

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

**PRESENT:**

**MR. JUSTICE SYED AFZAL HAIDER, ACJ**  
**MR. JUSTICE SHAHZADO SHAIKH**

**CRIMINAL APPEAL NO.266/L OF 2005**

Muhammad Younis son of Nazar Muhammad,  
Caste Pawli, Resident of 5-Marla Scheme Dakhli  
Chak Nanikpur, Tehsil & District Pakpattan.

---Appellant

Versus

The State

--- Respondent

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Counsel for the appellant	---	Mr. Walayat Umar Chaudhry, Advocate
Counsel for the State	---	Ch. Muhammad Ishaque D.P.G.
FIR No., date & Police Station	---	312/01 dated 18.12.2001 Chakbedi, Pakpattan Sharif
Private Complaint No.	---	52 ASJ of 2003
Date of Judgment of Trial Court	---	26.05.2005
Date of Institution	---	10.08.2005
Date of Hearing	---	07.02.2011
Date of Judgment	---	<b>10.02.2011</b>

**JUDGMENT:**

**Justice Syed Afzal Haider, ACJ:** Appellant Muhammad

Younis has through this appeal challenged the judgment dated

26.05.2005 delivered by the learned Additional Sessions Judge,

Pakpattan Sharif whereby he was found guilty on three counts.

He was convicted firstly under section 11 of the Offence of

Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced

to life imprisonment with fine of Rs.50,000/- and secondly his

conviction was recorded under section 10(3) ibid and sentenced

to twenty five years rigorous imprisonment while the third

conviction was recorded under section 16 ibid and he was

sentenced to seven years rigorous imprisonment with fine of

Rs.25,000/-. The appellant was directed to be kept in jail till the

payment of fine. All the sentences were ordered to run

concurrently with benefit of section 382-B of the Code of

Criminal Procedure. However his co-accused namely

Muhammad Yousif and Yaseen were acquitted by the trial court whereas the co-accused Mst. Irshad Bibi had died during the trial.

2. The prosecution case in brief is that complainant Mst. Maryam Bibi PW.2 filed a private complaint under Sections 16 & 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with section 382/109 of the Pakistan Penal Code wherein she alleged that during the night between 3<sup>rd</sup> and 4<sup>th</sup> November 2001, at about 10.30 p.m, she woke up on account of knocking at the door. On her inquiry, Mst. Irshad responded by saying that she wanted to get 'Lassi'. She, therefore, unbolted the door whereupon accused Muhammad Younis and Yousaf armed with pistols and empty handed Yasin forcibly entered into the house. Younis accused put his hand on her mouth while the other accused put her in a car. Younis accused threatened her on pistol point that in case

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she raised alarm she would be killed. The accused persons alongwith an unknown driver took her towards Depalpur. Sikandar and Maulvi Yar Muhammad had seen her being carried away by accused in the car. At Dipalpur Chowk the accused administered juice and she became unconscious. On gaining consciousness she found herself on a cot in a room. Younis accused told that since her father had not supplied electricity to them so they had abducted her out of this grudge. On the next day accused Younis committed zina-bil-jabr with her. He would thereafter commit zina-bil-jabr with her during the night time while she was kept locked during the day for almost a month. After 2/3 days the accused snatched her golden ear-rings and nose pin. She proceeded to allege further that Yasin accused in the absence of Younis accused used to commit zina-bil-jabr with her. One day accused Younis accused alongwith his friend Maqbool came there. She requested

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Maqbool to get her released from the clutches of accused.

Maqbool informed her father who alongwith Maqbool arranged a raid and recovered her. The complainant alongwith her father submitted application for registration of criminal case against accused persons at police station Chakbedi but the police in connivance with the accused persons did not register the case.

However the police registered a crime report of the father of the complainant on 18.12.2001 without recording the correct version. During investigation the police in connivance with the accused persons declared accused Younis and Yousaf accused innocent of the charges and involved instead the complainant in the case. The complainant also stated that the motive of the occurrence was that her father Manzoor Ahmad had supplied electricity connection to the accused but due to non-payment of bills he disconnected the electricity due to which a dispute

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developed between the parties and due to this grudge she was abducted.

