

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

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

CRIMINAL APPEAL NO.32/L OF 2004

1. Abdul Ghaffar son of
Ghulam Hussain, R/O
House No.812, Rang Mahal,
Lahore.
2. Mst.Gul Zareen wife of
Muhammad Ashraf, R/O
Grid Station, Faisalabad Road,
Sheikhupura. --- Appellants

Versus

The State --- Respondent.

Counsel for the --- Rana Ejaz Ahmad Khan
Appellants. --- Advocate

Counsel for --- Sardar Ahmed Abid,
The State --- Advocate

F.I.R No. date & --- No.258 dated 15-7-2002
Police Station --- P.S Bhikhi
District Sheikhupura

Date of Order of --- 14-01-2004
Trial Court

Date of Institution --- 31-01-2004

Date of Hearing --- 01-02-2005.

Date of Decision --- 01-02-2005.

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JUDGMENT

ZAFAR PASHA CHAUDHRY, J: - This appeal is directed against the judgment dated 14-01-2004 passed by Mr. Shfqat Ali, Additional Sessions Judge, Sheikhpura, whereby Abdul Ghaffar and Mst. Gul Zarin, appellants, both brother and sister were convicted under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (hereinafter referred to as the Ordinance) and sentenced to 25 years R.I, each. The benefit of section 382-B, Cr.P.C was extended.

2. According to the prosecution, victim Maryam Ashraf moved an application on 15.7.2002 that Mst. Gul Zareen, appellant is her step mother and Abdul Ghaffar alias Kashi is her, i.e. Mst. Gul Zareen's brother. Father of Mst. Maryam Ashraf contracted a second marriage after death of Mst. Maryam's mother. She, i.e. Mst. Maryam was living with her maternal grand father but his father forcibly took her to his house where Mst. Gul Zareen was living with him as his wife. It was alleged that Mst. Gul Zareen got Maryam



subjected to Zina-bil-jabr by her brother Abdul Ghaffar alias Kashi. The victim was obviously under shock and distress but her stepmother, i.e. Mst. Gul Zareen warned and threatened her that in case she disclosed this fact to any one, she may be stoned to death. Mst. Maryam was not permitted to visit the house of her maternal grandmother whose residence was in the same street. In the month of July, 2002 Mst.Maryam's father left her in the house of her grand mother. Mst. Maryam's Phoophi (paternal aunt) cautioned Mst. Maryam that she should not disclose about the incident occurred to her, to her maternal grandfather and grandmother and took an oath on Holy Qur-an. Mst. Maryam was under tremendous shock and fear, therefore, she remained silent for about 3 / 4 days. However, after 3 / 4 days she narrated the whole incident to her grand parents. On 13.7.2002 she was got medically examined and on 15.7.2002 an application was moved to the D.P.O, Sheikhpura which was marked to SHO and formal F.I.R No.258 of 2002 was registered with Police Station Bhikhi, district Sheikhpura under section 10 of the Ordinance.



3. Usual investigation was initiated and on completion of the same both the appellants were sent up to face trial in the court of Additional Sessions Judge, Sheikhpura. The learned trial Judge framed charge under section 10 of the Ordinance read with section 109 PPC for commission of Zina-bil-jabr by Abdul Ghaffar and for abetment against Mst. Gul Zareen. They pleaded not guilty and as such claimed trial.

4. The trial commenced and the prosecution in support of its case examined eight witnesses. The prosecution on completion of its witnesses' statements tendered in evidence report of the Chemical Examiner Ex.PG and with that closed the prosecution case.

5. The learned trial Judge in order to ascertain the truth, examined Muhammad Ashraf, father of the victim, as CW.1 and Mst. Musrat Tasneem, sister of Muhammad Ashraf, as CW.2.

Mst. Maryam Ashraf was examined as PW.1. She gave her age as 12 years. The learned trial court in order to



satisfy itself with the capability and competence of the witness put three questions to her, which were answered by her intelligently and sensibly, thus established her capability. She stated that at the time of occurrence she was student of 5th class. After death of her real mother her father married Mst. Gul Zareen, appellant. She also shifted to the house of her father. Abdul Ghaffar alias Kashi, brother of her stepmother Mst. Gul Zareen, frequently visited their house. She was subjected to Zina-bil-jabr by Kashi on pistol point. Mst. Gul Zareen and Abdul Ghaffar alias Kashi threatened her with dire consequences in case she disclosed the matter to any one. She shifted to Lahore but Kashi committed Zina-bil-jabr with her over there as well. She did not disclose the same being under constant threat and fear of the accused persons. However, she ultimately informed her paternal grandfather about the criminal assault perpetrated on her. She moved an application to the police on which formal F.I.R was registered. She was subjected to lengthy rather grueling cross-examination with a view to dissuade her from the insinuation.



