

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO.70/L OF 2010

Muhammad Javed s/o Allah Ditta ... Appellant
r/o Mauza Opoth Janjiana Tehsil Shorkot,
District Jhang.

Versus

The State ... Respondent

Counsel for the appellant --- Syed Faiz-ul-Hassan, Mr. Imtiaz
Hussain Khan Baloch and Mr.
Talib Hussain Azad, Advocates

Counsel for the Complainant --- Mr. Karim Nawaz Abbasi,
Advocate

Counsel for the State --- Ch.Mohammad Sarwar Sidhu,
Add: Prosecutor General Punjab

FIR No., date & --- No.653/06, dated 06.09.2006
Police Station P.S. City Shorkot, District
Jhang

Date of Judgment of --- 30.04.2010
Trial Court

Date of Institution of Appeal --- 02.06.2010

Date of Hearing --- 08.09.2011

Date of Decision --- 08.09.2011

JUDGMENT

SHAHZADO SHAIKH, J:- The appellant Muhammad Javed has filed this Criminal Appeal against the judgment dated 30-04-2010, whereby he has been convicted and sentenced as under:-

Under Section 11 Offence of Zina (Enforcement of Hudood) Ordinance, 1979	Life Imprisonment with a fine of Rs. 10,000/- or in default one month S.I.
Under Section 10 (3) Offence of Zina (Enforcement of Hudood) Ordinance, 1979	5 years R.I. with a fine of Rs. 10,000/- or in default one month S.I.

Both the sentences were ordered to run concurrently with the benefit of section 382-B of the Code of Criminal Procedure.

However the learned trial Court acquitted remaining accused Saifullah, Akhtar Abbas, Faiz, Mst. Naseem Mai and Mst. Manzooran by giving them benefit of doubt.

2. The brief facts of the case arise out of FIR No. 653/2006, dated 06.09.2006 lodged at Police Station, City Shorokot, Jhang by complainant Mst.Zubaida Mai (PW-4) lodged FIR, in which she has stated that she is a house wife and does labour. About eight months prior to the occurrence she was married with her khalazad namely M. Amjad Korra r/o Hussainabad Colony and she started her matrimonial life. On 15.07.2006 she was present at her house when Mst.Naseem and Mst.Manzooran came to her house and asked her to accompany them to bazaar as they had to purchase clothes in connection with a marriage. After getting permission from her house mates, she alongwith Mst.Naseem and Mst.Manzooran went to Shorkot City. At that

time she was wearing gold ornaments i.e. Karray weighing 4 tolas, Kantay weighing 2 tolas, four rings weighing 1 tola 6 masha, buttons weighing 1 tola, locket weighing 1 ½ tola and she was also having cash amounting to Rs.13,000/- with her. They remained busy in shopping for about three or four hours, then returned. When the bus reached at Bus Stop Pull Nehar Mangan, Mst.Naseem and Mst.Manzooran got her down from the bus on the pretext that they wanted to accompany their male members who were standing there. In the meanwhile, a white colour car stopped near them. Accused Javed, Faiz, Saifullah, and Akhtar came down from the said car. They forcibly caught her and boarded her in the car. On her hue and cry, her father-in-law Allah Bakhsh and Mazhar Abbas, who were going towards their house on bicycle, rushed towards the spot in order to rescue her but the accused forcibly took her away by putting her in the car. The accused persons took the complainant to the house of accused Yousaf and confined her in a room. Accused Javed committed zina forcibly with the complainant in the night. Accused Saifullah also committed zina with her. She was detained there for 4/5 days. Then the accused put her in the car and took her to some unknown place where accused Saifullah and Javed had been guarding her and also committed zina with her turn by turn. The accused persons snatched her gold ornaments and cash amount. Mst.Zubaid Mai further stated that 8/9 days before lodging the FIR, the accused persons took

her to the house of one Yousaf accused where Mst.Naseem kept on guarding her. One day prior to lodging FIR, she finding an opportunity, escaped from the detention of the accused and reached the house of her in-laws while boarding a bus. Hence this case was registered.

