

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SHAHZADO SHAIKH

CRIMINAL APPEAL NO. 82/I OF 2010

1.Mohammad Nawaz son of Noor Mohammad ... Appellants
Caste Awan r/o Mohallah Sadiqabad,
Fatehjang District Attock
2.Mst.Sufraj w/o Bakht Kamal r/o Mohallah
Sadiqabad,Fatehjang,District Attock

Versus

The State ... Respondent

Counsel for the appellant ... Malik Tariq Mehmood,
Advocate

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

✓ FIR No. Date and ... No.218 dated 31.08.2005,
Police Station ... P.S. Fatehjang District
Attock

Date of trial Court ... 15.07.2010

Date of Institution ... 29.07.2010

Date of hearing ... 31.03.2011

Date of decision ... 31.03.2011

JUDGMENT

SHAHZADO SHAIKH, J :- This appeal jointly filed by Muhammad Nawaz son of Noor Muhammad and Mst. Sufraj wife of Bakht Kamal, both residents of Mohallah Sadiqabad, Fatehjang is directed against the judgment dated 15.7.2010 passed by learned Additional Sessions Judge, Attock whereby he convicted both the appellants/accused under section 337-J/34 PPC and under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, hereinafter referred to as the said Ordinance, and sentenced both of them as under:-

- | | | | |
|-----|--|---|---|
| i) | U/s 337-J/34 PPC | : | Five years R.I. each. |
| ii) | U/s 10(2) of the Offence:
of Zina (Enforcement of
Hudood) Ordinance,1979 | | Five years R.I. each with a fine
of Rs.20,000/- each or in
default of payment of fine,
three months S.I. each. |

Both the sentences shall run concurrently. The benefit of section 382-B Cr.P.C has been extended to them.

2. Brief facts of the case as alleged by the prosecution are that on 31.08.2005 Bakht Kamal, complainant moved an application whereby he stated that he was married to Mst. Sufraj 12/13 years back and out of this wedlock five children were born. Muhammad Nawaz, accused had visiting

terms with him and used to visit his house. On which his neighbours suspected the character of his wife. He forbade the accused from visiting his house and also reprimanded his wife. He was an employee of OGDC, on 07.07.2005 when he came back from the office, his wife gave him intoxicated material mixed in food, due to which he became unconscious and his brother with his other relatives took him to the hospital. His brother Abdul Aziz submitted an application to the Police in this respect and Police got him medically examined. After being discharged from the hospital, he started search for his wife and for the sake of his honour he did not want to take legal action. During search, on 12.07.2005 Muhammad Abid son of Muhammad Riaz, and Abdul Waheed son of Muhammad Aksar told him that they had seen her wife going towards Fatehjang on 08.07.2005 at 12.30 in the night in the company of Muhammad Nawaz son of Noor Muhammad. To save the family honour he tried for return of his wife. Sultan Muhammad, paternal uncle of accused promised him to return of his wife on the condition not to take any legal action against his nephew but later he flatly refused to get his wife returned. He alleged that Muhammad Nawaz, accused had

abducted his wife on the instigation of his uncle Sultan Muhammad for committing zina. He requested for legal action against the accused.

3. Investigation ensued as a consequence of registration of crime report No. 218 dated 31.8.2005. Muhammad Bashir, SI, PW-13 was Investigation Officer of this case. He deposed that on 8.7.2005 Abdul Aziz, PW-9 came to Police Station Fatehjang alongwith his brother Bakht Kamal who was semi-conscious and got his statement recorded; he lodged report and got Bakht Kamal medically examined from THQ hospital Fatehjang , after medical examination the Doctor handed over to him a sealed phial containing semi-solid food and blood for detection of poison, if any, which he took into possession vide memo Ex.P and on the same day he handed over the same to Sadaqat Moharrar for its safe custody; at that time Bakht Karmal was not interested for any legal proceedings, on 31.8.2005 he was present alongwith Police officials where Bakht Kamal came and got his statement recorded upon which the case was registered, he recorded statement of PWs under section 161 Cr.P.C. at the spot, on 24.9.2008 on cancellation of bail from the Court of learned Additional Sessions Judge,Attcok he arrested accused

Sultan, Nawaz and Mst. Sufraj, he got Mst. Sufraj and Nawaz medically examined from THQ hospital Fatehjang, after medical examination of Sufraj lady Doctor handed over to him a sealed parcel containing sample which he deposited with Moharrar for its safe custody and for onward transmission to the relevant officer, after due investigation of the case he found the accused guilty and challan against them under section 173 Cr.P.C was submitted before the Court of competent jurisdiction.

