

**IN THE FEDERAL SHARIAT COURT**  
(Appellate Jurisdiction)


**PRESENT**

**MR. JUSTICE SHAHZADO SHAIKH**  
**MR. JUSTICE RIZWAN ALI DODANI**

**CRIMINAL APPEAL NO.139/L OF 2007**

1. Jahan Zeb s/o Muhammad Akram, ... Appellants  
caste Kakkey Zai,  
r/o Quaidabad,  
Tehsil and District,  
Khushab.
  
2. Abdul Maajid s/o Rifaqat Ali,  
caste Kakkey Zai,  
r/o Quaidabad,  
Tehsil & District,  
Khushab.

Versus

 The State ... Respondent

Counsel for the appellants ... Mr. Muhammad Awaiz Khurram,  
Advocate

Counsel for the State ... Ch. Muhammad Ishaq,  
Deputy Prosecutor General for  
State

FIR No. Date and  
Police Station ... No.155 dated 24.07.2005,  
P.S. Gunjial, District  
Khushab.

Date of judgment of  
trial Court ... 30.06.2007

Date of Institution  
of appeal ... 18.07.2007

Date of hearing ... 29.07.2011

Date of decision ... 29.07.2011

**JUDGMENT:**

**Shahzado Shaikh, Judge:** Appellants Jahan Zeb and

Abdul Maajid have through this appeal challenged the judgment dated 30.06.2007 delivered by the learned Additional Sessions Judge, Khushab whereby they have been convicted under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to ten years rigorous imprisonment each with fine of Rs.25,000/- each or in default thereof to further undergo six months imprisonment each. Appellant Jahan Zeb has further been convicted under section 377 of the Pakistan Penal Code and sentenced to imprisonment for life with fine of Rs.25,000/- or in default thereof to further undergo six months imprisonment. Both the sentences awarded to Jahan Zeb appellant were ordered to run concurrently. The benefit of section 382-B of the Code of Criminal Procedure has been extended to both the appellants.

2. The prosecution case in brief is that FIR No.155 dated 24.07.2006 Ex.PB was registered at Police Station Gunjial on the

statement of complainant Maqbool Ahmad PW.5 wherein he alleged that on 23.07.2006 at 4.00 p.m. he alongwith Abdullah and Nasir Ahmad was going to home when they reached near Girls College Chowk, Quaidabad, they heard hue and cry of his son Muhammad Rashid victim PW.8, who is deaf and dumb, from Pepsi Godown. He alongwith the PWs rushed towards the godown, lifted the shutter and saw that Jahan Zeb accused was committing sodomy with Muhammad Rashid whereas accused Maajid was sitting nearby while putting off his shalwar. On seeing them the accused took their shalwars and ran away. The complainant and the PWs tried to apprehend the accused but they succeeded in fleeing away. On their query the victim informed them with gestures that both the accused caught him and took him in the shop. The complainant further stated that the relatives of the accused had been beseeching for forgiveness but he did not agree and got registered the crime report.

3. Investigation ensued as a consequence of registration of crime report. Muhammad Aslam Assistant Sub Inspector PW.4 undertook the investigation. He recorded FIR Ex.PB on the statement of the complainant, prepared injury statement of Muhammad Rashid Ex.PC and got him medically examined. He inspected the place of occurrence, prepared site plan Ex.PD and recorded statements of the PWs under Section 161 of the Code of Criminal Procedure. After medical examination of the victim, Nazar Hussain Constable produced before him MLR, a sealed parcel and sealed envelope which he took into possession through recovery memo Ex.PA and recorded statements of PWs of recovery memo under section 161 of the Code of Criminal Procedure. He made efforts for arrest of accused persons but to no avail. On 26.07.2006 he received *robkar* issued by the learned Additional Sessions Judge regarding interim bail before arrest of both the accused which he placed on the record. He recorded statements of Shamsul Hassan Muharrir/Head Constable and Nazar Hussain

Constable regarding transmission of parcel and envelope to the office of Chemical Examiner Rawalpindi. On 30.07.2006 he summoned both the parties for investigation, the complainant alongwith others joined the investigation whereas the accused did not join investigation. He received the report of Chemical Examiner on 31.07.2006 and placed the same on record. He arrested both the accused on 04.08.2006 after rejection of their bail application. He got both the accused medically examined and sent them to judicial lock up on 05.08.2006. He recorded statement of Muhammad Rashid victim through interpreter i.e. his father Maqbool Ahmad on 13.08.2006. After completion of investigation the Station House Officer submitted report under section 173 of the Code of Criminal Procedure before the Court on 12.08.2006 requiring the accused to face trial.

