

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTISCE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 155/I OF 2007

1. Muhammad Aslam son of Abdul Ghafoor.
2. Fayyaz son of Allah Ditta.
3. Fakhar son of Mumtaz Hussain.
All residents of Chak No.14/8-R,
Tehsil and district Khanewal.

... Appellants

Versus

The State

.. Respondent

Counsel for appellants

Maher Sardar Ahmed Abid,
Advocate

Counsel for State

...

Miss. Rukhsana Malik,
Additional Prosecutor General

FIR No. Date &
Police Station

...

105/2005, Dated 04.05.2005
Kacha Khuh, Khanewal

Date of judgment of
trial court

...

20.4.2007

Dates of Institution

...

13.7.2007

Date of hearing of Appeal

...

05.11.2008

Date of decision by
Federal Shariat Court

...

05.11.2008

JUDGMENT

SYED AFZAL HAIDER, JUDGE:- Appellants Muhammad

Aslam, Fiaz and Fakhar have challenged the judgment dated 20.4.2007 passed by the learned Additional Sessions Judge, Khanewal whereby all the three appellants were convicted under section 18 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to three years rigorous imprisonment each. They were given the benefit of section 382-B of the Code of Criminal Procedure.

2. Brief facts of the case have been narrated by Mst. Mumtaz Bibi in her complaint Ex.PA which became the basis of registration of Crime Report No.105, Ex.PA/1 dated 4.5.2005 Police Station Katcha Khuh. She stated that she was un-married and also an ailing person. On 30-04-2005 when all the family members had gone out of the house for cutting wheat crop she was all alone in the house. At about 10/11 a.m. Fayyaz accused came and told her that his sister, Mst. Shahnaz wife of Aslam appellant, who was not feeling well, had asked her to come. The complainant thereafter accompanied Fayyaz. On reaching the house of Muhammad Aslam, Fayyaz appellant, who was armed with hatchet, stopped at the entrance whereas

complainant entered the house. Muhammad Aslam appellant, armed with pistol, alongwith Fakhar appellant were standing there. Fakhar accused raised a 'lalkara' that she should not be spared today. He caught hold of the complainant from her arms and forcibly took her in the cattle shed where Muhammad Aslam appellant threw her on the cot, broke the string of her shalwar and attempted to commit zina-bil-jabr with her. The complainant resisted due to which her clothes were torn. She then raised hue and cry which attracted Muhammad Waryam, Sabir PWs alongwith other persons of the locality whereupon the appellants fled away from the spot. The motive behind the occurrence, as claimed by the complainant herself was, that appellants had a suspicion that complainant's brother Zulfiqar had illicit relations with the sister of Fakhar appellant and this prompted the appellants to send for the complainant on one or other pretext and attempt rape upon her. The accused thereafter sought indulgence but the complainant refused to patch up.

3. The oral statement of complainant P.W.1 was reduced to writing in the form of a complaint Ex. P.A. and sent to Police Station for formal registration of FIR. Thereafter, the investigation of the case was

undertaken by Muhammad Ameen, S.I. P.W.7. He visited the place of occurrence, prepared rough site plan and also recorded statements of witnesses under section 161 of the Code of Criminal Procedure. On 07-05-2005 he received robkar regarding appearance in pre-arrest bail application of the accused. On 13-06-2005, after rejection of pre-arrest bail of the appellant, he arrested them and got all of them medically examined on 10.04.2005 to determine their potency. After completion of investigation he sent up the report under section 173 of the Code of Criminal Procedure along with the accused on 21-06-2005 to face trial.

4. The learned trial court on receipt of the said report charged all the accused on 28.07.2005 under section 18 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and instead claimed trial.

5. The prosecution in order to prove its case produced seven witnesses. Summary of the deposition of each witness is being reproduced below:

i/ P.W.1 Mst. Mumtaz Bibi, the complainant supported the version stated by her before the police. She also deposed that the Shalwar worn at

the time of incident was produced before the Investigating Officer on 16.05.2005.

ii/ P.W.2 Sabir, a close relation of complainant supported her statement given in the court. He is an eye-witness of the occurrence. He admitted that the recovery witness Abid is also related to them. However he identified the house of Fayyaz appellant as the place of occurrence whereas according to the complainant the occurrence took place in the house of Aslam appellant.

