IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SHAHZADO SHAIKH
MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO.50/I/ of 2006

Rashid Minhas s/o Muhammad Khan ... Appellant
Caste Awan, r /o village Taween
Tehsil Pindi Ghaib, District Attock

Versus

.... Respondents

1. Muhammad Fayyaz S/o
   Gul Baz, caste Awan,
   r/o village Taween Tehsil
   Pindi Ghaib, District Attock

2. The State

Counsel for the appellant	...	Mr. M. Siddique Awan, Advocate
Counsel for respondent	...	Agha Muhammad Ali Khan Advocate
Counsel for the State	.....	Mr. Ahmad Raza Gilani Addl. Prosecutor General
FIR No. Date & Police Station	...	82, dated 22-4-2004, P.S Pindi Ghaib, Attock
Date of Judgment of Trial Court	.....	16-01-2006
Date of Institution of Appeal in FSC	.....	15-03-2006
Date of hearing	....	17.02.2012
Date of decision	....	17.02.2012

JUDGMENT

SHAHZADO SHAIKH, J. - This appeal is directed against the judgment dated 16.1.2006 passed by learned Additional Sessions Judge, Attock in Hudood Case No.4 of 2004, Hudood Trial Court No.19 of 2004 whereby he acquitted accused Muhammad Fayyaz son of Gul Baz, in case FIR No. 82 dated 22.04.2004 P.S. Pindi Ghaib, from the charges under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and section 377 PPC.

2. Brief facts of the case arising out of F.I.R No.82, dated 22.04.2004 Ex.PA registered under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 at Police Station Pindi Ghaib, District Attock by complainant Rashid Minhas, (PW.7), are that complainant Rashid Minhas, the victim gave statement before the Sub-Inspector P.S. Pindi Ghaib, stating therein that he was resident of a Dhoke near Village Taween, his father had died and he was a student of 8th Class. On the day of occurrence i.e. 22.04.2004 he was going to Government High School Mianwala for admission in 9th class. When he reached Adda

Mianwala at 8.00 a.m, Fayyaz accused, who was from his *braadari* met him, forcibly took him in a white coloured car and took him to his Dhoke which is situated at Village Taween where no person was present. He committed sodomy with him in a room. After committing the sodomy, the accused let the complainant free and he went away to his Dhoke while weeping and narrated all the facts to his mother Mst. Parveen Akhtar. Thereafter when the complainant alongwith his mother was going to lodge report, the police met them on the way where they lodged the report.

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 trial Court against the accused/respondent Muhammad Fayyaz, under Section 173 Code of Criminal Procedure.

4. The learned trial Court framed charge against the accused on 22.09.2004 under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under section 377 PPC. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case produced 09 prosecution witnesses at the trial. The gist of the evidence of prosecution witnesses is as follows:-

i) PW-1: Asif Abbas, SI. He deposed that on 22.4.2004 on receipt of complaint sent by Altaf Hussain, SI, he correctly recorded formal FIR Ex.PA without any omission or addition on his part.

ii) PW.2 Muhammad Hussain, Constable. He deposed that on 22.4.2004 he got medically examined Rashid Minhas victim from THQ Hospital, Pindi Ghaib and produced two sealed parcels and sealed envelope before ASI Altaf who seized same vide recovery memo Ex.PB attested by him.

iii) PW.3 Muhammad Ilyas MHC. He deposed that on 22.4.2004 Altaf Hussain ASI handed over to him two sealed parcels which he kept in the Malkhana and on 24.4.2004 he handed over two parcels to Ishtiaq constable for delivering the same in the office of Chemical Examiner, Rawalpindi intact.

iv) PW.4 Ishtiaq Rehman, Constable. He deposed that on 24.4.2004 he deposited two sealed envelopes in the office of Chemical Examiner, Rawalpindi intact.

v) PW.5 Mussarat ASI. He deposed that on 27.5.2004 investigation of this case was handed over to him. On 27.6.2004; he arrested accused Fayyaz present in Court. He got accused medically examined and on the following day the accused was sent to judicial lockup by the orders of the Court. He completed the investigation and got the accused challaned.

vi) PW.6 Dr. Zaheer-ul-Haq. He deposed that on 22.4.2004 he medically examined Rashid Minhas. According to opinion of

the Doctor, act of sodomy was committed on that day in the morning. He further stated that slight redness and swelling were present around the anus.3 anal and 3 parinal swabs were taken and pieces of shalwar, in three separate bottles which were sealed for sending the same to the office of Chemical Examiner for detection of semen. After receiving the Chemical Examiner report which was positive regarding swabs and piece of shalwar, the doctor finally opined that act of sodomy was committed with the examinee. Ex.PC/2 is Chemical Examiner report.

