IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE DR.FIDA MUHAMMAD KHAN
MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No.288/I of 2006

1. Ghulam Shabbir son of Pir Bakhsh
2. Rashid son of Hussain Bakhsh
3. Ramzan son of Habib

All residents of Mauza Garkana Waziri,
Tehsil Jampur District Rajanpur .... Appellants

Versus

The State .... Respondent

Counsel for appellant .... Sardar Khuram Latif Khan Khosa, Advocate

Counsel for State .... Mr Shahid Mehmood Abbasi, Deputy Prosecutor General

FIR. No. Date & Police Station .... 23, 12.4.2005 Harrand

Date of judgment of trial court 6.11.2006

Date of Institution 28.11.2006

Date of hearing 17.4.2008

Date of decision 23-04-2008

JUDGMENT

SYED AFZAL HAIDER, JUDGE.- Ghulam Shabbir, Rashid and Ramzan have, through this criminal appeal, challenged the judgment dated 6.11.2006 passed by learned Additional Sessions Judge, Jampur District Rajanpur whereby all the three appellants have been convicted and sentenced as under:-

1. Under Section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, 25 years rigorous imprisonment each with fine of Rs.100,000/- each and in default whereof to further undergo simple imprisonment for one year each;

2. Under Section 377 read with section 511of Pakistan Penal Code, five years rigorous imprisonment each with fine of 50,000/- each and in default of payment of fine to further suffer simple imprisonment for six months each; and

3. Under section 324 of Pakistan Penal Code, ten years rigorous imprisonment each to convict Ghulam Shabbir and Rashid plus to pay Arsh to the Injured/victim Saidal.

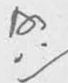
All the sentences have been ordered to run concurrently. Benefit of section 382-B, of the Penal Code has also been extended to the appellants.

2. Brief facts of the case as given out in the First Information Report are that Mauj Ali PW2 father of the injured/victim Saidal PW 3 aged about 12/13 years was present in his house at 8.30 p.m. on the fateful night of 12th April, 2005 when three accused namely Ghulam Shabbir alias Shabbi, Rashid alias Rashoo both armed with klashiankof and Ramzan armed with pistol came

there on motorcycle and called out by name his son Saidal who went out personally within his sight. He was asked by the accused persons to accompany them. However on his refusal all the three accused, forcibly took him on motorcycle which was driven by Shabbi. On the hue and cry of Saidal the complainant called his brothers Jumma and his son Afzal. All the three pursued the abductors on motorcycle. Shabbi and others brought Saidal to the wheat fields and all the three accused attempted sodomy on him but Saidal did not succumb to their desire and while making noise started running. The complainant as well as his brother Jumma and his son Afzal with the help of torch light saw that Shabbi accused fired straight at his son. Rashid accused also fired which hit Saidal on right hand. The occurrence was witnessed by him. Saidal fell on the ground. The complainant protested loudly whereupon the three accused indulged in aerial firing and extended threats to the complainant party. All the three accused then entered in the house of Shabbi accused. The complainant party also followed them but Shabbi's father Punnar, armed with rifle, came forward and warned that he would open fire if complainant came forward. Out of fear for life the complainant came back and

got hold of unconscious Saidal who was drenched in blood. He was then taken immediately to the hospital.

3. First Information Report was consequently registered on the same night at 10.00 p.m. on the statement Ex.PB of Mauj Ali, complainant/father of victim Saidal allegedly made at Hospital Harrand before Muhammad Iqbal SI PW 7 who sent the complaint to the Police Station Harrand on the basis of which formal FIR No.23/05 Ex.PB/1 mentioned above was registered by PW 6 Kazim Hussain ASI. The Investigating Officer PW7 then prepared the injury statement Ex.PF of the victim who was admitted in the emergency wing of the Harrand hospital. On 13.4.2005 PW 7 visited the place of occurrence and prepared rough site plan Ex.PH of the place of occurrence. He also recorded the statements of the P.Ws under section 161 of Code of Criminal Procedure and collected blood stained earth from the spot which was sealed in a parcel and taken into possession vide recovery memo Ex.PG attested by Jumma PW 5 and Afzal the alleged eye witnesses of the occurrence. He arrested accused Pir Bakhsh (since dead during trial)on 18.4.2005. Accused Pir Bakhsh produced sota P1 which was taken into possession vide recovery memo Ex.PA. He also arrested Ghulam Shabbir and Rashid accused on 25.5.2005 and on the

