IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SHAHZADO SHAIKH
MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO. 262/L of 2006

Khurram Shahzad S/o Nazir Ahmed ... Appellant
Caste Bhatti R/o Mohallah Ghausiabad,
Pir Mahal, Tehsil Kamalia, District Toba Tek Singh.

Versus

The State	....	Respondent

Counsel for the appellant	.....	Ch. Muhammad Arshad Ramay, Advocate
Counsel for the complainant	.....	Rana Aftab Ahmad, Advocate
Counsel for the State	.....	Mr. Nisar Ahmad Virk, D.P.G.
FIR No. Date & Police Station	.....	482/2005, Dated 15.12.2005 Peer Mohal, District Toba Tek Singh
Date of judgment of Trial Court	.....	30.08.2006
Date of Institution of appeal	.....	21.10.2006
Date of hearing	....	27.01.2012
Date of decision	....	27.01.2012

-:-

JUDGMENT

Justice Shahzado Shaikh, J:- This appeal has been moved by appellant Khurram Shahzad to impugn judgment dated 30.08.2006 delivered by learned Judge, Anti-Terrorism Court Faisalabad, whereby he was convicted under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 15 years rigorous imprisonment. He was also convicted under Section 7(c) of the Anti-Terrorism Act, 1997 and sentenced to 10 years with a fine of Rs.50,000/-, in default whereof, to further undergo simple imprisonment for 3 years. Both the sentences were ordered to run concurrently with benefit of Section 382-B of the Code of Criminal Procedure.

2. Brief facts of the case, arising out of F.I.R No.482/2005 dated 15.12.2005 Ex.PA/1 registered under Section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and 7 (3) Anti-Terrorism Act, 1997 at Police Station Peer Mahal, District Toba Tek Singh, as narrated by complainant Muhammad Arshad PW-7 are that he was residing in Pir Mahal. He was a masson by profession. On 15.12.2005 in the evening at about 5.00 p.m, his daughter namely Kashaf aged about 3 years went out of the house who did not come back. After a while being anxious he alongwith his brothers namely Suhail Ahmad and Muhammad Rashid tried to search his daughter Mst.Kashaf. During the search at about 9:00 p.m, when they reached near Khajjiwala ground of Mohallah Iqbal Town they heard the screams of a child. They reached there and saw that his daughter's Shalwar was removed and there was bleeding from her vagina.

Some unknown person had committed Zina-bil-Jabr with her. He and his brothers Suhail Ahmad and Muhammad Arshad brought her to Civil Hospital, Pir Mahal for the treatment. Hence, the case.

3. The case was duly investigated; the accused was arrested and statements of the PWs were recorded under section 161 Cr.P.C. After investigation, challan was submitted in the Court against the accused to face the trial. The learned trial Court framed charge against the accused on 27.03.2006 under section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and 7 of the Anti-Terrorism Act, 1997. The accused did not plead guilty and claimed trial.

4. The prosecution in order to prove its case produced 11 witnesses at the trial. The gist of the evidence of prosecution witnesses is as follows:-

i) PW-1: Shahid Altaf ASI is an author of the FIR.

ii) PW-2: Abdul Rashid (Rtd.Constable) during his posting at Police Station Peer Mohal, was delivered two sealed parcels and one envelope by Moharrar Shamshad Ali which he deposited in the office of Chemical Examiner, Lahore intact.

iii) PW-3 Ghulam Abbas ASI was handed over injury statement of the victim Mst.Kashaf Bibi aged 3 years. After medical examination the lady doctor handed over to him two sealed parcels, one sealed envelope and medical certificate which he delivered to Muhammad Yar S.I who took the same into possession vide recovery memo Ex.PB. On 21.12.2005 he was accompanying Muhammad Yar S.I to whom the lady doctor delivered one sealed envelope for DNA test of Mst.Kashaf which he delivered to Muhammad Yar, S.I who took into possession vide recovery memo Ex.PC.

iv) PW-4 Shamshad Ali Moharrar corroborated the statement of PW-2 Constable Abdul Rashid with regard to sealed parcels.

v) PW-5 Mst.Kashaf is victim of the case; PW-6 Mst.Naheed Irbab is mother of the victim and PW-7 Muhammad Arshad is father of the victim Mst.Kashaf. They, all the three, supported the occurrence and corroborated the contents of the FIR.

vi) PW-8: Muhammad Ilyas is a witness before whom accused Khurram Shehzad allegedly made a confession of his guilt.

vii) PW-9 Dr. Farooq conducted potency test of accused Khurram Shehzad and found him fit to perform sexual intercourse.

viii) PW-10: Lady Dr.Yasmeen Muazam medically examined the victim Mst.Kashaf aged 3 years and observed as under:-

"External examination:

1. A contused swelling 2 cm x 3 cm on the upper lip.
2. A contused swelling 2 cm x 1 cm on the lower lip.
3. Cutting of Middle finger of left hand (only tip or pulp).