He further deposed that on 27.6.2004 he also medically examined Muhammad Fayyaz s/o Gul Baz, r/o Tanween brought by police for potency test and he found him potent. Ex. PD is medical report which is in his hand writing and bears his signature.

vii) PW.7 Rashid Minhas is complainant and victim of this case. His statement has already been mentioned in the earlier part of this judgment.

viii) PW.8 Parveen Akhtar is mother of the complainant/victim Rashid Minhas who went alongwith complainant for lodging the report.

ix) PW.9 Muhammad Altaf, ASI, deposed that on 22.4.2004 when he was present at Ikhlas Chowk where complainant appeared before him, he recorded complaint Ex.PD/1 and after medical examination Muhammad Husain constable produced before him two sealed parcels in shape of envelope which he took into possession vide memo Ex.PB. He also prepared site plan Ex.PE. Thereafter the investigation of this was transferred to Mussarat ASI.

6. 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?

> "I am an army employee and was present at place of my posting on the alleged day of occurrence. The victim is a boy of easy virtue having illicit relations with different people. Ghulam Farid an attorney of Maliks' family is in habit of involving me in different cases when ever he finds an opportunity. He was aware of the fact that present victim is catamite so he involved me in this case falsely after pressurizing the victim to depose against me falsely. The photo graphs disclose this fact that I was involved in this case falsely and the PWs deposed against me on asking of Farid the attorney of Maliks."

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

8. After hearing both the parties the learned trial Court acquitted accused Muhammad Fayyaz son of Gul Baz from the charges under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance,1979 and section 377 PPC.

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

i) Accused Muhammad Fayyaz is nominated with specific role in the FIR; the evidence of the witness as PW-7 is very much clear and sufficient to establish the charge against him.

ii). The victim categorically stated that accused Muhammad Fayyaz is a person, who enticed him away from Mianwala Adda forcibly while boarding him in a white coloured car towards his Baithak where he was subjected by him to forcible sodomy and this portion of the PW-7 was not cross-examined by the defence although appellant was cross-examined at length in this case, so it is admitted fact that Muhammad Fayyaz is a person who committed the offence of sodomy with the appellant, after forcibly enticing him away to his *baithak*.

iii) The victim who was only 13/14 years of age at the time of occurrence gave full details of this heinous crime i.e. unnatural offence (with orphan child) who was student of 9th Class, with sufficient evidence against the respondent/accused.

iv) There is no question of falsely involving the accused in this case as no previous enmities between the parties have been established by the defence.

v) FIR was lodged promptly, and mother of victim appeared as PW-8 and also stated the whole story.

vi) The Ex.D.1 to Ex. D.3 denied by the appellant and it was not the case of the prosecution.

vii) Exact date, time and place where the photographs were taken, have not been mentioned.

viii) The learned trial Court totally ignored the material facts of the case, which are evidence of the victim, medical report, evidence of medical officer, positive report of chemical examiner, hence learned trial Court erred and the impugned judgment is based

on mis-reading and non-reading of evidence, therefore, same is not sustainable in the eye of law and is liable to be set aside.

ix) Learned trial Court also held that the victim was in the habit of being the subject of sodomy, although it is not correct finding of the trial Court, if it is admitted, even then accused can not seek benefit because the prosecution has successfully proved its case against him.

(x) The learned counsel relied on following case law:

1. 1988 SCMR 1614 (Mansab Ali Vs. The State)

2. 1997 P. Cr. L.J. 1500 (Azhar Iqbal and 2 others Vs. The State)

3. 2001 P.Cr.L.J. 503 (Saleem Khan and others. Vs. The State and others)

4. NLR 2005 Cr. 514 (Muhammad Riaz Vs. Muhammad Zaman and Ishtiaq)

5. 1999 P.Cr.L.J 686(Akbar Hussain Vs. The State)

10. During the course of arguments, learned counsel for the respondent in support of his contention raised following points:

i) Appeal against acquittal has narrow scope of interference in the finding of trial Court, always due weight and consideration are given to the finding of trial Court as there is double presumption of innocence.

ii) There are many doubts, dents and discrepancies in prosecution evidence and conviction cannot be based upon such type of evidence.

iii) Solitary statement of victim is not sufficient to prove the charge as it is not corroborative piece of evidence.

iv) The victim appeared as a PW-7 who admitted the photographs available on the record in compromise position hence the appellant is a habitual offender.

v) No reliance can be placed on MLR of the victim and report of chemical examiner in this regard as it is clear that such affairs of the victim are proved in the light of photographs.

