

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE HAZIQUK KHAIRI CHIEF JUSTICE
MR.JUSTICE SALAHUDDIN MIRZA

CRIMINAL APPEAL NO.12/K OF 2006 AND

1.Abdul Batin -- Appellants
2.Abdul Awwal alias Awal
both sons of Ahmed Ali Munshi
residents of Bengali Para, P.I.B.
Colony, Karachi

CRIMINAL APPEAL NO.15/K OF 2006

Asghar Ali son of -- Appellant
Akbar Hussain Baloch
Resident of Angara Goth
B-Area, House No.JV-63,
Liquatabad, Karachi.

Versus

The State -- Respondent

Counsel for appellants -- M/s Fazal Dad and
Abdul Batin and Abdul Manzoor Ahmed Bhutta,
Awwal alias Awal Advocates.

Counsel for appellant -- Mr.G.M.Kamal,
Asghar Ali Advocate.

Counsel for the -- Agha Zafir Ali,
State A.A.G.Sindh

No.date of FIR and -- No.218 dated 2.12.2000
Police Station P.S.PIB Colony,Karachi

Date of the judgment -- 31.1.2006
Of trial Court

Dates of institution -- 4.3.2006 and 30.3.2006

Date of hearing -- 18.10.2007

Date of decision -- 10-1-2008

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JUDGMENT

SALAHUDDIN MIRZA, J.- These two appeals i.e.

Criminal Appeal No.12/K of 2006 filed by appellants Abdul Batin, and Abdul Awwal and Crl. Appeal No.15/K of 2006 filed by appellant Asghar Ali are directed against the judgement dated 31.1.2006 passed by learned Ist Additional Sessions Judge Karachi-East, Mrs. Rashida Asad, whereunder she has convicted five of the six accused in the case of FIR No. 218/2000 of Police Station P.I. B. Colony, Karachi, under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, (hereinafter referred to as "the Ordinance") lodged by Eidan Mian of Bangali Para, Nafisabad, Tinhatti, Karachi, and sentenced them to various terms of imprisonment as under:

1. Abdul Batin

a). **Under section 10(3) of "the Ordinance":** Life imprisonment as tazir.

b). **Under section 498/34 PPC:** 2 years' RI + Fine of Rs. 10,000/- or further RI for six months in default of payment of fine.

Note:- It may be noted that this section is no more on the statute book and was repealed by the Offence of Zina

(Enforcement of Hudood) Ordinance, VII of 1979.

- c). **Under section 465 PPC:** 2 years' R.I + Fine of Rs. 50, 000/- or further RI for six months in default of payment of fine.
- d). **Under section 493 PPC:** 10 Years' RI + fine of Rs. 50,000/- or further RI for six months.

2. Umer Farooq

Acquitted.

3. Mst. Bano Bibi

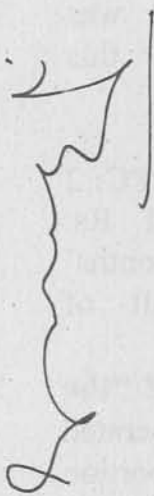
- a). **Under section 498(34) PPC:** She was not found guilty under this section but nevertheless, "taking a lenient view she was given imprisonment already undergone by her till the day of judgement" (sub-clause 'c' on page 15 of the judgement).

- b). **Under section 10(3) of "the Ordinance:** Strangely enough, even though a lady, she was also convicted under section 10(3) of "the Ordinance" (line-3 & 4 of page-15 of the judgement) but it could not be deciphered from the judgement as to what sentence was awarded to her under this section.

4. Asghar Ali

- a). **Under section 498/34 PPC:** 2 years' RI + fine of Rs. 10,000/- or six months' RI in default of payment of fine.

- b). **Under section 10(3) of "the Ordinance":** Was not found guilty vide portion marked 'A' at page-14 of the judgement but found guilty vide first paragraph of page-15 of the judgement but it is not clear from the judgement what sentence was awarded to him under this section.