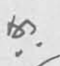


pointation of Shabbir one rifle, P2 was recovered with three live cartridges. On the same day i.e. 25.5.2005 the accused Rashid also got recovered a 32 bore revolver P4 alongwith two live bullets from the "baithak" of Ghulam Shabbir which was also taken into possession vide recovery memo Ex.PC. After completion of investigation PW 7, a report by way of a "challan" was submitted to trial court by Siraj Hamid SI/SHO on 5.6.2005. He was not produced by the prosecution.

4. The trial court on 20.2.2006 framed charges against four accused under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with section 377/511-PPC and section 324 read with section 34 and 506 of the Pakistan Penal Code but the accused did not plead guilty and claimed trial.

5. The prosecution in all produced 7 P.Ws and also tendered in evidence Medico Legal Report of the victim, recovery memos of weapons of offence and also other incriminating material to prove its case. After the close of the prosecution evidence on 31.7.2006 the learned trial court on 8.8.2006 recorded statements of three surviving accused under section 342 of Code of Criminal Procedure wherein all the three appellants claimed innocence, while

Ghulam Shabbir and Ramzan took up the plea of alibi. The third accused Rashid pleaded that Daida brother of the victim Saidal had intimacy with his sister Mst. Najma and Saidal victim used to carry messages between Daida and Mst. Najma. On the night of occurrence Saidal victim was present on the back side of their house when he was chased by Rashid whereupon Saidal raised hue and cry which attracted his brother Muhammad Afzal who in order to save his brother Saidal fired at Rashid which however hit Saidal due to darkness. The complainant party in order to avoid the "chatty of kala kali" got registered this case. All the three appellants claimed that the PWs are interse related and they have been falsely roped in this case. None of the accused had produced any evidence in their defence nor made statements under section 340(2) of the Code of Criminal Procedure. The learned trial court found the accused guilty. All of them were convicted and sentenced as noted above. Hence this appeal by the three appellants against their conviction and sentences. We proposed to decide this appeal through this judgment.



6. Muhammad Shafi P.W.1, police constable on 18.4.2005 accompanied Muhammad Iqbal SI, PW 7 and effected arrest of Pir Bux accused who was armed with a four feet long sota P1 which was recovered

vide memo Ex.PA. Complainant Mauj Ali appeared as PW 2. It was on his statement that the first information report was lodged. He is also an eye witness of the entire episode. Saidal victim aged 13/14 years appeared as PW 3. He is the second eye witness of the occurrence. He is also an injured witness. Dr. Muhammad Rashid appeared as PW 4. He examined Saidal PW on 12.4.2005. Jumma, brother of complainant appeared as PW 5. He is a witness to the recovery of blood stained earth. Muhammad Afzal PW was given up on 13.5.2006. Kazim Hussain ASI scribe of the formal first information report Ex.PB/1 appeared as PW 6 and Muhammad Iqbal, Sub Inspector and Investigating Officer appeared as PW 7. Reference to his evidence has already been made above.