3. The case was duly investigated, the accused were arrested and statements of the PWS were recorded under section 161 Cr.P.C. After investigation, challan was submitted in the court against the accused to face the trial. The learned trial court framed charges against the accused on 17.07.2007 under sections 11 and 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

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

PW-1 Dr.Misbah-ul-Qammar medically examined the victim Mst.Zubaida Mai on 12.09.2006 at 10.30 a.m. on the application Ex.PA and observed as under:-

1. Hymen showed old tears.
2. Vaginal Orifice admitted two fingers easily.
3. No mark of physical violence was seen on any part of her body or clothes.
4. Three vaginal swabs were taken, sealed and handed over to police for sending to Chemical Examiner, Govt: of Punjab Lahore for semen detection and serological test.

Opinion:-

She has gone through the report of Chemical Examiner Ex.PC and according to the report Ex.PC, the swabs were found to be stained with semen. She is of the opinion that she was used for sexual intercourse.

PW-2 Muhammad Nawaz is a police constable. He deposed that on 20.9.2006 Muhammad Akram Muharrir H/C handed over to him one sealed envelope, two sealed phials which he deposited in the office of the chemical examiner Lahore on 21-9-2006.

PW-3 Zulfiqar Ali is a police constable is a formal witness regarding the warrants of arrest as well as proclamation of the accused Javed Iqbal .

PW-4 Mst.Zubaida Mai is the victim of this case. She stated that she was married with Amjid and was living with him. Mst.Naseem and Manzooran visited her house about 3 years and 2 months back. Both of them were her friends and also residents of her parent's village. Both of them asked her to accompany them for purchasing certain articles for marriage. She accompanied them. She also took with her gold ornaments weighing 10 tola and cash amount to Rs: 13000/- . All of them remained busy in the shopping for about 2/3 hours and then proceeded back to their house. They all boarded the bus. When they reached at Bus Stop Mangan then Mst. Manzooran and Mst. Naseem got stopped the bus at the said Bus Stop. They got her also down from the bus at the said Bus Stop. Then all of a sudden car of white colour reached there. Faiz, Saif, Akhtar and Javed forcibly boarded the victim in the said car. She raised hue and cry which attracted Allah Bakhsh and Mazhar who attempted to rescue her but the accused took

her in the said car in the house of one Yousaf and detained her in a room. Where accused Javed and Saif committed Zina with her. Thereafter, the accused took her to unknown destination where she was kept for one month and 5 days and during this period, accused Saif and Javed were committing zina with her. The accused again took her to the house of Yousaf and kept her there for 4/5 days. Accused Mst.Naseem was guarding there. She availed the opportunity of escaping from the said place and came to the house of her husband. The accused Saif and Javed snatched her gold ornaments and cash amount from her. She reported the matter to the police through her statement Ex.PF and later on she was medically examined at DHQ Hospital Jhang through police.

PW-5 Allah Bakhsh is an eyewitness. He narrated more or less the same facts as narrated by the complainant/victim in her deposition.

✓ PW-6 Rajab Ali, SI is Investigating Officer of this case who obtained warrants of arrest against accused Javed Iqbal on 16.1.2007 and also obtained proclamation on 17.1.2007 of the said accused. He arrested the accused on 16.2.2007 and submitted the challan on 19.2.2007.

PW-7 Muhammad Akram ASI, he was Muharrar at Police Station Shorkot City on 12.9.2006 and on the said date Muhammad Nawaz ASI handed over to him a sealed envelope and sealed phials which he kept the same in police Malkhana for safe custody. On 20.9.2006 he delivered the said parcel to Muhammad Nawaz Police Constable for onward transmission to the office of the chemical examiner Punjab Lahore.

PW-8 Dr.Mazhar Abbas, who medically examined the accused Javed Iqbal and found him fit for sexual intercourse. MLR is Ex.PG.

PW-9 Muhammad Saeed Zaubair Retired Sub Inspector, who after receiving the complaint Ex.PF recorded the formal FIR ExPF/1.

Learned trial Court after close of the prosecution evidence recorded statements of accused under section 342 of the Code of Criminal Procedure. However, the accused/appellant did not tender evidence on oath.

