

54

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO.20/L OF 2010

Akhtar Hussain son of Muhammad Nawaz,
Caste Bhatti, resident of Chak No.119/7DR,
Chichawatni, District Sahiwal.

---Appellant

Versus

1. The State

2. Shahmand Ali son of Mughla resident of Chak
No.119/7DR, Tehsil and District Sahiwal.

---Respondents

Counsel for the appellant	---	Mr. Seerat Hussain Naqvi, Advocate
Counsel for the State	---	Ch. Muhammad Ishaque D.P.G.
FIR No., date & Police Station	---	180/01 dated 03.07.2001 Kassowal, District Sahiwal.
Date of Judgment of Trial Court	---	21.12.2009
Date of Institution of Appeal	---	22.02.2010
Date of Hearing	---	22.07.2011
Date of Decision	---	22.07.2011

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JUDGMENT:

SHAHZADO SHAIKH, JUDGE: Appellant Akhtar

Hussain has through this appeal challenged the judgment dated 21.12.2009 delivered by the learned Additional Sessions Judge, Chichawatni, District Sahiwal whereby he was convicted under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 14 years rigorous imprisonment with benefit of section 382-B of the Code of Criminal Procedure.

2. The prosecution case in brief is that complainant Shahmand Ali PW-4 submitted complaint Ex.PA before the Police stating therein that on 30.06.2001 at 6.00 p.m. his unmarried daughter Mst.Ameeran Bibi aged 15/16 years went to the house of her aunt Mst.Bakhat Bibi to see her as she was sick; while the complainant was present in his house. Bahadar, husband of Mst. Bakhat Bibi, came to the complainant and informed him that at about 7.00 p.m. when he alongwith his wife Mst. Bakhat Bibi and Abid Hussain was present in his house, accused Mazhar Abbas, Azhar Abbas, Muhammad Ramzan, Haji, Rab Nawaz, Abdul Rehman, Mumtaz and Habib while

armed with deadly weapons trespassed his house and abducted Mst.Ameeran Bibi, daughter of the complainant by force for commission of Zina. On his hue and cry, witnesses Ghulam Shabbir and Muhammad Ali reached the spot. The accused fled away while extending fatal threats. The complainant party chased the accused but the accused succeeded in decamping in a van alongwith the abductee Mst.Ameeran Bibi. The motive behind the occurrence is that mother of the accused Mazhar namely Mst.Zohran Bibi had gone somewhere and the aforementioned accused had the suspicion that Ahmad Ali, son of the complainant had abducted her.

During investigation, Mst.Ameeran Bibi was recovered from the illegal custody of accused Mazhar Abbas and her statement under Section 164 of the Code of Criminal Procedure was recorded on 07.07.2001 wherein she stated that she was abducted by Mazhar Abbas, Azhar and Muhammad Liaqat whereas accused Azhar and Akhtar used to commit Zina with her at Vehari and Jata.

3. Investigation ensued as a consequence of registration of the crime report. Muhammad Hafeez S.I PW-5 carried out the

investigation. He inspected the place of occurrence; prepared rough site plan Ex.PF; recorded statements of PWs under Section 161 of the Code of Criminal Procedure; on 07.07.2001 recovered Mst.Ameeran Bibi from the custody of Mazhar Abbas (since dead) accused from Mouza Easa Tehsil Nankana Sahib; arrested accused Mazhar Abbas; got recorded statement of Mst.Ameeran Bibi under Section 164 of the Code of Criminal Procedure; got her medically examined; added offence under Section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979; on 26.07.2001 he arrested accused Akhtar Hussain in this case. On 27.07.2001 he was sent to Judicial Lock up; on 30.07.2001 he arrested accused Azhar Abbas in this case and sent him to Judicial Lock-Up on 31.07.2001; on 05.09.2001 he arrested accused Naveed Ahmed in this case and sent him to Judicial Lock-Up on 06.09.2001. During his investigation, all the aforementioned four accused were found involved in this case while accused Mumtaz, Rabnawaz, Fami and Ramzan and Abdul Rehman were not found involved in this case. Accused Liaqat Ali was also

58

found involved in this case but was not traceable. Thereafter this witness was transferred and he handed over the Police file to the Station House Officer.