4. On 12.9.2006 the learned trial Court framed the charge against the accused Muhammad Nawaz son of Noor Muhammad, Mst.Safraj wife of Bakht Kamal and Sultan Muhammad son of Mian Khan under section 337-J/34 of the Pakistan Penal Code and under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to which they pleaded not guilty and claimed trial.

5. Co-accused Sultan Muhammad was acquitted by trial Court with finding that there was no direct or circumstantial evidence available on the

record to connect Sultan Muhammad with the commission of alleged offence. Therefore, he was acquitted from the charge.

6. The prosecution in order to prove its case examined thirteen witnesses

the gist of the prosecution evidence is as follows:-

- i. PW.1 is Lady Dr. Shabana Afzal, WMO, Public Health Nursing School, Attock who medically examined Mst. Sufraj on 24.9.2005 and observed as under:-

“She was a young lady of average height and built, well oriented in time and space. She was having five children and last born child was 2 ½ years. Her pulse was 70 times per minute, her blood pressure was 110/70 mmhg and her temperature was 98F. No mark of violence was seen on her chest, abdomen, and inner side of thigh. Her last menstrual period was eight months back.

On pelvic examination uterus was retroverted 12-weeks size, os was closed and her fornix were clear, three months pregnancy? Three vulva vaginal swabs were taken by me in a bottle, sealed, and handed over to the police for chemical detection of semen by Chemical Examiner, Rawalpindi Division, Rawalpindi.

In my opinion she has been used for sexual intercourse. Final result was referred for report of Chemical Examiner. Her abdomino pelvic ultrasonography was advised from Rawalpindi General Hospital for confirmation and well being of pregnancy. Ex.PA is correct carbon copy of Medico-Legal Report. As per report No.CE-52-7184, dated 27.9.2005 of the Chemical Examiner, the sent three vulva vaginal swabs were stained with semen. Semen identification test reveals sperm positive. In my opinion which is confirmed by this Chemical Examiner's report she has been used recently for sexual intercourse”.

- ii. PW.2 is Muhammad Amir, Foot-Constable who on 8.7.2005 produced Bakht Kamal in semi-unconscious condition before Medical Officer, THQ hospital, Fatehjang who after medical examination handed over to him three sealed phials alongwith sealed envelope which he submitted before Muhammad Bashir,

SI who took the same into possession vide memo Ex.PB and he attested the same.

- iii. PW.3 is Muhammad Masood, FC who took a sealed envelope alongwith sealed parcel to the office of Chemical Examiner and deposited there intact which is handed over to him by the Sadaqat Ali, Muharrar on 27.9.2005.
- iv. PW.4 is Dr. Khalid Latif, Medical Officer who medically examined Bakht Kamal, complainant, took sample of blood and urine, and sent for chemical examination. Report of Chemical Examiner reveals that "Tranquillizer belonging to Denzodiaze pine group is detected in the above articles, however, quantitative estimation was not possible." He issued MLR (Ex.PC).
- v. PW-5 is Muhammad Akram, S.I. who received complaint (Ex.PD) drafted by Muhammad Bashir, SI through Muhammad Masood, Constable and on the basis of which he recorded FIR (Ex.PD/1).
- vi. PW-6 is Muhammad Miskin, ASI. He brought Mst. Sufraj to the hospital for medical examination and produced one sealed envelope before Muhammad Bashir, SI who took it into possession vide memo Ex.PE, handed over to him by the doctor on 24.9.2005.
- vii. PW-7 Abdul Majeed. He took three sealed phials and a sealed envelope to the office of Chemical Examiner, handed over to him by the Muharrar on 10.7.2005 and he deposited the same intact in this office on 11.7.2005.
- viii. PW-8 is Sadaqat Ali, Head-Constable who kept three-sealed phial in malkhana in safe custody on 8.7.2005 which was handed over to him by Bashir Ahmad, SI and on 10.8.2005 he handed over the same to Abdul Majeed, Constable for onward transmission to the office of Chemical Examiner, Lahore. On 24.9.2005 Muhammad Bashir, SI handed over to him a sealed parcel of envelope who kept the same in safe custody and on 27.09.2005 he handed over the same to Muhammad Masood, FC for onward transmission to the office of Chemical Examiner, Rawalpindi intact.
- ix. PW-9 is Abdul Aziz, brother of Bakht Kamal victim who deposed that Bakht Kamal is his real brother who was married with Mst.Sufraj Bibi accused. Out of this wedlock they have five children who are alive and were living in Mohallah Sadiqabad. One week before the occurrence there was matrimonial dispute between the spouses. On the night between