He conceded that none from the neighbourhood heard hue and cry of the complainant but he, as well as another cousin of the complainant Waryam P.W.3, heard the noise whereupon they responded and reached the place of occurrence. He also conceded that a Girls High School was situated towards " the north of the outer gate of the accused."

iii/ P.W.3 Waryam, uncle of the complainant also supported her. He stated that he alongwith Sabir P.W.2 reached the place of occurrence after hearing hue and cry raised by the complainant. He conceded that no one from the neighbourhood was attracted and none of them was cited as a witness. He also conceded like P.W.1 and P.W.2, that consultation among family members took place before registration of crime report with the

police. He stated that hue and cry was heard by him from a distance of one acre.

iv/ P.W.4 Dr. Umar Farooq examined the appellants to test their potency.

He found them sexually potent.

v/ P.W.5 Abid Hussain, another paternal uncle of the complainant, is the marginal witness of Ex.P.B, a recovery memo, by virtue of which the clothes

of complainant were taken into possession by the Investigating Officer. The

other attesting witness was Zulfiqar, brother of complainant, who according

to defence might be termed as the bone of contention as he was the person

complained against for having attempting rape upon the sister of appellant

Fakhar. This witness was however dropped by the prosecution.

vi/ P.W.6 Muhammad Zubair formally registered the complaint Ex.P.A.

sent by Muhammad Amin S.I. P.w.7.

vii/ P.W.7 Muhammad Amin is the Investigating Officer. He completed

the investigation after taking various necessary steps. He conceded that he

neither recorded the statement of any neighbour nor mentioned the existence

of neighbouring houses in site plan Ex.PF. He also conceded having

received a complaint on behalf of Mst. Zarina Bibi, sister of Fakhar

appellant, alleging that Zulfiqar, brother of complainant, P.W.1 had attempted rape upon her. No case was registered by him because according to him "the accused party could not prove the said allegation."

6. After recording the evidence of witnesses for the prosecution the learned trial court recorded statements of the accused under section 342 of the Code of Criminal Procedure wherein the three appellants took up the same plea that the brother of the complainant, namely Zulfiqar, had attempted to commit zina-bil-jabr with the sister of Fakhar accused. The matter was brought to the notice of local police. The complainant party, to save themselves from the consequences of that serious complaint instead got this false case registered against them as a counter measure, in connivance with Muhammad Ameen, S.I. The accused did not opt to appear under section 340(2) of the Code of Criminal Procedure. However they produced Muhammad Ayub in their defence, who as D.W.1 stated that he offered to take oath on Holy Quran regarding the innocence of the accused but the complainant party demanded money and on refusal of their demand they got this case registered against the accused while they were innocent. D.W.2 Allah Ditta in his own way affirmed the innocence of the accused.

The learned trial court in the end found the appellants guilty under section 18 of the said Ordinance and convicted and sentenced them as mentioned in the opening paragraph of the Judgment. Hence this appeal.

7. I have heard the learned counsel for the appellants as well as the learned Additional Advocate General for the State. The record has been perused and the evidence of witnesses has also been read with the assistance of learned counsel for the parties.

8. The first objection raised on behalf of the appellants is the element of delay in lodging the FIR. It was also stated that no plausible reason was given for delayed reporting. The second point raised by the learned counsel for defence was that the prosecution witnesses were not unanimous as regards the place of occurrence and they were also uncertain about the role played by Aslam and Fayyaz appellants. The learned counsel next contended that the evidence on record has not been properly appreciated by the learned trial court. According to him it was not a case of attempt to commit zina. The next point urged by the learned counsel was that the absence of medical report militates against the claim of the prosecutrix that she received injuries during the attempt to commit zina-bil-

jabr upon her. Lastly it was contended that the clothes of the prosecutrix were produced almost 16 days after the incident and 12 days after the registration of the crime report. The recovery memo was attested by her brother and paternal uncle.

9. Learned Additional Advocate General for the State supported the impugned judgment and while adverting to the points raised by the learned counsel for the appellants, stated that the delay of five days has been amply explained because during this period the accused were making attempts to seek pardon from the complainant. As regards the doubt about the place of occurrence and the role attributed by witnesses to the two appellants the learned counsel stated that the facts have been clearly stated by the complainant in her deposition which should be accepted. The learned counsel also averred that the evidence of the witnesses for the prosecution and for the defence has been duly considered and appreciated by the learned trial Court. In so far as the objection about the absence of medical examination of the prosecutrix it was urged that the medical examination was not called for as no sexual act had not been performed. The case of the prosecution is not rape but attempt to commit the offence of rap and lastly it

was submitted that delay in producing the clothes of the prosecutrix was not material because the prosecution had not charged the accused with the actual commission of zina.