Mst. Maryam Ashraf however stuck to her statement and her testimony could not be vitiated on any material point. She admitted that she had been medically examined by lady doctor.

PW.2 Muhammad Amar Shehzad and PW.3 Rasheed-ul-Hassan maternal uncle and maternal grandfather of Mst. Maryam stated about the incident as narrated to them by the victim. Their evidence at the best can be supporting evidence regarding the conduct of Mst. Maryam, victim who informed about the incident to them otherwise these witnesses are not witnesses of any fact in issue.

PW.6, lady doctor Farida Sheraz Waraich, medically examined Mst. Maryam Ashraf. Her age was given as 11 years. On external examination she did not find any cut, tear or bruises on vulva or vagina.

On her internal examination it was found that vagina admitted two fingers, hymen old torn and healed. It was recorded that she appeared to be habitual to sexual intercourse. Her three vaginal swabs were obtained and were

handed over to police for onward transmission to the Chemical Examiner. Vide report of the Chemical Examiner Ex.P.G, the swabs were found to be semen stained. PW.7 Dr. Muhammad Afzal found Abdul Ghaffar, appellant aged about 25 years to be potent.

Rana Ali Hassan, Inspector (PW.8), carried out the investigation. He furnished the details of the investigation and stated that on finding the appellants guilty challaned them to court. As already noted, Muhammad Ashraf, CW.1 is father of the victim. His statement relating to the history of his first marriage and the second marriage is not very relevant to determine the fact in issue. The only relevant piece of his statement is that victim did not inform him about the occurrence from the beginning to end. The next is Mst. Nusrat Tasneem, CW.2. She avoided to make any statement and stated that she knew nothing about the occurrence and that the victim did not make any complaint of any Zina-bil-jabr to her.



6. On close of the prosecution evidence, the appellants were examined under section 342 Cr.P.C. Abdul Ghaffar, appellant denied the allegations and pleaded that on account of a friction in the family mainly due to the marriage of father of the victim with his, i.e. appellant's sister Mst. Gul Zareen, he has been falsely implicated.

On conclusion of the trial the appellants were convicted and sentenced as detailed above.

7. The learned counsel on behalf of the appellants has mainly argued that the prosecution has not denied the enmity and ill will in between the maternal grandfather of the victim and other relations towards Mst. Gul Zareen. Admittedly Mst. Gul Zareen is the stepmother of Mst. Maryam Ashraf. Neither Mst. Maryam Ashraf nor her maternal grand parents and other relations were happy over the second marriage of Muhammad Ashraf with Mst. Gul Zareen. The learned counsel stated at the bar that subsequent to initiation of criminal proceedings an important development took place that Muhammad Ashraf has divorced Mst. Gul Zareen. The

enmity in between the parties is quite obvious. This argument, however, cannot be of any help to the defence because at the time of alleged occurrence or during the pendency of trial, Mst. Gul Zareen, appellant was wife of Muhammad Ashraf. Any development subsequent to the conclusion of the trial would not affect the merits of the case. The learned counsel in the alternate has argued at length that any unhealthy depiction from the evidence and especially from the clinical data as obtained by the lady doctor that the victim no doubt is a young girl but her chastity is not above board. In view of the unhealthy picture depicted through her medicolegal report, her testimony needs very strict scrutiny. He further argued that as far as Mst. Gul Zareen, appellant is concerned, the only evidence against her is the solitary statement of Mst. Maryam Ashraf, therefore, her conviction ~~ix~~ cannot be safely sustained.

The learned counsel for the prosecution has supported the judgment and prays to maintain the conviction of both the appellants.

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8. After hearing the learned counsel at the bar and appraising the evidence as has come on the record, we find that Mst. Maryam Ashraf is an extremely young girl rather a child aged about 10 or 11 years. Even her conduct and behaviour throughout appears to be quite natural and realistic. She being the child was threatened not to disclose the ugly incident to any of the relations from her maternal side. However, after joining her maternal grand parents she took up courage and narrated the whole incident to them. She supported her version in court. The learned trial Judge found her capable of making rational statement. She made a consistent statement indicting Abdul Ghaffar alias Kashi for commission of Zina-bil-jabr with her. Even if from her attitude or circumstances it may emerge that she was a consenting party but the same cannot be of any benefit to the accused. The victim is minor; rather extremely young aged only about 10 years. The only apprehension regarding the testimony of a child witness is of any tutoring. In the in instant case, Mst. Maryam Ashraf was subjected to a very searching and tough

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cross-examination but she stood the test of the same and her testimony or credibility could not be vitiated.

