

IN THE FEDERAL SHARIAT COURT

(Revisional Jurisdiction)

PRESENT

MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO.111/L OF 2010

Muhammad Umar son of Falak Sher,
R/o Bhedhal Autar, Tehsil Depalpur,
District Okara
(Presently confined in District Jail Sahiwal)
Appellant

Versus

The State Respondent

CRIMINAL REFERENCE NO.03/I OF 2011

The State ... Appellant

Versus

Muhammad Umar Respondent

Counsel for appellant ... Mian Muhammad Tayyab Wattoo
Advocate

Counsel for complainant ... **Mr. Muhammad Aamer Najeeb Wattoo,**
Advocate

Counsel for State ... Ch. Muhammad Sarwar Sidhu,
Additional Prosecutor General

FIR. No.Date & ... 446/06, 02.08.2006
Police Station Haveli Lakha

Date of judgment of ... 29.09.2010
trial court

Date of Institution of ... 15.10.2010 and 26.2.2011
Appeal & Cr.Reference respectively

Date of hearing ... 10.08.2011

Date of judgment ... 20.08.2011

JUDGMENT

DR. FIDA MUHAMMAD KHAN, Judge.- The appellant Muhammad Umar has challenged the judgment dated 29.09.2010 passed by learned Additional Sessions Judge, Depalpur District Okara whereby he has convicted him under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the said Ordinance) and sentenced him to life imprisonment with payment of fine of Rs. 30,000/- or, in default thereof, two months simple imprisonment. He has further convicted him under section 10(4) of the said Ordinance and sentenced him to suffer death sentence.

Criminal Murder Reference No. 03/I of 2011, erroneously sent earlier to Lahore High Court has also been submitted by the District & Sessions Judge, Okara for confirmation of death sentence. Since Criminal Appeal as well as the Murder Reference arise out of one and the same Judgment, both are disposed of by this Single Judgment.

2. This case has arisen out of FIR. (Ex.PA/1) registered on 2.8.2006 at Police Station Haveli Lukha on the written application (Ex.PA)

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of complainant Abdul Ghani regarding an occurrence which took place on
1st August, 2006 at 7.00 p.m. in the area of Bhidhal Uttar District Okara.

3. The case of prosecution in brief is that the complainant Abdul Ghani submitted a written application (Ex.PA) on 02.08.2006 before SHO Police Station, Haveli Lukha District Okara wherein he stated that, on 01.08.2006 at about 7.00.p.m, his virgin daughter Mst. Nabeela Bibi, aged about 15/16 years, went out of the house to ease herself in the cotton field wherein Muhammad Sajid and Muhammad Umar, armed with deadly weapons, alongwith two unknown persons, were already present. They abducted her forcibly at gun-point with the intention to commit zina with her. They took her at some distance to a vacant field where Muhammad Sajid and Muhammad Umar, one after the other committed zina-bil-jabr with her and the un-identified two persons remained there at as guard. The complainant further alleged that when his daughter did not return till late hours, he set out for her search alongwith his brothers Muhammad Akram and Muhammad Aslam. At about 4.00.a.m. on hearing hue and cry of his daughter, the complainant and the P.Ws were attracted to the vacant field. On seeing them the above accused fled away, leaving the said girl in naked condition.

The complainant helped his daughter to put on her clothes. She told about the whole occurrence to them. It was further alleged by the complainant that heirs of the accused had been beseeching him for not reporting the matter to the police but he turned down their request and got registered the case.

4. After registration of FIR, the case was investigated by Rashid Baig, Sub Inspector who recorded supplementary statement of complainant wherein he further nominated Amjad and Majid sons of Latif as co-accused. On 10.10.2006 he joined Sajid accused in the investigation. He also recorded statements of Abdullah and Muhammad Ashraf, constables and thereafter when he was transferred from the said police station. The case was investigated by Muhammad Murtaza, Sub Inspector, P.W.5. On 02.08.2006 he inspected the place of occurrence, prepared rough site plan (Ex.PC) and recorded statements of witnesses under section 161 Cr.P.C. On 03.08.2006 he moved an application (Ex.PD) for medical examination of Mst. Nabeela Bibi and got her medically examined from Haveli Lukha Hospital. During investigation, he found accused Muhammad Umar not guilty in this case.

