

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE.

CRIMINAL APPEAL NO.44/L OF 2009.

Muhammad Arif S/o Muhammad Iqbal,
R/o Chak No.458/J.B, Abadi Wali Shah,
Police Station Saddar, District Jhang.

.... Appellant.

Versus

The State. Respondent.

Counsel for appellant. Ch.Sarfaraz Ahmed Chadhar,
Advocate.

Counsel for complainant. Mr.Abdul Salam,
Advocate.

Counsel for State Ch.Muhammad Sarwar Sidhu,
Addl: Prosecutor General
Punjab.

FIR No. date and FIR No.93, dated 20.02.2006,
Police Station. P.S. Saddar, District Jhang.

Date of impugned 17.03.2009.
Judgment.

Date of Institution ... 13.04.2009.

Date of hearing 09.05.2011.

Date of decision ... 13.05.2011.

JUDGMENT:

Justice Agha Rafiq Ahmed Khan, Chief Justice.— Appellant Muhammad Arif son of Muhammad Iqbal has filed this criminal appeal against the judgment dated 17.03.2009 delivered by the learned Sessions Judge/Court for Juveniles Trial, Jhang, whereby the appellant has been convicted Under Section 10 (2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as 'the Ordinance') and sentenced him to seven years Rigorous Imprisonment and to pay Rs.20,000/- as fine, or in default thereof to further undergo one year rigorous imprisonment. The benefit of section 382 (b) of the Code of Criminal Procedure has been extended to the appellant. It was also directed that the amount of fine, if realized, half of it shall be paid to the victim as compensation and remaining be deposited in the government treasury.

2. Briefly stated, the facts of the prosecution are that on 20.2.2006 Allah Ditta complainant submitted written application Ex.PC to the Station House Officer Police Station Saddar Jhang on the basis of which Crime Report No.93/2006 (Ex.PC/1) was registered. In his application, the complainant stated that on the night between 18/19-2-2006 at about 10.00 p.m. he alongwith his wife went to a house in the neighbourhood for Qur'an Khawani. They had left their daughter Mst.Bushra aged about 10/12 years alongwith other children in the house. At about 11.00 p.m. Muhammad Farooq son of Muhammad

Iqbal entered into his house and forcibly picked up his daughter Mst.Bushra and took her to vacant baithak of Ahmad. He started committing Zina-bil-Jabr with her. She raised hue and cry on which Haq Nawaz and Nadeem Akhtar attracted to the place of incident. On seeing them, the accused fled away. The complainant further stated that father of accused alongwith others requested him not to lodge the case against the accused but he did not agree and presented his application Ex.PC before the SHO Police Station Saddar Jhang, on the basis of which the present case was registered against the accused. After arrest of the appellant/accused and completion of the investigation, challan under section 173 of the Code of Criminal Procedure was submitted against him. The appellant/accused was charged on 26.3.2008, to which he pleaded not guilty and claimed trial.

3. The prosecution in support of its case examined as many as eleven witnesses. The gist of prosecution evidence is as follows:-

- (i) PW.1 Doctor Abdul Aziz, S.M.O, on 8.11.2006 examined Muhammad Arif, appellant for his potency. He found the appellant/accused fit for sexual act.
- (ii) P.W-2 is Muhammad Shafi constable. He stated that on 21.2.2007 he accompanied Abdul Majeed, Sub-Inspector and Mst. Bushra to District Headquarter Hospital, Jhang, where after medical examination of Mst.Bushra by the Lady Doctor, he was handed over two sealed phials and two sealed envelopes and a copy of the MLR. Regarding the said articles the Investigation

Officer prepared the recovery memo Ex.PB. He further stated that so long as the aforesaid articles remained in his custody, no one had tampered with it.