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

6. Learned counsel for the appellant contended that there is unexplained delay in reporting the occurrence to the Police; that none of prosecution witness had seen the offence of zina, except solitary statement of victim and in absence of reliable corroboration conviction cannot be maintained on this evidence; medical evidence conflicted with ocular evidence; there was no semen grouping and there was no DNA test report available on the record; place of occurrence mentioned in site plan in view of the circumstances of the case created serious doubt regarding offence committed by the appellant as the place of occurrence is thickly populated area. Learned counsel for the appellant further argued that it is not a case of abduction but admittedly, the alleged victim went with the appellant with her free consent with the permission of her family members. She admitted in her cross-

examination that she had returned and reaches her house on that day; Allah Bakhsh father-in-law of the victim was a chance witness who saw the alleged occurrence, but did not lodge any report to police in this regard. The victim claimed that she was taken at different places but she did not make any hue and cry at any place. The trial court disbelieved the story of abduction to the extent of co-accused and the same was not challenged by the prosecution; neither Amjad has been produced as a witness nor nikahnama regarding marriage between Amjad and victim was produced by the prosecution; Lady Doctor has categorically stated that no marks of violence had been found on the body of the victim; as the victim was already married lady no grouping of semen and DNA test had been conducted in this respect by the prosecution ; the prosecution story is not inspiring confidence; Learned trial court clearly observed in impugned judgment that the acquitted accused were involved in this case due to ulterior motive.

7. Learned counsel for the complainant argued that appellant had taken plea of Nikah which has not been proved as he neither produced any registered nikahnama nor Nikahkawan nor Secretary Union Council in this regard during the trial . He argued that learned counsel for the appellant has referred to some minor contradictions, of common nature. These are not significant, particularly in view of fact that the victim is female illiterate. He further argued that the appellant/accused stated that he had withdrawn his

suit for restoration of conjugal rights on the basis of compromise between the parties but he did not produce any evidence regarding alleged compromise from the victim side. On the other hand, the victim denied the fact that she contracted any Nikah with the appellant with her free consent but forcibly thumb impressions were taken on blank papers by the accused; she also denied that she had submitted any application against her father-in-law namely Ghulam Muhammad, etc. The learned counsel for the complainant argued that there is no evidence on record regarding enmity or ulterior motive against the appellant by the victim . Finally, he argued that prosecution has successfully proved its case against the appellant beyond reasonable doubt.

8. The learned Additional Prosecutor General appearing for the State on the other hand supported the impugned judgment. He was of the view that the solitary statement of the victim is a corroborated piece of evidence and has given a truthful and confidence inspiring account of occurrence. He further argued that the appellant remained proclaimed offender for about 7 months as such the claim of victim regarding abduction by the appellant is proved. He further argued that under the circumstance case against appellant has been proved therefore, his conviction and sentences awarded by the learned trial court may be maintained.

9. Mst.Zubaida Mai,complainant was also present in the court. She stated that learned trial court had wrongly acquitted the remaining accused whereas the present appellant has been convicted under sections 11/10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance,1979 on the same set of evidence. The learned trial court had not properly appreciated the evidence and on the basis of mis-reading and non-reading of evidence, the remaining accused had been acquitted. She further claimed that the acquitted accused had snatched her gold ornaments as well as cash amount of Rs.13000/-; She stated that in spite of fact that case had fully been proved against all the accused persons, the learned trial Court did not do justice with her.

✓ 10. At the end, learned counsel for the appellant rebutted that absconion of the appellant has no value at the stage of hearing of the appeal and this objection could have been raised at the bail stage and at this stage it has no force and legal value.

11. We have studied the record in the light of points raised by the appellant side and the reasons given in the judgment of the trial Court supporting the findings of the guilt.

12. We would first scrutinize and weigh the objection of delay in making the report and its implications in the present case. The incident, according to the complainant occurred on 15.7.2006 after the complainant left for shopping with the accused ladies. Throughout the period of her abduction

and her forced/guarded detention, till her recovery, the accused had been committing zina-bil-jabr with the victim at different places. She remained under threat due to fear of her life. When the complainant came back to her in-laws' house, she told about the offence committed with her by the appellant along with the details that appellant Muhammad Javed had threatened and put her thumb impression on some blank papers, when she was taken in the Chamber of Advocate, although she had clearly told them that she was already married. She reported the matter to police immediately after her recovery/return. The appellant remained proclaimed offender for about 07 months. The victim categorically denied in her deposition regarding filing of any private complaint in the court of Kabirwala against any one. The appellant took the plea that he contracted marriage with the victim Mst.Zubaida Bibi after she was divorced by her previous husband, Shoukat. In support of this defence plea he filed a copy of suit for restitution of conjugal rights as Ex.DB and order in this regard dated 29.6.2006 as Ex.DC in which the accused stated that he had compromised with victim and on the said ground his suit for restitution of conjugal rights was dismissed whereas there is no evidence available on the record that any such compromise had been effected between the parties, hence plea taken by the appellant in his defence has not been proved and has no legal value. The appellant has also filed a certified copy of complaint titled Mst.Zubaida Mai

