

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE.

CRIMINAL APPEAL NO.47/I OF 2010.

Mujahid Hussain S/o Muhammad Iqbal
Resident of Chak No.8-A/8-R,
Tehsil and District Khanewal Appellant.

Versus

The State. Respondent.

Counsel for appellant. Mehr Sardar Ahmed Abid,
Advocate.

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

FIR No. date and
Police Station. ... FIR No.67, dated 22.05.2006,
P.S, Makhdoom Pur,
District Khanewal.

Date of impugned
Judgment. 15.03.2010.

Date of Institution ... 10.05.2010.

Date of hearing 21.04.2011.

Date of decision ... 06.05.2011.

JUDGMENT

Justice Agha Rafiq Ahmed Khan, Chief Justice.—This Criminal Appeal filed by Mujahid Hussain son of Muhammad Iqbal is directed against the judgment dated 15.03.2010 delivered by the learned Sessions Judge/Juvenile Court, Khanewal, whereby the appellant has been convicted under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to above as 'the Ordinance') and sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs.25,000/-, or in default of payment of fine to further undergo three months simple imprisonment. He was also convicted under section 377 PPC and sentenced to seven years rigorous imprisonment with fine of Rs.25,000/-, or in default thereof to undergo three months simple imprisonment.

Both the sentences were ordered to run concurrently with the benefit of section 382-B, Cr.P.C extended to the appellant.



2. Brief facts of the prosecution case as revealed from the contents of FIR 67/06 registered at Police Station Makhdoom Pur, District Khanewal on 22.5.2006, on the basis of application (Ex.PC/1) submitted by complainant Khadim Hussain son of Ghulam Muhammad to the SHO Police Station Makhdoom Pur, District Khanewal, are that his son namely Muhammad Waris (victim) aged about 7/8 years was passing by the house of appellant/accused Mujahid Hussain son of Muhammad Iqbal. The appellant/accused

Mujahid Hussain enticed the complainant's son Muhammad Waris and took him to his baithak on the pretext of listening of "deck". He closed the door of the baithak and on pointation of a knife, threatened Muhammad Waris and committed sodomy with him. Muhammad Waris cried which attracted Zafar Iqbal, Muhammad Afzal and Zafar Ahmad, who witnessed the incident through the jharri of the door. They entered the baithak and rescued Muhammad Waris. They also admonished appellant/accused Mujahid Hussain. On his coming back to his house Muhammad Waris narrated the incident to complainant. Then the complainant alongwith the above witnesses went to the house of Mujahid Hussain, who confessed his guilt and requested the complainant for pardon but the complainant did not agree. He lodged the report against the appellant. After registration of the case the appellant/accused was arrested and after completion of the investigation, he was challaned under section 173 of the Code of Criminal Procedure. He was formally charged on 10.11.2009 to which he pleaded not guilty and claim trial.

3. At the trial prosecution examined twelve witnesses in all. The gist of their evidence is as under:-

- i. P.W.1 Muhammad Yaqoob, Head Constable was posted as Moharrir of Police Station Makhdoom Pur. On 23.5.2006 Muhammad Nawaz Sub-Inspector handed over to him one sealed envelope, which he kept in safe custody in the Malkhana and on 10.6.2006 he handed over the same to Muhammad Hussain constable for

onward transmission to the Office of Chemical Examiner, Multan.

- ii. PW.2 is Abdur Rasheed constable. In his presence, Muhammad Iqbal, father of appellant/accused produced a knife to Falak Sher, Assistant Sub-Inspector and stated that the same was in possession of the appellant/accused at the time of occurrence. The said knife was taken into possession, vide recovery memo Ex.PA.
- iii. PW.3 is Dr.Zahid Imran, Medical Officer. On 24.11.2007 he medically examined appellant/accused Mujahid Hussain for his potency. He found him fully fit for sexual act.
- iv. PW.4 Syed Zameer Hussain, Sub-Inspector was posted as Duty Officer Police Station Makhdoon Pur when Khadim Hussain complainant produced written application before him. On the basis of said application he formally registered the case, vide FIR Ex.P.C against the appellant/accused.
- v. PW.5 is Muhammad Hussain constable. On 10.6.2006 he took the sealed parcel containing swabs and deposited the same in the Office of Chemical Examiner, Multan, intact.
- vi. PW.6 is Dr.Mumtaz Ahmad Khan, Senior Medical Officer. On 18.5.2006 he medically examined Waris, aged about 8 years. He found no marks of violence on any part of body of Waris externally. On examination of anus and rectum, lacerations and tears were present at 5, 7 and 11 O' clock position. Lacerations were fresh and blackening was present all around the anus, which indicated penetration. He took rectum swabs, sealed and handed over to Zafar Iqbal maternal uncle of victim, for sending to the chemical examiner for detection of semen.