vi) In such cases grouping of the semen and DNA test was necessary to establish the case, as other person has also been introduced in position of committing offence with the victim/ appellant but prosecution has failed to do so.

vii) As it is a case which depends only upon solitary statement of victim and there are many improvements and contradictions in his statement.

viii) As the statement of victim is not confidence inspiring, learned trial court rightly disbelieved his statement and acquitted the respondent.

ix) No injuries on any part of body have been shown as per MLR hence medical evidence does not support the prosecution case.

x) The driver who dropped both the victim and respondent at the *Baithak* of respondent was not produced by prosecution as a witness.

xi) The victim clearly stated that when respondent called him and asked him to be seated in the car, at that time some of class-fellow of the victim were with him but prosecution had not produced any of his class-fellows as witness of last seen; in such situation story of victim become doubtful.

xii) The victim also stated in his cross-examination that he tried to raise alarm but the accused threatened him that the respondent has a pistol and if he would raise alarm he was to face dire

consequence but pistol had not been recovered from the possession of respondent.

xiii) As the victim is a person of easy virtue hence his statement is not worth reliance.

11. The learned counsel for the respondent relied upon the following case law in favour of his contention.

1. PLD 1985 SC 11 (Ghulam Sikandar and another Vs. Mamarz Khan and others).

2. 1997 P.Cr.L.J. 1107 (Waqar-ul-Islam and another Vs. The State)

3. 2008 P.Cr.L.J. 958 (Muhammad Shafique alias Chuma and others Vs. The State)

4. 2010 P.Cr.L.J. FSC 215 (Muhammad Shahid Sahil Vs. The State and another)

5. 2011 SCMR 646 (Tahir Khan Vs. The State)

6. 2011 SCMR 917 (Muhammad Shakeel Vs. The State)

7. PLD 2011 SC 554 (The State and others Vs. Abdul Khaliq and others)

12. Learned Additional Prosecutor General stated that he supported the impugned judgment, although 6/7 years have passed since this occurrence and state had not file any appeal against the impugned judgment. He, however, stated that otherwise in light of prosecution evidence case against the respondent is fully proved.

13. We have heard the learned counsel for the parties, gone through the file of the case, evidence of the prosecution witnesses as well as statements of the accused have been perused. The relevant portions of the impugned judgment have been scanned.

14. This is a case in which an orphan boy namely Rashid Minhas aged about 13/14 years was subjected to unnatural lust by Muhammad Fayyaz respondent. The victim/complainant lodged the report on 22.04.2004 on the same day when occurrence took place. He nominated the present respondent namely Muhammad Fayyaz s/o Gul Baz with specific role and gave details of the occurrence on each angle. On the same day i.e. 22.04.2004 at about 3.00 p.m. Dr. Zaheer-ul-Haq, medical officer THQ hospital Pindigheb medically examined the victim Rashid Minhas. During medical examination doctor observed redness and swelling present around the anus. He further stated that three anal and three peri-anal swabs were taken and a piece of shalwar in three separate bottles were sealed for sending the same to the office of Chemical Examiner, Rawalpindi for detection of semen. Doctor did not give his opinion regarding the commission of sodomy

till the receipt of report of Chemical Examiner. Later on, he received the report of Chemical Examiner which was positive regarding swabs and piece of shalwar. Then the Doctor opined that the act of sodomy was committed with the victim. This shows that in legal terms, in the light of MLR positively supported by the Chemical Examiner's Report and as confirmed by the doctor, the act of penetration was proved.

15. The learned counsel for the accused raised a point that grouping of semen and DNA test was necessary in this case to establish it, although the victim had all along nominated only one accused Fayyaz. However, in order to take benefit of such a matching or grouping, the defence had neither raised this point at the trial nor made any request in this regard.

16. Victim Rashid Minhas appeared as PW-7 before the trial Court and gave complete details regarding offence committed with him by the respondent Muhammad Fayyaz. He was put to lengthy cross-examination but he remained unshaken. The deposition of the minor victim was noticeably innocent, trustworthy and confidence inspiring during his entire statement and cross examination. The defence had not raised any question as

to this offence that it was not committed. When the defence put the question regarding photographs which were produced by the defence during the trial and are available on the record, the minor victim innocently stated that Ex.D-1 is his photograph which was photographed by Muhammad Fayyaz accused Ex.D-2 was his photograph and other person might be Fayyaz who committed the offence. Production of these photographs, reliance of the defence on such photographs and further reliance on the cross examination of the minor victim on the photographed facts and features do not de-link the accused from the scene of occurrence. On the contrary all these factors and direct pointation of the minor victim to the accused and his (of the accused) having photographed the same, have to be seen and examined in the totality of the assertions of the minor victim, which fully prove his presence and involvement in the lustful crime behind stealthy sheet of black-mail photographed.