5. Learned trial court on receipt of challan framed charge against accused Sajid Latif on 31.10.2007 under sections 11 and 10(3) of the said Ordinance. However, thereafter, on 09.10.2008 the learned trial court framed amended charge against the accused Sajid Latif as well as the present appellant Muhammad Umar under sections 11 and 10(4) of the said Ordinance. The accused did not plead guilty and claimed trial.

6. The prosecution, in order to prove its case at the trial, produced eight witnesses. The gist of deposition of P.Ws is as under:-

- * Mst. Nabeela, victim, appeared as P.W.1 and gave details of her abduction and commission of zina-bil-jabr by both the accused and also corroborated the statement made by her father Abdul Ghani, complainant/PW.2;
- * Abdul Ghani, complainant appeared as P.W.2. By and large he re-iterated the contents of complaint (Ex.PA) on the basis of which formal FIR.(Ex.PA/1) was registered;
- * Lady Dr. Robina Nasreen appeared as P.W.3 and stated that on 03.08.2006 she medically examined Mst. Nabeela victim. As per her report she found "No bruise, tear or laceration on the local parts. Vagina permitted one finger loosely. Hymen was torn." She issued MLC (Ex.PB) dated 03.08.2006 in this respect;

- * Muhammad Abdullah, ASI appeared as P.W.4. He deposed that on 03.08.2006 he was posted as Moharrar and on the same day Ghulam Murtaza, ASI handed over to him a sealed parcel said to contain swabs for keeping in Malkhana and he handed over that to Muhammad Ashraf, Constable No.215 on 09.08.2006 for onward transmission to the Office of Chemical Examiner for analysis;
- * Statement of Muhammad Murtaza, Sub Inspector was recorded as P.W.5. He partly investigated the case. The same has been mentioned herein above;
- * Muhammad Amin, SI as P.W.6 stated that on 02.08.2006, complainant Abdul Ghani produced before him complaint (Ex.PA), on the basis of which he drafted formal FIR. (Ex.PA/1) without omission or addition;
- * Muhammad Ashraf, Constable No.215 appeared as P.W.7 and stated that on 09.08.2006 Muhammad Abdullah, Moharrar handed over to him one sealed parcel said to contain swabs to deliver the same in the office of Chemical Examiner, Lahore. He delivered that intact on the same day;
- * Rashid Baig, Investigating Officer who partly investigated the case appeared as P.W.8 and gave details of the investigation conducted by him.

7. The learned trial court after close of prosecution evidence recorded statement of appellant/accused Muhammad Umar under section 342 Cr.P.C. wherein he deposed that the P.Ws had deposed against him due to previous enmity and that the case was false and fabricated. He did not produce any evidence in defence and also made no statement on oath under section 340(2) Cr.P.C. The learned trial court after completing all codal formalities, convicted the appellant under sections 11 and 10(4) of the said Ordinance and sentenced him as mentioned above. Hence the present appeal.

8. We have heard the learned counsel for the parties and perused the record with their assistance. Learned counsel for the appellant submitted that:-

- * the appellant was declared innocent by the Investigating Officer;
- * the FIR was delayed and the story of the prosecution is unnatural and unbelievable;
- * the place of occurrence was situated in the nearby vicinity of house of the complainant;



- * as admitted by P.W.1 Mst. Nabeela Bibi victim of the offence, her sister Shakeela and three other girls namely Abida, Humera and Fatima were also accompanying her but even they neither raised hue and cry nor reported the matter to father of the victim;
- * the evidence of P.W.2 is only hear-say;
- * no signs of struggle were observed at the place of occurrence; and
- * lastly no grouping of semen was made.

He further submitted that the complainant party has patched up the matter with the appellant Muhammad Umar and he has moved a Criminal Misc. Application No. 139/2010/LHR in this respect alongwith the statements and affidavits of the complainant party.