According to the Chemical Examiner Report, the said swabs were found to be stained with semen.

- vii PW.7 Muhammad Sadiq, constable was entrusted with the non-bailable warrant of arrest issued against the appellant/accused. According to him, he made every effort but the appellant/accused was untraceable. He was also entrusted with the proclamation notices issued against the appellant. He returned the same with his report.
- viii. PW.8 Khadim Hussain is complainant and father of victim Waris. He narrated the facts as mentioned herein above.
- ix. PW.9 Waris is the victim. He stated as under:-
- “On 17.5.2006, at about 5.00 p.m. I was going in the street of my Chak. Mujahid accused called me and offered to arrange the listening of songs at deck. He took me into baithak of his house. He closed the door, brought out knife, stripped off my shalwar, threatened to hit knife blow in my belly and then committed sodomy with me. Zafar s/o Allah Bakhsh, Zafar s/o Ghulam Akbar and Afzal were attracted to the spot due to my hue and cry as they were passing through the street. They pushed the door after seeing the occurrence by peeping through the door. All the three rescued me from Mujahid accused and took me to my father. My father had come to the house of the accused alongwith the witnesses. The accused party extended requests to my father but he did

not consent. I was then brought to DHQ Hospital, Khanewal where I was examined medically”

x. PW.10 is Muhammad Afzal. He stated as under:-

“On 17.5.2006, at about 5.00 p.m. I, Zafar Iqbal Qadri s/c Allah Bakhsh and Zafar Ahmad s/o Ghulam were passing through the street. We heard someone crying and went to the baithak of Iqbal/Mujahid accused. We saw through the steaks (jharries) of the door, that Waris was fallen on the ground and Mujahid accused was committing sodomy with him. We pushed the door which was opened. We rescued Waris and admonished accused. The shalwars of victim Waris and accused Mujahid were stripped off. Waris was injured, bleeding from anus. We lifted him to his house where his father was present. We narrated the matter to Khadim Hussain father of Waris victim. Khadim complainant took us to the house of the accused to furnish complaint. The accused party confessed its guilt and made requests for pardon. The complainant did not agree to it. We then went to P.S but the police did not redress our grievance. The case was registered on the order of Justice of Peace”.

xi. PW.11 is Zafar Iqbal. He also stated the same facts as narrated by Muhammad Afzal, PW.10.

xii. PW.12 is Falak Sher, Assistant Sub-Inspector. He verified the hand writing and signatures of Muhammad Nawaz, Sub-Inspector, the Investigation Officer of this

case. According to him, Muhammad Nawaz Sub-Inspector is no more in this world.

4. The appellant/accused Mujahid Hussain made his statement under section 342 Cr.P.C wherein he denied the allegation and pleaded innocence. While responding to the question, "why this case against you and why the PWs have deposed against you?" he replied as under:-

"It is a false case and PWs deposed against me falsely. There had been dispute between complainant party and ourselves due to neighbourhood. Present case was got registered with much delay and after due deliberation only to avenge the grudge and differences. No sodomy was committed by me with Waris, alleged victim. He was not competent to give evidence against me. The other private witnesses were his relatives and therefore, they deposed falsely against me. I am innocent."

The appellant/accused did not produce any evidence in his defence. He also did not opt to record his statement on oath as provided under section 340 (2) of the Code of Criminal Procedure.

5. Mehr Sardar Ahmed Abid, Advocate for appellant has contended that there is inordinate delay of about four days in lodging the FIR. That all the witnesses are interested and relatives of victim. That the swabs taken, were sent to the Chemical Examiner, Multan after the delay of about 17 days. He further argued that under the circumstances and facts of the case, section 12 of the Ordinance is not attracted, therefore, conviction and sentences awarded to the appellant

thereunder cannot be maintained. Ch.Muhammad Sarwar Sidhu, Additional Prosecutor General Punjab for the State has fully supported the impugned judgment and conviction of the appellant, and has stated that the victim was a minor boy who fully implicated the appellant in his deposition before the court. The medical evidence is also supportive to the statement of the victim. He was kidnapped from the street by the appellant to his baithak, therefore, he was rightly convicted under section 12 of the Ordinance as well as under section 377 of the Pakistan Penal Code.