17. The accused has also taken a plea that the victim was a boy of easy virtue; alleging that the victim was of loose morals and promiscuous. Weakness of victim, even if found in fact, can not provide a licence to the

lustful. It can not be allowed to add any strength to the predisposition and propensity of the offender. Furthermore, this plea has not been proved by the accused, although in favour of his plea he submitted some photographs before trial Court and Exhibited the same as D-1, D-2 and D-3 but these photographs do not constitute substantial piece of evidence, and on the basis of such evidence conviction or acquittal could not be based, whenever the same could not be proved under the law. It is also pertinent to mention that dates, time and place where the photographs were taken, under what circumstances and by whom have not been mentioned.

18. If accused takes such type of plea and fails to substantiate the plea, he cannot claim any benefit out of it. Even otherwise although every piece of evidence has to be carefully analysed in its specific segment of the crime, it has also to be taken into consideration in the perspective of whole picture, and in toto, but not simply, singly or partially in isolation. No doubt, here, the minor victim innocently recognized the photographs, e.g., D-1, (the photograph of victim alongwith Waqas), without knowing technicalities/tricks/legalities involved in photography, but he also stated that the photograph was taken by Fayyaz accused. Regarding photograph Ex.D-2 he stated that it was his photograph and the other person hiding face might be Fayyaz who had committed the offence. The minor victim

consistently withstanding the lengthy cross examination, fully involved the accused Fayyaz; the defence in fact by producing these photographs and putting such questions, accepted presence and involvement of the accused in the occurrence. Since the defence had not produced any witness to prove these photographs under the law, and this defence plea was not reasonable, consequently it had to be rejected. The accused could not clear himself of the allegation, by calling the minor victim a boy of "easy virtue". This could not in any way lend any support or strength or provide proof of his (of the accused) virtue. Insistence of the accused on proving 'easy virtue' of the victim could on the contrary reflect on the accused himself and point towards his intimacy or association in this possibly 'easy affair', according to him. Procurement or production and dependence of the accused on such photographs, rather, involves him in association or intimacy with such a circle of exploiters of 'virtue' of minor victims, and their subsequent blackmailing and exploitation through photographs, videos, etc., etc.

19. The victim stated that he did not raise any alarm when the accused asked him to sit in the car because the accused was his close relative. The statement of victim seems to be natural as he had no enmity or ill will against the respondent Muhammad Fayyaz to falsely involve him in this case. The defence has also not taken any plea regarding enmity or ill will and did not prove such type of enmity due to which the victim could

put his and his entire family's honour to stake, substitute the real culprit and pursue the case for justice to all stages/fora.

20. The accused in his statement under section 342 Cr.P.C. took a specific plea of alibi and stated that as he was an army employee, he was present at the place of his posting on the alleged day of occurrence. But the victim categorically stated when a suggestion was put on him and asserted that he (accused) was present at the place of occurrence and committed the offence on the day of occurrence.

Alibi, in fact, could be of following forms:
-to make an excuse for oneself,

-to make an excuse for (another).

Furthermore, alibi has two basic ingredients:

a. a *defence* by an accused person that he was elsewhere at the time the crime in question was committed,

and

b. the *evidence* given to prove this.

Thus alibi is a plea of defence and its reasonable evidence, both.

Alibi is a form of *defense* whereby a defendant attempts through reasonable *evidence* to prove that he was elsewhere when the crime in question was committed. The fact of his (of the accused) having been elsewhere when the crime in question was committed, has to be proved in reasonable legal terms. Therefore, in legal usage it offers an explanation to avoid blame or justify action; as an excuse. In

legal parlance it is not merely personal excuse but entails reasonably satisfactory evidence. Following is relevant to be examined:

> Alibi and burden of proof. The accused is *required only to produce evidence* to show his presence where he states to be at the time of occurrence to raise reasonable possibility of his presence at that place. Prosecution must prove its case beyond reasonable doubt. **[PLJ 1982 SC 592].**

But in this case the accused did not produce any sort of evidence to show his presence at the place as claimed by him.

It was incumbent upon the accused to prove this plea as it is settled principal of law that when accused took a plea of alibi he must produce some cogent evidence which could not reasonably be discarded. In this connection, following may also be considered::

(**Alibi plea of.** The burden of proving the plea is on the person **who** takes **up** the plea. **[PLD 1964 Pesh. 288(FB)].**)

Alibi: person raising the plea of alibi must discharge the **burden by** proving it. **[1983 SCMR 697].**

In this case the defence has not produced any witness/evidence in support of his plea, at the trial. (Accused having taken a special plea of alibi had failed to prove the same on record. [2006 SCMR 1106].