Pelvic Examination

1. Hymen ruptured. There was a tear at 4'O Clock position in vagina.
2. Another tear at 8'O clock position.

Both tears were bleed.

Vagina admitted one finer easily. Two vaginal swabs and two perineal swabs were taken and sent to the Chemical Examiner, Lahore for detection of semen.

Two vaginal swabs along-with envelop were sent to Professor of Micro-Biology Centre of Excellence, Punjab University, Lahore for detection of semen grouping (DNA test).

All the injuries occurred within probable duration of 4 hours and caused by blunt weapon.

OPINION:

In my opinion, the rape was committed with her and final opinion would be given after receiving the report of

Chemical Examiner, Lahore. In the light o report No.2333/S, dated 24.12.2005 of the office of Chemical Examiner, Lahore my opinion is that the swabs sent for detection of semen is positive."

ix) PW-11 Muhammad Yar S.I recorded statement of the complainant Muhammad Arshad Ex.PA and sent the same to the Police Station for registration of the case; he visited the place of occurrence; prepared site plan of the place of occurrence; effected recovery and prepared recovery memo; recorded statements of the witnesses under Section 161 of the Code of Criminal Procedure; arrested the accused Khurram Shehzad on 18.01.2006 and submitted report under Section 173 of the Code of Criminal Procedure against him on 19.01.2006 after finding him guilty of the offence.

5. The learned trial Court thereafter examined accused Khurram Shehzad under section 342 of the Code of Criminal Procedure on 05.06.2006. He, inter-alia, pleaded his innocence. In reply to the question "why this case against you and why the PWs deposed against you?" the accused stated as follows:-

"It is false case. In fact complainant and his wife run 'Brothal House' in the Mohallah. I with many other people of the vicinity forbade them not to run 'brothal house'. Complainant with the connivance of the Investigation Officer joined 20/25 persons in investigation on suspicion and after receiving handsome amount from them they were released. Before this occurrence complainant had abducted Mst.Perveen Bibi daughter of Muhammad Tufail and she was returned with the struggle made by the Ahle-Mohallah. First of all the complainant got arrested four real brothers of said Mst.Perven Bibi namely Muhammad Khan, Anwar,

Yaseen and Riaz. After that Aftab and Shehzad were arrested in this case who have been released after obtaining handsome amount. I am a poor man. I cannot fulfill his illegal demand of the complainant so he involved me in this false case. The Investigating Officer did not bother to trace the original culprit and in order to save his skin made me scapegoat. The PWs are inter-se related who have deposed falsely against me."

The accused neither made his statement under section 340(2) of the Cr.P.C. nor produced any defence witness.

6. The learned trial Court, after hearing the learned Counsel for the contending parties, convicted and sentenced the appellant as mentioned in opening paragraph of this judgment.

7. Ch. Muhammad Arshad Ramay, learned Counsel for appellant Khurram Shahzad has raised the following points:

i) This is an unseen occurrence.

ii) There is no direct evidence even Zafar, who was stated to be the witness of extra judicial confession of the accused, was not produced.

iii) The DNA report is totally negative. Even the circumstances of the case linking the accused have not been explained.

iv) The child/victim was not in a position to record her statement. Even before the learned trial Court she could not give the correct name of her mother.

v) There were allegations against father and mother of the victim, therefore, enmity cannot be ruled out.

vi) It is a case of extra-judicial confession, which is very weak type of evidence.

vii) The appellant was not nominated in the FIR and it was after a few days that the accused was involved. Even the father-in-law of the

complainant, who has referred to the extra judicial confession has not brought the person (Zafar) before whom the extra judicial confession was alleged to have been made. The learned Counsel has relied upon the following case law:

PLD 2006 SC 538

Abdul Mateen Vs. Sahib Khan and others

Extra judicial confession must be proved by evidence of very high and un-impeachable character.

PLD 2006 Lahore 207

Nasir Mahmood & another Vs. The State & another

Extra-judicial confession is generally and almost universally accepted and perceived as a very weak type of evidence and the same cannot suffice by itself to maintain a conviction on a capital charge.

viii) It was an evening time occurrence and the child/victim was recovered from a thoroughfare which shows that it was highly improbable that the incident could have taken place as alleged.

