IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

HON'BLE MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.12/P OF 2005

1. Ihsanullah S/O Sher Nawaz
2. Saif-ur-Rehman S/O Abdullah Khan — Appellants

Versus

1. The State
2. Muhammad Riaz S/O Dost Muhammad — Respondents

Counsel for the appellant:		Mr.Noor Gul Khan (Marwat), Advocate
Counsel for the State:	----	Mr.Gul Daraz Khan,Advocate
FIR. No. Date & Police Station	----	47 dt. 28-03-2003 P.S. Ghazni Khel, Lakki Marwat.
Date of Judgment of trial court	----	12-04-2005
Date of Institution of Appeal	----	21-04-2005
Date of hearing	----	27-10-2008
Date of Judgment	----	27-10-2008

JUDGMENT

SYED AFZAL HAIDER, Judge Appellants Ihsanullah alias Sano and Saif-ur-Rehman have through this Criminal Appeal registered as No. 12/P of 2005, have challenged their conviction and sentence recorded by learned Sessions Judge Acting as Presiding Officer of the Juvenile Court, Lakki Marwat whereby the appellants were convicted and sentenced as follows:-

a) Under section 12 of Office of Zina (Enforcement of Hudood) Ordinance, 1979, 05 years rigorous imprisonment each with a fine of Rs. 30,000/- each and in default to further undergo three months simple imprisonment each

b) Under section 18 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, 05 years rigorous imprisonment each plus to pay a sum of Rs. 30,000/- as fine and in default to fine to further undergo three months simple imprisonment each.

Both the sentences have been ordered to run concurrently with benefit of section 382-B of the Code of Criminal Procedure extended to both.

2. The case has been called out twice. It is 10.30.a.m. but no one has appeared on behalf of the appellants. I have gone through the record of the case and perused the evidence with the assistance of the

learned counsel for the State. Since I have come to the conclusion that it is a fit case in which the appeal should be accepted so there is no need to wait for the appearance of the counsel of the appellants as no prejudice is being caused to them under the circumstances. On the contrary it is proper and just to release a detenne the moment the court comes to the conclusion that the conviction and sentence merits reversal.

3. At the outset it may be mentioned that both the appellants as well as the complainant are young boys whose ages range from 15 to 16 years. The case on the other hand rests upon the solitary statement of Muhammad Riaz complainant, P.W.2. The only allegation is that the appellants caught hold of the complainant and each one of them rubbed his penis against the anus of the complainant while the latter and the appellants had not undressed themselves. Since there was no allegation of any unnatural act having been committed so there was no medical examination of the complainant. However neither the appellants were medically examined to determine their potency to

perform sexual act nor the shalwar of the complainant was sent to the Chemical Examiner for analysis to determine whether it was stained with semen as a result of rubbing. In fact there was no need to send the shalwar of the complainant for examination because none of the appellant was naked when the alleged act was being performed. The place of occurrence is admittedly a graveyard abutting the thorough fare and time of the occurrence is mid of the day when people are usually out of their homes.

4. The complainant neither alleged any force against the appellants while making a statement in the witness box nor did he allege that he was threatened with dire consequences on gun point or by show of force if he did not succumb to the evil design of the appellants. The complainant does not say either that he made attempts to escape. It is not in evidence that semen of any appellant was discharged. In so far as the conviction under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is concerned the law is clear that whosoever kidnaps any person in order that such person

may be subjected or may be so disposed of to be put in danger of being subjected, to the unnatural lust of any person shall be punished with death or rigorous imprisonment which may extend to 25 years. In this case there is neither allegation of kidnapping nor evidence on record to that effect. The conviction under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is therefore not justified. The same is hereby set aside.

