

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

**PRESENT**

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

**CRIMINAL APPEAL NO. 38/I OF 2009**

Muhammad Ayyaz son of Muhammad Nawaz  
R/o Dhoke Chinota, Dakhli Gali, P.S. Murree, Rawalpindi.

..... Appellant

Versus.

The State

Respondent

**CRIMINAL APPEAL NO.45/I OF 2009**

Mst. Tanzeem Akhtar d/o Muhammad Riaz, r/o Village Dheer Kot  
Sattian, Tehsil Kotli Sattian District Rawalpindi

..... Appellant

Versus

1. Muhammad Anwar s/o Muhammad Nawaz r/o Post Office  
Dhoke Chinota Dakhli Ghel P.S. Murree District Rawalpindi
2. The State

..... Respondents

**CRIMINAL REVISION No. 09/I of 2009**

Muhammad Riaz r/o Village Dheer Kot Stttian, Tehsil Kotli Sattian  
District Rawalpindi

..... Petitioner

Versus

Muhammad Ayyaz son of Muhammad Nawaz R/o Dhoke Chinota,  
Dakhli Gali, P.S. Murree, Rawalpindi.

..... Respondent

51

1-A

Counsel for appellant in Cr.A.No.38/I of 2009	....	Mian Riaz Ahmad, Advocate
Counsel for appellant/petitioner in Cr.A.No.45/I of 2009 and Cr.Rev.No.09/I of 2009	....	Qari Abdul Rasheed,
Counsel for State	.....	Ch. Muhammad Sarwar Sidhu, Additional Prosecutor General
FIR. No. Date & Police Station	.....	211, 19.11.2006 Kotli Sattian, Rawalpindi
Dated of judgment of trial court		09.02.2009
Date of Institution	.....	07.04.2009, 11.04.2009 and 02.09.2010 respectively
Date of hearing	.....	27.01.2011
Date of decision	.....	27.01.2011

5:1

**JUDGMENT**

**SYED AFZAL HAIDER, Judge.**- Appellant Muhammad

Ayyaz has through Criminal Appeal No. 38/I of 2009 challenged the judgment dated 09.02.2009 delivered by learned Additional Sessions Judge, Rawalpindi, Camp at Kahuta whereby he was convicted under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 10 years rigorous imprisonment and a fine of Rs. 25,000/- and in default whereof to further suffer three months simple imprisonment. The accused Muhammad Anwar was acquitted vide the same judgment.

2. Mst. Tanzeem Akhtar, victim in this case, feeling aggrieved by the judgment dated 09.02.2009 of the learned trial court, has preferred Criminal Appeal No. 45/I of 2009 against Muhammad Anwar respondent, the co-accused of Appellant Muhammad Ayyaz, who was acquitted by the same judgment. The part of the judgment relating to acquittal of Muhammad Anwar has been impugned.

8/1

3. Muhammad Riaz complainant has moved Criminal Revision No. 09/I of 2009 for enhancement of sentence of respondent Muhammad Ayyaz. As both the appeals and revision arise out of the same judgment so all the three matters are being disposed by this common Judgment.

4. Brief facts of the prosecution case are that Muhammad Riaz lodged a crime information on 19.11.2006 at Police Station Kotli Sattian, District Rawalpindi, stating therein that on 15.11.2006 at about 6.00.p.m. his daughter Mst. Tazneem Akhtar, victim/P.W.3 went out of the house to answer the call of nature. Since she did not return for some time so the complainant alongwith his wife Mst. Raheela Jan set out in her search but they were unable to locate Mst. Tanzeem Akhtar. On the next day i.e. 16.11.2006 the complainant again undertook the search of his missing daughter. At about 8.00.a.m. he met Muhammad Liaqat and Muhammad Saeed P.Ws who told him that they had seen the accused Muhammad Ayyaz and Muhammad Anwar going towards Gulehra Gali, New Murree alongwith Mst. Tanzeem Akhtar in a vehicle. The complainant suspected that both the accused had abducted his daughter for the purpose of zina. It

6:1

is further stated that the relatives of Muhammad Ayyaz and Muhammad Anwar promised to return the victim but finally they refused to oblige. It was under these circumstances that the complaint was registered as FIR at serial number 211/2006.