8. On the other hand, Rana Aftab Ahmad, learned Counsel for the complainant has argued as under:-

i) The occurrence took place on 15.12.2005 at 5.00 p.m. At 5 O' Clock in December, sun is about to set and in fact the occurrence had taken place in the darkness when the child was kidnapped and subjected to rape. The place from where the child was recovered was in fact not a thoroughfare and particularly by that time in the winter the people are confined to their homes and the accused could easily commit the said offence at the isolated place.

ii) The occurrence took place at an isolated place as shown in the site plan.

iii) The victim/child, her father and mother are consistent in their depositions who were not cross-questioned on relevant details and material points before the learned trial Court.

iv) The victim/child specifically identified the accused while recording her statement who was present before the learned trial Court.

v) There is no enmity from the side of the complainant otherwise the complainant could have easily nominated the accused right at the time of lodging the FIR. He nominated the accused only after the minor child, aged 3 years, had disclosed and given details about the culprit after she recovered from the trauma, being admitted in the hospital and under the effect of the offence it was quite natural for her not to be in proper senses.

vi) So far DNA report is concerned, it was not produced before the learned trial Court where it could have been examined. The submission of the report after it was called at this very late stage, in fact at the last moment, by the Appellate Court raises many questions on this report by the defence.

vii) The accused made extra-judicial confession before Muhammad Ilyas, father-in-law of the complainant, as he was the person who could have influence on the complainant and the accused came forward to make the confession before him because by that time he concluded that investigation proceedings were initiated in the vicinity; the victim/child was friend of his niece Ansa and his involvement could be exposed any time.

viii) At the end he also stated that the appeal was badly time barred because the appeal should have been filed within seven days while it was filed after 30 days.

9. Mr. Nisar Ahmad Virk, learned D.P.G. appearing for the State has raised following contentions:

i) The FIR is prompt.

ii) The accused were not nominated in the FIR which shows bona-fide of the complainant who had not any enmity or ill-will against the accused.

iii) This case not only depends upon circumstantial evidence but also the victim herself deposed against the accused and her deposition before the trial Court giving eye-witness account.

iv) Solitary statement of the victim/child is sufficient to prove the case.

v) The statement of the victim got corroboration from the statements of her father and mother.

vi) Muhammad Ilyas PW.8 deposed about extra-judicial confession made by the accused before him.

vii) The factum of occurrence was further corroborated by the lady doctor Yasmeen Muazam PW.10.

viii) The statement of accused under section 342 Cr.P.C. does not give clean chit to the accused himself.

ix) The DNA report is not a basic piece of evidence.

10. In rebuttal the learned Counsel for the appellant stated as under:-

i) The delay in filing the appeal has already been condoned.

ii) The victim on a question, put to her by the learned trial Court at the time of recording her statement, gave the name of her mother as Raheela whereas her name is Mst. Naheed Irbab.

iii) The DNA report is received in this Court, after the Court had called for the same and it was delayed by the concerned authority and not by the appellant himself for which he is not responsible.

11. We have heard the learned Counsel for the parties and perused the record with their assistance. Relevant portions of the impugned judgment have been scanned.

12. This is an unfortunate case in which a minor girl Mst. Kashaf, aged 3 years was subjected to zina-bil-jabr by Khurram Shahzad appellant. The complainant lodged the FIR against unknown accused. The occurrence was reported to have taken place after 5.00 p.m. (after about sun set) on 15.12.2005. The complainant, while searching, found his daughter in precarious condition at about 9.00 p.m. and the FIR was registered at 11.00 p.m. on the same date. Till that time the complainant himself did not know about the accused. From this it can easily be inferred that at that time the complainant was in perturbed condition carrying his minor innocent daughter, who was in precarious condition with whom such a brutal act was committed and her treatment was to be started immediately after lodging of the FIR. It was only after the victim/minor girl came out of shock/trauma, being admitted/under treatment in the hospital, that she disclosed about the accused. The complainant stated that his daughter informed the police that she was taken by Khurram Shahzad, uncle (Chachu) of Mst. Ansa who gave her a Pepsi bottle and sweet (Berfi). Mst. Kashaf, victim/child appeared as PW.5. The learned trial Court put her some questions to ascertain her competence to record statement, whereafter she stated that she was given sweet and one bottle by Khurram. She pointed towards Khurram accused, who was present in trial Court, and stated that the accused was Khurram who is uncle (Chachu) of Ansa. She further stated that she was given a bite by the said Khurram. The version of the victim was corroborated by the statement of the lady doctor Yasmeen Muazam PW.10 who observed contused swellings on the upper lip and lower lip of the victim as well as cutting of middle finger of left hand. The victim was not cross-examined

and no objection was raised on any material point, although opportunity was given to the defence, which amounts to acceptance of her statement on the part of defence. Ocular testimony of the prosecution witness was natural, reliable, satisfactory and confidence inspiring. Even sole testimony of the victim was enough for conviction, as it was truthful and inspiring confidence.