4. The learned trial Court framed charge against the accused on 16.09.2006 under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under section 377

of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

5. The prosecution produced eight witnesses to prove its case. The gist of the deposition of the witnesses is as follows:-

- (i) Pw.1 Shamsul Hassan Moharrir/Head Constable stated that on 24.07.2006 Muhammad Aslam Assistant Sub Inspector/Investigating Officer gave him a sealed parcel and an envelope for its safe custody to Malkhana which he handed over to Mazhar Hussain Constable for onward transmission to the office of Chemical Examiner, Rawalpindi.
- (ii) PW.2 Nazar Hussain Constable got medically examined Muhammad Rashid victim from Civil Hospital Quidabad. After medical examination the Medical Officer gave him a sealed parcel alongwith registered envelope which he handed over to the Investigating Officer which the I.O took into possession through recovery memo Ex.PA, attested by Muhammad Mushtaq and Atta-ur-Rehman. He delivered a sealed parcel containing swabs alongwith sealed envelope in the office of the Chemical Examiner Rawalpindi

on 26.07.2006 which were handed over to him by Shamsul Hassan Moharrir/Head Constable in the night between 25/26.07.2006.

- (iii) PW.3 Mushtaq Ahmed Constable stated that on 24.07.2006 Nazar Hussain Constable produced before the Investigating Officer a sealed parcel containing swabs alongwith a sealed envelope which the Investigating Officer took into possession through recovery memo Ex.PA and he alongwith Atta-ur-Rehman attested the recovery memo.
- (iv) PW.4 Muhammad Aslam Assistant Sub Inspector had undertaken the investigation whose detail has already been mentioned in paragraph 3 of this judgment.
- (v) Maqbool Ahmad complainant appeared as PW.5 and endorsed the contents of the crime report Ex.PB.
- (vi) PW.6 Abdullah supported the version of complainant PW.5.
- (vii) PW.7 Dr. Muhammad Ehsanullah Danish had medically examined Muhammad Rashid victim on 24.07.2006 and observed as under:-

“A boy aged about 10/11 years when asked to go into knee elbow position, hesitantly did so. No

signs of struggle were seen on the body. Boy had defecated and took bath twice after the act. He also changed his clothes. Local examination of the anal area showed abrasions on the entrance of anus, Alongwith somewhat hyperemic mucosa. Two tears one at 9.0 O' clock and another at 3.00 O' clock position were seen. Examination was quite painful. Clothes of the boy presented by the attendant, were collected and sent to Chemical Examiner for detection of any semen on the basis of above mentioned findings. I described that sodomy occurred. The MLC of Muhammad Rashid is Exh.PH and my signature over it is Exh.PH/1.

After receiving report of Chemical Examination, Exh.PJ, I am of opinion that sodomy was committed with Rashid victim as stated previously."

The doctor had also medically examined accused Abdul Majid and Jahan Zeb on 4.8.2006 and found them sexually potent.

- (viii) PW.8 Muhammad Rashid victim recorded his statement through interpreter Hamid Asghar Head Master Government Special Education Centre, Noorpur Thal, which is as under:-

"Name of the child is Rashid as indicated by him. He is eight years old. The child is telling the time of occurrence as 4.0 PM but he cannot tell the date. Again stated the date as 23-7-2006. As stated by the interpreter the victim has stated that



the accused gave him 15 rupees. The accused took him some where pulled down the shutter and removed his shalwar. As interpreted the accused took him to a barbar shop. As interpreted the victim said that the accused committed sodomy with him. The child cannot state/explain the names of the accused. However, as interpreted he says that alphabet of Bay comes in the name of one of the accused. As interpreted the name of other accused is Maajid. As interpreted the accused gave him beating whereupon he started weeping. As interpreted his father and maternal uncle arrived there and they helped him in wearing shalwar. As interpreted the accused ran away. As interpreted he was taken to hospital and was medically examined. At this stage, the victim rightly indicated towards the accused present in the court. As interpreted he does not know that who got lodged the FIR."

