

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No. 152/I of 2007

Riaz Hussain son of Allah Bakhsh
R/o Mullan Miran Ghazanfar Gark
Muzaffargarh Appellant

Versus

The State Respondent

Counsel for appellant Mehar Sardar Ahmed Abid,
Advocate

Counsel for State Mr. Asjad Javaid Ghural,
Deputy Prosecutor General

FIR. No. Date & 96,15.2.2006
Police Station Rohillanwali, Mazaffargarh

Date of judgment of 26.5.2007
trial court

Dates of Institution 06.7.2007

Date of hearing 14.5.2008

Date of decision 14.5.2008

JUDGMENT

SYED AFZAL HAIDER, JUDGE.- This is an appeal through which Riaz Hussain has challenged his conviction recorded by learned Additional Sessions Judge-III, Muzaffargarh on 26.05.2007 in Hudood Case No.33-2 of 2006 and Hudood Trial No.13 of 2006 under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 whereby he was sentenced to 07 years rigorous imprisonment with a compensation amounting to Rs. 50,000/- under section 544-A of the Cr.P.C “ for causing psychological and mental anguish, ravishing her chastity, damaging her reputation in the society and causing a stigma to her, in default of payment thereof, the convict suffer S.I. for six months and the compensation amount will be recoverable as arrears of land revenue. However the convict is given the benefit of section 382-B, Cr.P.Code”.

2. The case emanates from the crime No.96/2006 registered with Police Station Rohelanwali, District Muzaffargarh on 15.02.2006 at 10.30 a.m. on the statement of Mst. Samina P.W.1 regarding an incident which took place on the night between 27/28.01.2006.

3. The age of the appellant as recorded by the learned trial court in the title of the judgment is 20 years though the formal charge framed by the learned trial court on 07.07.2006 and the statement of the accused recorded thereafter does not disclose the age of the appellant. However there are two statements of the appellant recorded under section 342 of the Code of Criminal Procedure. The first statement was recorded on 11.04.2007 in which significantly the space of age has been left blank. The second statement recorded on 15.05.2007 by the same trial judge under section 342 of the Code of Criminal Procedure records the age of the appellant as 16/17 years which means that on the alleged date of occurrence, which was around 27/28.01.2006 the appellant was around 14/15/16 years of age.

4. The reason for recording the second statement under section 342 of the Code of Criminal Procedure was that the given up P.W. Muhammad Akmal was summoned as C.W.1 on 12.05.2007 and the statement made by him had to be put to the accused and hence the necessity of recording of the statement for the second time.

5. I have gone through the judgment. The learned trial judge, while concluding para 20 of his judgment, observes:-

“The defence has also produced document Ex.DD to prove the minority of the accused Riaz Hussain, but the defence has neither taken plea of minority at the time of framing of charge against him or in his statement u/s 342 Cr.P.Code or through moving any independent application for his trial under the Juvenile Justice System Ordinance, 2000 which means that the accused admitted his age of his majority. So far as document Ex.DD is concerned, it is not conclusive proof of age of the accused Riaz Hussain. The accused has neither produced the scribe of document Ex.DD nor moved any application for his summoning u/s 540 Cr.P.Code. Therefore in my humble view, the document Ex.DD is not helpful to the accused for holding him at this belated stage as a minor in age at the time of the commission of occurrence in this case. In view of above, the defence has badly failed to create any dent or loophole in the prosecution case through leading any reliable and cogent defence”.

6. As mentioned above the learned trial judge, it appears, did not consider the fact that the age of the appellant was mentioned in one and it was omitted in the other statement recorded under section 342 of Code of Criminal Code. The observations of the learned trial court that the appellant was a minor in age at the time of commission of the occurrence shows that the provisions of Juvenile Justice System Ordinance, 2000 were in his view. The State counsel did not contest the element of minority of the appellant particularly when Ex.DD was produced during the trial on 14th April 2007 i.e. more than a month before the announcement of judgment. A cursory

glance over the Juvenile Justice Ordinance, 2000 shows that a child shows that under section 2 means a person who at the time of the commission of an offence has not attained the age of 18 years. Under this law Juvenile Courts have been specially set up under section 4 with exclusive jurisdiction to try cases in which a child is accused of the commission of an offence. Section 6 of this Ordinance lays down the procedure of the Juvenile Court. Section 7 is relevant to the point under discussion because it states that if a question arises as to whether a person before it is a child for the purpose of this Ordinance, the Juvenile Courts shall record a finding after such inquiry which shall include a medical report for determination of the age of the child. It clearly means that medical report is not the solitary point for consideration but school leaving certificate and other evidence may also be brought on record. Under section 10(2) of this Ordinance it is stated that where a child accused of non-bailable offence is arrested, he shall be produced before a Juvenile court which means that the onus is on the police officers, arresting the accused to take him to a court of competent jurisdiction to legalise investigation and performance of other codal formalities. The Juvenile Court alone is competent to decide the issue of age

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and in this particular case when the school leaving certificate, showing the date of birth, was brought to the notice of the learned trial court it should have been considered and given weight in the sense that a inquiry should have been taken place. At best there would have been a delay of 02 or 03 weeks to ascertain the factum of age so that the rights and the privileges granted by this Ordinance to a child are not taken away if the appellant was found to be a child at the time of the commission of offence.