5. Investigation ensued as a consequence of formal registration of the crime report. Partial investigation of the case was conducted by Khizar Hayat, ASI P.W.6. On 19.11.2006 he visited the place of occurrence, prepared site plan Ex.PB, recorded statements of witnesses under section 161 of the Code of Criminal Procedure and got Mst. Tanzeem Akhtar medically examined from District Headquarter Hospital Rawalpindi on 21.11.2006. He also got recorded statement of Mst. Tanzeem Akhtar under section 164 of the Code of Criminal Procedure. The investigation of the case was transferred to Majeed Ahmad, ASI on 24.11.2006. Accused Muhammad Ayyaz and Muhammad Anwar appeared before Abdul Majeed, ASI on 17.12.2006 who joined them in the investigation and formally arrested them on 22.12.2006 after dismissal of their pre-arrest bail. During his investigation he found accused

Muhammad Ayyaz guilty but according to him Muhammad Anwar was innocent and hence he was placed in column No.2 of the report. The report was prepared under section 173 of the Code of Criminal Procedure and sent to the court requiring the accused to face trial.

6. Learned trial court on receipt of the said report framed charge against both the accused under sections 11 and 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 on 19.06.2007. The accused did not plead guilty and claimed trial.

7. The prosecution in order to prove its case produced 10 witnesses at the trial. The gist of statement of witnesses for the prosecution is as under:-

- i. Abdul Karim, ASI appeared as P.W.1 and stated that on 21.11.2006 Majeed Ahmad, S.I. handed over to him one sealed parcel/envelope for keeping the same in safe custody in the *malkhana* and on the next day he handed over the same to Abdul Ghaffar, Constable No.3092 for onward transmission to the office of Chemical Examiner;
- ii. Abdul Ghaffar, Constable No. 3092 appeared at the trial as P.W.2 to state that on 22.11.2006 he received one sealed

- parcel. He deposited the same in the office of Chemical Examiner, Rawalpindi on the same day;
- iii. Mst. Tanzeem Akhtar, the victim of the crime appeared as P.W.3. She narrated the story of her abduction by Muhammad Ayyaz and Muhammad Anwar accused and thereby corroborated the contents of complaint made by her father Muhammad Riaz, complainant P.W.5;
- iv. Muhammad Latif, P.W.4 stated that he seen accused Muhammad Anwar sitting in the front seat of the yellow taxi while Mst. Tanzeem Akhtar and Muhammad Ayyaz were sitting on the rear seat of the vehicle. He is a witness of Waj-takkar;
- v. Muhammad Riaz, complainant PW.5 reiterated the facts recorded in the FIR
- vi. Khizar Hayat, ASI appeared as P.W.6 and gave details of the part of investigation which he conducted in the case which have already been mentioned above in an earlier paragraph;
- vii. Muhammad Jamil, Inspector appeared as P.W.7 and stated that on 19.11.2006 Muhammad Riaz complainant submitted application Ex.PA and he drafted formal FIR Ex.PB;
- viii. Lady Dr. Qaisar Jahan appeared as P.W.8. She stated that she medically examined Mst. Tanzeem Akhtar on 21.11.2006. She further deposed that on examination she did not find any sign of violence on the body of the victim and on pelvic examination she found her 12/14 weeks pregnant;

- ix. Dr. Adnan Asad P.W.9 stated that on 26.12.2006 he medically examined Muhammad Ayyaz and Muhammad Anwar accused and found them sexually potent; and
- x. Majeed Ahmad, S.I. appeared at the trial as P.W.10 and gave details of his part of investigation. The same has also been mentioned in an earlier paragraph.
8. Learned trial court after close of the prosecution evidence recorded statements of accused under section 342 of the Code of Criminal Procedure. Accused Muhammad Ayyaz in answer to question No.14 "Why this case against you and why the P.Ws have deposed against you" stated as under:

"This case has been registered against us only to disgrace us in the eyes of society as I use to scold the alleged victim as well as her parents because of her indecent and vulgar habits whereby she had already undergone abortion in a hospital at Murree. When she was getting aborted for the first time, I had lost my senses and maltreated the mother of Tanzeem Akhtar. Apart from this my wife often used to altercate with her parents brothers and sisters on the objectionable attitude of her sister Tanzeem Akhtar, thus a few years ago an altercation took place between Fakhrul Islam - complainant's son and my wife and as a result said Fakhrul Islam had broken my wife's arm. I had got registered a case against him which is still pending in the concerned court. Thus, complainant and her family had contrived such malice in their hearts. That's why they have got registered the

5.1



instant case against us. So far as deposition of PWs against me or the co-accused is concerned, virtually no witness deposed against us. The only private witness Muhammad Latif deposed against us due to close relationship with the complainant. It is pertinent to mention that the witnesses cited in FIR had refused to appear before Investigating Officer as they did not see us travelling alongwith Mst. Tanzeem Akhtar. The complainant utmost tried to disgrace us by getting registered this false case. All other witnesses are government officials and they were duty bound to appear before this honourable court.”