3. As a consequence of filing of private complaint, the matter was entrusted to Magistrate Section 30, Pakpattan Sharif for conducting inquiry under section 202 of the Code of Criminal Procedure. The learned Magistrate after recording cursory statements of the witnesses submitted a report on 23.01.2003 whereafter the learned trial court summoned accused persons Muhammad Yousaf, Muhammad Younis, Muhammad Ysin and Mst. Irshad Bibi to face trial. However co-accused Mst. Aisha was not summoned by the learned trial Court. The learned trial Court framed charge against accused persons under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Accused Muhammad Younis and Muhammad Yasin were also charged under section 10(3) of the

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Ordinance ibid. The accused did not plead guilty and claimed trial.

4. The complainant produced four witnesses to prove the case. The gist of the deposition of the witnesses is as follows:-

- (i) Muhammad Ashraf Head Constable appeared as PW.1 to identify the signatures of Abdul Hamid Head Constable who had formally recorded FIR Ex. PA.
- (ii) Mst. Maryam Bibi complainant appeared as PW.2. She endorsed the contents of her private complaint Ex.PB.
- (iii) PW.3 Muhammad Yar stated that on 3<sup>rd</sup> November at 10.45 p.m. he was present at Adda Bonga Hayat when he had seen Younis, Yousaf, Yasin and Mst. Maryam Bibi in a white coloured car going towards Depalpur. He tried to stop the car but to no avail. He informed Manzoor Ahmed father of Maryam Bibi.
- (iv) PW.4 Manzoor Ahmed supported the version of her daughter Mst. Maryam Bibi complainant PW.2.

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5. The complainant closed the evidence on 11.03.2005. The learned trial Court thereafter recorded statements of three Court Witnesses. The gist of statements of these witnesses is as under:-

- (i) CW.1 Abdul Hameed Assistant Sub Inspector stated that he was posted as Moharrar/Head Constable at Police Station Chakbedi. On 01.12.2001 he formally recorded FIR Ex.CW.1/A on receipt of complaint.
- (ii) CW.2 Dr. Muhammad Siddique had medically examined Muhammad Younis accused on 11.01.2002 and found him sexually potent.
- (iii) CW.3 Khadim Hussain Assistant Sub Inspector stated that on 18.12.2001 he alongwith police officials was present at Adda Chakbedi on official duty where Manzoor Hussain got his statement Ex.CW.3/A recorded which was sent to Police Station Chakbedi for formal registration. He then proceeded to the place of occurrence, recorded statements of witnesses under section 161 of the Code of Criminal Procedure, prepared site plan Ex.CW.3/B. He arrested accused Muhammad

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Younis on 10.01.2002 when his pre-arrest bail was dismissed. He got accused Younis medically examined and sent him to judicial lock up. During investigation he found Younis accused guilty.

6. The learned trial Court recorded statements of the accused under section 342 of the Code of Criminal Procedure on 15.03.2005. The accused denied the allegations leveled against them. Appellant Muhammad Younis in reply to the question "Why this case is against you and why the PWs have deposed against you?" stated as under:-

"I am innocent. Case against me is based on concocted story and the PWs deposed against me due to close relationship with the complainant and PWs are inter-related with each other."

7. The learned trial Court after completing the codal formalities of the trial and hearing arguments of the contending parties returned a verdict of guilt. Convictions and sentences under various counts were recorded against the appellant as mentioned in the opening paragraph of this judgment.

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8. We have gone through the file. Evidence of witnesses of prosecution and statement of accused have been perused. Relevant portions of the impugned judgment have been scanned.

9. Learned Counsel for the appellant has raised the following points for consideration:-

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- i. That the element of abduction alleged by prosecution has not been proved;
- ii. The allegation of rape has neither been corroborated medically nor by any direct evidence;
- iii. The witnesses of the prosecution are related inter se;
- iv. That there is enmity between the parties and a false case has been concocted by prosecution against the appellant; and lastly
- v. The appellant has already suffered incarceration for a period of more than nine years.

10. Learned D.P.G. appearing on behalf of the State urged as under:-

- i. That the impugned judgment does not merit interference;
- ii. That the oral statement of the victim is sufficient to establish the guilt of appellant; and lastly that the
- iii. Deficient investigation or unnecessary concessions by investigating officer cannot destroy the effect of direct evidence of the victim.

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11. We have examined the impugned judgment. The reasons that prevailed upon the learned trial Court to record convictions on various counts may be summarized as under:-

- i. That the evidence of witnesses for the prosecution cannot be discarded merely on the ground of mutual relationship;
- ii. Absence of medical examination of victim is not fatal because medical examination is merely corroborative piece of evidence and furthermore the victim was a married woman;
- iii. The witnesses for the prosecution are independent and had no enmity to involve the appellant in a false case; and

iv. Appellant was found guilty in police investigation. The opinion of police is of course not binding upon court yet it is a relative piece of evidence.

