IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

HON:MR.JUSTICE NAZIR AHMAD BHATTI,CHIEF JUSTICE
HON:MR. JUSTICE SHAFI MUHAMMADI,

Criminal Appeal No.9/I of 1996

Pervaiz son of Noor Ahmed, Caste Rajput,Resident of Chak Wassi, P.S. Khanqah Dogran, Sheikhupura.	....	Appellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Mr.Muhammad Ilyas Siddiqui , Advocate.
Counsel for the State	.....	Ch.Muhammad Ibrahim Advocate
FIR No.246 dated and police Station	.....	246, 5.6.1990 P.S.Khanqah Dogaran.
Date of the Order of the Trial Court	.....	19.11.1995.
Date of Institution	.....	15.1.1996.
Date of Hearing	.....	26.3.1996.
Date of Decision	.....	09.04.1996
Date of announcement	.....	19.05.1996.

Cr.A. No.9/I of 1996

(Pervaiz .... Versus .... the State)

JUDGMENT

SHAFI MUHAMMADI,J.- Appellant Pervaiz s/o Noor Ahmad has preferred the present appeal against the sentence and conviction awarded by Additional Sessions Judge, Sheikhupura, in a case arising out of an F.I.R. No.246 dated 5.6.1990 registered at P.S. Khanqah Dogran Distt Sheikhupura:-

(i)u/s 457 PPC to suffer R.I. for 5 years with a fine of Rs.10,000/- in default whereof to further undergo R.I. for one year;

(ii) u/s 11 of the Offence of Zina(Enforcement of Hadood) Ordinance, 1979 (herein after referred to as the Ordinance) to suffer life imprisonment with whipping mumbering 30 stripes and a fine of Rs.20,000/- and in default whereof to further undergo 2 years R.I.; and

(iii) u/s 10(3) of the Offence of Zina (Enforcement of Hadood) Ordinance 1979, to suffer 25 years R.I with whipping numbring 30 stripes.

2. The facts giving rise to this appeal, as reflected by the F.I.R, are that one Lal Din, his sons Muhammad Boota and Muhammad Siddique were asleep on the roof of their house in the night between the 28th and 29th of May,1990 to guard his family members and property whereas his other family members including his wife Mst. Ruqqia Bibi, his grand daughter Mst. Rukhsana aged 10/11 years and other children were asleep in the courtyard of the same house.

At about midnight the said Lal Din woke up on hearing some alarm and saw (i) appellant pervaiz armed with carbine, (ii) Mansha, (iii)Phaggu accused (both since dead) and (iv) Muhammad Ashfaq alias Baggu (Since proclaimed offender) to be present there. They were grappling with Mst.Ruqqia Bibi and Mst.Rukhsana Bibi. Lal Din, Muhammad Boota and Muhammad Siddique went down stairs. The accused persons picked up Mst. Rukhsana and took her towards eastern side of village. The accused were chased but could not be apprehended. It was further alleged that the accused had also stolen Rs.10,000/- and 4 gold bangles. The charge-sheet was submitted against all the accused showing therein (i) accused Muhammad Mansha and Phaggu as killed in police encounter vide F.I.R. No.614 dated 23.8.1990 while the present appellant and Muhammad Ashfaq alias Bhaggu as the arrested accused persons. During the pendency of this case Muhammad Ashfaq alias Baggu absconded and was declared proclaimed offender. Therefore, only the appellant was tried and convicted as stated earlier. Hence the present appeal.

3. The prosecution in support of its case first examined Mst.Rukhsana d/o Wali Muhammad who deposed that on the day of incident, all the four accused had entered the house at about mid-night. They were armed. She was forcibly taken inside a room. Her mother also awoke up in the meanwhile.

