

IN THE FEDERAL SHARIAT COURT
(Appellate / Revisional Jurisdiction)

PRESENT

MR.JUSTICE DR.FIDA MUHAMMAD KHAN

CRIMINAL APPEAL NO.79/L OF 1996

Ali Hussain s/o Sufi Bashir Ahmad, r/o Kot Radha Kishen, P.S Raiwind Sadar, Teh & Distt Kasur;

... Appellant

Versus

The State

... Respondent

Counsel for the appellant

... Mr.Khalid Naveed Dar, Advocate

Date of institution

... 24-3-1996

L.W CRIMINAL REVISION NO.29/L/96

Allah Ditta son of Muhammad Tufail, r/o Malik Street, Ward No.4, Kot Radha Kishen, P.S Sadar Raiwind, Distt. Kasur;

... Petitioner

Versus

Ali Hussain s/o Sufi Bashir Ahmad

The State

... Respondent

Counsel for the petitioner

... Mr.Asghar Ali Chaudhri, Advocate

Date of institution

... 17-4-1996

Counsel for the State in both the above matters

... Mr.Muhammad Anwar Dholan, Advocate

FIR No., date & police station

... 612, 16-11-1995, Sadar Raiwind, Distt Kasur

Date of order of trial Court

... 12-3-1996

Date of hearing & decision

.. 6-6-1997

JUDGMENT:

(V.B.)

DR.FIDA MUHAMMAD KHAN,J.- This appeal filed by Ali Hussain son of Sufi Bashir Ahmad is directed against the judgment dated 12-3-1996 passed by the learned Additional Sessions Judge, Kasur whereby he has convicted him under section 7 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, herein-after referred to as the said Ordinance, and sentenced him to five years R.I. and a fine of Rs.15,000/- or in default of payment of fine further one year R.I. The benefit of section 382-B Cr.P.C. has been extended to him. Criminal Revision has also been filed by Allah Ditta for alteration of conviction from under section 7 to under section 10(3) of the said Ordinance and enhancement of sentences accordingly. Since the appeal and said revision arise out of the same judgment I am disposing of them together by this judgment.

2. Briefly stated the case of prosecution as narrated by Allah Ditta in his application Ex.PA, made by him on 16-11-1995, before Incharge choki police Kot Radha Kishen, P.S. Raiwind is to the effect that his cousin Mst.Saima Bibi aged 6/7 years had gone to fetch water from a water tap near the bank of canal. On that day at about 2.30/3.00 p.m, Ali Hussain r/o the village dragged her to the nearby slaughter house. Malik Muhammad Ali who saw the incident himself kept standing there

and called the complainant through his son Arshad Ali. Accordingly the complainant alongwith Muhammad Asgher reached at the place of occurrence. They found that the door of the house was bolted from inside. They opened the door by pushing the same and saw that shalwar of Mst.Saima Bibi was lying on the cot and Ali Hussain was committing zina-bil-jabr with her. On seeing them he took pistol 30 bore and, threatening them, ran away while also taking his shalwar in his hands. They went inside and picked up Mst.Saima Bibi in unconscious condition while smeared in blood. They took her to the Civil Hospital Kot Radha Kishen. The Medical Officer sent her to General Hospital Lahore. P.W.11 Muhammad Sharif ASI sent Ex.PA to the Police Station for formal registration of the FIR. Thereafter he handed over Mst.Saima Bibi to Muhammad Aslam constable for her medical examination. Then he went to the place of occurrence and inspected the site and took into possession one blood stained chadar vide recovery memo Ex.PB. P.W.10 Muhammad Sharif SI arrested Ali Hussain on 18-11-1995. After necessary investigation he was challaned to face the trial.