9. Learned counsel for the complainant verified the affidavits and statements made for effecting a compromise between the parties and confirmed the contents regarding compromise made by the complainant party, as contained therein.

10. Learned Additional Prosecutor General, however, fully supported the impugned judgment and submitted that findings of

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Investigating Officer were not binding on Courts. He further submitted that the offence was not compoundable and besides the ocular evidence of P.W. 1 and P.W.2, report of the Chemical Examiner was positive which corroborates the allegations made against the appellant.

11. We have thoroughly perused the record in the light of the submissions made by all learned counsel for the parties. It transpires that the occurrence took place on 01.08.2006 at about 7.00.p.m. and a report in this respect was lodged with the police by Abdul Ghani father of Mst. Nabeela Bibi, aged 15/16 years, who was virgin at that time. According to the complainant his daughter Mst. Nabeela Bibi had gone out of the house for easing herself in the cotton field where the absconding co-accused Muhammad Sajid, appellant/accused Muhammad Umar, armed with fire arm weapons, and two unknown persons were already present. They forcibly took her at some distance to a vacant field where Sajid and Umar committed zina-bil-jabr with her, turn by turn, and the un-identified persons remained as guard. When Mst. Nabeela did not return till late night, he got worried and set out in her search alongwith his brothers Muhammad Akram and



Muhammad Aslam and, in the process, at about 4.00.a.m, after hearing hue and cry of his daughter reached to the said field. On seeing them however the accused succeeded in making good their escape. The complainant saw his daughter in naked condition. After making her put on her clothes, they took her along to their house. According to him the heirs of accused had been beseeching them to refrain from initiating legal proceedings against them, but the complainant refused and lodged the report.

12. After investigation the police declared Muhammad Umar innocent and challaned only his co-accused Muhammad Sajid for the offence. Accordingly formal charge was submitted only against Muhammad Sajid on 31.10.2007. However, on 30.04.2008 when statement of Mst. Nabeela was recorded, the complainant submitted an application for summoning the appellant Muhammad Umar to face trial. The said application was allowed and the appellant was also summoned to face trial in this case. Initially a charge had been framed under section 10(3) of the Ordinance but on 09.10.2008 the charge was amended and sections 11 and 10(4) of the Ordinance against both the accused Muhammad Sajid and



Muhammad Umar were substituted. During the trial, however, on 16.05.2009 the accused Sajid absented and, subsequently, on 23.11.2009 he was declared proclaimed offender and the case to his extent was separated under section 512 Cr.P.C. Thereafter, only Muhammad Umar appellant/accused was tried.

13. Out of the eight P.Ws produced by the prosecution, P.W.1, Mst.Nabeela Bibi, P.W.2, Abdul Ghani and P.W.3 Lady Dr. Robina Nasreen are most significant. Mst. Nabeela is victim of the case who in her statement charged Muhammad Sajid (the absconding accused) as well as the appellant Muhammad Umar for commission of zina-bil-jabr with her. P.W.3 Lady Dr. Robina Nasreen medically examined Mst. Nabeela on 03.08.2006 and made, inter-alia, the following observations:-

“No bruise, tear or laceration on the local parts.

Vagina permitted one finger loosely. Hymen was torn”.

P.W.2, Abdul Ghani, father of the victim has supported the version made by

P.W.1 Mst. Nabeela Bibi.

14. So far as the occurrence is concerned, the statement of Mst.

Nabeela Bibi finds full corroboration from the medical evidence produced

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by P.W.3 as well as the from the report of Chemical Examiner (Ex.PF).

However, besides the fact that no grouping of semen was made to hold the appellant responsible and create his nexus with the offence, there are some major discrepancies and contradictions which make the case of prosecution to the extent of appellant/accused highly doubtful. As stated above, P.W.1 at the time of occurrence, was accompanied by her sister Mst. Shakeela as well as three other girls Abdida, Humera and Fatima. None of them was either produced at the trial nor cited as a witness in the calendar of witnesses even.

