

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

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

CRIMINAL APPEAL NO.36/I OF 2010

Muhammad Anar Khan son of Mohammad ... Appellant
Siddique, caste Arrain, resident of Hajka,
Tehsil Bhalwal, District Sargodha

Versus

The State	...	Respondent
Counsel for the appellant	...	Syed Muhammad Tayyab, Advocate
Counsel for the complainant	...	Mr.Muhammad Tariq Riaz, Advocate
Counsel for the State	...	Ch. Muhammad Sarwar Sidhu, Additional Prosecutor General Punjab for State
FIR No. Date and Police Station	...	No.342 dated 15.08.20062, P.S. Bhera, District Sargodha.
Date of judgment of trial Court	...	30.03.2010
Date of Institution of appeal in FSC	...	17.04.2010
Date of hearing	...	18.08.2011
Date of decision	...	18.08.2011

JUDGMENT

RIZWAN ALI DODANI, J. - This appeal has been moved by appellant Muhammad Anar Khan son of Muhammad Siddique to challenge judgment dated 30.03.2010 delivered by learned Additional Sessions Judge, Bhalwal whereby he was convicted and sentenced as under:-

U/s 11 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 Life imprisonment with fine of Rs.20000/- or in default thereof to further undergo three months imprisonment.

U/s 10 (2) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 10 years rigorous imprisonment with fine of Rs.20000/- or in default thereof to further undergo three months imprisonment.

Benefit of section 382-B of the Code of Criminal Procedure has been extended to the appellant.

2. Brief facts of the case arising out of F.I.R No.342, dated 15.08.2006 Ex.PG registered under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 at Police Station Bhera, District Sargodha by complainant Misri Khan (PW.4), are that complainant is resident of Hajka Sharif. He had purchased a tractor Trolley for labour. About four months before he had employed accused/appellant Anar Khan as a driver and he was on visiting terms in his house. He had five sons and four

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daughters. Mst. Shahnaz Bibi was his elder daughter. During this period Anar Khan developed illicit relations with his daughter but he had no knowledge about it. On 12.08.2006 at about 1:00 p.m. when he returned to his house, his daughter Mst. Shahnaz Bibi was not present in the house. He started search for his daughter. During search, Saeed Ahmad son of Muhammad Siddique and Naseer Ahmad son of Ghulam Yaseen met him and told that they had seen Mst. Shahnaz Bibi in the company of Anar Khan accused/appellant at Adda Bhera who had taken her towards Bhalwal on a wagon. He had been searching his daughter but she could not be traced. His daughter had taken away with her cash Rs.16000/- and two tola golden ornaments along with her, hence this 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/appellant Anar Khan placing him in column No.3 of report under Section 173 Code of Criminal Procedure. The learned trial Court framed charge against the accused on 25.09.2007 under section 11 of the Offence of

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Zina (Enforcement of Hudood) Ordinance, 1979 and under section 10 of the Offence of Zina (Enforcement of Huood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

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

- i) PW-1: Hafiz Dr. Noor-ul-Ameen, Medical Officer, RHC, Bhera deposed that on 19.01.2007 he was posted at RHC, Bhera as Medical Officer. On the same day, he medically examined Muhammad Anar Khan son of Muhammad Siddique and his observations are as under:-

General Physical Examination

A young male, everage built, physically and mentally healthy.

Local Examination

1. No marks of violence seen on his body.
2. Penis was in normal size and shape.
3. Secondary sexual character was fully developed.
4. Both the testies were present in respect secretum.

Opinion

In his opinion there is nothing to suggest that examinee is impotent.

MLC is Ex..P-A which is in his hand and bears his stamp and signature.



ii) PW.2 Muhammad Naseer who deposed that he knew nothing about the occurrence.

iii) PW.3 Lady Dr. Nazia Tab'ish, Women Medical Officer, RHC, Bhera who deposed that on 23.11.2006 she medically examined Mst. Shahnaz Bibi d/o Misri Khan aged about 19 years brought by Muhammad Younis, ASI.

