offence.

11. It has to be kept in mind that section 265-K is an exception to the general rule relating to trial of cases under the Code.

This provision has therefore to be construed strictly. The trial judge is under an obligation to record reasons to justify the inference that in all probability the verdict of guilt will not be returned. It should be noted

that proceedings under this section are summary in nature. There has to be judicious exercise of discretion under section 265-K. Depriving

a complainant to prove his case through oral or documentary evidence

is not fair exercise of jurisdiction. Stifling the prosecution is not the

purpose of this section. Reference may be made to the following

reports to illustrate the nature and extent of jurisdiction under section

265-K of the Code of Criminal Procedure.

12. In the case of Syed Mushtaq Hussain Shah Bokhari Vs.

The State and another reported as PLD 1981 Supreme Court 573, the

Hon'ble Judges agreed with the principle enunciated in the case of

Syed Ahmed Vs. State reported as PLD 1958 SC (Pak) 21, that the prosecution should not be stifled at the outset and the party should be allowed to produce its evidence.

13. In the case of The State Vs. Mir Nabi Bukhsh Khan Khoso and another reported as 1986 P.Cr.L.J 1130 it was held that even though the law does not require the recording of evidence before passing the order of acquittal under section 265-K of the Code of Criminal Procedure, yet this jurisdiction should not be pressed into service to stifle or to throttle prosecution. In this case the Hon'ble Division Bench remanded the case for re-trial as the Court had acquitted the accused without framing the charge and without taking into consideration material on record and of course without offering opportunity to prosecution to produce its evidence. In the instant case there is however no complaint that the prosecution is employing dilatory tactics to delay the disposal of the case or the complainant was reluctant to produce evidence in support of his accusation.

14. In the case of Khawaja Zulfiqar Ali Vs. The State, reported as 1992 MLD 265(Lahore), it was held that ordinarily the

guilt or innocence of an accused person will depend on the totality of facts and circumstances revealed during the trial. Section 265-K is an exception and it has to be construed strictly. The Court would not lightly grant petition under section 265-K if there exists some material to connect the accused with crime.

15. In the case of The State Vs. Azim Malik, reported as PLD 2005 SC 686, at page 703 it was found that the trial Court could not have invoked section 265-K of Code of the Criminal Procedure to <sup>Ac</sup> acquit the accused, if there was documentary, oral or circumstantial evidence.

16. In this view of the matter when the oral evidence as well as medico legal opinion and the report of the Chemical Examiner was available to prove the offence the learned trial court, by granting relief to respondents, suffocated the complainant party by depriving them the right of producing available evidence in support of their case. The Judgment of the learned Additional Sessions Judge, Dera Ghazi Khan dated 19.11.2005, passed in Hudood Case No.07 of 2005 whereby the respondents were acquitted is hereby set aside and

Criminal Appeal No. 316/I of 2005 moved by the complainant

Hashim is accepted. The case is consequently remanded for re-trial.

The learned District & Sessions Judge, Dera Ghazi Khan ensure

attendance of parties and expeditious disposal of the case under

intimation to the Registrar of this Court.

*S. Muaidan*

JUSTICE SYED AFZAL HAIDER

*M. Z. Yasir*

JUSTICE MUHAMMAD ZAFAR YASIN

Islamabad the 26<sup>th</sup> August, 2008

UMAR DRAZI/

Fit for reporting

*S. Muaidan*

JUSTICE SYED AFZAL HAIDER