vs. Ghulam Muhammad etc but the victim/complainant categorically denied regarding this complaint, the appellant also had taken plea that Mst.Zubaida got divorce from Shaukat by filing suit for dissolution of marriage, although not relevant, but even this defence plea was not proved by the appellant, to the effect of nefariously intended allegation of the defence. It is on record that accused/appellant Javed filed a suit for restitution of conjugal rights before family court which was dismissed as withdrawn as the appellant had stated that it was being withdrawn as compromise had been reached with the victim, but no such evidence was produced. As such it becomes clear that the appellant had filed a suit for restitution for conjugal rights just to add credulity to his false claim of nikah with the abductee/victim, and further in order to make it gullible, one sided story of compromise was added so that the false suit for restitution of conjugal rights could be rolled back before facts were unfolded before the learned trial Court. Forged claim of Nikah, false suit for restitution of conjugal rights and its withdrawal on fake claim of compromise, added strength to the charge that while she was kept by the appellant/accused she was subjected to sexual illicit intercourse, and all this trickery by the appellant/accused was to somehow cover up the crime in some paper-work. If there was any grain of truth in the claim of Nikah, he would have without any loss of time produced the Nikahnama, the Nikahkawan/registrar and the record and record-keeper of the Union

Council in this regard, during trial. But he didn't do that. This goes to prove beyond any reasonable doubt that the accused committed offence of abduction and thereafter he committed zina-bil-jabr with her, as claimed by the victim. This fact has also been proved through medical evidence as she appeared before Medical Officer immediately after her recovery for medical examination through police and as per medical evidence it is proved that victim Mst.Zubaida Mai was subjected to sexual intercourse. In such situation when the appellant has taken plea of nikah but not proved the same the arguments of Learned counsel for the appellant regarding grouping of semen and DNA test has no legal value, which could add any weight on his side.

✓ 13. The appellant however, submitted a nikahnama before this court at appellate stage, which on the face of it speaks of forgery. The accused/appellant had claimed that the victim was married with him by her brothers/family members, but none of them appears as wakil, mushir or witness in any manner on the alleged nikahnama. Full particulars, including CNIC Numbers, etc., of the strange witnesses have not been disclosed on the alleged nikah, which is claimed to have been solemnized in a different town, without explaining as to how the victim was taken there. Very important columns in the alleged nikahnama (which doesn't indicate its status as being a copy for bride, bridegroom, Union Council, or Registrar, i.e., whether it is original, duplicate, triplicate or quadruplicate copy, as has to be printed on

the prescribed form), have not been filled in the nikahnama, which in normal circumstances, a reasonably knowledgeable and responsible nikahkawan would not leave blank/crossed, which jeopardize the fundamental rights of the bride, shown to be consenting to the *bond(age)*, just for indemnity gift (mahar) of Rs.500 (Rs. Five Hundred), without even indicating whether it was paid or payable. Important columns of signatures of the concerned have been left blank and even the alleged signature of a nikahkawan/registrars has been hidden at an irrelevant place under a stamp. This piece of paper, vehemently denied by the victim, in the above circumstances, has no legal and evidentiary value, particularly when not presented and proved at the trial.

✓ 14. Learned counsel for the appellant raised a point about delay in reporting the occurrence to the Police. It is explained in the efforts of the illiterate poor people at community level. Furthermore, immediately, after escape of the victim, the matter was reported to Police, and medical examination was also arranged. In the circumstances, solitary statement of the victim about illicit intercourse by the accused/appellant with the victim, who was under physical and psychological command and control, for such a prolonged period, in strange conditions of physical and mental coercion, cannot be denied only on the pretext that there were no marks of violence or resistance on the body of the victim. In fact physical surrender in such

compelling conditions is preceded by mental capitulation and hopelessness at least till the tide turns. When offenders ensure that their crime remains screened, the point that the offence is unseen cannot be pressed by ignoring the nature of the crime, the manner of commission of the offence, and importantly, the circumstances attending the solitary witness undergoing the ordeal as victim.