3. At the trial the prosecution examined 11 witnesses in all. P.W.1 is Nazir Ahmad FC. On 19-11-1995 he alongwith Muhammad Sharif ASI and Muhammad Sharif SI went to P.S Raiwind Sadar and took Ali Hussain appellant/accused from lockup and brought him to Pulli Deputy Wala where, on his pointation

the pistol P2, used in this case, was recovered from the mud between Rohi Nullah and Raiwind road. The same was taken into possession vide recovery memo Ex.PD. Six live bullets were also with the pistol which were also taken into possession. On 22-11-1995 he took one sealed envelope with three sealed phials, given to him by Muhammad Yasin Moharrir P.W.6, and transmitted the same to the office of Chemical Examiner intact. P.W.2 is Allah Ditta. He is the complainant who reiterated his statement as mentioned hereinabove. P.W.3 is Muhammad Asghar. He is the eye witness who accompanied the complainant to the place of occurrence. He fully supported the statement of P.W.2. P.W.4 is Malik Muhammad Ali. He is another eye witness who saw Ali Hussain accused taking baby Saima from near the water pump to the slaughter house. He sent his son Arshad to the house of the victim to inform them accordingly. On his information Allah Ditta and Asghar reached the place of occurrence and thereafter all of them saw the appellant/accused committing zina-bil-jabr with Mst.Saima Bibi. He also fully supported the prosecution version. He is also a marginal witness to recovery memo Ex.PB whereby the police took into possession Dhoar Ex.P1 from the cot. P.W.5 is lady Dr.Perveen Arif, Woman Medical Officer, Integrated Rural Health Centre, Kot Radha Kishen. On 16-11-1995 she medically examined Mst.Saima Bibi who was brought

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by police. She made the following observations:-

- "1. Her secondary sex characters were not developed. Breast were not developed. Exillary and pubic hair were not present.
2. Multiple abrasions on inner sides of both thighs were present.
3. Vaginal tears were present on posterior part of vaginal wall. Hymen was irregularly torn. Blood clots were present in the vaginal crifice. She was unconscious."

She took three vaginal swabs and sent the same to the Chemical Examiner. She opined that apparently rape was committed. The probable duration of injuries, according to her, to be within two hours. She handed over one sealed envelope and three phials to the constable for onward transmission to the office of Chemical Examiner. She issued medico-legal report Ex.PC duly signed by her. P.W.6 is Muhammad Yasin MHC. On 19-11-1995 the Moharrir Head Constable handed over to him one parcel, three phials and one envelope pertaining to the instant case which he then handed over to Nazir Ahmad FC on 22-11-1995 for onward transmission to the office of Chemical Examiner Lahore intact. P.W.7 is Fajar Khan HC. On 17-11-1995 Muhammad Sharif ASI/IO gave him three phials, one sealed envelope and one Dhoar for safe custody in malkhana. He then handed over the said articles to Muhammad Yasin HC. So long as that remained with him the same were kept intact. P.W.8 is Dr.Abdul

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Raof, Medical Officer. On 19-11-1995 he medically examined Ali Hussain appellant/accused aged 14 years. In his opinion there was nothing to suggest that he was impotent. P.W.9 is Muhammad Ashraf HC. On 16-11-1995 he recorded formal FIR Ex.PA/1 on the basis of complaint Ex.PA. P.W.10 is Muhammad Sharif SI. He took over investigation of this case on 17-11-1995 from Muhammad Sharif ASI. On 18-11-1995 he arrested Ali Hussain appellant/accused. On 19-11-1995 he recovered pistol at his pointation from near Rohi Nullah Bank near deputy-wala and took the same into possession vide memo Ex.PB. He also got recovered six live bullets alongwith pistol. He recorded the statements of PWs and prepared the site plan of recovery which is Ex.PD/1. He got the appellant/accused medically examined and sent him to judicial lockup through Magistrate. He completed the challan. Supplementary challan was also prepared by him. P.W.11 is Muhammad Sharif ASI. On 16-11-1995 while posted as ASI at P.P Kot Radha Kishen he learnt about the occurrence of instant case. He reached Kot Radha Kishan hospital alongwith the police employees/constables. Allah Ditta produced before him a written application Ex.PA for registration of the case which he sent to the Police Station through Abdul Hamid constable. Then he handed over the victim to Muhammad Aslam for her medical examination. He went to the place of occurrence and