She observed as under:-

External Examination

No mark of violence seen on her body.

Internal Examination

Hymen was torn. Vagina admitted two fingers.

One external swab and two internal swabs were taken, sealed and sent for chemical examination.

According to the report of Chemical Examiner, Rawalpindi external and internal vaginal swabs were stained with semen. SO the final opinion was that act of sexual activity was performed.

Ex.P-B is the correct carbon copy of medical certificate which is in her hand and bears her signatures. Ex.P-C is report of Chemical Examiner.


iv) PW.4 Misri Khan complainant who deposed that he had purchased a tractor trolley for labour. Before 12.08.2006, i.e., about four months earlier, he had employed accused/appellant Muhammad Anar Khan, present in Court, who was known to him, as driver. On 12.08.2006 when he (Misri Khan) was away from his own house whereas his wife was also away to bazaar to purchase domestic articles. When they returned to their house his daughter Mst. Shahnaz Bibi was not present in the house. He started searching for her daughter Mst. Shahnaz Bibi meanwhile Saeed Ahmed son of Muhammad Saddique and Naseer Ahmed son of Ghulam Yaseen met him and told him that they had seen Mst. Shahnaz Bibi in the company of

Muhammad Anar Khan accused/appellant who had taken her towards Bhalwal on the wagon. He had been searching her daughter but she could not be traced. Muhammad Anar Khan had abducted for the purpose of committing zina-haram with her. He approached the police station on 15.08.2006 and FIR was registered against the accused/appellant Muhammad Anar Khan.

His daughter Mst. Shahnaz Bibi afterwards came to his house by availing opportunity to escape.

Police did not investigate the case on merits and favoured the accused/appellant.

v) PW.5 Mst. Shahnaz Bibi, deposed that Muhammad Anar Khan accused/appellant was working as tractor driver with her father prior to this occurrence. On 12.08.2006 when the accused/appellant was present in her house when her father was away and her mother was also not in her house and she was all alone. At about noon time Muhammad Anar Khan accused came to their house and took her to Bhalwal under the pretext that her father had met a road accident and when she came to Bhalwal he made her to sit in a taxi car and took her to Rawalpindi where he forcibly kept her in the house of his brother (brother of Muhammad Anar Khan accused/appellant) and had been committing forcibly rape with her. He took her to some other place and forcibly got her thumb impression on different papers. Muhammad Anar Khan accused/appellant had been committing forcible rape with her during the period of abduction. By finding opportunity she arranged to come to her father's house. She appeared before the I.O. and made her statement. She was medically examined by the Women Medical Officer.

 vi) PW.6 Muhammad Saeed Ahmad who deposed that on 12.08.2006 he alongwith Naseer Ahmed PW were present near

Bus stop Bhera where at about after-noon Misri Khan complainant met them, who was searching for his daughter Mst. Shahnaz Bibi upon which he and Naseer Ahmed PW told him that they had seen Muhammad Anar Khan accused/appellant taking Mst. Shahnaz Bibi in a wagon bound for Bhalwal. After registration of the case he appeared before the I.O. and made his statement under Section 161 of Code of Criminal Procedure.

vii) PW.7 Shabbir Hussain No.144/C who deposed that on 23.11.2006 he was posted at P.S. Bhera. He joined the investigation of this case with Muhammad Yaseen, ASI/I.O at Police Station, Bhera. Mukhtar constable No.482, returned to police station in his presence after getting examined medically Mst. Shahnaz Bibi in his presence and handed over two sealed phial and a sealed envelope to the I.O., who secured the same vide recovery memo Ex.P-D which was attested by him as well as Muhammad Tufail No.698/C.

viii) PW.8 Mukhtar Ahmed No.432/C who deposed that on 23.11.2006 he was posted at P.S. Bhera. He produced Mst. Shahnaz Bibi before the Women Medical Officer at RHC, Bhera for Medical Examination.