(53)
(23)

The accused persons extended threat of dire-consequences. They took her mother dragging in the room. Her mother was wearing four golden bangles which were also snatched by accused Pervaiz. Accused Pervaiz gave beeting to Mst. Rukhsana and asked her about cash. Her mother informed Pervaiz about the place where cash of Rs.10,000/- was lying. The said cash was also taken away. Then they forcibly took Mst. Rukhsana to a "Dera" where they committed zina with her. As accued Pervaiz belonged to the same village so he was fully indentified by all the eye-witness but the names of accused Mansha and Baggu were known to the victim lateron. However, she could not tell the name of the fourth accused. She also disclosed in the court that she was taken to different cities in Sindh and then was brought back to Punjab. These are the main points of her statements and the prosecution story. Her statement u/s 164 Cr.P.C was also got recorded wherein he had repeated the same story as stated in her examination-in-chief except few additional details which she narrated in the court. The defence in its detailed cross-examination tried to shatter her statement with reference to certain points which were not mentioned in her statement recorded u/s 164 Cr.P.C but those points neither affect the main story as stated by her in her examination -in-chief nor can be treated contradictions. The age of the victim, if calculated from the birth certificate on record, appears to be about 13 years at the time of incident.

Another important witness is P.W. Lal Din who is grand father of Mst. Rukhsana d/o Wali Muhammad and also the complainant. His statement fully corroborates the incident. He has further disclosed in his statement in the Court that father of accused Pervaiz had promised from time to time to restore Mst.Rukhsana and then flately refused to do so after 4/5 days.

The defence, while examining this witness, suggested a defence theory that Lal Din had lodged the F.I.R. at the instance of one lumberdar namely Imdad who had political enmity with one Bashir Hanjira. As accused Pervaiz belonged to Bashir Hanjra group and had opposed Imdad lumberdar in some election, hence this story was concocted by complainant Lal Din to implicate the appellant in a false case . However, this suggestion was fully denied by the witness.

Muhammad Boota s/o Lal Din is another eye-witness who remained unshattered in his examination -in-chief. Regarding his statement, the learned counsel for the appellant disclosed that his statement was recorded after about 23 days by the police.

Dr.Tehreen Fatima, the lady doctor, has stated in her report that Mst. Rukhsana was subjected to sexual intercourse. The learned counsel for the appellant did not assail this piece of evidence.

Statement of appellant was recorded u/s 432 Cr.P.C whereas

he took a stand that he has been falsely implicated in the case due to party faction, enemity and suspicion but he did not like to produce any evidence in support of his stand.

The learned counsel for the appellant also took a new stand at this appellate stage that in the circumstances of the case, even if the prosecution story is believed to be true, the learned trial Court could award sentence to the appellant under section 10(2) and not u/s 10(3) of the Ordinance.

4. We have no hesitation in our mind to hold that learned counsel's contention in this regard is totally baseless. Our reasoning, for holding so, can be summarised as under :-

Section 10(2) of the Ordinance relates to punishment for zina and section 10(3) of the Ordinance is concerned with the punishment for zina-bil-jabr. The word Zina and the term Zina-bil-jabr have been defined in section 4 and 6 of the Ordinance respectively which read as under:-

> " Section 4. A man and a woman are said to commit 'zina' if they wilfully have sexual inter-course without being validly married to each other.
>
> Section 6(1) A person is said to commit zina-bil-jabr if he or she has sexual inter-course with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:-

(a) against the will of the victim;

(b) without the consent of the victim, when the consent has been obtained by putting the victim in the fear of death or of hurt, or

(d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believe herself or himself to be validly married.

A bare perusal of these definitions clearly shows that zina is commission of wilful intercourse by a man and a woman without being validly married to each other and it is converted into zina-bil-jabr when the same act takes place against the will and / or without the consent of the victim or with the consent of the victim if the same was obtained by putting him or her in fear of death or hurt or he/she was made to believe himself /herself to be validly married.

In the light of this difference we have no doubt in our mind that the offence committed by the present appellant was not attracted by section 10(2) of the Ordinance and the learned trial court was justified on the strength of evidence to convict and sentence him u/s 10(3) of the Ordinance.

5. Come to the conviction and sentence u/s 457 PPC and

u/s 11 of the Ordinance. It has been shockingly observed by us that in most of the cases the learned defence advocates, on the bases of detailed cross-examination, succeed to bring into light few contradictions and then presume that these contradictions are more than sufficient to shatter the base of any case. It is therefore necessary to point out that number of those contradictions may be one or one million but they may not be helpful to get the base of any case shattered unless they are of such nature that they shatter the main story of the prosecution case or shatter the character of witness to get it attracted by section 3 of the Qanun-e-Shahadat Order,1984 or to corroborate the defence theory if any. Claiming to be innocent on the basis of mere denial of allegations without producing any evidence in defence may always be fatal to the case of an accused even if he/she is an innocent person, particularly when the defence counsel fails to shatter the foundation of prosecution story. In the present case the appellant was charged to have committed four offences including charge of abduction. He pleaded not guilty and brought a defence theory that there was political enmity in the back ground of this case but he did not produce a single witness in proof of that theory. If he was speaking the truth then he could produce any worker of his group or even his father in proof of this theory. Similarly he could produce some evidence to show that the victim was a characterless girl and ~~she was~~