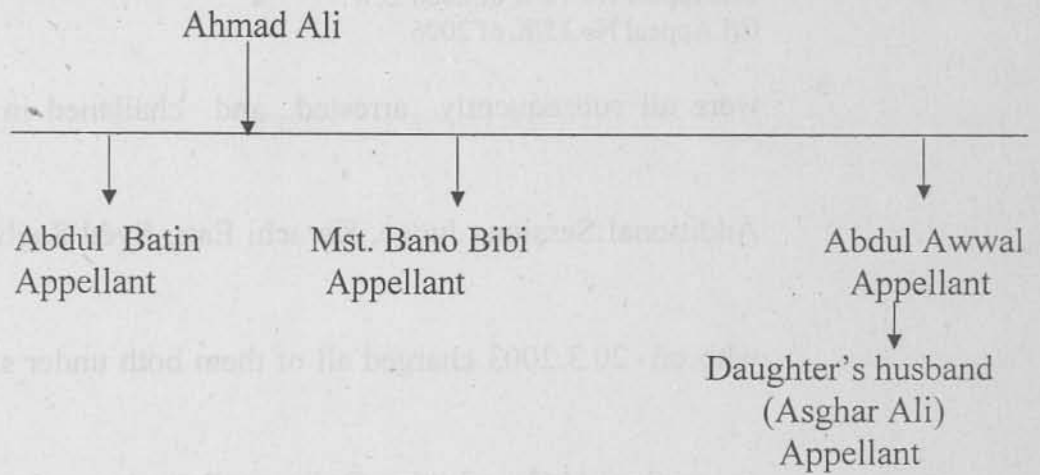
5. Shiraz

- a). **Under section 498/34 PPC:** 2 years' RI + fine of Rs. 10,000/- or further six months' RI in default of payment of fine'
- b). **Under section 10(3) of "the Ordinance":** He was exonerated from committing offence under section 10(3) vide portion 'A' at page-14 of the judgement but still found guilty vide first paragraph of page-15 of the judgement. Not clear from the judgement as to what, if any, sentence was awarded to him under this section.

6. Abdul Awwal

- a). **Under section 498/34 PPC:** 2 years' RI + fine of Rs. 10,000/- or six months' further RI in default of payment of fine.
- b). **Under section 10(3) of "the Ordinance":** Was exonerated of this charge vide portion marked 'A' at page-14 of the judgement but found guilty under the same charge vide first paragraph of page-15 of the judgement. It is not clear from the judgement whether he was awarded any sentence under section 10(3) of "the Ordinance".

2. It is to be noted that two of the six accused persons are strangers while the remaining four are closely related to each other as would appear from the following table:



3. The prosecution case is that Mst. Rashida, 19, daughter of complainant Eidan Mian, was married to one Abdul Salam in 1996 but was living with the complainant for some time prior to the date of occurrence. About 10/12 days prior to the lodging of the FIR (which was lodged on 2.12.2000) the complainant and his wife went on their work, leaving Mst. Rashida at home and when they returned at 4 p.m. they discovered that their daughter had disappeared from the house and the search of the parents did not yield any result. The complainant apprehended that someone had abducted his daughter for purposes of zina and reported the matter to the police. On 5.12.2000 Mst Rashida herself came back to the house of her parents and narrated the story of her abduction and commission of zina-bil-jbr at the hands of five of the accused persons with the help of the sixth accused Mst. Bano who

were all subsequently arrested and challaned in the Court of 1st

Additional Sessions Judge, Karachi East, Syed Saghir Hussain Zaidi,

who on 20.3.2003 charged all of them both under section 16 as well


as section 10(3) of "the Ordinance", **not sparing even the lady**

accused from the charge under section 10(3) of "the Ordinance".

All the accused pleaded not guilty to the two charges and claimed to

be tried whereafter the prosecution examined the following witnesses

before the learned trial Court:



PW 1 Eidan Mian. He is the complainant and father of the alleged abductee Mst. Rashida. He stated that on 22.11.2000 he went to his duty and when he returned after finishing his work he found that his daughter had not returned from her duty and after searching her for 10/12 days he lodged the FIR on 2.12.2000. On 5.12.2000 her daughter came back to his house at her own and informed him that Asghar Awwal, Batin, Farooq "and others" had kidnapped her and had kept her at an unknown place where they committed zina-bil-jabr with her. In cross examination he said Zahirul Islam

had initiated 107/117 Cr.P.C. proceedings against the appellants in which he (Eidan Mian) was a witness, that the accused persons lived in the next lane from his house but he did not know them when the FIR was lodged. He said he did not remember whether he had moved an application against the accused persons on 12.6.2000 but admitted having made complaint against them (but did not state 'when' nor he explained how he made complaint against them when he did not know them even till the time the FIR was lodged on 2.12.2000). He first denied that police had recorded his statement in connection with that application/complaint but then conceded that SI Choudhri Imtiaz of PIB Colony police station had recorded his statement on 10.6.2000 in respect of his application. He further admitted that, at the time when he filed application against the accused, his daughter also filed a case in the Court against one Zahir-ul-Islam and at that time she was residing with the accused and lived with them for about three months (later in the cross examination he stated 'four months', at 'A' at page 10 of paper-book). He further admitted that his