7/8.7.2005 Mst. Sufraj Bibi mixed some intoxicant in the meal of Bakht Kamal and his children and in the mid night while her husband and children were unconscious she left the home. While leaving the house she took away gold ornaments valuing Rs.70,000/- and clothes valuing Rs.10,000/-. While Bakht Kamal, his brother was unconscious he moved application (Ex.PF) which bear his signature.

- x. P.W-10 is Bakht Kamal, the complainant of this case, who stated the same facts as he narrated in his complaint Ex.PB.
- xi. PW-11 is Abdul Waheed, who is an eye witness and supported the case of prosecution.
- xii PW-12 Muhamamd Riaz is brother of victim Bakht Kamal who deposed that "On 15.7.2005 Sultan Muhammad son of Mian Khan co-accused came to him, (this PW) and said that his nephew Muhammad Nawaz had committed mistake and he wanted that Bakht Kamal forgave him and did not take any legal action against Muhammad Nawaz, accused. He further promised that he would get Mst. Sufraj returned to his house from Muhammad Nawaz, accused."
- xiii. PW-13 is Bashir Ahmad, SI. He is Investigating Officer, and his role has already been mentioned in para 3 of this judgment.

7. After closing prosecution evidence, statements of accused were recorded under section 342 of the Code of Criminal Procedure. The accused neither opted to make their statements recorded under section 340(2) of the Code of Criminal Procedure nor produced any witness in their defence.

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

9. Learned counsel for the appellant contended that:-

- i. the relation between husband and wife was restrained. The appellant Mst.Sufraj had filed a suit for dissolution of marriage by way of Khula, through family suit No.80/I of 2005 instituted on 11.07.2005, which was decided on 5.4.2007, and was decreed in favour of appellant. Whereas the FIR was lodged after institution of this suit, on 31.8.2005 that is after institution of the suit for dissolution of marriage through Khula by the appellant, Mst.Sufraj.
- ii. the appellant in his statement under section 342 Cr.P.C, while answering question No.3, narrated true story behind the this case, is reproduced as under :-

“that I was married with Bakht Kamal in 1993. We have fine children. The attitude of complainant Bakht Kamal towards me remained cruel from the very first day but I kept on compromising due to my family honour. On 5.7.2005 complainant turned me out of his house in three wearing clothes after giving beating and on 11.7.2005. I filed suit for dissolution of marriage which was decreed and the appeal against which also met the same fate, due to which Bakht Kamal concocted a false case against me after two months. I moved application for pre-arrest bail upon which the complainant came to me and offered me to withdraw suit for dissolution of marriage and reside with me and then he would withdraw this case, so I 22.9.2005 I started to live with the complainant but on 24.9.2005 the complainant appeared before the Court and opposed my bail application whereupon my bail was cancelled. I remained three days with my husband in his home. I have not given any intoxication to the complainant. I am living with my mother. The allegations against me are totally false..
- iii. Medico- Legal Report does not support the prosecution case, the accused/appellant lady is a married women.
- iv. Learned counsel for the appellant argued that appellant Mst.Sufraj before her arrest was living with the competent from 22.9.2005 to 24.9.2005.
- v. in absence of DNA test/grouping of semen the MLR as well as report of Chemical Examiner has lost its evidentiary value.
- vi. there is delay in lodging the FIR, having been lodged after consultation and deliberation.
- Vii. Mst.Sufraj gave address of her parents on the suit of dissolution of marriage and still she is living with her parents in their house.