4. After receipt of report under Section 173 of the Code of Criminal Procedure, the learned trial Court framed charge against the accused Akhtar Hussain, Naveed, Azhar Abbas and Liaqat on 26.05.2003 under Sections 11 and 10 (4) of the Offence of Zina (Enforcement of Hudood) Ordinance. All the accused did not plead guilty and claimed trial.

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

(i) PW-1: Liaqat Ali ASI while posted as Moharrar of the Police Station chalked out the FIR Ex.PA/1.

(ii) PW-2: Lady doctor Shazia Zubair medically examined the victim Mst.Ameeran Bibi and observed as under:-

"On P/V examination vulva and vagina were found healthy. Hymen was torn. Tears were old. Vagina

59

admitted two fingers easily without pain. Per vagina bleeding is present which shows menses.

The injury was declared under Section 337-F(I) PPC which caused blunt weapon within the duration of seven days."

According to the report of Chemical Examiner, Multan which is Ex.PC the swabs were found stained with semen.

(iii) PW-3: Mst.Ameeran Bibi is victim of the case. She supported the occurrence and corroborated the prosecution story.

(iv) PW-4: Shahmand Ali is complainant of the case. He endorsed the contents of his crime report.

(v) PW-5: Muhammad Hafeez S.I is Investigation Officer of the case. His statement has been expounded in para No.3 supra.

(vi) Head Constable Muhammad Arshad is author of the FIR.

6. After closure of the prosecution evidence, the learned trial Court recorded statements of the accused under section 342 of the Code of Criminal Procedure. All the aforementioned four accused

denied the charges leveled against them and pleaded innocence. Only accused Akhtar Hussain was convicted whereas the other co-accused were acquitted. Therefore, defence plea of the accused Akhtar Hussain is elucidated herein. In response to question: "Why this case against you and why the PWs deposed against you", the accused Akhtar Hussain stated as under:-

"I am innocent. I have falsely been involved in this case due to enmity and grudge in order to blackmail and extract money under the influence of her father. I have already deposed the facts in above questions in detail."

The accused did not opt to appear as his own witness under Section 340(2) of the Code of Criminal Procedure.

7. The learned trial Court after concluding the codal formalities of the trial returned a verdict of guilt. Conviction was recorded and sentence awarded as mentioned in the opening paragraph of this judgment. Hence this appeal.

8. Learned Counsel for the appellant contended that the appellant is innocent; he has no concern with the commission of the

61

alleged offence and he has been falsely implicated due to personal grudge. He further contended that the alleged victim.

9. On the other hand, learned D.P.G assisted by learned Counsel for the complainant contended that the appellant has rightly been convicted and sentenced and deserves no leniency.

10. We have gone through the evidence of witnesses of the prosecution, statement of the accused and the material available on record. Relevant portions of the impugned judgment have been scanned.

11. During the course of arguments, learned counsel for the appellant in support of his contention formulated the following points:-

i) That except the complainant Shahmand Ali PW-4 and the victim Mst.Ameeran Bibi PW-3, no other private witness has been produced although the private witnesses were stated to be present at the place of occurrence at the time of occurrence.