We may observe that in the natural course of events all the four girls should have proceeded immediately to the house to inform the complainant but there is nothing on record to even show that they either offered resistance or raised hue and cry on the spot or ever informed the complainant thereafter.

According to the complainant when his daughter Mst. Nabeela Bibi did not return to the house till late night, he got worried and alongwith his two brothers set out in search of his daughter. The question is why he did not ask Mst. Shakeela about the occurrence and why Mst. Shakeela herself did not disclose details about the exact place of occurrence from where Mst.

Nabeela had disappeared. The said place was not at all too far off. Had the occurrence taken place in the manner stated by the complainant, he should have gone much earlier to the said place and succeeded to recover his daughter. The time of occurrence was 7.00.p.m. and it took almost 09 hours till 04.00 a.m, when he was allegedly attracted over there and that too after the hue and cry of his daughter. In this background, his statement does not inspire confidence. Moreover, in his cross-examination he stated that he saw his daughter in naked condition while her hands were also tied. Mst. Nabeela does not say a word like that. According to the complainant except the two accused none else was present at that time but Mst. Nabeela refers to the presence of two other unknown persons who were standing as guards over there. It is also noteworthy to mention that as admitted by P.W.2, he had earlier lodged a case for the abduction of his wife wherein the absconding co-accused was also nominated as an accused. Though he denied, he was suggested that he had effected a compromise with said Sajid by giving an affidavit. He admitted that he had divorced his wife after her abduction. This reflects on the conduct of P.W.2 and his veracity. According to P.W.2,

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Muhammad Akram and Muhammad Aslam were his real brothers and they had accompanied him during the search of Mst. Nabeela who has also deposed likewise. However, both of them have not appeared as PWs to corroborate their version. It is also questionable as to why the occurrence continued for about 09 hours and the appellant and his absconding co-accused kept on waiting, till the arrival of complainant party, at the same place where Mst. Shakeela and three other girls had seen Mst. Nabeela disappear. According to Mst. Nabeela the appellant and his co-accused Sajid were armed but P.W.2 who saw both of them makes no mention to their arms, whatsoever.

15. We have also perused the application submitted by learned counsel for the appellant wherein inter-alia he has submitted that the complainant and his daughter have exonerated the appellant/accused and have no objection if he be acquitted of the charge. He has submitted the affidavits of P.W.1, Mst. Nabeela, P.W.2, Abdul Ghani, complainant for this purpose. The contents of the affidavits and statements are confirmed by the learned counsel for complainant. The contents clearly spell out that the

appellant/accused was innocent and had neither abducted Mst. Nabeela nor committed zina-bil-jabr with her. Mst. Nabeela has added that being a night occurrence she could not identify the appellant and had nominated him on account of suspicion but after due satisfaction has come to the conclusion that her allegation against him was based on sheer mis-understanding.

Though the offence is not at all compoundable, the statements as well as affidavits submitted by the complainant party disclose retraction from their earlier statements and create gravest doubt about the veracity of their depositions. It is evident that the victim and her father who have now changed their versions and have not only resiled from their previous statements but have turned a somersault and given totally conflicting statements, are worthy of no credence and any conviction especially the one carrying capital punishment cannot be awarded on the testimony of such witnesses who lack credibility and reliability.

16. In this view of the matter we have come to the conclusion that the case of prosecution against the appellant/accused is highly doubtful and he is entitled to get the benefit thereof.

17. Consequently for the reasons stated above we extend benefit of doubt to the appellant/accused Muhammad Umar and allow his appeal and acquit him of the charges. He is confined in jail. He shall be released forthwith, if not, required in any other case.

18. Since the case against the appellant/accused has not been proved and he is acquitted of the charges leveled against him, the question of confirmation of death sentence of the appellant does not arise. Therefore, Criminal Murder Reference No. 03/I of 2011 is not confirmed and is answered in the negative.

19. These are the reasons for our Short Order passed on 10.08.2011.


JUSTICE DR. FIDA MUHAMMAD KHAN


JUSTICE SHANZADO SHAIKH


JUSTICE RIZWAN ALI DODANI