7. I have gone through the provisions of this Ordinance. This law contemplates certain privileges and rights for a Juvenile under trial and Special Courts have been created with the sole object of trying juveniles. Notification is also issued by virtue of which Judges are appointed as Special Courts to try the juvenile offenders. After going through the provisions of this Ordinance it is crystal clear that moving of an application by a juvenile under trial is not a condition precedent for conferring jurisdiction upon the court to take cognizance of the element of age under this law. It appears that as and when the court is informed that the accused is or was a child at the time of commission of the offence the trial court is bound to adopt the procedure prescribed under the Juvenile Justice

Ordinance. Juvenile Ordinance is a special law and it takes precedent over the general law. The Juvenile Ordinance does not concede discretion to a trial court to ignore mandatory provisions.

8. This, in my opinion, is an illegality which vitiated the trial of the appellant. The trial court was required to hold an inquiry the moment it came to its knowledge that the under trial was juvenile. There is no escape from it.

9. I am fortified in my conclusion by the decision in the case of Babar Ali Versus The State reported as PLD 2007 Lahore 650 at page 674 decided by a Full Bench of the Lahore High Court in which inter-alia, the following directions and guidelines to the police and subordinate judiciary were issued as regards the stage and forum of urging and considering the ground of minority of an accused person for the purpose of Juvenile Justice System Ordinance, 2000:-

- (vi) "If a case is sent by a Magistrate to a Juvenile Court for trial and if the question of juvenility of the accused person is contested by the complainant party or the State before the Juvenile Court then the Juvenile Court is to decide the same in terms of the provisions of section 7 of the Juvenile Justice System Ordinance, 2000.
- (vii) If the question of juvenility of an accused person crops up for the first time after the case has already reached an

ordinary court for trial then the ordinary court is to decide the said issue under subsection (2) of section 5 of the Juvenile Justice System Ordinance, 2000 through an inquiry akin to that contemplated by section 7 of the said Ordinance.

(viii) As required by the relevant Rules and Orders of the Lahore High Court, Lahore all Magistrates and trial courts must pay special attention to the age of the accused person before them and must record his age in the relevant record, charge-sheets and final judgments as the matter of age is important to issues pertaining to the forum of trial, sentence and custody, etc.”

10. However the ninth direction issued by the Hon'ble Lahore High Court, Lahore was that if the accused raises the question of minority for the purpose of being treated as a child, within the purview of Juvenile Justice System Ordinance, 2000, then such claim should be raised by him at the earliest possible opportunity and preferably during the course of investigation and if he raises such a claim for the first time at a belated stage of trial or during the course of the appellate proceeding then such a conduct would be difficult to approve in the absence of any strong reason or explanation justifying such a delay. It was further held that an adverse inference may be drawn where the concession in question is claimed after undue and un-explained delay. It may be noted that these directions were issued by the Lahore High Court at the end of September 2007 and this case

was decided by the learned trial Court on 26th May, 2007. It therefore clearly means that the learned trial court as well as the investigating police agencies were not aware of the existence of these instructions as enumerated in the judgment delivered by the Full Bench of Lahore High Court. Moreover, the plea of minority in the instant case had been taken by the appellant after his statement under section 342 of the Code of Criminal Procedure had been recorded but the prosecution had not raised any objection. As noted above, at the time when his statement under section 342 of the Code of Criminal Procedure was recorded the space indicating his age after writing his name, parentage, occupation and residence was left blank. I have even otherwise seen the appellant who is present in Court on bail. He was also present in person during the trial proceedings. He was also seen and interrogated by the police soon after the middle of February 2006. Even a cursory glance at the face of the under trial was sufficient to suggest that he had not come of age. I am therefore, inclined to hold that he should be permitted to avail opportunity of claiming minority as envisaged by the Juvenile Justice System Ordinance, 2000. Deprivation of the chance to claim right provided under a special law would not be advancing the cause of justice.

11. Resultantly the conviction is being set aside and the case is remanded to the learned trial court for fresh trial under the Juvenile law provided the learned trial court has been notified as a juvenile court. In case the learned trial court is not so notified then the file should be placed before the learned Sessions Judge, Muzaffargarh for being entrusting to a court of competent jurisdiction.

12. The appellant is already on bail as per order of the Hon'ble Chief Justice of the Federal Shariat Court dated 12.11.2007. He is directed to appear before the trial court on 28.05.2008 for further proceedings. Consequently the judgment of the learned Additional Sessions Judge-III, Muzaffargarh dated 26.05.2007 delivered in Hudood Case No.33-2/2006 and Hudood Trial No.13/2006 is hereby set aside and the case is remanded for a fresh trial as contemplated by Juvenile Justice Ordinance, 2000. The appellant has been informed that he has to appear before the learned trial court on 28.05.2008 by which date the Office should ensure the dispatch the entire record of the case to the trial court. It is further directed that the trial of the case should be completed within three months i.e. by the end of August 2008, and monthly progress report should be sent to the Registrar of

this court by the learned trial court. The Criminal Appeal No.152/I of 2007

succeeds in the above terms. The appellant is already on bail and need not

furnish fresh bail bonds.

S. Haider

JUSTICE SYED AFZAL HAIDER

Islamabad the, 14th May, 2008

UMAR DRAZ/

Fit for reporting.

S. Haider