- (iii) PW.3 is Allah Ditta complainant. He more or less narrated the same version as mentioned herein above.
- (iv) PW.4 is Mst.Bushra, victim. She stated that on the night of incident at about 10.00 p.m, her parents went to attend a Shabina in their neighbourhood. She and her younger brother Umid Ali were alone in the house. In the meanwhile Arif accused picked her up and took her to the baithak of Ahmad where he took off his own clothes and also removed her clothes and committed Zina-bil-Jabr with her. She raised hue and cry, which attracted Nadeem and Haq Nawaz PWs to the spot. On seen them the accused fled away. Thereafter she returned to her house and on the next day they went to police station. According to her, she was medically examined at District Headquarter Hospital, Jhang.
- (v) PW.5 Nadeem Akhtar in his deposition before the court supported the above version of the complainant and as well as that of the victim Mst.Bushra.
- (vi) PW.6 is Muhammad Ramzan. He stated that on 21.2.2006 Abdul Majeed Sub-Inspector handed over to him two sealed parcels and one sealed envelope for keeping the same in safe custody in the Malkhana. On 22.2.2006 he handed over the same to Ahmad Ali constable for onward transmission to the office of Chemical Examiner, Lahore. He stated that during the period the above article remained in his custody, no one tampered with it.
- (vii) PW.7 is Ahmad Ali constable. He deposed that on 22.2.2006 Muhammad Ramzan, Moharrir Head Constable handed over to

him two sealed parcels and one sealed envelope which he deposited in the office of Chemical Examiner, Lahore on the same day, as intact.

- viii. PW.8 is Muhammad Afzal Retired Inspector. He stated that on the direction of the SHO Police Station Jhang, on 20.6.2006 he registered the crime report Ex.PC/1, on the basis of application Ex.PC of Allah Ditta complainant.
- ix. PW.9 is Muhammad Khan, Sub-Inspector. He stated that on 7.11.2006 he arrested Muhammad Arif accused, who was sent on remand to jail on 8.11.2006.
- x. PW.10 is Lady Doctor Kaneez Zahra, W.M.O. On 21.2.2006, she examined Mst.Bushra aged about 14/15 years. She observed as under:-
- “1. Hymen had got healed tears.
 2. Vaginal orifice admits two fingers.
 3. No marks of violence seen on any part of body.
 4. Three vaginal swabs were taken, sealed and sent to Chemical Examiner, Lahore for semen analysis and Serological examination.”

According to her opinion, Mst.Bushra was used to sexual intercourse.

- xi. PW.11 Abdul Majeed, Sub-Inspector is the Investigation Officer of the present case. According to him, on 20.2.2006 the present case was entrusted to him for investigation. He inspected the place of incident and prepared the site plan Ex.PE. He recorded the statements of the PWs under section 161 of the Code of Criminal Procedure. On 21.2.2006 he got Mst.Bushra medically examined from Civil Hospital, Jhang. Vide recovery memo Ex.PB he took into

possession a phial and an envelope. As the accused was absconding, therefore, he got initiated proceedings under section 87 as well as under section 204 of the Code of Criminal Procedure. On 15.4.2006 he submitted incomplete challan against the accused.

4. After close of the prosecution evidence, statement of the appellant/accused was recorded under section 342 of the Code of Criminal Procedure. He denied the allegations and pleaded innocence. He neither opt to record his statement on oath as provided under section 340 (2) of the Code of Criminal Procedure nor produced any witness in his defense. However, while answering to Question No.8 “Why this case against you and why the PWs have deposed against you” he replied as under:-

“The PWs are related inter-se. The case is absolutely false. No independent and reasonable person from the locality has appeared against me even during the investigation and afterwards during the trial. Both the PWs are interested witnesses. They have narrated a false story before this Hon’ble Court. Mst.Bushra Bibi is a lady of immoral character. She was carrying illicit relations with her paramour one Nadeem Bhatti. She went to him herself and when she returned at late hours, her father asked about her missing from her house and she cooked up a false story just to save herself and her paramour above Nadeem Bhatti. The complainant lateron demanded monetary benefits from me, which I refused and he got registered a false case against me”.