6. The prosecution, after tendering in evidence report of the Chemical Examiner Exh.PJ, Original result card of victim Muhammad Rashid of Deaf and Dumb School, Sargodha Exh.PK and school identification card Exh.PM, closed its evidence on 26.06.2007. Thereafter the learned trial Court recorded statements of the accused under section 342 of the Code of Criminal Procedure on 26.06.2007. The accused denied the allegations

leveled against them and in reply to question "Why this case against you and why the PWs have deposed against you?" both the appellants gave similar answer which is as under:-

“Complainant and his PWs are closely related inter se and they all are also inimical to me because of professional rivalry and other enmity. In this context they have falsely involved me alongwith the co-accused in this case. They are never eye witnesses. The whole story of the prosecution is fabricated against us.”

7. The learned trial Court after hearing learned counsel for the parties and assessing the evidence convicted the appellants as mentioned above.

8. During the course of arguments, learned Counsel for the appellants raised the following points:-

i) That no force was applied to kidnap the victim.

On the contrary, PW-5 has deposed that the victim was taken to the Bazar. According to the F.I.R, it was reported that the accused had taken the victim to the

shop while PW-6 had deposed that the victim was taken from Bazar to the godown.

ii) With reference to allegation of abduction, the M.L.R is also relevant as the doctor has deposed that he had not seen any signs of struggle on the body of the victim.

iii) Orientation test of the victim was not conducted as envisaged in Article 3 of the Qanun-e-Shahadat Order.

iv) That it was objected by the learned defence Counsel at the time of deposition of PW-8, the victim Muhammad Rashid, that interpretation signs of the Interpreter and those of the victim were not correctly understood by either side. The learned trial Court have also noted during the cross examination of PW-8 that the latter was not properly understanding the gestures

and signs and was not able to properly convey his submission.

v) Statement under Section 161 Cr.P.C was recorded after 20 days.

vi) That in such circumstances, maximum punishment of life cannot be awarded.

vii) That presence of the prosecution witnesses at the place of occurrence is highly doubtful as the shop of the complainant is situated at the distance of about 01 K.M from the place of occurrence and the shop of PW-6 is also located at a distance of one Kilometer.

viii) The witnesses are related interse. PW-5 and PW-6 claiming to be chance witnesses have pointed different directions of the place of occurrence.

ix) That there is other population in the vicinity who would have naturally heard the shrieks of the victim but none of them has reported to have heard the hue and cries of the victim.

x) That the I.O recorded that except these two witnesses, no other private witness has been produced.

Although the PWs were physically strong than the accused yet they could not catch the fleeing accused.

xi) That according to the victim, the place of occurrence was barber's shop whereas according to PW-5 and PW-6 it was a Pepsi godown.

xii) That the medical evidence is not sufficient to connect the accused with the crime.

xiii) That according to the M.L.R of the victim Muhammad Rashid, anal swabs were not taken for detection of semen but Shalwar and Qameez of the

victim were sent to Chemical Examiner for detection of semen which as per report of the Chemical Examiner were not stained with semen.

xiv) That M.L.Rs of accused Abdul Maajid and Jahan Zeb indicate that they refused to give the samples of semen.

xv) That there was business rivalry between the parties.

xvi) That all these circumstances and the compromise between the parties do not support the harsher punishment awarded but could be considered for lesser sentence.

9. The complainant present in the Court himself stated that they have forgiven the appellants in the name of Allah and have forgiven them. On a query, it was clarified that the offences for which the appellants have been convicted are not

compoundable, but the compromise could only be considered for lesser punishment or reduction in the sentence.

Learned Counsel placed reliance on 2006 MLD 1288

(Lahore) wherein it has been laid down as under:-

*"compromise in non-compoundable offence – effect --  
Compromise effected between the parties could be  
**considered** for the purpose of sentence, when offence  
was not compoundable – While maintaining conviction of  
accused for offence under Section 377 PPC, his sentence  
was reduced to two year' R.I and sentence of fine was  
also reduced to Rs.1000/-."*

b) Learned D.P.G for the State in support of his contention raised the following points:-

i. That Section 361 PPC is relevant for consideration in this case as the victim was a minor of 12 years of age and of unsound mind and he was induced to be taken away for the purpose of commission of unnatural lust with him.

ii) That non-conducting of orientation test of the victim does not affect the prosecution case.

iii) The ocular account is supported by medical evidence.

iv) That a heinous crime has been committed by the appellants with a minor child of unsound mind, therefore, they deserve deterrent punishment.

v) That the prosecution case has been proved beyond any shadow of doubt.