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prepared site plan Ex.PF. He took one blood stained chadar therefrom vide recovery memo Ex.PB and sealed the same into parcel. He could not record the statement of the victim as whenever he contacted her for recording statement she started weeping. On 19-11-1995 Muhammad Sharif SI recovered pistol from the accused in his presence and he attested the recovery memo Ex.PD. Mst.Saima Bibi, who was found of enough intelligent to make statement before the Court, was also examined as court-witness. Her statement is reproduced hereinunder as made by her before the trial court:-

"Occurrence in the instant case took place about two months ago. It was Thursday and at about 2.00 p.m. I went to Nerwala Nalka for taking water. A boy (Munda) caught hold of me from my arm and put hand on my mouth and he took me inside and closed the door from inside. Then he put me on a cot inside and removed my shalwar. He then removed his own shalwar also and then lie on me on my urinal place. When he lay on me then I do not know what he did with me. The boy who committed the offence was a boy of butchers. He is present in court and at this stage witness has pointed out her finger towards the accused. I became unconscious during the occurrence. I do not know whether I was taken to the hospital or not."

Report of the Chemical Examiner Ex.PI reveals that the swabs were stained with semen. Another report of the Chemical Examiner Ex.PH on the blood and semen stained chadar reveals that it is stained with semen and blood.

4. The appellant/accused made a statement under section 342 Cr.P.C. wherein he denied the allegation and pleaded innocence.

He stated that the prosecution was wrong and false and PWs have deposed against him due to election rivalry with his father and uncle.

He also made a statement on oath under section 340(2) Cr.P.C.

in the following words:-

"The allegation by the prosecution that I committed Zina Bil Jabar with baby Saima is incorrect. Muhammad Ali PW had election rivalry with my father and my uncle (Chacha) and he involved me falsely in this case. On the day of occurrence I was not present at the place of occurrence as I was in the house of my Phuphi who lives in Kot Abdul Malik, Lahore. As I had earlier gone with my father to my Phuphi's house as my Phupha was ill and my father came back and my Phuphi asked me to live further. On 17-11-1995 my father came in Kot Abdul Malik, Lahore and told me that Muhammad Ali PW involved me falsely in the instant case. My father brought me on the evening of 17-11-1995 from Lahore to Kot Radha Kishen my house and then on 18-11-1995 produced me before police, who then kept me under custody for one day and sent me to judicial lock up on 19-11-1995. No pistol was recovered at my instance."

Alhaj Sufi Bashir Ahmad appeared as D.W.1 and made the following deposition:-

"On 10-11-1995 I learnt that my brother in law (sister's husband) living in Kot Abdul Malik, Lahore was ill. When I intended to go there Ali Hussain accused, my son, requested me to accompany him as he wanted to go to his Phuphi. I took him alongwith me. In the evening when I intended to come back, my sister phuphi of accused asked me to leave Ali Hussain in her house. Then I left him with her and came back to my house. On 16-11-1995 at about 9.00/10 A.M I learnt that Saima a relative of Malik Muhammad Ali was raped upon in the abandoned graves by some one. On the following night at about 2.00 A.M. police came to my house and Muhammad Ali was also in police vehicle and police directed me and my wife to sit in the vehicle. Police did not

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tell anything and told us that we will be informed in the police chowki. I and my wife were confined in the police post. I was given slaps and my wife was abused. Police asked me to produce Ali Hussain my son, I told police that he was in his Phuphi's house. In the morning police directed me to produce Ali Hussain and in the meanwhile my wife would remain confined. Then on 17-11-1995 which was Friday I went to my sister's house and brought back the accused from my sister's house. As I reached late in the night therefore produced my son before police on 19-11-1995. I told police that my son was innocent, but no heed was paid to my request. I and my wife then were relieved. Malik Muhammad Ali party started agitation to kill Ali Hussain accused. I then met Tariq a lawyer at Lahore and filed a writ in the High Court and prayed that my son may not be shot dead and be treated according to law and High Court was pleased to issue direction in this behalf. From 1979 upto 1991 in the elections there was contest between us and Malik Muhammad Ali PW as elections were held in 1983, 1987, 1991 and in 1991 elections Muhammad Ali PW lost, as against Malik Ajmal who was my candidate and won the election with my help, therefore Malik Muhammad Ali PW is my enemy, and wanted to insult and humiliate me. I had also filed an application in High Court for change of investigation and High Court ordered for the change of investigation. Then S.P ordered change of investigation to DSP Pattoki, but as complainant party was influential I was not given any relief. Due to election rivalry Muhammad Ali PW supplied pistol which was planted on my son and my son has been falsely involved due to said rivalry. Asghar and Allah Ditta are brother of Muhammad Ali PW. Saima is niece of Allah Ditta and PWs and Muhammad Ali are from one party. Malik Muhammad Ali is the head of the party."