she was telling lies against him. He could examine himself on oath if he had no witness to support his contention. Although avoiding to get himself examined u/s 340 (2) Cr.P.C cannot be treated a piece of evidence to be used against him yet at the same time , it can not be helpful to an accused if neither the accused examines himself on oath nor produces any evidence in his defence.Mere denial in the statement of an accused recorded u/s 342 Cr.P.C without any convincing material in support of his stand can never be helpul to an accused.

6. The learned counsel for the appellant has assailed the judgment on several technical and factual aspects of the case but none of them shatters the main story of the prosecution. For example the learned counsel has stated that no empty has been recoverd from the place of incident; mother of the victim was not examined and Rs.10,000/- or bangles were not recovered. We can guess to the extent of belief that if mother of the victim had also been examined in the court by the prosecution, the case punishable at least u/s 17(1) or u/s 17(2) of Offences Against Property (E.O.H) Ordinance,1979 would have been proved too. The contentions of the learned advocate for the appellant could be taken into consideration if the court had convicted and sentenced the appellant under any of the sub-sections of Section 17 of the Offences Against Property (E.O.H) Ordinance, 1979 in absence of

any piece of evidence. In such case we would have set aside such conviction and sentences. Record of the case reveals that charge against the appellant had been framed u/s 17 of Offences Against Property (E.O.H) Ordinance, 1979, but he was not convicted and sentenced under that section as the charge was not proved against him. He was convicted u/s 457 PPC although proper section in the circumstances of case for the said offence, in our view, was section 458 PPC or section 459 PPC. It was also urged by the learned counsel that the victim had attained puberty and she had been travelling with the accused persons with out making any noise any where. It was further averred that she had been medically examined after 3/4 days after her recovery and P.W.4 namely Muhammad Boota was examined after 23 days. On the strength of these points, the learned counsel for the appellants, perhaps, wanted to establish that the prosecution case was attracted by section 10(2) and not by section 10(3) of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979. We could accept such contention provided the appellant/accused had established this defence theory or had admitted his guilt by saying that the victim had run away with him against the wishes of her parents and so he was falsely implicated by her parents. In absence of any such defence such defence theory or admission, we are unable to accept this

theory at this belated or appellate stage because the case of the appellant is a case of mere denial of allegations and nothing else. It is an unfortunate that most of the learned advocates practicing on criminal side, while dealing with criminal cases in these days, do not make any defence theory to defend their clients and usually proceed with the cases without any proper defence in their mind. The result of making no defence at the the initial stage is obvious i.e. that no advocate of any calibre at the appellate stage would be able to get any benefit out of any such theory the foundation of which was not laid down by the learned advocate in the trial court. There may be exceptions to this proposition but the present case is not attracted by any exception. Similarly the contention of the learned advocate regarding statement of Mohammad Boota has no weight because if the statement of Muhammad Boota, recorded after 23 days, even if excluded from the proceedings, the same does not change the factual or legal position of the case.

7. We have , therefore, no hesitation to share the conclusion drawn by the learned trial court to convict and sentence the appellant under section 457 PPC, under sections 11 and 10(3) of the Offence of Zina (E.O.H) Ordinance, 1979 for committing offences of lurking house-trespass, kidnapping a minor

girl of 13 years old and committing zina-bil-jabr with her.

Upshot of the discussion is that the prosecution case against the appellant stands fully proved beyond all doubts. The appeal, therefore, merits dismissal and the same is accordingly dismissed.

(Shafi Muhammadi)
Judge

(Nazir Ahmad Bhatti)
Chief Justice

Islamabad , the 9.4.1996

Approved for reporting.

(Shafi Muhammadi)
Judge

Announced on 19.5.1996
at Islamabad.

19/5/96

Latif Baloch/