62

- ii) That out of 08 persons nominated in the FIR, only 04 including the present appellant were charged and tried by the learned trial Court.
- iii) That accused Mazhar Abbas from whose custody the victim was recovered has died.
- iv) That accused Akhtar Hussain was not nominated in the FIR although he was known to the complainant.
- v) Although it was reported in the FIR that the accused were carrying lethal weapons but the same were not recovered.
- vi) The van which was allegedly used in the abduction of the victim was not recovered.
- vii) That co-accused Muhammad Ramzan, Abdul Rehman, Mumtaz and Habibullah were declared innocent by the investigation and accused Azhar Abbas and Liaqat Ali were acquitted which belies the prosecution story.
- viii) That the victim in her cross examination stated that she is not ready to get her thumb impression compared with the alleged thumb impression on the disputed Nikah Nama.

ix) That the occurrence took place in the area of Police Station Kassowal District Sahiwal whereas the recovery was effected from the area of District Sheikhupura.

x) That the victim neither raised any hue and cry at the time of occurrence nor any Zina was committed to her.

xi) That the victim in her cross examination has admitted that she went on foot and did not raise any hue and cry at the time of her abduction.

xii) That accused Azhar Hussain, Mazhar Hussain and Akhtar Hussain are real brothers and commission of Zina is not possible by them together.

xiii) That there are material contradictions and discrepancies in the prosecution evidence, therefore, the appellant is entitled for acquittal by extending him benefit of doubt.

12. On the other hand, learned counsel D.P.G argued:-

i) That the Nikah as alleged by the appellant was not proved as the suit for jactitation of marriage filed by the victim was decreed and

the suit for restitution of conjugal rights filed by the appellant was dismissed by the learned Family Court. The same was challenged in appeal before the learned Addl. District Judge which was also dismissed vide judgment dated 02.01.2009, therefore, the Judgment of the learned Family Court has attained finality. Therefore, in this regard, no other piece of evidence can be considered at this stage.

ii) That the ingredients of force as envisaged in Section 349 PPC are attracted in this case which prove that the victim was forcibly abducted and was subjected to Zina-bil-Jabr by the appellant.

iii) That the report of the Chemical Examiner with regard to stains of semen is positive.

iv) That the learned trial Court has rightly convicted and sentenced the appellant under Section 10(3) Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, therefore, the Judgment of the learned trial Court is liable to be upheld.

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13. We have considered the arguments of the learned Counsel for the parties and also perused the record with their assistance.

14. Although appellant Akhtar Hussain was not nominated in the FIR but later on Mst. Ameeran Bibi in her statement under section 164 Cr.P.C. Ex.DA made specific allegations of abduction and zina-bil-jabr against Akhtar Hussain, appellant also. However appellant Akhtar Hussain took plea in his statement under section 342 Cr.P.C. that Mst. Ameeran Bibi with her own free consent entered into a valid Nikah with him and later, on the pressure of her parents and other relatives she resiled from the Nikah. The appellant produced Nikahnama dated 07.01.2001 Ex.DB regarding his Nikah with Mst. Ameeran Bibi. It transpires from the record that Akhtar Hussain appellant had filed a suit for restitution of conjugal rights while Mst. Ameeran Bibi, victim had filed a suit for jactitation of marriage. The suit of Mst. Ammeran Bibi was decreed in her favour while suit of Akhtar Hussain appellant was dismissed vide consolidated judgment

66

dated 30.04.2005 passed by the learned Judge, Family Court, Chichwatni. Akhtar Hussain appellant through an appeal challenged the judgment and decree dated 30.04.2005 of the Family Court, which was dismissed vide judgment and decree dated 02.01.2009 of the Additional District Judge, Chichawatni.

15. Mst. Ameeran Bibi, victim was medically examined by PW.2 Lady Doctor Shazia Zubair on 07.07.2001 and the doctor observed that the victim was subjected to sexual intercourse. The report of Chemical Examiner Ex.PC was also positive as the swabs were found stained with semen, which corroborates the opinion of doctor regarding sexual intercourse with Mst. Ameeran Bibi.