daughter lived with the accused until the decision of the case filed by her against Zahir-ul-Islam. He then filed the copies of the following documents in the Court. 1). Copy of a 'Compromise Application' dated 3.11.2000 in Family Suit No. 660/2000 (Zahir-ul-Islam Vs Mst. Rashida Begum, evidently a suit for restitution of conjugal rights) pending in the Court of 1st. Family Judge Karachi East. This application is signed by the parties to the suit and in this application it was stated that at the intervention of the father of the defendant (Mst. Rashida) and other well-wishers of the parties, the parties had patched up their differences and Mst. Rashida had returned to the house of her husband Zahir. At the bottom of the application is the order of the Court of the same date, 'disposing of the suit in view of the compromise application'. 2). Application jointly given by the parties, for the withdrawal of Suit No. 588/2000 (Mst Rashida Begum Vs Zahir-ul-Islam (suit for jactitation of marriage). In this application it is stated that Mst. Rashida had filed the suit for dissolution of marriage at the instance of Batin (one of the appellants in the present appeal) who was rival



of her husband who had allegedly married her on the basis of a nikahnama on which he had fraudulently obtained her signatures (but she had not signed this application but thumb-marked it). She further stated in this application, "*I did not accept him (Batin) to be my husband on the basis of the said forged and fraudulent documents and so much so that I never permitted him to cohabit with me*". She also stated in her application that due to some domestic disputes she was not maintaining good terms with her husband and this dispute was exploited by Batin. At the bottom of the second page of the application there is order of the Family Court Judge, dismissing the suit of jactitation as withdrawn. This application and the order of the family judge thereon are also of 3.11.2000.

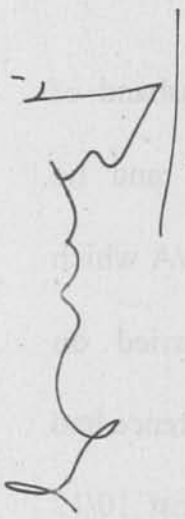
Pw-2 Mst. Rashida: She is the alleged victim girl. She said that on 21-22 November 2000 she was returning from Tinhatti Chowk to her house when a taxi stopped near her in which Asghar, Batin and Awwal were sitting. Batin came out of the taxi and attempted to kidnap her



whereupon a number of persons gathered there to whom Batin said that she was his wife and was not willing to go home and thus the three accused persons managed to kidnap her in the taxi and she was taken to some unknown place where they (i.e. Awwal, his son Asghar and his brother Batin), and some other persons as well, committed zina-bil-jabr with her 'with the help of Mst. Bano accused' (what help Mst. Bano could provide in this regard, was not clarified). However, on 5.12.2000 she managed to escape from the place where she was confined and came to her father's house in rickshaw and narrated her tale of woe to her father who 'rang/called' the police and after her medical examination the case was registered with the police against the accused. She identified all the accused in the Court. In cross examination she admitted that she knew the accused for the last ten years since prior to 13.1.2004 when her statement in Court was recorded as PW 2. She admitted having filed family suit No.588/2000 against Zahir-ul-Islam but denied that in her plaint she had stated that Zahir had divorced her on 3.12.1996 and thereafter she had married Batan on 10.6.2000 (she did say so in




paras 2, 3 and 4 of the plaint) but admitted that she had alleged in her plaint that Zahir intended to spoil her life. She also admitted that she attended the Court on the dates of hearing of her suit. She also admitted that her father used to make applications with the police against the accused. She admitted having got recorded her statement at Police Station PIB Colony in the presence of SI Imtiaz but added that that statement was made by her under the pressure of the accused (pressure of the accused even in the police station!). She also admitted that she was living with Batin, Awwal and Asghar during the pendency of her family suit (for 4 months according to her father PW 1). She admitted that accused Awwal is father-in-law of accused Asghar and that accused Awwal and accused Batin are brothers and that accused Mst Bano is sister of accused Awwal and that they all resided together as a joint family. She denied having lived with accused Batin as his wife from 10.6.2000 to 3.11.2000. She admitted that the house of her father was just in the next street from the house of the accused. She admitted that the accused persons neither



committed zina with her, nor conspired with any one to force her to commit zina with any one else, during the pendency of her family suit.

Note: Neither PW 1 nor PW 2 made any reference to 'Abdus Salam' to whom she was married in 1996 as per FIR. Both of them now speak of Zahir-ul-Islam as the husband of PW 2.