13. The complainant stated that when his daughter Kashaf victim disclosed about the incident before the police he and his wife were also present. Mst. Naheed, wife of the complainant and mother of the victim/child also appeared as PW.6. Although they were not eye witnesses of the occurrence yet they gave details about the facts which were narrated to them by their minor daughter. Both these witnesses were cross-examined but their veracity could not be shattered.

14. Muhammad Ilyas PW.8 deposed about the extra judicial confession made by the accused before him. He stated that Khurram Shahzad accused stated before him that he had made a mistake by committing Ziadti i.e. forcible commission of zina and the accused requested to get him pardoned as the complainant was his relative (son-in-law). Although extra judicial confession is not the basic piece of evidence for conviction and sentence yet it could be used, if properly corroborated in evidence. During cross-examination of Muhammad Ilyas PW no question was put to him in denial of extra judicial confession. The contention of the learned Counsel for the appellant that other witness of extra judicial confession i.e. Zafar was not produced as a witness and it is a weak type of evidence is not established because it is a settled law that the prosecution

has to prove its case on the quality of evidence and not on the quantity of the evidence. Out of the witnesses of extra judicial confession one Muhammad Ilyas appeared, who was cross-examined by accused but nothing came on the record that the accused had not made the extra judicial confession. Zafar was given up as Ilyas had appeared as the main witness of extra judicial confession, and no more additional witnesses were considered necessary. In this connection, following is very relevant:

> --Prosecution was not bound to produce all the prosecution witnesses mentioned in the calendar of the witnesses, except which were necessary to prove the guilt of accused--(KHADIM HUSSAIN vs State 2011 PCrLJ 1443 FEDERAL-SHARIAT-COURT)

Furthermore the statements of victim/child PW.5, her mother Mst. Naheed Irbab PW.6 and father Muhammad Arshad complainant PW.7 are consistent with each other and corroborating each other. The medical evidence coupled with the report of Chemical Examiner according to which the swabs were found stained with semen, lends further support to the prosecution version.

15. No enmity is established from the record between the parties. The appellant in his statement under section 342 Cr.P.C. did not succeed to point out any plausible reason about his false involvement in the case instead he leveled further allegations against the complainant and his wife that they run brothel in the Mohallah and he (the accused) with other people of the vicinity forbade them from this act. If this was the situation, it is very easy for the accused to produce inhabitants of the Mohallah as witnesses in his defence. Furthermore if the complainant wanted to involve the accused

due to enmity, he straight away could have nominated him as accused in the FIR. It shows honesty of the complainant that he lodged the FIR against unknown person and on coming to know about the accused he gave his name.

16. Neither accused himself appeared as a witness of his own account to make statement on oath under section 340(2) Cr.P.C. that he was falsely implicated by the complainant, nor he had produced any defence witness for disproving the charge against him. In this connection guidance may also be sought from FEDERAL-SHARIAT-COURT judgment reported as KHADIM HUSSAIN vs State 2011 PCrLJ 1443.

17. So far DNA report is concerned, it was received in this Court on 16.03.2011 from the District Police Officer, Toba Tek Singh in compliance with order dated 09.02.1011 whereas the DNA report was dated 08.03.2006. This report did not show its receipt in the office of DPO, Toba Tek Singh. There is no explanation as to why the DNA report had not been produced before the learned trial Court immediately after its receipt in the DPO office. The learned trial Court made many efforts to get the DNA report vide orders of the learned trial Court dated 11.02.2006, 04.03.2006, 14.03.2006 and 18.03.2006. It is noteworthy that the DNA report is dated 08.03.2006 and if it was prepared on 08.03.2006 then why it was not produced before the learned trial Court in due course of time. Now at appellate stage, the DNA report cannot be considered because its submission at this belated stage raises many questions regarding its authenticity, particularly when it does not bear receipt/inward number and

