

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

JUSTICE MUHAMMAD ZAFAR YASIN
JUSTICE SYED AFZAL HAIDER

Criminal Appeal No. 11/L of 2007

Fayyaz Ahmad s/o Ghulam Akbar, caste Dawna, r/o
Gudara Colony, Jampur District Rajanpur

..... Appellant

Versus

The State Respondent

Counsel for appellant Malik Amjad Pervez,
Advocate

Counsel for State Qazi Zafar Iqbal
Addl: Prosecutor General

FIR. No. Date & Police Station 416, 14.09.2004
Jampur, Distt:Rajanpur

Date of Judgment of Trial court 08.12.2006

Dates of Institution 22.01.2007

Date of hearing 21.05.2009

Date of Judgment 21-05-2009

M. Z. Yasin

JUDGMENT:**MUHAMMAD ZAFAR YASIN, JUDGE:-**

This appeal is

directed against judgment dated 08-12-2006 passed by learned Additional Sessions Judge, Jampur, district Rajanpur whereby the appellat Fayyaz Ahmed has been convicted under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and has been sentenced to twenty five years R.I with a fine of Rs;50,000/- or in default thereof to further undergo S.I for one year. He was also convicted under section 377-PPC and sentenced to R.I for ten years with fine of Rs:50,000/- or in default thereof to further undergo S.I for one year. Benefit of section 382-B Cr.P.C. has also been given to the appellat by the learned trial Judge.

2. Brief facts of the case are that on 13-09-2004 victim Muhammad Tariq went to Jampur to purchase some food stuff. When he did not return till evening, the complainant alongwith Khadim Hussain and Ghulam Fareed went to Jampur in his search. At about 9.00 p.m. they reached near the house of Allah Ditta, the co-accused, they heard cries of Muhammad Tariq, they entered the house, as the door was open. They saw appellat Fayyaz Ahmed had stripped off his shalwar and was committing

sodomy with victim Muhammad Tariq while Allah Ditta co-accused was holding the victim. On seeing the complainant and PWs, the accused persons fled away from the scene. On interrogation of complainant, victim Muhammad Tariq told that the accused persons had brought him from a hotel of Kotila Mughalan by deceitful tact. Thereafter firstly accused Allah Ditta had committed sodomy upon him and later on appellant Fayyaz Ahmed committed sodomy upon him. Hence FIR 416/04 was got registered with police station Jampur on 14-09-2004 regarding occurrence dated 13-09-2004 by Muhammad Mithoo, the nephew of the victim.

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3. During investigation police took the victim boy Muhammad Tariq to T.HQ Hospital Jampur on the same day where at about 3-15p.m. his medico legal examination was conducted by the doctor. Then the Investigating Officer collected the evidence and also arrested the accused. During the investigation both the accused persons were found guilty and were challaned to face the trial.

4. The trial court i.e. Additional Sessions Judge, Jampur framed the charge against the appellant Fayyaz Ahmed — and co-accused Allah

Ditta on 17-03-2005 under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII and 377 PPC, to which each of the accused pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution produced eight witnesses.

The most important and star witness of the case is the victim Muhammad

Tariq who made his appearance in the court as P.W-6. The other important

P.W of the case is complainant, who is also an eye witness of the

occurrence and he entered the dock as P.W-5. The medical evidence was

brought on the record through Dr.Muhammad Nasrullah who had

conducted the medical examination of the victim body and he appeared

before the trial court as P.W-8. The doctor had also signed the police

application Ex.P.C. for medical examination of the victim and had also

conducted the potency test of accused Fayyas Ahmed and given his report

as P.E. The doctor also placed on record correct carbon copy of the MLC

issued by him as Ex.P.F. and the attested copy of the report of Chemical

Examiner as Ex.P.G. Here it must be mentioned that evidence of the doctor

was recorded by the trial court after recording of the statements of the

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accused Muhammad Fayyaz and co-accused Allah Ditta under section 342-
Cr.P.C., on the application of the prosecution as his evidence was omitted
mistakenly at the proper time. Rest of the PWs were formal in nature. P.W-
1 Muhammad Sadiq Moharrir/HC who had kept the sealed envelop said to
contain anal swabs for safe custody in the Malkhana and then for onwards
transmission to the office of Chemical Examiner Multan which he kept
there intact and on 29-9-2004 handed over the same to Bashir Ahmed
396/C for onwards transmission to the office of Chemical Examiner Multan

intact who transmitted the same and endorsed its transmission as P.W-4.

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Muhammad Sohanra 69/C made his appearance as P.W-2 who had escorted
the victim to T.H.Q. Hospital Jampur for getting his medico legal
examination and received the anal swabs and then handed over the same to
the Investigating Officer who took the same into possession vide recovery
memo Ex.P.A. attested by P.W-2. It was P.W-3 who had chalked out the
formal FIR Ex.P.B/1 as Duty Officer of the police station. The
Investigating Officer of the case namely Mr. Bilal Ahmed SI made his
appearance as P.W-7 and narrated the course of investigation step by step.