PW-3: Zahir-ul-Islam. He is the alleged husband of PW 2 Rashida (alleged abductee) and he produced copy of nikahnama as Ex.7/A which shows that he and Rashida were married on 5.9.1996. According to him the occurrence had taken place on 14.12.2000 (as against 10/12 days prior to 2.12.2000 per FIR). He said that accused Asghar, Awwal and Batin abducted his wife and forged a nikahnama under which his wife was purportedly married to Batin and thereafter under the influence of the accused persons his wife filed a suit for khula against him(in cross examination he said it was 'suit for jactitation and was filed on 20.6.2000'). He said that after 3.11.2000 he and Rashida commenced living together but on 21-22 November 2000 she was (again) kidnapped by

the accused. Zaheer further said that after coming back, Rasheeda informed him that the accused persons demanded Rs.80,000/- for her return (something Mst. Rashida herself did not say). He conceded that he and Rashida both used to attend the Family Court during the hearing of the suit for Jactitation.

PW-4 Muhammad Himayat. He is mohallaidaar of the complainant and says he is eye witness of the kidnapping of Mst. Rashida at Tinhatti Chowk by Awwal, Batin and Asghar and added that when the people who gathered around Mst. Rashida inquired why she was being taken, *'the accused persons disclosed that she is his wife'*. What he stated is mostly hearsay evidence. He contradicts Rashida when he says that she has no issue with Zaheer and he admits that he has 'terms with police officials'.

PW-5 Kamal Hussain: He is musheer of arrest of accused Batin and Farooq (Umer Farooq) who were, according to him, arrested at night between 6/7 December 2000.

PW-6 SI Malik Muhammad Anwar. He had only recorded the FIR.


PW-7 Imam Din. He claims to be eye witness of abduction at Tinhatti Chowk on 21 or 22 November 2000. He says he saw a taxi in which Awwal, Batin and a girl were sitting and Asghar was explaining to the crowd gathered around the taxi that the girl was wife of Batin. He did not bother to see the outcome of the quarrel and went his way and after 3 or 4 days he learnt from mohalla people that the same accused persons had also abducted the girl before. In cross examination he said that he did not know the accused persons before but did not explain how he said that it were Batin, Awwal and Asghar who were abducting the girl.

PW-8 Inspector Zakya Farooqi. She says that on 2.12.2000 she was posted in 'Ladies cell', East and that on 5.12.2000 the complainant informed her on telephone that the abductee Rashida had come back home whereupon she went to the house of the complainant, took the abductee in her custody under musheernama Ex. 5/B and recorded her statement. She arrested Umer Farooq and Batin accused. She

also got recorded on 13.12.2000 the 164 Cr.P.C. statement (Ex.17/A) of the abductee through a Magistrate. On 13.12.2000 she was searching the remaining accused persons and when she reached Bengali Para she saw accused Awwal, Asghar and Shiraz who ran towards Liaqatabad on seeing the police party'. However, she did not say whether she succeeded in arresting them or not but the same night she claimed to have arrested accused Bano Bibi. She further stated that 'it came to her knowledge' that accused Batin ran a shop near the house of abductee who was issueless and took her photographs and instigated her to file a suit for jactitation of marriage. She also produced Chemical Examiner's report as Ex. 12/C. After obtaining the legal opinion from PDSP she filed the challan in the Court. She also stated that the abductee remained in the custody of 'Ladies cell' from 5.12.2000 to 13.12.2000 and during this period the complainant, his family and Zahir-ul-Islam used to come to visit the abductee.



PW-9 Dr. Nisar Ali Shah, the then MLO of Civil Hospital, Karachi. He examined accused Umar Farooq on 9.12.2000 for determination of his sexual potency and his report is in positive. It is however a matter of surprise that even though accused Abdul Batin was not produced before him but he has also given an opinion in the positive about his sexual potency.



PW-10: Lady doctor Waseem Farmaan, the then WMLO of Police Hospital. She had medico-legally examined Mst. Rashida on 06.12.2000. She produced her MLC as Ex. 14-A. She did not discover any marks of violence on the body of Rashida whose vagina admitted two fingers and hymen was torn and healed. She had taken vaginal swabs and sent them to the Chemical Examiner for determination of semen whose report Ex.12/C is in the negative.