21. Generally Appeal against acquittal has narrow scope of interference in the finding of trial Court. But once admitted, the appeal against acquittal has to be decided on its own merits, and where judgment of acquittal was based on mis-reading and/or non-reading of evidence or it was speculative, as has been observed in this case. Solitary statement of victim is sufficient to prove the charge as it is fully corroborated by MLR and Chemical Examination Report, confirming conditions of penetration to

prove the commission of offence of unnatural lust. In this connection, reference to the following may also be made:

> Appeal against acquittal once admitted, entire case is reopened on facts and law. High Court will interfere if prosecution evidence has been rejected on speculative grounds. Appellate court to re-examine whole evidence and draw its own conclusions. [1973 SCMR 635].

22. Accused Muhammad Fayyaz is nominated with specific role in the promptly lodged FIR; the evidence of the victim minor boy is very much clear and sufficient to establish the charge against him. The victim categorically stated that accused Muhammad Fayyaz enticed him away forcibly while boarding him in a white coloured car towards his Baithak where he was subjected by him to forcible sodomy.

The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979. (Ordinance No. VII of 1979) Section 12 reads as follows:

> "12. Kidnapping or abducting in order to subject person to unnatural lust. Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of,....."

In this connection, following is relevant to be considered

> Kidnapping and Abduction. Difference. In kidnapping a minor person or person of unsound mind is removed from the lawful guardianship and is simply taken away or enticed to go away with the kidnapper. In abduction force, compulsion or deceitful means are used. In kidnapping the consent of the kidnapped is .immaterial while in abduction consent condones the offence. In kidnapping intent of the accused is irrelevant, but in abduction, it is the all important question. Kidnapping is not a continuous

offence but in abduction whenever an abductce is removed from one place to another it is an offence. [AIR 1943 Lah. 227; 35 Cr. LJ 1386].

23. In nutshell, the evidence of the victim is quite natural and also confidence inspiring. There was no conflict between medical evidence and evidence of victim. The case against respondent is fully established and proved beyond shadow of doubt. There is no enmity and the accused side had admitted through their own conduct that the occurrence had taken place as stated by victim and statement of the victim is fully corroborated by the circumstances leading to the offence of sodomy. No reason has been given as to why the real accused would be substituted to involve falsely the accused without even attribution of any enmity. The victim was medically examined on the same day of occurrence. The doctor received the swabs and sent the same for chemical analysis after being duly sealed. The report of Chemical Examiner is positive. We do not doubt its veracity because no such suggestion or allegation has been made in this connection. The defence plea of alibi and photographs is an after thought as the respondent could not prove these under the law.

24. We have carefully examined the evidence. and find that the trial Court has not properly appraised the evidence which caused mis-carriage of justice. We for the foregoing reasons are of the considered view that acquittal of respondent in the circumstances of the case being not based on sound principles of criminal administration of justice is not sustainable and. consequently, we allow this appeal and set aside the acquittal of the respondent. Resultantly Cr. Appeal No.50/I of 2006 (against acquittal) is accepted, filed by appellant namely Rashid Minhas s/o Muhammad Khan against the judgment dated 16.01.2006 passed by Learned Additional Sessions Judge, Attock, whereby respondent Muhammad Fayyaz s/o Gul Baz was acquitted of the charges under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with section 377 PPC. Judgment of the trial Court is set aside.

25. Respondent Muhammad Fayyaz s/o Gul Baz is convicted under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to 7 years R.I. with a fine of Rs:20,000/-; in default of payment of fine he shall further undergo S.I. for 06 months. He is

also convicted under section 377-PPC and sentenced to 07 years R.I. with a fine of Rs: 20,000/-; in default of payment of fine he shall further undergo S.I. for 06 months. Both the sentences shall run concurrently with the benefit of Section 382-B Cr.P.C.

26. The convict Muhammad Fayyaz son of Gul Baz is not present before Court today. Learned trial Court is directed to take him into custody and send him to jail to serve out the above mentioned punishments. Learned trial Court is further directed that requisite warrants in this regard shall also be issued.

27. These are the reasons of our short order dated 17.02.2012.

JUSTICE SHAHZADO SHAIKH

JUSTICE RIZWAN ALI DODANI

FIT FOR REPORTING.

JUSTICE SHAHZADO SHAIKH

Islamabad the
17th February,2012
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