It was the I.O. who had referred Muhammad Tariq victim of the case for medical examination through docket Ex.P.C and it was the Investigating Officer who had prepared the site plan of the place of occurrence without scales and placed on record as Ex.P.D.

6. After completion of prosecution evidence, the statement of the accused/appellant under section 342-Cr.P.C was recorded wherein each of the accused denied the allegation leveled against him and claimed to be innocent. They both opted not to make their statement on oath under section 340(2) Cr.P.C. However, three documents Ex.D.A., Ex.D.B and Ex.D.C were placed on record as defence evidence by the co-accused Allah Ditta. Nevertheless, the appellant ^{M-Z. Jasin} Fayyaz Ahmed did not produce any evidence in his defence.

7. On the basis of prosecution evidence the learned trial court convicted the appellant Fayyaz Ahmed under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 25 years R.I. Further, the learned trial court also convicted the appellant Fayyaz Ahmed under section 377 PPC and sentenced him for 10 years R.I. with

fine of Rs: 50,000/- in default of payment of fine he was further to undergo

S.I for one year. The convict Fayyaz Ahmed was also given the benefit of section 382-B Cr.P.C. However, co-accused Allah Ditta was acquitted of both the charges.

8. Hence this appeal against his conviction and sentence filed by the appellant Fayyaz Ahmed.

Mu-Z-Tasim

9. The learned counsel for the appellant at the very outset has argued that the conviction under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 recorded by the learned trial court is not maintainable in law as the prosecution has failed to prove that the appellant had kidnapped or abducted the victim Muhammad Tariq aged 14/15 years for the purpose of subjecting him to unnatural lust. As regards conviction of appellant Fayyaz recorded by the learned trial court under section 377 PPC, the learned counsel for the appellant has not challenged the same but has prayed that as by now the appellant has served more than three years and seven months in jail, therefore sentence of the appellant under section 377 PPC be reduced to already undergone by him.

10. On the other hand, the learned Deputy Prosecutor General candidly conceded that the prosecution through its evidence could not prove commission of offence punishable under section 12, Offence of Zina (Enforcement of Hudood) Ordinance, 1979; while the learned counsel for the appellant has already conceded the conviction of the appellant under section 377 PPC, therefore, the sentence awarded to the appellant Fayyaz Ahmad under section 377 PPC be up held.

11. Arguments heard. Record perused.

m z Joshi
12. Through the evidence of victim PW-6 Muhammad Tariq commission of offence punishable under section 12, Offence of Zina (Enforcement of Hudood), Ordinance, 1979 against the appellant has not been proved as he had deposed that he had come to purchase household articles while at Kotla Road, Allah Ditta and Fayyaz accused met him and asked him that there was a Khairat. He accompanied them to a house where the door was open. Firstly, Fayyaz Ahmad committed sodomy and then Allah Ditta committed sodomy with him. While on 14-09-2004, they got registered the case. Thus it is in the evidence of the victim himself, who is

a grownup boy of 14/15 years that he himself had gone to the place of occurrence with his own free will. Thus ingredients of offence punishable under section 12, Offence of Zina (Enforcement of Hudood) Ordinance, 1979 have not been proved by the prosecution through evidence. Therefore, the conviction and sentence of the appellant recorded by the trial Court under the said provision of law is not maintainable.

M. Z. - Jabbar

13. As regards the conviction of the appellant recorded under section 377 PPC, the learned counsel for the appellant has not challenged the same and has only prayed for reduction of sentence to already undergone by him. The record reveals that by now the appellant has already served sentence of more than 3 years and seven months, including the period spent in jail as under trial prisoner; while the trial court has given benefit of section 382-B Cr.P.C. to the appellant. The Medical Officer, Tehsil Head Quarter Hospital, Jampur who, medically examined the accused Fayyaz Ahmad, has recorded the age of the accused as about 16 to 19 years. This is vide Ex.PE. In view thereof, the appellant Fayyaz Ahmad was just teen ager at the time of occurrence.

He has already served more than three years and seven months of his substantive sentence.

14. Taking into consideration, all the circumstances noted above, we are of the considered view that it would meet the ends of justice, if the sentence of the appellant Fayyaz Ahmad recorded under section 377 PPC is reduced to already undergone. However we also reduce the fine from Rs:50,000/- to Rs:20,000/- and in default, to undergo 3 months S.I.

15. Resultantly, as the prosecution has failed to prove the commission of offence by the appellant punishable under section 12, Offence of Zina (Enforcement of Hudood), Ordinance, 1979, therefore the conviction and sentence recorded by the trial court there-under is hereby set aside. However, the conviction of the appellant Fayyaz Ahmad recorded under section 377 PPC by the trial court, is up held, while, his sentence recorded under section 377 PPC by the trial court is reduced to already undergone by him. Further, the appellant shall also pay fine of Rs:20,000/- or in default thereof, he shall further undergo three months, S. I.

M. Z. Jasin

16. With this modification in conviction and sentence, this appeal

is partly allowed and is disposed of in above terms.

m. z. yasin

JUSTICE MUHAMMAD ZAFAR YASIN

Syaid

JUSTICE SYED AFZAL HAIDER

Lahore, 21-5-2009

Akram/*