After Medical Examination the WMO handed over to him two sealed phial and one envelope which he produced before the I.O. who took the same into possession.

ix) PW.9 Sikandar Hayat No.1293/MHC who deposed that on 23.11.2006 Muhammad Yaseen, ASI/I.O. handed over to him sealed envelope alongwith two sealed bottles when he was posted as Moharrer at P.S. Bhera, which he kept in malkhana for safe custody. On 27.11.2006 he handed over the parcel of envelope and two sealed bottles to Mukhtar Ahmed No.482 for onward transmission to the office of Chemical Examiner, Rawalpindi, intact.

x) PW.10 Muhammad Yaseen, ASI/I.O. deposed that on 15.08.2006 when he was posted at P.S. Bhera, the investigation of this case was handed over to him. He inspected the place of occurrence. He also prepared the site plan which is Ex.P-E and drawings and note on Ex.P-E are in his hand and bears his signature. He also recorded the statements of PWs under Section 161 of Code of Criminal Procedure. On 23.11.2006 he also recorded the statement of victim Mst. Shahnaz Bibi. He got her medically examined by the WMO after obtaining the permission by the Learned Area Magistrate. He also produced victim Mst. Shahnaz Bibi before the Special Magistrate, Sargodha for recording her statement under Section 164 of Code of Criminal Procedure but due to non-presence of accused/appellant Muhammad Anar Khan her statement could not be recorded.

On 19.01.2007 he arrested accused/appellant Muhammad Anar Khan and got him medically examined by the Medical Officer and on 20.01.2007 he sent the accused/appellant Muhammad Anar Khan to judicial lock up after finding him guilty. Prior to that he also verified the Nikah Nama of Mst. Shahnaz Bibi with accused/appellant Muhammad Anar Khan which was found to be correct.

xi) PW.11 Hafiz Ahmad Tariq, DDOR, Talagung deposed that on 25.11.2006 he was working as Special Judicial Magistrate, Sargodha. On the same day, Mst. Shahnaz Bibi d/o Misri Khan was brought before him by ASI Muhammad Yaseen, P.S. Bhera for recording her statement under Section 164 of Code of Criminal Procedure. Mst. Shahnaz Bibi abductee stated before him that police had already recorded her statement under Section 161 of Code of Criminal Procedure, therefore, she did not want to get her statement recorded under Section 164 of Code of Criminal Procedure. He gave his note on the application of Muhammad Yasin, ASI Ex.PF and his

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note Ex.PF/1 which is in his hand and signed by him. The abductee also affixed her thumb impression on it.

xii) PW.12 Sikandar Khan, ASI deposed that on 15.08.2006 when he was posted as Moharrar at P.S. Bhera, Muhammad Ashraf, ASI lodged FIR No.342, dated 5.08.2006. He identified his hand writing and signature of Muhammad Ashraf, ASI which is Ex.PG.

5. Learned trial Court after close of the prosecution evidence recorded statements of accused under section 342 of the Code of Criminal Procedure who denied the prosecution case, pleaded innocent and stated as follows in answer to the question why this case against you and why the PWs deposed against you?

“The case was registered due to enmity. The PWs have deposed against me due to relationship with the complainant”.

6. However, the accused/appellant did not tender evidence on oath.

7. After hearing both the parties the learned trial Court convicted and sentenced the appellant as mentioned in opening para of this judgment.

8. We have gone through the file. Evidence of the prosecution witnesses as well as statements of the accused have been perused. The relevant portions of the impugned judgments have been scanned.

9. During the course of arguments, leaned counsel for the appellant in support of his contention raised following points:-

- i) that there is delay in lodging the FIR and prosecution has not properly explained this delay.
- ii) that the abductee Mst. Shahnaz Bibi being sui-juris had voluntarily contracted marriage with the accused/appellant.
- iii) that the complainant had clearly mentioned in the FIR that accused/appellant Muhammad Anar Khan developed illicit relations with his daughter prior to her alleged abduction.
- iv) that during investigation the Nikahnama was found to be valid document as per statement of Investigation Officer.
- v) that there are many discrepancies in the statement of alleged victim Mst. Shahnaz Bibi PW.5.
- vi) that if the case against accused/appellant has been proved under Section 10 (2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 then co-accused Lady Mst. Shahnaz Bibi should also be punished.
- vii) that PW.2 who was eyewitness clearly stated that he knew nothing about the occurrence whereas PW.6 the other eyewitness, is close relative, being maternal uncle of the victim.