10. Learned counsel for the State on the other hand supported the impugned judgment with the following contention:

- i. That Mst.Sufraj, accused remained with accused Muhammad Nawaz from 7.7.2005 to 29.7.2005 without any legal relation and she appeared before Court on bail and later, her bail was rejected.
- ii. That the prosecution witnesses namely Muhammad Abid and Abdul Waheed had seen Mst.Sufraj accused in the company of Muhammad Nawaz accused on 8.7.2005 at about 12.30 night going towards Fatehjang.
- iii. That he has no objection if the parties entered into compromise to extent of section 337-J/34 of the Pakistan Penal Code.

11. I have heard learned counsel for the appellant and learned State counsel at length. The entire evidence available on record has been carefully and minutely perused and considered including the impugned judgment in the light of the contentions raised by the learned counsel for the parties.

12. Evidence for each allegation of the husband in the situation of extremely strained relationship, where the wife instituted the suit for dissolution for marriage for cruelty of the husband, by way of khula, and had to live away, even leaving grown up daughters and other small children, and the husband got her arrested and opposed her bail, has to be very carefully examined, to isolate any iota of reasonable doubt. There is colossal delay in

lodging of the FIR. The alleged occurrence took place on 7.7.2005 whereas FIR were lodged in this case on 31.8.2005 after delay of about one month and 23 days, which has not been properly explained by the prosecution. It was a heavy duty upon prosecution to explain the same. Due to such failure, the case of prosecution became doubtful. The complainant, while searching for the missing wife, he neither contacted his in-laws, i.e., anyone from parents of his wife, nor anyone else from any relation of either side. He did not report true facts of the case including missing of his wife when allegedly a report Ex.PF regarding his intoxication was lodged by his brother Abdul Aziz PW-9 and he was taken to hospital for medical examination. Even after coming to know that the appellant/accused was last seen with accused Muhammad Nawaz, he did not associate any notable or elder from either side while approaching paternal uncle of accused, Sultan Muhammad, who was also then involved as co-accused by the complainant.

13. The complainant had not produced any independent witness to prove the case.

14. Mst.Sufraj was referred to the lady doctor for medical examination after nearly three months of alleged occurrence. After receiving positive report of chemical examiner the lady doctor opined that the appellant Mst. Sufraj had been used recently for sexual intercourse. The appellant, Sufraj Bibi was a married lady and it is clearly stated by appellant in his statement under section 342 Cr.P.C. that she was living with her husband, complainant Bakht Kamal, during that specific period, from 22.9.2005 to 24.9.2005 i.e., at the time of her arrest cancellation of her bail. As such report of Chemical Examiner as well as medico-legal report lose evidentiary value.

✓ 15. It is worth noting that Mst. Sufraj was not recovered from the possession of Muhammad Nawaz appellant but she was living with her parents and the prosecution implicated the co-accused Nawaz that he had taken Mst. Sufraj for the purpose of sexual intercourse in spite of the fact that she had filed suit for dissolution of marriage against the complainant before the lodging of the FIR by the complainant. Relations between complaint and Mst.Sufraj were strained, she left the house of complainant,

she filed the suit of dissolution of marriage by way of Khula, against him, which was decreed in favour of Mst. Sufraj. Attested copy of order of Family Court dated 5.4.2007 is on the record. In her said suit she had taken the plea that during the period of marriage, the conduct of the defendant Bakht Kamal and his parents towards the plaintiff was very cruel, he often used to beat her. As such her life was in danger due to cruel hands of her husband.