15. Judicious appreciation of evidence cannot be ensured, particularly as required under concepts of *adl* (to apportion, appropriate and assign the due to each) and *qist* (to precisely divide), in vacuum or just within the shielded shell of the offence or network of the crime, in such cases. Circumstances may necessitate to view the occurrence on bigger screen or canvas. Gender bias, and social vulnerability, aggravated by poverty and illiteracy, has to be properly analysed, in each case and circumstance, to see whether social milieu is pulling the pane of scales against the female victim, while demanding a number of eye witnesses, in unequal and technical contest of unseen occurrence. Therefore, solitary statement of victim, in each case has to be properly evaluated in such circumstances and corroboration.

16. Similarly, offence cannot merely be denied on the point that the place of occurrence was within thickly populated area. This cannot be adopted as a thumb rule. Offenders can easily create their own peculiar shields within urban depth, slum clusters and population thickness.

17. In the impugned judgment of the trial Court, and in discussion of the case, attention has mainly remained focused around the term 'abduction', although following words and phrases in Section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, also need deeper examination in this case:

The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979.
Ordinance No. VII of 1979, Section 11-Kidnapping, abducting or inducing women to compel for marriage etc.:

- intent to compel a woman,
- knowing it to be likely to compel her,
- marry against her will,

- she may be forced or seduced to illicit inter-course,
- knowing it to be likely to be forced or seduced to illicit inter-course,
- by criminal intimidation,
 - abuse of authority,
 - any method of compulsion,
 - induce any woman to go from any place..
- with intent...
- knowing that it is likely that she will be, forced or seduced to illicit inter-course with another person..

18. Analysis of the charges and appreciation of evidence shows that all the ingredients of Section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, are also present in the offences. When the

appellant/accused claimed to have solemnized nikah with the victim, in a different town, and particularly when none of her relations was present there, he did not explain how she was produced at appointed place and time for the alleged nikah. Even if this story may be considered for a while, it shows that there was an unexplained compelling force behind or over her, that brought her there without anyone from her family with her. This shows that it was not a straight matter of civil marriage, otherwise the appellant might have taken her to a court, for the purpose. In the circumstance, and in the evidence, following ingredients of Section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, are amply evident:

'intent' and 'knowledge' of 'compulsion' to 'marry against her will', and in absence of its validity, 'illicit intercourse', also by co-accused ('another person'), for which she was 'forced,' or 'seduced,' or there was 'criminal intimidation', 'abuse of authority', or 'any method of compulsion', to 'induce' her 'to go from any place' .

19. Charge of abduction and all other episodes, incidental to it, were denied by the defence, as the victim first left her house when she went with her lady friends with her free consent and permission of her family members. This is a case of composite criminal occurrence, comprising more than one episodes of offences. Charge of abduction along with operation of

its intent and purpose, under Section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, would start from the time and place from where removal, against will of the victim, was enacted, for which she was either (to use the terminology of this Section):

-forced, or
-seduced, or
-compelled, or
-intimidated, or
-abused, or
-induced.

20. On careful analysis of the entire evidence available in the case we have come to the conclusion that the case against the appellant stands proved beyond any shadow of reasonable doubt and he has been rightly convicted and sentenced under section 10(3) and 11 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 . The appeal is dismissed. The judgment passed by learned Addl: Sessions Judge, Shorkot District Jahang in Hudood case No.25 of 2007 and Hudood trial No.05 of 2010 is upheld and conviction and sentences awarded to appellant Muhammad Javed s/o Allah Ditta are maintained.

21. Learned trial Court is directed to summon Saifullah s/o Muhammad Bakhsh, Akhtar Abbas s/o Muhammad Nawaz, Faiz s/o Allah Ditta, Mst.Naseem Mai w/o Umar Hayat and Mst.Manzooran w/o Allah Ditta who had been acquitted in the same judgment without appreciating each aspect of

evidence in respect of each of them for specific roles, facts, circumstances and nature of the occurrence. Each segment of the occurrence and the chain of offences need to be analysed separately and in continuum specially when accused has been convicted under section 11 and 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, but above mentioned co-accused have been acquitted on the same set of evidence, from the related charges.

22. In this view of matter the learned trial court is, therefore, directed to properly examine and analyse the evidence on each allegation about each co-accused for full dispensation of justice in accordance with law under intimation to this court through Registrar.

23. These are reasons of our short order dated 08-09-2011.



JUSTICE SHAHZADO SHAIKH



JUSTICE RIZWAN ALI DODANI

Islamabad, the
08th September, 2011
Zain/*


Fit for reporting.


JUSTICE SHAHZADO SHAIKH