10. I have considered the arguments advanced at the bar. In so far as the place of occurrence and the role attributed to the appellants is concerned even the delayed crime report disclosed that Fayyaz appellant had approached P.W.1 Mst. Mumtaz Bibi who had asked her to accompany him as his sister Mst. Shahnaz Bibi wife of Muhammad Aslam appellant was ailing. She stated that when she reached the house of Muhammad Aslam then Fayyaz appellant who was armed with a kulharri stood at the entrance whereas Aslam armed with pistol and Fakhar appellants were already present in the house. Fakhar appellant gave a lalkara and both of them caught hold of the complainant by her arm and took her to the cattle dhari where Muhammad Aslam threw her on the charpai and after cutting the string of her shalwar made attempt for zina. The complainant P.W.1 endorsed the version narrated in the FIR in her deposition before the learned trial court. P.W.2, Sabir, a close relation of the complainant, stated that he alongwith Waryam, uncle of complainant heard noise emanating from the

house of Fayyaz appellant where-after they went to the house of Fayyaz appellant where they found him outside the house armed with a hatchet. P.W.3 Muhammad Waryam, the uncle of the complainant stated that he and Sabir P.W. on hearing hue and cry rushed to the house of Aslam accused and. "Both the accused Fakhar and Aslam then ran away". Ex.PF is the site plan, which show that the place of attempted crime was a room in the house of Muhammad Aslam appellant. There is a public street beyond the western wall of this room. The complainant herself and P.W.2 do not agree as to which house was the place of crime.

11. I also find that the delay of five days has not been satisfactorily explained by the prosecution. All the three witnesses for the prosecution admit consultation before reporting the matter to the police. It was also admitted that the accused party did not approach the complainant for tendering apology or restraining her or the complainant party from reporting the matter to the police though the crime report discloses the other way round. The other point to be kept in view, as regards the element of delay in lodging the FIR and consultation before making the crime report, is the admitted fact that an application was moved before the police officer by

Zarina Bibi sister of Fakhar appellant requesting him to register criminal case against Zulfiqar, brother of complainant, P.W.1, for making an attempt to commit zina-bil-jabr with her. The Investigating Officer admitted that he had received an application but he did not lodge a report because the allegation, according to him was not proved by the accused party. Unfortunately even the learned trial court, while concluding the judgment and returning a verdict of guilt against the appellants, also adopted the same argument. It was evidently forgotten that the duty of the police officer was not to investigate the case and form an opinion after sifting evidence before registering a crime report. Section 154 of the Code of Criminal Procedure ordains that i/ every information relating to the commission of a cognizable offence, ii/ if given to an officer in charge of a police station, shall be reduced to writing by him or under his direction, iii/ and be read over to the informant, iv/ and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, v/ and the substance thereof shall be entered in a book to be kept by such officer in such form as the Provincial Government may prescribe in this behalf.

12. Admittedly an application was moved by Mst. Zarina Bibi against Zulfiqar, brother of complainant P.W.1 disclosing commission of a cognizable offence. The Investigating Officer was duty bound to follow what the law prescribes for such a situation. The police officer is not allowed to assume the role of a trial court. Sifting of evidence or arriving at a conclusion on the complaint of a citizen is the sole preserve of the court competent to decide the matter under law after a report has been sent to it under section 173 of the Code of Criminal Procedure. Under the circumstances the appellants are justified in claiming the complaint of the sister of the appellant Fakhar against Zulfiqar, the brother of the complainant, was set aside and in the meantime a counter version was maneuvered which became the basis of crime report No.105/2005 and consequently criminal proceedings were initiated against the appellants who were the real aggrieved persons. It is they who had not only been denied justice but were arraigned on the charge of attempted rape. This aspect has not attracted the attention of learned trial Court.