6. I have given full consideration to the arguments advanced by the learned counsel and have gone through the entire evidence available on record. As far as delay in lodging the FIR is concerned, it has been fully explained in the application (Ex.PC/1) of complainant Khadim Hussain addressed to the S.H.O Police Station Makhdoom Pur, District Khanewal. Further from the evidence of PW.6 Doctor Mumtaz Ahmad Khan, S.M.O, it appears that the victim was examined by him on 18.5.2006 on the order of Special Judicial Magistrate, Khanewal on the next day of the incident, which means that police had not lodged the FIR, but same was registered after the medical certificate of the victim was received. Under the circumstances, the delay in registration of the case cannot be fatal as the same has been explained satisfactorily. Victim Waris (PW.9), who was about eight years old at the time of incident, in his deposition before the court has fully implicated the appellant by stating as under:-

“On 17.5.2006, at about 5.00 p.m. I was going in the street of my Chak. Mujahid accused called me and offered to arrange the listening of songs at deck. He took me into baitnak of his house. He closed the door, brought out knife, stripped off my shalwar, threatened to hit knife blow in my belly and then committed sodomy with me. Zafar s/o Allah Bakhsh, Zafar s/o of Ghulam Akbar and Afzal were attracted to the spot due to my hue and cry as they were passing through the street. They pushed the door after seeing the occurrence by peeping through the door. All the three rescued me from Mujahid accused and took me to my father. My father had come to the house of the accused alongwith the witnesses. The accused party extended requests to my father but he did not consent. I was then brought to the DHQ Hospital, Khanewal where I was examined medically”.

Muhammad Afzal (PW.10) and Zafar Iqbal (PW.11) have fully corroborated the evidence of the victim.

7. The incident had taken place in the evening of 17.5.2006 and the victim was examined immediately on the next day on the orders of Special Judicial Magistrate by Doctor Mumtaz Ahmad Khan, S.M.O, who deposed in court that the victim was a child of about eight years and on examination of his anus and rectum, lacerations and tears were present at 5, 7 and 11 - O - clock position. Lacerations were fresh and blackening was present all around anus. Those indicated penetration. Three rectum swabs were taken and sealed for sending to the Chemical Examiner for detection of semen. The report of Chemical Examiner (Ex.PE) indicates that the swabs were found to be stained

with semen and in the opinion of the doctor sodomy was committed with the victim.

8. The defence plea taken by the appellant in his statement under section 342 of the Code of Criminal Procedure, that the complainant party had a dispute with them due to neighbourhood, therefore, the present case was registered against him, does not appeal to mind and appears to be after thought in view of the above evidence on record.

9. Mere relationship of witnesses with the victim cannot be ground for disbelieving eight years' minor, when his evidence is corroborated by the doctor who examined him. From the evidence on record, it is fully proved that the present appellant and none else had committed sodomy upon the victim, therefore, he has committed an offence punishable under section 377 of the Pakistan Penal Code.



10. As far as the allegation of kidnapping of the victim by the appellant/accused. is concerned it has been alleged that the victim Waris was passing near the house of appellant, when he took him to the baithak on the pretext of listening 'Deck'. In my humble view, provision of section 12 of the Ordinance is not attracted because taking Waris victim from adjacent street to the baithak by the appellant would not constitute offence of kidnapping as contemplated by section 12 of the Ordinance. This view has also been taken in several reported cases such as i. PLD 1967 SC P.363 (Muhammad Razzaq and Munir Ahmad..Vs..The State), ii. PLD 1985 F.S.C P. 404 (Zulfiqar..Vs..The State) and iii. PLD 1984 F.S.C P.23 (Muhammad Tufail..Vs..The State).

11. The upshot of above discussion is that the conviction and sentences passed by the learned trial court under section 12 of the Ordinance are set-aside and the appellant is acquitted from the charge thereunder. His conviction under section 377 of the Pakistan Penal Code is however maintained. Since the appellant was of tender age and it was his first offence, therefore, the sentence is reduced from seven years rigorous imprisonment to three years rigorous imprisonment. The fine of Rs.25,000/-, on in default thereof to suffer three months simple imprisonment, is maintained. The benefit of section 382-B, Cr.P.C, extended to the appellant, shall remained intact.

12. Above are the reasons for my short order of even date.



JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice

Islamabad the
May 06, 2011.
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Approved for reporting.