4. The prosecution closed its case at this stage and learned trial judge then examined SI Ch. Imtiaz Ahmad as CW-1.

CW-1: SI Ch. Imtiaz Ahmad. He was posted as Additional SHO at Police Station P.I.B. Colony Karachi when on 12.6.2000 he



received an application of complainant Eidan Mian from Army Monitoring Cell 'regarding this incident' (per FIR the incident had occurred in November, 2000). He produced its copy as Ex. 15-A. He then undertook the investigation and brought Batin, Mst. Rashida, Zaheerul Islam, complainant Eidan Mian, Kamal and Razya to the police station and recorded their statements. He produced copies of these statements as Ex. 15-B to 15-G. In her statement Mst. Rashida stated that she had obtained divorce from Zahirul Islam and thereafter she had contracted marriage with Batin with her free will. She also produced before him copies of divorce deed, declaration of her free will and of nikahnama with Batin. The add. SHO has produced their copies as Ex. 15-H to 15-J. He further stated that in view of the statements recorded by him and documents examined by him, he allowed Mst. Rashida to go with her 'husband Batin'. He further stated that sometime after, Mst. Rashida herself appeared before him and told him that she had filed a family suit against Zahirul Islam, and since the dispute had thus become sub-judice he suspended further investigation in the

matter. In cross examination by the trial Judge, he said that the originals of all the documents produced by him were with the Army Monitoring Cell. Cross examined by the counsel of the accused, he said that Mst. Rashida had stated before him that she had been happily living with her husband Batin but her ex-husband Zahirul Islam and her father were in collusion with each other in falsely implicating her husband Batin and others in the criminal case.

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5. The 342 Cr.P.C. statements of the accused were then recorded.
 6. Appellant Abdul Batin denied the prosecution version of the case and stated that Mst. Rashida had obtained divorce from her ex-husband Zahirul Islam and thereafter she had married him with her free will. He also stated that the complainant had falsely implicated the entire family of Abdul Awwal --- his sister Mst. Bano, his brother Batin and his daughter's son Asghar, besides Sheeraz and Umar Farooq. It is however to be noted that learned trial Judge put questions to him which were contrary to facts. For example, in question No. 7 he was asked "It has come in evidence that sbductee Mst. Rashida had

filed two family suits No. 558/2000 and 660/2000 against her husband

Zahirul Islam” whereas she had, in fact, filed only one suit, and that

too bearing No. 588/2000 (not 558/2000) while the other suit was

filed by ‘her husband’ against her. Also, under question No. 10 it was

said that ‘it has come in evidence 14.12.2000 at 1.00 a.m. co-accused

Asghar Ali, Abdul Awwal, Sheeraz and Mst. Bano were arrested by

Lady ASI (she was SI) Zakya Farooqi on the pointation of

complainant Eidan Mian in presence of Abdul Kareem and Zahirul

Islam’. This is factually incorrect since PW 8 SI Zakya Farooqi says

she arrested only Mst. Bano, Batin and Umar accused. About Abul

Awwal, Asghar Ali and Sheeraz, the Lady Inspector said that she saw

them fleeing towards Liaqatabad on seeing the police party. Accused

Abdul Batin did not offer to examine himself under Section 340(2)

Cr.P.C. and also declined to lead any defence evidence.

7. Acquitted accused Umar Farooq and co-accused/convict

Sheeraz (who has not filed appeal against his conviction) and the

other appellants, on the whole, supported appellant Abdul Batin in

their 342 Cr.P.C. statements. All of them stated that they had been called at the police station and when they went there they were arrested. All of them did not offer to appear as their own witness under section 340(2) Cr.P.C. and did not lead any defence evidence.

8. We have gone through the evidence on record with the help of learned counsel for the appellants and learned State Counsel.

9. It may be noted that the appellants, acquitted co-accused Umar Farooq and non-appellant Sheeraz and Mst.Bano (who, though convicted has not filed appeal because she was sentenced to imprisonment already undergone) had been proceeded against in the present case on the basis of FIR No. 218/2000 recorded at police station PIB, Karachi, on 2.12.2000 at the instance of Eidan Mian and we shall therefore first determine whether the case set up by the prosecution in the FIR has been established on the basis of evidence brought on record by the prosecution. What had happened in the past prior to the recording of FIR, and in respect of which there is no reference in the FIR, shall be looked into afterwards.

10. The complainant stated in the FIR that his daughter Mst. Rashida (the alleged abductee) was married to Abdul Salam in 1996 but was living with him (complainant) and that he and his wife had gone on their work 10/12 days before lodging of the FIR (which was lodged on 2.12.2000) and their daughter Mst. Rashida was left at home but when they returned home at 4 p.m. they did not find Mst. Rashida in their home. This version has been totally abandoned by the complainant in his evidence where, as PW 1, he implied that Mst. Rashida was wife of Zahirul Islam and that on the day of occurrence she had not been left in the house but she had also gone on her work but did not return by the time he himself returned. The complainant admitted the contents of the FIR as correct and tendered it in Court in evidence but did not explain the vast difference between it and the instance taken by him during the evidence. **Secondly**, there is nothing on record to explain as to how Mst. Rashida, who was shown to have been married to Abdul Salam in 1996, became the wife of Zahirul Islam by the time the case reached the stage of evidence. **Thirdly**,



whereas complainant Eidan was not sure of the date of occurrence on 2.12.2000 when he lodged the FIR and therefore stated therein that the occurrence was of 10/12 days prior to the lodging of the FIR, he somehow remembered the exact date more than three years later when he was examined as P.W.1 and said the occurrence had happened on 22.11.2000. Same version was given by Mst. Rashida when examined as PW 2. These three changes of instance in the prosecution case throw serious doubt on the prosecution story.