16. Learned trial Court in awarding conviction and sentence to the appellant, has relied upon medical evidence and report of Chemical Examiner while holding the appellant guilty of zina, without any direct or indirect evidence or circumstantial or ocular testimony to establish that such crime had actually been committed by the appellant. In this regard the lady doctor had taken the vaginal swabs for Chemical analysis but semen grouping was not done which was necessary in the peculiar circumstances of the case as the accused lady was already married.

17. The next piece of evidence on which learned trial Court has relied upon is statement of PW-12 Riaz , brother of complainant. He said that on

15.7.2005 Sultan Muhammad uncle of Nawaz appellant came to him (PW-12) and said that his nephew Muhammad Nawaz appellant committed mistake and if complainant Bakht Kamal forgave his nephew and did not take any legal action against him he would get Mst.Sufraj returned to his house from Muhammad Nawaz appellant, but this witness did not disclose as to what was the response or reaction of the complainant to such an offer or suggestion. This witness admitted in his cross-examination that he did not even disclose this fact before his deposition and also did not explain as to why he did not disclose it. I am of the view that no reliance can be placed on such a plea in evidence.

18. So far the prosecution case that appellant Mst. Sufraj in collusion with the appellant Nawaz administered intoxicant/poison to the complainant Bakht Kamal as a result of which the complainant became unconscious, is concerned, no fact in proof has been brought on record. As per report of Chemical Examiner, tranquilizer was detected but no comment on quantity was possible. In this regard Dr. Khalid Latif Medical Officer PW-4, who conducted medical examination of complainant Bakht Kamal, opined that



the complainant was oriented in time, place and person at the time of examination, his blood pressure was 120/80 mmhg, pulse was 65 p.m., and pupils were normal. He also admitted in his cross-examination that patient was conscious when he was produced before him for medical examination. Furthermore, there is no evidence of washing stomach of the victim, if any poison or intoxicant was given to him. Although in the report Exh.PF lodged by the real brother of the complainant namely Abdul Aziz (PW-9) in this regard, it was claimed that intoxicant material was administered, both, to the complainant and the children also, so that the appellant/accused left the house when they (the complainant and the children, both) were unconscious, but the children were neither taken for medical examination nor for any treatment. PW-10 Bakht Kamal the complainant clearly stated in his cross-examination that none of his children were medically examined; his children had not taken meal with him; none of his children was unconscious. On the other hand PW-9 Abdul Aziz categorically stated in his deposition that Bakht Kamal complainant and his children were unconscious while Mst. Sufraj Bibi left the house. These contradictions in the statements of

both the star witnesses create serious doubts in the story of prosecution. In fact under circumstance no such incident took place and story as mentioned in the FIR is concocted. In view of this, there is no piece of reliable evidence or proof if any intoxicant material was administered by appellant to the complainant. The complainant said that he had returned home after all days' work, in the evening. The accused could have easily run away during the day when the complainant was not there. There was no need to stage all this drama of intoxication. As such it has no evidentiary value which can be used against the appellant for maintaining the conviction.

19. In view of above discussion I am of the view that there are many doubts, discrepancies, and contradiction in the prosecution case. For entitlement to benefit of doubt to the appellant, it is not necessary that there should be many circumstances creating doubt. Even if a simple circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he or she becomes entitled to such benefit not as a matter of grace and concession but a matter of right. Therefore, this appeal is allowed.

Conviction and sentence awarded by Additional Sessions Judge, Attock at

Fathjang vide his judgment dated 15.7.2010 are set aside. The appellants Muhammad Nawaz son of Noor Muhammad and Mst. Sufraj wife of Bakht Kamal are acquitted from both the charges, i.e. under section 337-J/34 of the Pakistan Penal Code and under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 by giving them benefit of doubt. The appellants are on bail, their bail bonds are discharged. These are the reasons of my short order dated 31.3.2011.

Sd/-

JUSTICE SHAHZADO SHAIKH


Islamabad, the
31st Mach, 2011
Abdul Majeed

Fit for reporting.

Sd/-

JUSTICE SHAHZADO SHAIKH