5. In so far as section 18 of the said Ordinance is concerned it relates to the punishment for attempting to commit an offence. The question for determination by the learned trial court was as to what offence had been committed under the circumstances. The offence which might have been committed at best, if the shalwar of the victim and each appellant had been removed, would be offence under section 377 of Pakistan Penal Code. But whatever was alleged on oath did not constitute an offence. In this view of the matter I do not know what offence the learned trial court had in its mind when conviction under section 18 was being recorded. Section 18 of Ordinance VII of

1979 contemplates imprisonment for a term which may extend to one half of the longest term provided for that offence. In order to bring a case within the mischief of section 18 it is necessary to first determine the specific offence whose commission was being attempted. There is no such finding given by the learned trial court though the charge is relatable to un-natural lust as contemplated in section 12 of Ordinance VII of 1979. I have already found that the allegations contained in the prosecution version do not bring the appellants with the mischief of section 12 because the un-natural lust visualized by this section is consequential to the act of kidnapping or abduction. The learned trial court did not deem it expedient to consider applying section 377 of the Pakistan Penal Code in view of section 237 of the Code of Criminal Procedure read with section 20 of Ordinance VII of 1979.

6. I have carefully gone through the statement of the complainant, the solitary narrator of the incident, and find that he has not even alleged that when he was caught by the appellants, he was asked or forced to succumb to their evil design. His shalwar was

not removed by the appellants. There was not even a scuffle between them. There is therefore, no allegation even that an offence of sodomy was attempted to be committed upon him. The only allegation is that the appellants rubbed their sexual organs against the back of the complainant while they were not un-dressed and then the appellants decamped. If true this is certainly an indecent act, but every naughty gesture does not fall within the domain of an attempt of an offence. There is a possibility that the two urchins embraced the complainant which fact was not liked by him.

7. I have also considered the possibility of applying a section detailed in Chapter XXII of the Pakistan Penal Code, entitled " Of Criminal Intimidation, Insult and Annoyance", but it appears that the undesirable gesture attributed to the appellants is not covered by any of the eight sections contained in this Chapter. That is probably the reason learned trial court did not consider the possibility of recording conviction under Chapter XXII of the Penal Code. The learned trial

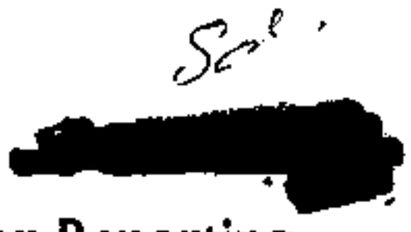
court was content with observing that the action complained of was immoral.

8. It is therefore clear that no offence is made out from the solitary statement of the complainant recorded at the trial and the learned counsel for the State has not been able to point out any provision of law under which such an un-desirable act on the part of the appellants would amount to an unnatural offence. The un-natural offence contemplates penetration at-least which is possible only if at-least the lower or under garments of the active and passive agent are removed to facilitate this action. There can be no attempt of un-natural offence when the parties are properly dressed. In this view of the matter it is not possible to sustain conviction and the sentence of the appellants. The charge against the accused must be not only proved beyond all reasonable doubts but the action complained of, in order to become the basis of conviction, must be a distinct offence in the statute book and tri-able by courts of competent jurisdiction. An act of moral lapse does not ipso facto become an offence. I may not

disbelieve the complainant in this case but his complaint has to be examined in the context of penal provision of prevailing laws. Keeping also in view the fact that the appellants and the complainant were minors at the time of commission of the incident, I take a lenient view and acquit both the appellants by giving them the benefit of doubt.. The conviction and sentence awarded by learned Sessions Judge/Judge Juvenile Court, Lakki Marwat on 12-04-2005 in Hadd Case No. 47 against the appellants under sections 12 and 18 of Ordinance VII of 1979 is hereby set aside. Consequently the appeal of appellants is accepted and they are directed to be released forthwith unless they are required in any other case.

JUSTICE SYED AFZAL HAIDER

Announced in open Court
At Peshawar on 27-10-2008
UMAR DRAZ/



Fit for Reporting