10. We have heard learned Counsel for the appellants and learned D.P.G for the State and scanned the evidence available on record.

11. We examined the evidence and material placed on record. We are fully convinced that prosecution had been able to prove the case against the appellant beyond any reasonable shadow of doubt. In that connection, the defence had failed to bring anything on record to consider that complainant had fabricated a false story for any annoyance or ill will against the appellant. The



doctor who had medically examined the victim had found abrasions on the entrance of anus. The doctor also found two tears on at 9.00 O'clock and another at 3.00 O'clock position. He further stated that examination of the victim was quite painful. The doctor was of the opinion that sodomy was committed upon the victim.

12. The plea put forth by appellants about professional rivalry and other enmity was denied categorically by the complainant during the trial. Appellants also did not produce any evidence in this regard. They did not come up to make statement under Section 340 (2) Code of Criminal Procedure. It was submitted on behalf of appellants that the occurrence was un-witnessed, but the perusal of evidence showed that Maqbool Ahmed consistently deposed against the appellant. The medical evidence supported the allegation that the victim was subjected to un-natural offence. The lengthy cross examination of complainant Maqbool Ahmed did not shake his credibility. There is no material

on the record that the complainant substituted the appellants for real culprits. It is established principal of law that substitution is a rare phenomenon. The testimony of prosecution witness is confidence inspiring. The appellants had not proved any enmity to attach some motive. Maqbool Ahmed complainant had no enmity or ill will against the appellants so as to falsely involve them on the charge of this nature, to put at stake the honour of his son, and in fact his entire family for life. It is clear from the record that the appellants are directly charged in the report for having committed the act of un-natural offence with Muhammad Rashid victim who is deaf and dumb and he was a minor of about 11 years. The statement of victim is duly corroborated by the medical evidence and any suggestion for any motive for false implication hardly appeals to reason. In the circumstance, conviction of the appellants on both counts i.e. under Section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and 377 PPC awarded

by learned Additional Sessions Judge, Khushab vide his judgment dated 30.06.2007, is maintained.

13. However the complainant has compromised with the appellants and in that regard affidavit has been placed on record, and the complainant present himself in the Court also asserts accordingly in the name of Pleasure of God, good relations and harmony in the community. However, it was clarified that the offence is not compoundable under the law. The learned counsel also submitted that appellants are young men and are first offenders and bread earners for their families.

✓ 14. Keeping the entire matter in view and the case law cited as well, the conviction and sentence of appellant Jahanzeb as awarded to him by the learned trial Court vide judgment dated 30.06.2007 under Section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to 10 years R.I. with fine of Rs.25000/-, failing which, he shall have to undergo further 6


months imprisonment, is maintained. However, while maintaining his conviction under Section 377 PPC, his sentence is reduced from life imprisonment to 10 years R.I. with fine of Rs.25000/-, in default whereof, he shall have to further undergo 6 months imprisonment. All the sentences shall run concurrently with benefit of Section 382-B Code of Criminal Procedure.

15. As regards appellant Abdul. Maajid, his conviction under Section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is also maintained but his sentence is modified from 10 years to the term already undergone with fine of Rs.25000/- in default of which, he shall have to further undergo 6 months imprisonment. He is present in the Court on bail and he shall remain on bail till 10<sup>th</sup> of August, 2011, by which time, the appellant shall deposit the fine with the learned trial Court, failing which, he shall be taken into custody by the concerned Police and sent to jail to serve out the sentence of 6 months. After the fine is

deposited, the learned trial Court may release his bail bonds and sureties with the report to this Court. Copy of this judgment be sent to the learned trial Court, Jail Superintendent and to the SHO concerned for information and compliance.

16. These are the reasons of our short orders, dated 29.07.2011.

  
  
JUSTICE SHAHZADO SHAIKH

  
  
JUSTICE RIZWAN ALI DODANI

Lahore, the  
29<sup>th</sup> July, 2011  
Hummayun/-

*Fit for reporting.*

  
  
JUSTICE SHAHZADO SHAIKH