5. After hearing both the parties the learned trial judge convicted the appellant/accused and sentenced him as mentioned in opening para of this judgment.

6. Ch.Sarfaraz Ahmed Chadhar, Advocate for appellant has contended that the offence is said to have taken place during night between 18/19 February 2006 at 10.00 p.m. but the FIR was lodged on 20.2.2006 at 6.35 p.m. therefore, there is inordinate delay in lodging the report without any reasonable explanation. He has further argued that the medical evidence is not supportive to the evidence of alleged victim and no test for semen grouping was conducted. The PW.9 Muhammad Khan Sub-Inspector, Investigation Officer of the case in the challan had admitted that in his investigation it was found that the alleged occurrence had not taken place.

7. Mr.Abdul Salam, Advocate for has argued that delay in lodging the FIR is well explained by the complainant. The appellant since guilty, has remained absconder for about 9 months and thereafter he was arrested. The victim namely Mst.Bushra has fully involved the implicated the appellant in this case. Ch.Muhammad Sarwar Sidhu, Additional Prosecutor General for State has also supported the impugned judgment.

8. I have given full consideration to the arguments advanced by the learned counsel and have gone through the material available before me.

9. There is inordinate delay of about 36 hours in lodging the FIR, which has not been explained satisfactorily in the FIR. Both the witnesses namely Haq Nawaz and Nadeem Akhtar are closely related to the complainant being real brother and nephew. There is no independent witness in the case though admittedly there are several houses near the house of complainant and according to him several persons had the knowledge of occurrence and they had requested him to forgive the appellant. The complainant in cross-examination has also admitted that inhabitants of the neighbourhood had appeared before the Investigation Officer and stated that the alleged occurrence did not take place.



10. The story narrated by victim Mst.Bushra PW.4 also does not appeal to mind as to how only one empty handed person forcibly took her from the house to the Baithak of one Ahmad and committed Zina with her without her consent. Medical evidence also belied her statement as according to medico-legal report issued by Lady Doctor Kaneez Zahra, the victim had no marks of violence on any part of her body. Furthermore, as per statement of lady doctor, her vagina admitted two fingers and hymen had got healed tears, which clearly means that the alleged victim was habitual to sexual intercourse. This fact is also confirmed by the lady doctor in her cross-examination.

11. The Investigation Officer namely Muhammad Khan Sub-Inspector (PW.9) has stated that he had joined Ahmad Bukhsh alias Ahmad, owner of the baithak where the incident is said to have taken

place, and also other persons namely Naseer Ahmad, Nasir and Muhammad Ramzan. All these independent persons did not support the prosecution story. This police officer has also deposed that as per his investigation, the alleged occurrence had not taken place. Even ~~xxx~~ victim Mst.Bushra in her cross-examination has deposed that "When the accused had picked me up and was taking me to the Baithak I was raising hue and cry, Haq Nawaz and Nadeem had come there. Nadeem and Haq Nawaz had rescued me during the way to the baithak of Ahmad". This means that before taking her to the baithak she was rescued in the way by the witnesses.

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12. Nadeem Akhtar (PW.5) in cross-examination has stated that they could not see the appellant as he ran away, whereas Mst.Bushra as stated above, has given contradictory statement in her deposition. All these material contradictions in the statements of the witnesses coupled with the medical evidence and the statement of Muhammad Khan Sub-Inspector made the prosecution case highly doubtful.



13. In view of the above discussion, I am of the considered opinion that the prosecution case is ~~full of doubts~~ ^{doubtful} and that the prosecution has not been able to prove the charge against the appellant. The appeal is therefore allowed and conviction and sentences awarded to the appellant vide the impugned judgment dated 17.03.2009 are set-aside. The appellant is acquitted from the charge. He is in jail. He shall be released forthwith from jail, if not required in some other custody case.

14. These are the reasons for my short announced on 13.05.2011.



JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice

Islamabad the
May 13, 2011.
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Approved for reporting