16. From the fact of filing suit for restitution of conjugal rights by the appellant and the opinion of the lady doctor, it is clear that Akhtar Hussain appellant committed intercourse with Mst. Ameeran Bibi and solitary statement of Mst. Ammeran Bibi is sufficient to prove the allegation against the appellant. Such an intercourse in the absence of valid Nikah, as disproved through the

67

litigation in the Family Court and onwards, amounts to Zina, which needs to be analysed as to whether it was zina-bil-jabr or not.

17. According to the statement of Mst. Ameeran Bibi victim, PW.3 the accused abducted her from the house of her aunt Bakhtan Bibi and they took her to different places, by using different modes of transportation even by foot, and kept her at places with population in the surroundings, but she did not raise alarm at any stage. Furthermore MLR of Mst. Ameeran Bibi, victim does not show any mark of violence on her body parts particularly those which could provide evidence of violence or use of force by the accused or resistance offered in this regard by the victim, to indicate forcible act of zina. In such circumstances, at the most zina with consent could be alleged from the aforementioned facts and circumstances of the case.

18. The contention in denial of allegation of zina, that except complainant Shahmand Ali, and the victim Mst.Ameeran Bibi, no other private witness was produced although private witnesses were present at the time of occurrence, is not tenable in view of the

68

recovery of the victim from one of the co-accused Mazhar Hussain (since dead), brother of the appellant, and assertion of the accused/appellant about Nikah with the victim, which could not be proved before Family Court and Addl. District Judge. Solitary statement of the victim, duly supported by documentary evidence of decree of Family Court and verdict in Family Appeal No.72/ADJ/2007 dated 02.01.2009 of Addl. District Judge, and MLR corroborated by Report of Chemical Examiner, is sufficient to lead to believe the commission of act of zina, in these circumstances.

19. Although 08 persons were nominated in the FIR No.180/01 dated 03.07.2001 Police Station Kassowal, but only 04 including the appellant were charged and tried by the learned trial Court, as during the course of investigation and before the trial Court, allegations under sections 11 and 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, could not be proved.

20. The contention of the learned counsel for the appellant that accused Akhtar Hussain, although known to the complainant was

not nominated in the FIR No.180/01 dated 03.07.2001 Police Station Kassowal, is also untenable. On the contrary it goes to support the prosecution that the Complainant reported the facts at the time of FIR to the extent and as known to him. More and exact details were provided by the victim in her statements under section 164 Cr.P.C. and also before the trial Court in evidence.

21. The contention of the learned counsel for the appellant that alleged weapons of offence and the van used in the occurrence were not recovered, are not relevant to the ingredients of the offence and the relevant section under which the appellant has been convicted and sentenced for the remaining allegation of nature of zina, in the circumstances, under section 10 (2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

22. The point raised by the learned counsel for the appellant that the victim in her cross examination stated that she was not ready to get her thumb impression compared with the alleged thumb impression on the disputed Nikah Nama, is redundant after the decree

70

of the learned Family Court, upheld by the learned Addl. District Judge also, has attained finality.

23. The contention of the learned counsel for the appellant that the occurrence took place in the area of Police Station Kassowal District Sahiwal whereas the recovery was effected from the area of District Sheikhpura, on the contrary go to support the prosecution that the victim was moved from one place to the other in the whole span of the offence.

24. In view of above, the conviction of appellant Akhtar Hussain under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 is converted to Section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and his sentence is reduced from fourteen years to ten years Rigorous Imprisonment. However imposition of fine is compulsory under Section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, therefore, a fine of Rs.1,00,000/- (Rupees One Lac) is imposed on appellant Akhtar Hussain or in default of payment

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of fine he shall further undergo six months Simple Imprisonment.

Benefit of Section 382-B Cr.P.C. is extended to the appellant.

25. With the above modifications, the appeal is dismissed.


26. The above are the reasons for our short order passed on

22.07.2011 in the open Court.

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Justice Shahzado Shaikh

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Justice Rizwan Ali Dodani

Dated, Lahore the

29-07-2011
M. Imran Bhatti/*

Fit for reporting.

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Justice Shahzado Shaikh