Mst.Bilqees Bibi also appeared as D.W.2 and made a statement

on oath in the following words:-

"Ali Hussain accused is my nephew. My husband is suffering from asthma. On 10-11-1995 Sufi

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Bashir my brother alongwith Ali Hussain accused came to my house for seeing my ailing husband. On the same day my brother Bashir went back. Ali Hussain remained in my house. On 17-11-1995 at about 10.00/11.00 a.m. my brother came to my house and he was very much worried and told me that Malik Muhammad Ali an election rival had done some karwai against them and then took Ali Hussain with him."

5. I have heard learned counsel for the parties and have perused the record with their assistance. It transpires from the record that the case of prosecution against the appellant/accused is mainly based on the statements of P.W.2 Allah Ditta, complainant, P.W.3 Muhammad Asghar, P.W.4 Malik Muhammad Ali and C.W.1 Mst. Saima Bibi, the victim. The statements of these prosecution witnesses are fully consistent in material particulars and inspire confidence. P.W.2, P.W.3 and P.W.4 are eye witnesses who saw that the shalwars of both the victim Mst.Saima Bibi and the accused Ali Hussain accused were lying aside on cot and that Ali Hussain accused was committing zina with her. They are also consistent that the accused was armed with a pistol and on seeing them he had threatened them to keep aside and, while taking his shalwar in his hand, thereafter, he ran away from the place of occurrence. Mst.Saima Bibi, who was found by the Court having enough intelligence to make a statement, stated that the boy who committed the offence with her was a boy of butchers and was present in the Court. At that stage

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she pointed her fingers towards him. All the witnesses including Mst.Saima Bibi have been cross-examined at length but nothing fruitful to the defence has been adduced from them. Mst.Saima Bibi in particular has stood firm and her statement has not been shattered. In reply to a suggestion, she stated that her brother Aslam had asked her to identify the accused who had committed the offence with her. However, she has further explained that he did not tell her what to narrate in court and that she was not told by any one what statement was to be made before the court. The depositions made by these PWs find full corroboration from medico-legal report Ex.PC. P.W.5 Lady Dr.Perveen Arif who medically examined Mst.Saima Bibi soonafter the occurrence, inter alia, observed as under :-

"Mutiple abrasions on inner side of both thighs in upper part.

Vaginal tears are present on posterior part.

Hymen is irregularly torn.

Blood clots are present in vaginal orifice.

She was unconscious when brought to hospital."

She took three vaginal swabs from upper, middle and lower sides of vagina. The same were kept in safe custody in malkhana and were subsequently sent to the Chemical Examiner who, vide his report Ex.PI, found that the same were stained with semen. The prosecution case is further supported by the recovery

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of blood stained chadar P1 from the place of occurrence which was recovered and secured vide memo Ex.PB and was subsequently found by the Chemical Examiner, vide his report Ex.PH, to be stained with semen and blood. The pistol P2, recovered on the pointation of the accused and secured vide memo Ex.PD, further support the prosecution version. The occurrence took place in a broad day light and there was no question of mis-identification of the accused who was seen and correctly identified by the eye witnesses who also belong to the same place. No cogent reason has been brought on record by the defence why the accused was falsely implicated in the case. So far as the election rivalry is concerned that cannot be considered sufficient reason for false implication in a case of this nature. The plea of alibi as mentioned by the accused as well as the DWs does not ring true in circumstances. The promptly lodged FIR followed by prompt medical examination leaves no room for doubt whatsoever that the appellant/accused has committed the offence, as stated by the prosecution.