13. I have also noticed that all the witnesses admitted that quite a few houses, including a girls high school, adjoins the place of occurrence but

it is very strange that during day time, at 11.00 a.m, the hue and cries of P.W.1 were heard only by her two near relatives i.e. P.W.2 and P.W.3 who were at some distance. They reached at the place of occurrence but no one else heard it. How did they discern that the cries were being emitted by their niece. It was also admitted in cross-examination that no one from the neighbourhood appeared as a witness. I also find that Zulfiqar, who was originally mentioned in the calendar of witnesses, was given up by the prosecution probably because he would have been questioned as regards the complaint of the sister of Fakhar appellant about his attempt to commit zina-bil-jabr with her. Such a question would expose lapses on the part of police who failed to register a case against him.

14. It is also worth noticing that P.W.7 Muhammad Ameen, S.I. who was Investigating Officer of this case, admitted that the place of occurrence in fact fell within the jurisdiction of Police Post Aaqil, Police Station Katcha Khuh whose Incharge was an ASI at the time of alleged occurrence. It is strange that no report was lodged there during this period by complainant party but P.W.7 remained in charge of the case and it was only after five days of the alleged occurrence that he received an oral complaint

of P.W.1 and reduced into writing outside the police station and forwarded the same for formal registration as an F.I.R.

15. After going through the cross-examination of these witnesses, I am not convinced about the veracity of the statements made by the prosecution party. The deposition of the witnesses do not inspire confidence. Serious doubts have crept in the prosecution story which however have not been cleared at all. How come that not a single neighbour was examined by the Investigating Officer. The officer does not mention the existence of a ¹⁵ Girl High School in the neighbourhood. No one heard the cries of P.W.1 around the house of appellant Aslam but close relatives of the complainant responded to the cries from a distance of one acre. The witnesses are not certain from which house the noise came nor they state that they identified the shriek of victim who happened to be their niece. Why was the complaint of Mst. Zarina Bibi refused registration and why was Zulfiqar given up? All these and more obstinate questions assail the mind and no satisfactory reply is available on record.

16. In this case on the one hand we have prosecution version which discloses an attempt on the part of appellants to commit rape upon Mst.

Mumtaz Bibi but on the other hand is the defence version to the effect that Zulfiqar, brother of complainant Mst. Mumtaz Bibi attempted rape on Mst. Zarina Bibi sister of Fakhar appellant. An application was also handed over to the police officer by the victim but a counter case was managed by complainant group with the active assistance of the police officer. The appellants not only adopted a consistent defence but succeeded in creating doubts about the acceptability of prosecution story. In criminal trials the defence consists of three steps: Firstly we have to see the trend of cross-examination; secondly we examine the statement of the accused and find whether it is in line with the questions put to the witnesses in their cross-examination and third element of defence consists of witnesses produced on behalf of the accused or his statement under section 340 of the Code of Criminal Procedure or in the alternative the line of arguments adopted by the accused before the trial judge. The appellants not only succeeded in establishing that there were many residential houses around the house of the appellant where the offence was alleged to have been committed and no one heard the cries of PW.1 but the appellants successfully established that an application was given by Mst. Zarina Bibi to the police officer who refused

to pay attention to her supplication. It was also suggested that to cover up the said crime a counter version was cooked up. This defence is visible at all the three stages though it has not been appreciated at the conclusion of trial.

17. In order to hold a person guilty of an offence, reliable evidence must be forthcoming in a straight manner. The liberty of a citizen cannot be jeopardized even for a day without lawful reason. The reputation, right of sustenance and other valuable rights can be suspended only when an accused person has been found guilty on the basis of unimpeachable evidence.

Reasonable doubts destroy the very acceptability of prosecution version. It is because of this that the benefit of reasonable doubt is always granted, as a matter of right, to the accused and not the prosecution.

18. Under the circumstances it is not possible to sustain the conviction and sentence awarded by the learned trial court in Hudood Case No.12H/2005 and Hudood Trial No.4/2005 vide judgment dated 20-04-2007 through which the appellants were convicted and sentenced in relation to F.I.R. 105/2005 as mentioned in the opening paragraph of this Judgment.

19. Resultantly, I set aside the aforesaid conviction and sentence recorded by the learned trial court and acquit the appellants by extending the

benefit of doubt. The appellants are present in Court today on bail. The sureties of the appellants are relieved of their obligation qua the appellants.

The appellants are free to move about.

20. The appeal registered as Criminal Appeal No.155/I of 2007 is hereby accepted.

Syaidar

JUSTICE SYED AFZAL HAIDER

Islamabad the 5th November, 2008
UMAR DRAZ & MUJEEB/

Syaidar

Fit for Reporting