date, and any sign of having been received by any official/competent person in the office of the DPO, at the relevant time. It should have been produced in the trial Court where opportunity was to be given to the complainant party to examine/test its validity and to raise objections/arguments regarding the same. The general nature of reporting in the DNA Test without disclosing matching or non-matching of the technical points/elements in the DNA segments, renders it wanting in that respect. At the end, the report goes out of its normal sphere/scope of reporting by inviting more material of other suspects, if any. It is mentioned in the DNA report that two oral swabs of Khurram Shehzad were taken in the Laboratory "in the witness of S.I. Muhammad Yar". However the person, who took oral swabs of Khurram Shehzad, had not verified the identity of Khurram Shehzad as he did not mention his address, CNIC number or any other particulars in order to testify that the person produced in the Laboratory was Khurram Shehzad. No independent witness had identified Khurram Shehzad in the Laboratory except SI Muhammad Yar as stated above. This could possibly put some question marks on the part of the reporters even. In the DNA test, the stains present on the pieces of shirt of the victim were matched with oral swabs of the accused without explaining as to why vaginal swabs of the victim were not cross-matched with the sperm of the accused, which was not taken for this purpose. Furthermore, DNA Test is not the basic and the most reliable piece of evidence, under the circumstances. Ocular evidence of personal suffering of the minor victim girl who withstood the ordeal and distress of trial, duly corroborated by medical evidence, and depositions and cross examination

of all the PWs produced in this regard, could not be shattered by the defence on any material point. In this connection, reliance is also made on following case law:

> Utility and evidentiary value of the DNA Test was acceptable but not in a case falling under the penal provisions of *Zina* punishable under Hudood Laws having its own standard of proof, Principles. **[PLD 2005 Lah. 589 (a)].**
>
> Ocular testimony of the prosecution witness was natural, reliable, satisfactory and confidence inspiring--- Prosecution had fully proved the case against accused beyond any shadow of doubt---Defence had not proved any enmity, ill-will or malice against prosecution witness---Sole testimony of the victim was enough for conviction, if it was truthful and inspiring confidence--- ---***Despite the fact that DNA report about the swabs did not match with the profile of accused, the observations of lady doctors, were enough evidence of the fact that victim had been subjected to sexual intercourse--- Opinion of the Lady Doctor lent corroboration to the statement of the victim that accused had subjected her to zina***---Non-receipt of matching report of ***DNA test***, did not negate the ocular account of prosecution witness--.Prosecution having proved its case beyond any shadow against accused, accused had rightly been held guilty, convicted and sentenced by the Trial Court---Conviction and sentence awarded to accused by the Trial Court, were maintained. **(KHADIM HUSSAIN vs State 2011 PCrLJ 1443 FEDERAL-SHARIAT-COURT)**

18. From the facts and circumstances of the case, it is established that the prosecution has fully proved its case beyond any shadow of doubt. The witnesses are consistent in their depositions. The learned Counsel for the appellant has not been able to break the chain of consistency among the witnesses. The learned Counsel for the appellant has also prayed that the appellant has suffered more than six years incarceration in jail and his sentence may be reduced. We are not inclined to the request of the learned Counsel for the appellant because the appellant has committed a heinous offence with a minor innocent child of 3 years. She did not even know about the consequences of the act which was committed with her in brutal manner. This act of the appellant not only pained, shocked, and traumatized the victim/minor girl but left a stigma on the family, looking at our moral, cultural and societal values. The appellant does not deserve any further leniency, as the learned trial Court has already shown it to him, by not awarding him the full dose of punishment and penalty.

19. In view of what has been discussed above, Cr. Appeal No.262/L/2006 filed by appellant Khurram Shahzad against his conviction and sentence is dismissed.

20. Appellant Khurram Shahzad was convicted under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 15 years R.I. He was also convicted under section 7(c) of Anti-Terrorism Act, 1997 and sentenced to ten years R.I. with fine of Rs.50,000/- or in default thereof to further undergo three years S.I. Both the sentences were ordered to run concurrently with benefit of section 382-B Cr.P.C.

21. The conviction and sentences awarded to appellant Khurram Shahzad vide judgment dated 30.08.2006 passed by the learned trial Court in Hudood Case No.38/ATC/2006, Hudood Case Trial No. 127/ATC/2006 are maintained. Both the sentences shall run concurrently and benefit of section 382-B Cr.P.C. extended to the appellant by the learned trial Court will remain intact.

22. Accordingly Cr. Misc. No.432/L/2006 filed by Khurram Shahzad appellant for suspension of sentence is dismissed as having become infructuous.

23. The above are the reasons of our short order dated 25.01.2012 announced in the open Court.

[redacted]
Justice Shahzado Shaikh

[redacted]
Justice Rizwan Ali Dodani

Dated Lahore the
27th January, 2012
*M. ImranBhatti /**

FIT FOR REPORTING.

[redacted]
Justice Shahzado Shaikh