11. The charge framed under section 16 of "the Ordinance" against the six accused jointly is that they abducted Mst. Rashida from Tinhatti Chowk 10/12 days prior to the recording of FIR, that is, on 21 or 22 November 2000. The first witness on the point is the abductee Mst. Rashida PW 2 herself. She blames Asghar, Awwal and Batin for her abduction in a taxi from Tinhatti Chowk and stated that, when a crowd gathered there, Batin said that she was his wife whereupon the crowd let the accused take her with them. She did not state that she raised any hue and cry and protested that she was not Batin's wife.

PW 1 complainant and PW 3 Zahirul Islam are not eye witnesses of abduction. However, PW 1 said that his daughter told him that 'Farooq and others' were also amongst those who had kidnapped her (whereas daughter herself as PW 2 only implicated Awwal, Asghar and Batin in her abduction). PW-4 Muhammad Himayat, without saying that he witnessed the kidnapping, stated that the 'abductee was going to Tinhatti towards Mohajir Camp, that the accused Batin, Awwal and Asghar abducted her from Tinhatti and on the inquiry by the people (not him) accused persons disclosed that *'she is his wife so has taken her house'*. The witness did not clarify as to which of the accused, amongst the three accused persons who were abducting Mst. Rashida, claimed to be her husband. The witness also stated that he knew Eidan Mian because he resided in the same locality in which he (the witness) was residing and that Eidan Mian's daughter Mst. Rashida was married to Zahirul Islam. It is therefore strange that Himayat did not inform the crowd which had assembled around the taxi at the time of abduction that Mst. Rashida was not the wife of any



of the three accused but of Zahirul Islam. It is also strange that he did not try to thwart the kidnapping bid but just walked down the road after seeing the kidnapping. The witness further admitted that he had terms with police officials, which amounts to saying in simple words that he was their tout. The evidence of Himayat is highly unreliable.

The next witness on the point of abduction is PW 7 Imam Din who stated that on 21 or 22 November he was going towards Tinhatti when he saw some people gathered at Tinhatti Chowk around a taxi in which Awwal, Batin and a girl were sitting and Asghar was explaining to the assembled crowd that the girl sitting in the taxi was wife of Batin. From the fact that he gave the names of the three accused persons at the outset, it is obvious that he knew them but he did not inform the Court as to whether the girl was, in fact, wife of Batin or not. And he also walked away, without further bothering about the incident. He also did not say whether the girl was also supporting the three abductors or was protesting and, if she was protesting, why he and the assembled crowd did not rescue her.

12. We have minutely scrutinized the evidence on the point of abduction and we do not consider it sufficient or reliable enough to bring home the charge of abduction against Asghar, Awwal and Batin. There is contradiction in the evidence of the eye witnesses. Whereas PW 2 the abductee says that it was Batin who explained to the crowd that she was his wife, PW 7 Imam Din says that it was Asghar who explained to the crowd that the girl sitting in the taxi was wife of Batin and the third witness PW 4 Himayat seemed to have forgotten whom to name and said that '*accused persons disclosed that she was his wife*'. PW 3 Zahirul Islam, who claims he is husband of the abductee, did not even know the date of occurrence and said abduction had taken place on 14.12.2000 whereas even FIR was recorded on 2.12.2000 according to which the occurrence is of 10/12 days prior thereto.

13. None of the witnesses examined in this regard, including the alleged abductee, has said that the abductee raised any hue and cry or protested against her abduction or sought the help of the crowd which



had gathered around the taxi. And if she had done this, the crowd would have surely rescued her from the clutches of the accused. Both the alleged eye witnesses of kidnapping (PW 4 and PW 7) did not intervene to thwart the kidnapping bid and this is highly unnatural conduct on their part unless it is believed that either they, like the crowd, were convinced that no kidnapping was attempted and that Mst. Rashida was wife of Batin or they were false witnesses and did not see any such occurrence at all. The circumstances suggest that the latter possibility is nearer to the truth.