viii) that in same set of evidence, PW.2 was declared as hostile witness who was independent witness and neighbour of the complainant.

ix) that Lady Doctor was not cross examined because marriage between the accused/appellant and victim had been solemnized.

x) that the witness of Nikah i.e. Nikah Khawan and Secretary, Union Council were given up. If they appeared before the Court then factum of Nikah was to be proved.

xi) that the application submitted by the complainant before the police has not been exhibited.

xii) that sole witness, the victim, did not mention the place where intercourse had been committed with her.

xiii) that PW.6 who was maternal uncle of the victim did not inquire from the victim that where she was going with the accused/appellant Muhammad Anar Khan when this PW had seen both of them sitting in the wagon at Adda Bhera.

xiv) that the PW.10 Muhammad Yaseen, ASI/I.O. I.O. has verified the Nikah Nama of Mst. Shahnaz Bibi with accused/appellant Muhammad Anar Khan which was found to be correct and legal.

xv) that trial Court should have called the given up witness of Nikah as a Court Witness but this legal aspect has been ignored by the trial Court.

xvi) that there is no evidence regarding illicit relation between victim and accused/appellant prior to Nikah as such prosecution has failed to prove such allegation between accused/appellant and victim before Nikah.

xvii) that learned trial Court has neither taken into consideration the evidence produced by defence side before

trial Court nor documentary evidence Exs.D.A/D.B/D.C were properly considered by the learned trial Court in the judgment.

xviii) that as the complainant has not filed any private complainant in this regard, therefore, the prosecution cannot go out from the challan/FIR case.

xix) that the victim has not filed any suit for jactitation of marriage against the appellant, hence she has accepted the Nikah.

xx) that the victim has not been recovered from the accused/appellant.

xxi) that appellant has taken plea of valid Nikah whereas prosecution did not negate this plea as it was duty of the prosecution to disprove the Nikah Nama of both of them.


xxii) that the prosecution neither got registered any criminal case against the appellant regarding preparation of forged document i.e. Nikah Nama nor filed any suit against these document.

xxiii) that Investigation Officer had not prepared the site plan where the victim was confined by appellant at Rawalpindi.

xxiv) that there are contradictions between the statements of PW.8 and PW.9. As PW.8 says that he produced two sealed phials and one envelope before I.O. whereas PW.9 says that he handed over the parcel to Mukhtar Ahmed PW.8 for onward transmission to the office of Chemical Examiner.

10. On the other hand the learned Additional Prosecutor General,


appearing for the State, and learned counsel Mr. Muhammad Tariq Riaz for

 the complainant Misri Khan supported the conviction of the appellant and

submitted that there was no enmity between the parties to fabricate the false case against the appellant, therefore learned trial Court has rightly relied upon the testimony of prosecution witnesses. He also made the following submission for consideration of the Court:-

- i) that proving of Nikah was duty of the defence.
- ii) that documents produced by defence had not been properly proved as on the face of these documents the name of Mst. Shazia Bibi has been shown instead of Mst. Shahnaz Bibi as such these documents could not be linked with this case before the trial Court, whereas before Lady Doctor also the name of Mst. Shahnaz Bibi is clearly mentioned as a victim.