9. It may be mentioned here that the appellant elected to give detailed replies to ten out of sixteen questions posed to him by the learned trial court while recording his statement without oath at the conclusion of the prosecution evidence. However both the accused did not tender evidence on oath. After concluding the codal formalities of the trial the learned trial court returned a verdict of guilt against appellant Muhammad Ayyaz alone. He was convicted and sentenced under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as mentioned in the opening paragraph of this judgment. His co-accused was however acquitted as according to the learned trial judge the prosecution had failed to establish the charge against him. Hence the present appeal against conviction.

10. We have gone through the file. The evidence on record as well as the statement of accused have been perused. Relevant portions of the impugned judgment have been scanned. The points urged by the contending parties have been taken note of.

11. Learned counsel for the appellant, has raised the following points for consideration of this court:-

- i. That there is no direct evidence of zina-bil-jabr in this case;
- ii. The DNA test in this case was not undertaken which was necessary because the victim was pregnant at the time of occurrence;
- iii. There were no marks of violence on the person of the victim and the swabs were taken five days after the occurrence;
- iv. There is no previous history of bad character of the appellant;
- v. The wife of the appellant has sworn an affidavit that her husband is a gentleman and father of 3/4 children; and lastly
- vi. that the said case is false.

12. Learned Counsel on behalf of a) the appellant Mst. Tanzeem Akhtar in her appeal against acquittal of Muhammad Anwar respondent

5/1

in Cr. Appeal No.45/I of 2009 as well as b) representing Muhammad Riaz complainant in Criminal Revision No.9/I of 2010, has made the following submissions jointly;

- i. That the victim had fully implicated both the accused for abduction as well as zina-bil-jabr;
- ii. That the allegation of zina-bil-jabr has been medically corroborated;
- iii. That the victim was a minor girl and the accused was double her age; and
- iv. That the sentence of accused be enhanced to life imprisonment under section 10(4) of Ordinance VII of 1979.

13. The reasons that found favour with the learned trial court for convicting appellant Muhammad Ayyaz and acquitting Muhammad Anwar may be summarized as follows:-

- i. That the accused admitted that he was in the company of the victim from 15.11.2006 till her recovery when he, on her asking, had taken her to Chaklala (paragraph 24 and 26 of the judgment);
- ii. That this was a "consenting journey" between the accused and the victim. It was not a case of "forcible abduction";

iii. That the consenting part of relationship is supported by the fact that Mst. Tanzeem Akhtar was already having illicit relationship with the accused. (paragraph 25 of the impugned judgment) and

iv. That as per report Ex.PF of the Chemical Examiner, the swabs were found stained with semen. S.I.

v. That certain persons including the brother-in-law of the accused Major (Rtd) Didar Khan filed affidavits before the Investigating officer to attest the innocence of Muhammad Anwar co-accused but none of them affirmed innocence of the appellant Muhammad Ayyaz. It may be mentioned here that Muhammad Anwar, the acquitted accused and the appellant Muhammad Ayyaz are real brothers. (Paragraph 31 of the impugned judgment)

vi. The reason for acquittal of Muhammad Anwar was that the only allegation against him was that he was armed with a pistol which was not recovered from him. The only evidence against him was given by Muhammad Latif PW.4 who had allegedly seen the victim with the two accused. The witness was maternal uncle of Mst. Tanzeem Akhtar

but he did not report the matter either to the complainant or the police.

The name of this witness of Wajtakar was introduced in a supplementary statement. (Paragraphs 32/33 of the impugned judgment)

14. We have considered the arguments in the light of evidence and related material available on record. Our observations are as follows:-

- i. That admittedly Mst. Tanzeem Akhtar was in the company of the appellant as per his own statement without oath, while replying to questions No.2,4 and 7. He also admitted having restored her to Muhammad Riaz, father of victim, in the house of her sister at Chaklala;
- ii. That the appellant admitted that when he alongwith Mst. Tanzeem Akhtar went to Rawalpindi in the house of Major Didar, his brother-in-law, the house was locked. He was however informed there, naturally by people residing there, that the occupants of the house had gone on receiving information that Mst. Tanzeem Akhtar had been abducted;
- iii. The appellant on his own showing had come to know at the time he reached Chaklala that the news about the abduction of that Mst. Tanzeem Akhtar had travelled yet the course adopted by him subsequent to this incriminating information, was not natural. He could have taken back

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Mst. Tanzeem Akhtar to her parents and told them with all confidence at his command that he had only accompanied her on her asking but that was not done. The appellant and Mst. Tanzeem Akhtar remained together for four days.