14. This is the only evidence on the point of abduction and it is unreliable and when we look at this evidence together with the contradictions in the prosecution case referred to in the previous paragraphs, we are of the view that the alleged occurrence of 21/22 November 2000 has not been established at all, much less established beyond any shadow of doubt, and appears to be no more than a concocted story. Complainant Eiden Mian has apparently lodged a false complaint and is therefore guilty of prostituting the process of

law for ulterior motives. At any rate, Sheeraz, Umer Farooq and Mst.

Bano are not even implicated by any witness in the abduction of Mst. Rashida from the Tinhatti Chowk.

15. The basis of criminal prosecution is the FIR. No investigation can be initiated without first recording the First Information Report and once an FIR has been recorded the investigation is undertaken on its basis. Facts and crimes not incorporated in an FIR and not emanating from the facts given in it are not made the basis of investigation under that FIR. However, here is a case in which some crimes are said to have been committed prior to the lodging of the FIR which does not refer to any event prior to November 2000 but the police made investigations in respect of crimes which find no place in the FIR and the prosecution adduced evidence in respect of those alleged crimes and the learned trial court has not only taken such evidence into consideration but has also convicted and sentenced the accused in respect of such crimes and therefore we shall examine this evidence and the findings given by learned trial court thereon.

16. The complainant and his FIR give an impression that his daughter Mst. Rashida was a simple 19-year old married girl living with her father from whose house she disappeared on 21-22 November 2000. The evidence, however, unfolds quite a different scenario. Complainant admitted in his cross examination that all the accused persons lived in the adjoining lane from his house and that the alleged abductee had filed suit No. 588/2000 for jactitation of marriage in the family Court against Zahirul Islam and during its pendency she lived with appellant Batin in his house for three months (further down the cross examination he said 'for four months') and the house of Batin is in the next lane from his (complainant's) house. Mst. Rashida herself stated that she lived with accused Batin, Awwal and Asghar during the pendency of her suit for jactitation of marriage against Zahirul Islam. This suit, alongwith Suit No. 660/2000 filed by Zahirul Islam for restitution of conjugal rights, was withdrawn on 3.11.2000 as per applications and orders thereon of the same date (3.11.2000) (pages 16-20 of the paper book). He himself filed copy of

its plaint in the Court (P. 98 of paper book) which shows it had been filed on 20.6.2000. This would indicate that the suit of Mst. Rashida remained pending in the Court from 20.6.2000 to 2.11.2000, that is, for four and a half months and this would show that she lived with Batin for four and half months. She admitted that she was housemaid and used to go to work all alone. She also stated that she used to go to the Court on the dates of hearing of her suit. She also said that the pre-trial proceedings undertaken by the family Court had failed.

17. In the light of these admitted facts, it is impossible to believe that she lived with accused Batin (and others since they all were living as a joint family) for such a long time under duress and against her wishes when the house of Batin was in the lane next to the lane in which house of her father is located and when she so frequently and freely went out of the house to attend to his work as housemaid and to appear in the Court on the dates of hearing of her suit. In Para-3 of her plaint in the suit for jactitation of marriage she says that Zahirul Islam had divorced her through a written divorce deed on 3.12.1996 and

Zahirul Islam in his written statement (Page-106) while denying everything did not specifically deny the execution of the divorce deed.

All this is indicative of the fact Mst. Rasheeda lived with appellant Batin for over four months freely and at her own accord and she claimed to have married him after having been divorced on 3.12.1996

by Zahirul Islam through a written divorce deed. The evidence of CW

1 SI Imtiaz Ahmad is very material who called the complainant and the accused after receiving complainant's application from Army

Monitoring Cell and recorded their statements and Mst. Rashida stated

in her statement that she had been divorced by Zahirul Islam and had married Batin with her free volition. Mst. Rashida in the trial Court

admitted having said so but said she had done this due to fear of the

accused. This explanation of Mst. Rashida is unbelievable because she

should have had no fear of the accused while making statement to

police in police station.

18. Although this Court has no jurisdiction to hold whether Mst.

Rashida was duly divorced by Zahirul Islam and adjudication on this

point lies within the jurisdiction of the family court having territorial jurisdiction in the matter, circumstances show that this may well be true. The fact that Mst. Rashida was not residing with Zahirul Islam but her father is also indicative of the fact that she and Zahirul Islam were a divorced couple. It is evident that Mst Rashida subsequently fell under the spell of her father who with the help of her ex-husband got the suit for jactitation withdrawn. In view of this position, it cannot be said that Mst Rashida lived in adultery with accused Batin as She honestly believed in the authenticity of the talaqnama executed by Zahirul Islam. Besides, she debunks the charge of zina-bil-jabr when she, after alleging in the examination-in-chief that '*beside accused persons, other persons also committed zina with her*' states in her cross examination that during the period she lived with Batin (and other accused, since all of them lived together as a joint family) during the pendency of the family suit (which stretched to 4 ½ months) neither the accused committed zina with her nor 'had made any conspiracy for zina with any other person'.