6. In this view of the matter I have come to the irresistible conclusion that the case of prosecution against the appellant/accused is established beyond any reasonable doubt. I have also considered the contention of learned counsel for complainant in revision petition for altering conviction of the appellant from

section 7 to section 10(3) of the said Ordinance. I have also perused the observations of the learned trial court in this respect in the impugned judgment which contains the discussion in paragraphs 13 and 14. The learned trial Judge has correctly appreciated the evidence in this regard and the learned counsel for complainant was not in a position to place reliance on any judgment where, in similar circumstances, the sentence awarded to an accused under the age of fifteen was altered to section 10(3) of the said Ordinance or enhanced accordingly. It may also be mentioned that a combined study of section 7 and section 10 of the said Ordinance reveals that the offence of zina committed by a non-adult person has been distinguished from zina committed by an adult person. Therefore the offences mentioned in these sections are treated as separate offences with separate quantum of punishments. According to the provisions of section 7 of the said Ordinance a person found guilty of zina or zina-bil-jabr, if he is not an adult, is liable to be punished with imprisonment of either description for a term which may extend to five years or with fine or with both. Such a person may also be awarded the sentence of whipping upto 30 stripes. Moreover, according to the proviso in this section, in case of an offender of above fifteen years of age, punishment of whipping shall be awarded with or without any other punishment. It means that if an

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offender is below the age of 15 years and he is awarded punishment of whipping no other punishment may be awarded to him. The language of this section read with section 2A which defines the adult as a person who has attained the age of 18 years in case of a male and 16 years in case of a female or who has attained puberty, logically leads to the conclusion that the law-maker has made distinction between the sentences of a person between the age of 15 and 18 years in case of a male and the persons who are below the age of 15 years. In the instant case P.W.8 Dr.Abdul Raof, Medical Officer, who examined the appellant/accused on 19-11-1995, stated his age about 14 years. In cross-examination he admitted that he did not take the sample of the semen of the accused for puberty test/grouping or for chemical analysis. He further admitted that as per appearance the accused was of a weak built and was about four feet in height. During the course of hearing the learned counsel for the appellant as well as learned counsel for the petitioner made different submissions regarding the age of the appellant/accused, as reflected from his general appearance. Therefore in order to reach at correct conclusion about the demeanour and physical appearance, the appellant/accused who was confined in District Jail Kasur was asked to be produced in custody. Accordingly he was produced in this Court and it was confirmed

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that the observations made by the Medical Officer, Dr. Abdul Raof P.W.8, were correct. Thus the precise proof required for adulthood is not available on record and the appellant/accused can be given the benefit of doubt in this respect, inspite of the Chemical Examiner's positive report. Moreover it is also worth-mentioning that the sentence prescribed for zina bil jabr liable to taazir by an adult person, under section 10(3) of the said Ordinance is extendible from minimum sentence of four years R.I. to 25 years. In the instant case the appellant/accused has been convicted under section 7 of the said Ordinance and he has been awarded the maximum sentence of five years R.I. provided therein. Therefore I am convinced that the sentence awarded to the appellant/accused is sufficient, in circumstances of the case, to meet the ends of justice and as such I do not feel any necessity to interfere therein.

7. Consequently, for the reasons stated above I maintain conviction and sentences of the appellant Ali Hussain son of Sufi Bashir Ahmad awarded on 12-3-1996 by the learned Additional Sessions Judge, Kasur and dismiss his appeal. I also dismiss Criminal Revision No.29/L of 1996 for enhancement of sentence. The benefit of section 382-B extended by the learned trial court shall remain intact. The appellant is present in custody.

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He shall be sent back to jail to serve out the remaining sentences.



(Dr.Fida Muhammad Khan)
Judge

Lahore, the
6th June, 1997
Iqbal

Fit for reporting.



(Dr.Fida Muhammad Khan)
Judge