

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE.

CRIMINAL APPEAL NO.53/L OF 2010.

1. Sabir Hussain son of Allah Yar,
R/o Mauza Jarh Rathaib,
Tehsil & District Muzaffargarh.
2. Tufail Hussain son of Muhammad Yameen,
R/o Manak Pur, Tehsil & Distt: Muzaffargarh.
.... Appellants.

Versus

The State. Respondent.

Counsel for appellant. Mehr Tanvir Ahmad Jangla,
Advocate.

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

FIR No. date and Police Station. FIR No.284, dated 14.08.2006,
P.S. Shah Jamal,
District Muzaffargarh.

Date of impugned Judgment. 31.03.2010.

Date of Institution ... 29.04.2010.

Date of hearing 02.05.2011.

Date of decision ... 02.05.2011.

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**JUDGMENT:**

**Justice Agha Rafiq Ahmed Khan, Chief Justice.**- Appellants Sabir Hussain son of Allah Yar and Tufail Hussain son of Muhammad Yameen have filed this criminal appeal against the judgment dated 31.03.2010 delivered by the learned Additional Sessions Judge, Muzaffargarh, whereby appellants have been convicted Under Section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as 'the Ordinance') and sentenced them to five years Rigorous Imprisonment each with the benefit of section 382 (b) of the Code of Criminal Procedure, extended to them.

2. The brief facts of the prosecution case as arises from the contents of FIR Ex.PB/1 registered on the basis of application (Ex.PB) submitted on 11.8.2006 by Mst.Zarina Bibi complainant are that on the night between 8 & 9 August 2006 early in the morning she came out of the Haveli and went to ease herself in the nearby field. She saw the appellants/accused Sabir Hussain and Tufail Hussain alongwith two other unknown persons, they were armed with sotas. They over powered her. She tried to raise alarm but the appellants/accused put their hands on her mouth and threatened her that if she raised noise she would be killed. They took her to a nearby cotton crop field. Firstly Sabir Hussain and thereafter Tufail Hussain, appellants/accused, committed Zina-bil-jabr with her. During the scuffle the

hand of the appellants/accused removed from her mouth and she raised alarm on which her brother Ghulam Yaseen and Allah Razi, PWs attracted to the place of incident. On seeing them, the appellants/accused left her in naked condition and fled away from the spot. They while decamping from the spot, were seen and identified by the said PWs. She then put on her shalwar. She further stated that the parents of the appellants beseeched her parents for compromise but they did not agree and due to this reason report could not be lodged promptly. She prayed for legal action against the appellants/accused for committing the offence. After registration of the case and completion of the investigation, the appellants/accused were challaned under section 173 of the Code of Criminal Procedure. They were charged on 12.1.2009, to which they pleaded not guilty and claimed trial.

3. The prosecution in order to prove its case examined seven witnesses. The gist of prosecution evidence is as follows:-

(i) PW.1 Lady Doctor Munzah Farhan, WMO examined Mst.Zarina Mai on 11.8.2006. She observed as under:-

“A contusion 5 cm X 1 cm present on the lower middle back.

Vulva/vagina-healthy.

Hyman shown fresh tears.

Vagina admits one finger easily.

H/O start of menstruation two years back.”

Three primed high vaginal swabs were taken and sent to the chemical examiner for detection of semen if any.

(ii) P.W-2 is Mst.Zarina Bibi, complainant/victim. She narrated the same facts as stated by her in the FIR, mentioned above.

- (iii) PW.3 Dr.Naseer Ahmed Rana, Medical Officer examined Sabir Hussain, appellant/accused for his potency, who found him fit for performing sexual act.
- (iv) PW.4 Ghulam Yasin is brother of the victim. He supported the complainant and corroborated her statement.
- (v) PW.5 is Talib Hussain, Inspector. He investigated the case. On 20.4.2007 he got medically examined the appellant/accused Sabir Hussain who was on his pre-arrest bail. He arrested him on 19.7.2007 when his bail was not confirmed. He also arrested the appellant/accused Tufail Hussain who join the investigation on 16.8.2007 and on the same day he got him medically examined through the doctor for his potency. On 18.8.2007 he arrested the appellant/accused Tufail Hussain when his bail before arrest was not confirmed.
- (vi) PW.6 is Muhammad Akbar, Sub-Inspector. He stated that on 11.8.2006 Mst.Zarina Mai appeared before him and made her statement Ex.PB, on the basis of which he registered the case vide case FIR Ex.PB/1. He inspected the place of incident and prepared the site plan Ex.PF. He further stated that on the application of the appellants the parties appeared before the DSP Investigation. The appellants/accused were however declared innocent, therefore, he recommended for cancellation of the case.
- (vii) PW.7 is Shah Aalam Khan Gashkori, DSP. He stated that on 16.3.2007 he summoned both the parties. On 20.3.2007 he visited the place of incident and inspected the same in presence of both the parties. He, after conducting the investigation in the case, held guilty the appellants/accused, however, according to him, as the report of chemical examiner was in negative, therefore, he altered the section of law to section 18 of the Ordinance and sent back the case file to the police station.