19. We agree with learned trial judge that it is impossible to believe that a grand father, along with his grand son and brother, would jointly commit zina with Mst. Rashida in which heinous crime and immoral act sister of the ^{grand} father would help her two brothers and a nephew to commit zina with Mst. Rashida. The entire prosecution story is unbelievable. And, here also, there is hardly any evidence worth the name which could involve appellants Asghar Ali, Mst. Bano and Shiraaz in the commission of the crime except the 164 Cr.P.C. statement of Mst.Rashida.

20. We have noted above that PW 8 SI Zakya Farooqi had got recorded the 164 Cr,P.C. statement of Mst Rashida on 13.12.2000. This statement, which bears no date, was tendered in evidence by learned State counsel as Ex. 17/A. In this statement Mst. Rashida implicates Asghar, Awwal and Batin for her abduction on 21-22 November 2000 and further states that she was taken to a house where she was kept until 5.12.2000 when she managed to escape and during this period the three abductors and Mst Bano used to bring people who

committed zina with her and that on 5.12.2000 Mst. Bano and Awwal (both brother and sister) had brought Shiraz and then themselves went away whereupon she asked Shiraz as to where they had gone and he replied that they had gone to fetch ransom money of Rs. 80,000/- from her father on receipt of which she would be released and then Shiraz committed zina with her and when he thereafter went to the bathroom she ran away from the said house. This is the only piece of evidence which has come against Shiraz but even this allegation against Shiraz is proved false by the fact that her vaginal swabs taken the very next day were not found by the Chemical Examiner as semen-stained vide his report Ex. 12/C.

21. The medical evidence also goes against the prosecution case. Mst. Rashida allegedly escaped from the clutches of the accused on 5.12.2000 and the very next day she was medically examined and her vaginal swabs were taken and the report of Chemical Examiner Ex.12/C did not find any semen stains on them. If Mst. Rashida was

being sexually assaulted by so many persons as she alleged, surely the swabs would have been semen-stained.

22. However, the 164 Cr.P.C. statement of Mst. Rashida had not been duly proved by examining the judicial magistrate who had recorded it and no explanation was given for not examining him and it thus an unproved document. Moreover, PW 8 SI Zakya Farooqi of the 'Ladies cell' stated that Mst. Rashida remained in the custody of the said 'cell' from 5.12.2000 to 13.12.2000 where the complainant, his family and Zahirul Islam used to come to meet her. As such, there is strong reason to suspect that during these eight days Mst. Rashida was pressurized by complainant and Zahirul Islam to implicate the accused persons and it is also significant to note that her custody was handed over to the complainant immediately after she recorded her statement before the judicial magistrate. As such, the 164 Cr.P.C. statement of Mst. Rashida, having not been properly proved in accordance with law and apparently having been made under the pressure of the complainant and Zahirul Islam, is of no evidentiary value.

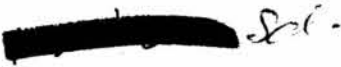
23. In short, we are of the view that the alleged abduction of November 2000 is not true or at least it has not been proved beyond any shadow of doubt and the crimes allegedly committed prior to November 2000 have also not been proved. Learned Additional Sessions Judge grossly erred in finding the appellants guilty on the basis of flimsy and unreliable evidence and, in the case of Mst. Bano and Shiraz, almost no evidence at all. We would, therefore, set aside the impugned judgement, accept the two appeals. Appellants Abdul Batin, Abdul Awwal and Asghar Ali are on bail and their bail bonds are discharged. Co-accused Shiraz, who has not appealed against his conviction, and co-accused Mst.Bano who has also not filed appeal because she was sentenced to imprisonment already undergone by her and was released when the impugned judgment was announced, stand on a firmer ground as virtually no witness involved them in the commission of the offence and in the light of the judgements reported as 1972 SCMR 194 (Muhammad Aslam and five others vs. The State) and 1985 SCMR 662 (Muhabbat Ali and other vs. The State) they are



also acquitted and Shiraz may also be released forthwith if not

required in any other case.


JUSTICE SALAHUDDIN MIRZA


JUSTICE HAZIQUL KHAIRI
Chief Justice

Announced at Islamabad Karachi
On 10-1-2008
ABDUL RAHMAN/**

Approved for
reporting.
S/S
10.1.08