(21)

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI, CHIEF JUSTICE.

CRIMINAL APPEAL NO.280/L OF 1995.

Asghar Ali son of Noor Muhammad, resident of Chak No.156/TDA, Tehsil and District Layyah.	...	Appellant
Versus		
The State	...	Respondent
For the appellant	...	Mr.Lal Khan Baloch, Advocate.
For the Complainant	...	Ch.Ali Muhammad, Advocate.
For the State	...	Mr.Muhammad Anwar Dholan, Advocate.
No.& date of F.I.R Police Station	...	No.81,dt.26.5.1995, P.S Saddar Layyah
Date of order of the trial court	...	28.9.1995
Date of Institition	...	12.11.1995.
Date of hearing	...	20.3.1996.
Date of decision	...	02.7.1996.

-0-

JUDGMENT

NAZIR AHMAD BHATTI, CHIEF JUSTICE.- Prosecutrix Mst.Nasreen Bibi aged about 12/13 years resident of Chak No.156/TDA was alone present in her house on 25.5.1995. At about 10/11 A.M accused Asghar Ali entered the house and subjected the prosecutrix to zina-bil-jabr. The prosecutrix raised alarm whereupon Jalal Din and Rukan Din were attracted to the spot and the accused left her and escaped. She made a report of the occurrence to Sub Inspector Zahoor Ahmad of Police Station Leiah at 900 hours on 26.5.1995 in the General Bus Stand. F.I.R No.81 was registered on the basis of the said report.

2. The prosecutrix was medically examined by P.W.1 Dr.Sartaj Tirmzi on 26.5.1995. The lady doctor found furchette intact, hymen intact all around but elastic in nature and one finger could pass. The lady doctor obtained 3 vaginal swabs and the report of the Chemical Examiner thereon was that they were not stained with semen. The lady doctor gave the opinion that sexual intercourse had not been committed with Mst.Nasreen Bibi. The lady doctor had also seen one abrasion on the palmer wrist joint of the prosecutrix which was simple in nature and was caused within a duration of 24 to 36 hours.

3. P.W.7 Zahoor Ahmad Sub Inspector arrested the accused on 31.5.1995. After investigation the accused was sent up for trial before ~~Additional~~ Sessions Judge Leiah who charged

(23)

him under section 452 PPC and section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to which he pleaded not guilty and claimed trial.

4. The State produced 7 witnesses in proof of the prosecution case. The accused made a deposition under section 342 Cr.P.C. He also produced one defence witness but did not make any deposition on oath.

5. After the conclusion of the trial the learned ~~xxxxxxxxxx~~ Sessions Judge convicted the accused under section 10(3) of the Hudood Ordinance read with section 18 thereof and under section 452 PPC. For the offence under the Hudood law the appellant was sentenced to undergo rigorous imprisonment for 4 years and to pay a fine of Rs.4000/- or in default to further undergo rigorous imprisonment for 4 months. For the offence under section 452 PPC he was sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.2000/- or in default to further undergo rigorous imprisonment for 2 months. The convict has challenged his conviction and sentence by the appeal in hand.

6. I have heard learned counsel for the parties at length who also led me through the entire record of the case. During the trial besides the prosecutrix, P.W.6 Rukan Din was produced as eye witness who deposed that the prosecutrix

(24)

had been subjected to rape by the appellant. However, P.W.6 Rukan Din is a relative of the prosecutrix and his testimony is not reliable.

7. The most important factor in this case is the evidence of the lady doctor. The prosecutrix was medically examined by the lady doctor a day after the occurrence and according to that examination the prosecutrix had not been subjected to sexual intercourse. The hymen was found intact and although it was elastic yet it admitted only one finger. All this would show that the prosecutrix had not been subjected to sexual intercourse.

8. The learned Sessions Judge convicted and sentenced the appellant for the offences to commit rape and house tress-pass but after a careful perusal of the ~~xxx~~ entire record I have come to the conclusion that even these offences were also not proved against the appellant beyond any reasonable doubt. There were other houses in the same vicinity adjacent to the house of the prosecutrix and people lived there. It is doubtful that in that situation the appellant could have dared to commit any of the offences. His assertion was that he had been charged on account of previous enmity. However, the oral and ocular testimony had been entirely belied by the medical evidence of not only the lady doctor but of the Chemical Examiner as well whose report showed that the vaginal swabs were not stained with semen. Perhaps the simple injury suffered

(25)

by the prosecutrix on her wrist was taken by the learned trial Judge as evidence of attempt, but in my opinion that was also not sufficient to prove that the appellant had entered the house of the prosecutrix and had attempted to commit rape. Even otherwise this was not originally the case of the prosecution. The prosecutrix had not charged the appellant for attempt to commit rape in the F.I.R which she had recorded a day after the alleged occurrence. The F.I.R clearly disclosed that after entering her house the appellant forcibly opened her trouser and started committing zina-bil-jabr and she had cried on account of pain whereby two persons were attracted to the spot. This will clearly indicate that the appellant had been charged for the actual offence of rape whereas the evidence produced during the trial neither proved this offence nor the offence of attempt to commit rape.

9. The prosecution evidence was not sufficient to bring home the guilt of the appellant for any of the offences for which he was convicted. The appeal is,therefore, accepted. The conviction and sentence of the appellant recorded on 28.9.1995 by the learned Sessions Judge Leiah are set aside and he is acquitted of the offence for which he was convicted and sentenced. He shall be set at liberty forthwith if not wanted in any other case.

Fit for reporting.

CHIEF JUSTICE

Announced on 2.7.1996
at Islamabad.

M.Akram/