4. After closing prosecution evidence, the appellants/accused were examined under section 342 of the Code of Criminal Procedure. They did not record their statements under section 340 (2) of the Code of Criminal Procedure nor produced any witness in their defense. However, while answering to Question No.8 "Why this case against you and why the PWs have deposed against you" the appellant/accused Sabir Hussain replied as under:-

“I am running a grocery shop and my house is at a distance of about 2/3 kilometer from the alleged place of occurrence. Earlier I purchased land measuring 11 beghas, which is situated 2/3 acres from the house of the complainant. My friends Fida Hussain also purchased the land from the father of my co-accused Tufail. The complainant party was also interested in the said land. Later on they started stealing my water and grass and so many times, the matter went up to police station. The father of accused Tufail had been helping me against the complainant party. Before the alleged occurrence, my relatives abducted the mother in law of Allah Razi PW. I have deep enmity with the complainant party. A week prior to the alleged occurrence Allah Razi PW and Muhammad Shafi, the father of the complainant let their cattles in my fields and also cut away the grass where a quarrel took place between me and Allah Razi etc. The complainant party attempted to get register a dacoity case against me. They failed and thereafter involved me and my co-accused in present false case. During investigation the SHO as well as the DSP declared us innocent. The PWs have deposed against me due to facts mentioned above”

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

6. I have heard Mehr Tanvir Ahmad Jangla Advocate for appellants and Ch.Muhammad Sarwar Sindhu, Addl: Prosecutor General Punjab for State and have gone through the material available on record.

7. There is inordinate delay of about five days in lodging the report. The offence is said to have taken place during the night in between 8/9 August 2006 but the matter was reported to Muhammad Akbar, Sub-Inspector at Police Station Shah Jamal on 14.8.2006 at 11.00 a.m. The explanation given by the complainant/victim in the

FIR that the legal heirs of the appellants beseeched the parents of the complainant/victim for compromise, appears to be unnatural and after thought. How <sup>is</sup> it ~~is~~ possible that after the tragedy of gang rape by two persons, the victim and her parents would keep mum for so many days and could not report the matter immediately to the police.

8. In the FIR, victim/complainant has stated that after committing Zina when the witnesses came to the spot, the culprits fled away and then she got and put on her shalwar. In her deposition also she has stated the same facts but her real brother Ghulam Yasin (PW.4) has given different version by deposing that his mother and brother's wife came at the place of incident and they put the clothes on the body of the victim.

9. In this case, no independent witness has been cited though in cross-examination the victim has stated that there were several houses around their house but no person from the nearby has come forward to support the version of the complainant which is very astonishing.

10. After the registration of the case the matter was investigated by Talib Hussain, Sub-Inspector as well as Muhammad Akbar, Sub-Inspector. They found the appellants/accused innocent and recommended for the disposal of the case under "C" clause. Shah Alam Khan Gashkori, DSP Circle had also investigated the matter and agreed with the report of both the above officials. In spite of this, on the basis of some evidence the appellants were challaned under

section 18 of the Ordinance subsequently by PW.5 Talib Hussain, Inspector.


11. Lady doctor Munzah Farhan, WMO who had examined the victim, had taken vaginal swabs and had sent the same to Chemical Examiner but the report indicates that no semen was found in those swabs. The trial court did not believe the story of victim regarding the gang rape but convicted the appellants under section 18 of the Ordinance for attempt to commit Zina.

12. The oral and ocular testimony had been totally belied by the medical evidence of not only the lady doctor but by Chemical Examiner also, whose report is in negative. It appears that single injury, i.e. a contusion 5 c.m. X 1 c.m present on the lower middle back of the victim was considered by the learned trial judge as evidence of attempt to commit rape. The prosecutrix herself nowhere in the FIR or in the court stated that the appellants had made any attempt to commit rape upon her but on the contrary her contention through was that she was gang raped by both the appellants and this version has not been believed by the court and the appellants have been acquitted under section 10 (4) of the Ordinance from the charge of gang rape.

13. In view of the above discussed evidence and reasons I am of the firm opinion that the prosecution evidence was not sufficient to bring home the guilt of the appellants for the above offence, for which they

have been convicted. Hence this appeal is accepted, the conviction and sentences awarded to the appellants Sabir Hussain and Tufail Hussain by the learned Additional Sessions Judge, Muzaffargarh, vide the impugned judgment dated 31.03.2010, are set-aside and the appellants/accused are acquitted of the charge. The appellants are in jail. They shall be released forthwith, if not required in any other custody case.

14. These are the reason for my short order of even date.

  
**JUSTICE AGHA RAFIQ AHMED KHAN**  
Chief Justice

Islamabad the  
May 02, 2011.  
F.Taj/\*

Approved for reporting.