- iv. We also find that Major Didar never appeared in his defence;
- v. The victim had categorically stated that she was pregnant because she had developed intimacy with the appellant. This fact was never challenged in the cross-examination;
- vi. The learned trial court has fully appreciated the entire evidence and has on the basis of the material available on record acquitted Muhammad Anwar as well as Muhammad Ayyaz under section 11 and also acquitted Muhammad Anwar accused under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 but convicted the appellant alone not for rape but under section 10(2) *ibid*. There is no miscarriage of justice either on account of non-reading of material evidence or mis-reading or drawing wrong conclusion from proved facts.
- vii. The scope of inquiry has been narrowed down in this case in view of the allegation of Mst. Tanzeem Akhtar being in the company of appellant and sexual intimacy and the acceptance by appellant that she was with him from 15.11.2006 till she was restored to her father. This

61

restoration took place on 19.11.2006. The appellant appeared before the Investigating Officer on 17.12.2006 after obtaining interim bail which was ultimately cancelled on 22.12.2006 when the accused was formally arrested. The swabs, taken immediately after her return, were found stained with semen. In view of this situation the guilt has been brought home to the accused who has utterly failed to either demolish prosecution allegation or give a satisfactory explanation of the stained swabs. The girl admitted in so many words her intimacy with the appellant even on previous occasions.

- viii. Learned counsel for the complainant/prosecution side has not advanced any substantial argument in support of the Revision Petition moved for enhancement of sentence. The fact of the matter is that the maximum sentence that can be awarded to an accused under section 10(2) of Ordinance VII of 1979 is ten years. The words used in the section are "*imprisonment for a term which may extend to ten years.*" The Courts usually do not award maximum sentence to convicts. It is in rare cases that maximum dose is awarded. The normal term awarded by courts is between five to seven years sentence in cases of consent. We would have, on our own, reduced the sentence to seven years but in this case the appellant has transgressed the limits that bind the families in our society. The appellant abused his position as a brother-

case which is covered by the mischief of gang rape. We find that it is a case of consent. The argument that the victim was minor is factually not correct but she on her own showing was 18 years at the time of alleged occurrence.

- x. The appeal against acquittal would have been admitted for regular hearing if the learned counsel for appellant Mst. Tanzeem Akhtar had shown that the order of acquittal of Muhammad Anwar was in utter disregard of prosecution evidence or the findings arrived at by the trial court were wholly artificial, shocking or ridiculous. No piece of material evidence was left out of consideration in this case. The entire evidence was brought on record in legal way. The codal formalities of the trial were not found deficient. There is no perversity or manifest wrong in the impugned judgment. The learned trial court had the initial advantage of watching the demeanour of contending parties. Acquittal verdict carries a double presumption of innocence. The mere fact that on re-appraisal of evidence on record a different view may be possible is no ground to interfere in a verdict of acquittal. Reference The State versus Tanveer ul Hassan and five others, 2009 PCr.LJ 199.
- xi. The conviction and sentence recorded against appellant Muhammad Ayyaz by the learned trial court in this case does not merit interference for reasons recorded above.



Cr. Appeal No. 38/I of 2009,  
Cr. Appeal No. 45/I of 2009 &  
Cr. Revision No. 09/I of 2009

17

15. On the basis of what has been stated above Criminal Appeal No.38/I of 2009 is dismissed. Criminal Appeal No.45/I of 2009 against acquittal as well as the Criminal Revision No. 09/I of 2009 for enhancement of the sentence are dismissed in limine. This judgment contains the reasons for the short order of dismissal announced in open Court.

*Sd/-*  
  
JUSTICE SYED AFZAL HAIDER

*Sd/-*  
  
JUSTICE SHAHZADO SHAIKH

Islamabad the 27<sup>th</sup> January, 2011.  
UMAR DRAZ\*

*Fit for reporting*

*Sd/-*  
  
JUSTICE SYED AFZAL HAIDER