11. We have carefully analyzed the arguments of the learned counsel for the appellant and the learned counsel for State in the light of evidence on record. It transpires from the record that occurrence took place on 12.08.2006 and FIR was lodged by the complainant on 15.08.2006. The complainant admitted in FIR that illicit relations had been developed with his daughter Mst. Shahnaz Bibi by accused/appellant Muhammad Anar Khan prior to alleged abduction. The minute perusal of the deposition of alleged abductee Mst. Shahnaz Bibi revealed that she did not make any hue

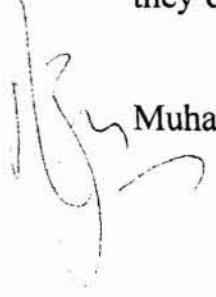
 and cry during the course of abduction. She was taken to different places by

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the accused/appellant and she also lived with him for about three months in Rawalpindi and Chakwal, but she did not complain to any person that she had been abducted by the accused/appellant without her consent. On the contrary she filed a complaint against her father. She controverted the alleged NikahNama simply on the ground that accused/appellant had taken her thumb impressions on different papers. She neither filed any suit for dissolution of marriage nor jactitation suit against the accused/appellant in spite of the allegation that he had taken her thumb impressions on different papers. She was about 19 years of age. All these circumstances show that she being enticed accompanied the accused/appellant. It is also a fact that she refused to recognize the appellant as her husband after she came back to the house of her parents. Mst. Shahnaz Bibi did not have any marks of violence or struggle/resistance against force, when she was medically examined by the Lady Doctor. No weapon has been used during this process or recovered by Investigation Officer. Therefore, this does not fall under Section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 but falls under Section 16 of the Offence of Zina (Enforcement of

Hudood) Ordinance, 1979, Enticing and taking away a women with intent to commit illicit sexual intercourse with her is sufficient to constitute an offence under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 even with maneuvered or manipulated consent of that woman. This is admitted fact and there is evidence on record that after enticing/taking away the abductee the appellant kept her with him for about three months. Mere production of Nikahnama, although bearing name of Shazia instead of Mst. Shahnaz Bibi (victim) is not necessary proof of Nikah. The alleged application by the victim (Shahnaz) against her father, is also not in the name of Shahnaz (victim) but in the name of Shazia. Muhammad Saeed real maternal uncle of victim, had seen Muhammad Anar Khan accused/appellant taking Mst. Shahnaz Bibi in a wagon bound for Bhalwal, at bus stop Bhera and that at that time they both were on foot. He also admitted in his cross-examination that Bhera bus stop is a busy place and many people were present at the said bus stop. He also admitted that they did not inquire from Mst. Shahnaz Bibi that where she was going with

 Muhammad Anar Khan accused/appellant.

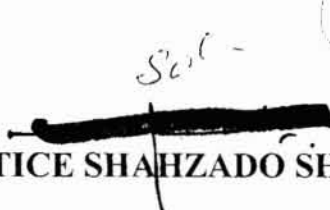
12. Consequently for the reasons stated above, the appeal is dismissed, however, with the modification that the conviction and sentence awarded by the learned trial Court under Section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to undergo life imprisonment with fine of Rs. 20000/- and in case of non-payment of fine, to further undergo imprisonment for three months S.I. is converted to that under section 16 of Offence of Zina(Enforcement of Hudood) Ordinance, VII of 1979 with R.I for 7 years and fine of Rs.20,000/- and in default to further undergo three months S.I. as already awarded by the learned trial Court, is maintained. The accused was further convicted under section 10(2) of Offence of Zina(Enforcement of Hudood) Ordinance, VII of 1979 and sentenced of 10 years R.I. with fine of Rs.20,000/- and in default thereof to further undergo three months S.I. The sentence awarded by learned trial Court to appellant Muhammad Anar Khan is reduced from 10 years R.I. to 07 years R.I. in case of default in payment of fine of Rs.20,000/-, he will undergo further imprisonment for three months S.I. Both the sentences shall

run concurrently. Benefit of section 382-B Cr.P.C. extended to the appellant by the learned trial Court is maintained.

13. With the above modifications, the appeal i.e. Cr. Appeal No.36/I/2010 is dismissed.

14. The above are the reasons of our short order passed on 18.08.2011 in the open Court.


JUSTICE RIZWAN ALI DODANI


JUSTICE SHAHZADO SHAIKH

Announced in open Court on 18.08.2011
At Islamabad
Abdul Majeed/-

Approved for reporting.


JUSTICE RIZWAN ALI DODANI