9. Following the rule of prudence in order to maintain conviction some corroboration may be sought for. In this case, the same is not lacking. The accusation made by the victim or the allegations leveled by her are fully supported by the medical evidence. She appears to have been consistently subjected to sexual intercourse. The medical evidence is further supported rather strengthened by the report of the Chemical Examiner, whereby the swabs were found to be stained with semen. The prosecution has thus proved beyond doubt commission of Zina-bil-jabr against Abdul Ghaffar alias Kashi; his conviction under section 10 (3) of the Ordinance, is therefore, unexceptionable.

10. As regards quantum of sentence, the learned trial Judge has awarded sentence of 25 years, R.I which is maximum under section 10 (3) of the Ordinance. No doubt the victim is extremely young and she was subjected to the assault for more than once. The appellant, who is brother of

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her stepmother, had all the opportunities to have an access to the victim. He, by misusing his position and availing all the opportunities, kept on committing the offence. In order to determine the quantum of sentence necessary attending circumstances and facts have to be taken into consideration. The appellant, no doubt, has committed a heinous offence yet he is a young man, entire future is in front of him, and, as per record he has no previous history of any criminal or immoral antecedents. The one of the principle consistently laid down in Islamic Jurisprudence is to provide an opportunity for reformation. The culprit should not go unpunished but at the same time the possibility of his reformation and mending the future behaviour should not be ignored. The learned counsel at the bar informs that the appellant has earnestly expressed his deep penitence and remorse over the sin committed by him. He assures that the appellant will mend his future behaviour and therefore some leniency may be shown.

11. After hearing the learned counsel, we feel that imposition of maximum sentence is rather on the harsher side.

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By taking stock of all the facts and the evidence, we are of the view that imprisonment of 15 years R.I will meet the ends of justice. Accordingly, the conviction of Abdul Ghaffar alias Kashi is upheld, however, his sentence of 25 years R.I is reduced to 15 years R.I. The benefit of section 382-B, Cr.P.C is extended.

12. As regards Mst. Gul Zareen, appellant, there is the allegation that she abetted or facilitated the commission of rape by her brother with Mst. Maryam Ashraf. The evidence in this behalf is the solitary statement of the victim. It is true that Mst. Maryam Ashraf has no enmity or any proved malice against Mst. Gul Zareen, appellant, but the fact remains that she is her stepmother. Displeasure or even annoyance on the part of maternal grand parents of Mst. Maryam Ashraf towards Mst. Gul Zareen is quite evident from the record. The possibility that she would have been prompted by her maternal relations to involve and implicate Mst. Gul Zareen, cannot be totally ruled out. Further more, apart from bald allegations of abetment or facilitation of commission of



offence, there is no other material or even a circumstance to show that Mst. Maryam Ashraf had in fact abetted her brother in accomplishment of his design. The allegations leveled by Mst. Maryam Ashraf vis-à-vis the involvement of Mst. Gul Zareen or any abetment on her behalf is not supported by any corroborative piece of evidence. As discussed above, the allegation of rape is corroborated by medical evidence and supported by the report of Chemical Examiner, but the allegation against Mst. Gul Zareen does not find any such support or corroboration. The rule of safe administration of justice demands that benefit of doubt should be extended to Mst. Gul Zareen, appellant. The allegation, however, strong or heinous may be, yet the conviction cannot be recorded in absence of credible or tangible evidence.

13. The conviction of Mst. Gul Zareen, appellant, in our mind cannot be sustained, the appeal to her extent is therefore allowed and her conviction and sentence is set-aside. She is present in court on bail; she and her surety are discharged from the bail bonds.



14. The conviction of Abdul Ghaffar alias Kashi is upheld, however, his sentence of 25 years R.I is reduced to 15 years R.I. The benefit of section 382-B, Cr.P.C shall be extended to him.



S. A. RABBANI
Judge



ZAFAR PASHA CHAUDHRY
Judge

Approved for reporting.



Islamabad the
February, 1, 2005.
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