12. After going through the entire record and considering the points raised before us and examining the manner in which the judgment has been recorded, our observations are as follows:-

i. That before a conviction is recorded under any offence the trial Court invariably examines very carefully whether the ingredients of the alleged offence have been proved. Section 367 of the Code of Criminal Procedure lays down that not only a judgment shall contain the point or points for determination but decision and reason for the decision on those points must be part of the judgment. The mere mention in this case that the accused was charged under sections 10, 11 or 16 of Ordinance VII of 1979 would not amount to compliance with legal requirements. The point to be determined under section 10 of Ordinance VII of 1979 is to see whether the charge of Zina or Zina-bil-Jabr liable to Tazir has been made out clearly against the accused and in cases covered by the mischief of sections 11 and 16 ibid is the point for

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determination is whether *kidnapping/abduction* or for that matter *enticing* or *taking away* a woman with the criminal intent of marrying the woman against her will or subjecting her to illicit intercourse has been established. The element of abduction or inducing the victim to compel her for marriage against her will or that she may be forced or seduced to illicit intercourse as visualised by section 11 or for that purpose the element of enticing away or taking away or detaining Mst. Maryam Bibi with criminal intent as required by section 16 of Ordinance VII of 1979 have not been discussed for arriving at the verdict of guilt. There are no reasons given in the judgment for convicting the appellant simultaneously under section 11 as well as section 16 of Ordinance VII of 1979 in the same transaction. A discussion on the ingredients of both the offences is lacking. We do not know on what basis the components of these two distinct offences have been proved beyond shadow of reasonable doubt.

ii. It is not enough that justice is dispensed by Courts. It is equally important that justice appears to have been done. A written judgment should be evidence of the fact that the conclusions arrived at in the verdict are duly supported by evidence on record and the contentions

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raised by the contending parties have been duly considered. In other words the judgment should clearly reflect due appreciation of the facts and evidence on record as well as the fact that the Court has applied its mind judicially in arriving at the conclusion of guilt or otherwise. The High Court Rules have defined the scope of the term judgment in Rule 1, Chapter 1-H, Volume III as follows:-

**1. Contents of a judgment.**---(i) In all cases a judgment must be drawn up containing (1) the point or points for determination, (2) the decision thereon, and (3) the reasons for the decision. In case of a conviction, the offence, the law applicable, and the punishment awarded, must be entered in the judgment. In case of acquittal, the offence must be specified and (if the accused is in confinement) a direction given that he be set at liberty. When there are more than one accused, the case of each should be dealt with separately.

The Supreme Court of Pakistan in the case of Shahid and 2 others Vs. The State and others 1996 S.C.M.R 1368 held as under:-

“The other contention of the learned Counsel for the appellants is that the High Court could not interfere with the acquittal judgment unless the judgment was found to be foolish, perverse or based on misreading or non-consideration of material evidence on record. With the assistance of the learned counsel for the appellants we have gone through the judgment of the *learned Trial Court and are constrained to observe that the learned Judge while evaluating the prosecution evidence in the case neither analysed the evidence on record nor gave its own reasons for rejecting the same.* The Trial Court in its judgment simply noted the criticism of defence counsel to the evidence of eye-witnesses and then disposed of the same with the observation that the State Counsel was unable to make satisfactory reply to the contention of the defence counsel. It need not be stressed here that presence of a counsel in a case is only meant for facilitating the trial of the case before the Court. *Failure of the counsel to render proper assistance in a case, therefore, cannot absolve the Court from its primary duty to decide the case in accordance with the law. Section 367, Cr.P.C. requires that the judgment of the Court should contain the point or points for determination, the decision of the*

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*Court on such points, and reasons for the decision.* Therefore, failure of the State Counsel to offer satisfactory reply to the criticism of the defence counsel to the prosecution evidence could not result in the acceptance of the contention of the defence counsel, thereby absolving the Court from its duty to examine and evaluate the evidence in the case and recording the reasons for acceptance or rejection of the evidence as required by law. We are sorry to say that the Trial Court while dealing with the prosecution evidence in the case did not record his own reasons for rejecting the prosecution evidence. Mere reproduction of the criticism of the defence counsel to the prosecution evidence in the case was not sufficient to absolve the Court from its duty to record its own reasons for acceptance or rejection of the prosecution evidence. In these circumstances, the learned Judge in Chambers was fully justified in interfering with the judgment of acquittal which was passed by the learned Trial Court without evaluating prosecution evidence in the case.”

*(Emphasis added)*

- iii. In our view there is no evidence on record in this case to establish the element of abduction or enticing away Mst. Maryam Bibi.



iv. The allegation of rape was challenged in the cross-examination by way of a suggestion which suggestion was however denied. There remains only the statement of complainant in which she has alleged rape not only to the appellant but also to the acquitted co-accused Muhammad Yousaf. The allegation was neither supported by medical examination nor report of the Chemical Examiner. Of course direct evidence of illicit intercourse is usually not available and hence reliance has to be placed on what the victim has to say subject of course to the principle that Courts are cautious in accepting uncorroborated testimony of the prosecutrix. Of course there is no legal bar in accepting solitary statement of the victim. The courts however exercise caution in this matter in the larger interest of justice.

v. The victim had specifically stated that she managed her escape through the intervention of one Maqbool. This allegation was not challenged by the appellant but the prosecution failed to produce the said Maqbool at the trial. He was the most relevant witness not only to prove the element of wrongful confinement of Mst. Maryam Bibi at a place in occupation of the appellant but his evidence would have supported the allegation of Zina-bil-Jabr. Additionally the question of

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recovery on a given date and from a particular place would also have been established. Maqbool was allegedly a neutral person because he was reportedly known to both the parties. The statement of victim that it was with the assistance of the said Maqbool that a police raid was arranged would have been corroborated conclusively. The police officer denied having recovered the victim as alleged by her.

vi. We are conscious of the fact that the investigation undertaken in this case was certainly below standard if not tainted. The absence of medical examination, non-availability of the time and place of recovery, inability to procure the evidence of Maqbool are some of the factors which are conspicuous by absence. The Investigating Officer Khadim Hussain Assistant Sub Inspector CW.3 did concede that "it is correct that Mst. Maryam Bibi was not recovered through police". It was an other concession that the police officer gave to the accused. The statement of this police officer as well as the mode and manner of his investigation including the delay on the part of staff of Police Station Chakbedi, District Pak Pattan to formally register the crime report reflects upon the lack of responsibility on the part of investigating and prosecution agency. Conscious effort

appears to have been made on the part of police in this case to cause damage to the complainant. Such a course does create hurdle in deciding a criminal case because the evidence and material relevant for the decision of the case is denied to the courts.

vii. It has also been brought on record that the police found the complainant guilty under section 10 of Ordinance VII of 1979 but the judgment is silent on this aspect of the case. Why was not Mst. Maryam Bibi sent up for trial? What is the mystery and why discriminate between the accused if it was a simple case of Zina with the consent of parties.

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viii. In this case even the judgment recorded by learned trial Court was not of the standard that is expected from an Additional Sessions Judge. The result of these two defects is that the very convictions become doubtful.

ix. The number of contradictions in the statement of Mst. Maryam herself and the number of persons involved by her in this case does not inspire confidence. We feel that it was a case of consensual relationship but in order to record conviction we have to be convinced that appellant alone was guilty. Mere feeling on our part is not a safe substitute for a firm conclusion.

13. In view of what has been stated above we hold that:-

- (i) the ingredients of the Offence under section 11 and section 16 of Ordinance VII of 1979 have not been proved; and
- (ii) the ingredients of the offence under section 10 of Ordinance VII of 1979 has also not been proved;

Consequently the convictions and sentences recorded thereunder by learned trial Court in the impugned judgment dated 26.05.2005 in Private Hudood Complaint No.52 ASJ of 2003, State Case No.58 ASJ of 2003 are set aside and extending benefit of reasonable doubt the appellant Muhammad Younis is acquitted of the three charges. The appellant is in jail. He shall be set at liberty forthwith unless required in any other case.

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[Redacted Signature]  
JUSTICE SYED AFZAL HAIDER  
ACTING CHIEF JUSTICE

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[Redacted Signature]  
JUSTICE SHAHZADO SHAIKH

Dated, Lahore the  
10.02.2011  
M. Imran Bhatti/\*

Fit for reporting.

*Sd/-*  
[Redacted Signature]  
JUSTICE SYED AFZAL HAIDER  
ACTING CHIEF JUSTICE