7. We have gone through the evidence and perused the record with the assistance of learned counsel for the parties. Learned counsel for the appellants was then asked to formulate the points that he wished to advance to challenge the conviction recorded by the learned trial court. The first point urged before us was that the occurrence took place at night time when it was dark. Complainant himself states that it was with the help of torchlight that they saw the accused firing at Saidal. That the allegation is of two fire shots

hitting Saidal whereas medical evidence indicates a single shot and that too is neither found to be a klashincof or a pistol shot. It is further stated that no empty was recovered from the place of occurrence which renders the recovery of arms useless. Furthermore it is highly improbable that having seen the young son injured by bullet wounds the unarmed complainant party pursued the armed appellants and did not attend to the young injured son. It also does not appeal to reason, the learned counsel for the appellant contended, that if the purpose of kidnapping was satisfaction of unnatural lust then why should the accused attempt sodomy within the sight of the pursuing party. The accused did not drive the victim to a remote place particularly when they had a motorcycle at their command. It was also contended that the time of registration of the report and medical examination is the same i.e. 10.00.p.m. It was finally submitted that the parties live in the same village not far away from each other. In fact the victim young boy, as per defence plea of Rashid accused, use to carry massages between Mst. Najma and Daida his elder brother, both of them had illicit sexual relationship. The accused saw Saidal at the back of his house and chased him whereupon he raised hue and cry which attracted Muhammad Afzal, brother of the injured witness Saidal to

the spot. The said Muhammad Afzal fired at Rashid accused in order to save his brother which however hit Saidal due to darkness. The complainant party in order to avoid the chatty of Kala kali maneuvered this case against the appellants.

8. Learned counsel for the State supported the judgment and urged that the evidence of complainant, an eye witness, is supported by the evidence of the second injured eye witness Saidal. The ocular evidence has thus been corroborated by medical evidence and for all practical purposes the prosecution case is established.

9. We have given careful consideration to the points urged by both the parties apart from reflecting upon the reasons which prevailed upon the learned trial court to record a verdict of guilty. However we find that the prosecution evidence does not inspire confidence. Learned counsel for the State was confronted with the facts that (i) the owner of field, the alleged place of occurrence from where blood was reportedly recovered was not associated by the Investigating Officer. He also does not find mention in the calendar of witnesses; (ii) The doctor does not only find one shot as the cause of two gun shot injuries but there was blackening and burning around injury No.1 alone

which was the forearm entry wound. Injury No.2 is obviously exit wound, (iii) the site plan does not at all indicate the place from where the eye witnesses saw the accused indulge in firing and making attempts to commit sodomy when it was admittedly dark. Fourthly it is not certain as to who took the injured person to the hospital. Medical report reveals that Saidal was brought to the hospital by Muhammad Iqbal S.I. but this witness however gives a different version. PW 2 father of Saidal claimed that he himself took the injured to the hospital where the thanedar (Investigating Officer Muhammad Iqbal SI, PW 7) also came and recorded his statement.

10. Mr. Shahid Mahmood Abbasi, Deputy Prosecutor General stated that the ocular testimony is fully corroborated by medical evidence and the failings on the part of prosecution should be ignored in the face of corroboration. As regards the number and nature of injuries suffered by the victim, the specific role attributed to the assailants by complainant party in their evidence and the possibility to observe with the help torch light, the particular part played by accused persons, the judge has to carefully assess the element of corroboration with particular reference to the culpability of the accused. There may be corroboration of ocular testimony with regard to the

number of injuries, kind of weapon used, the time that elapsed between the receipt of injury and medical examination, recovery of blood stained earth, the presence of injured witness but this alone is not sufficient to establish a link between the alleged assailants and the crime. Medical evidence by itself neither establishes the identity of the accused nor prove complicity of accused in the crime. Medical evidence must be in line with ocular account on all material facts. Medical evidence only confirms injuries. It does not identify the accused. Evidence must correlate and establish the accused with the crime. In the case under consideration the element of the requisite corroboration and nexus between the accused and the crime is lacking.

11. In the end learned counsel for the State argued that now there are two versions available on file. The version of the prosecution is more reasonable according to him. The apex court in the case of Ashiq Hussain Versus The State reported as PLD 1994 SC 879 has laid the principles for appreciation of evidence in a case of one version or two versions. It was held therein that if the court finds that although the accused had failed to establish his plea to the satisfaction of the court but his plea might reasonably be true even then the court must accept his plea and acquit or convict him accordingly.

In the case of Muhammad Younus Versus The State reported as 1992 SCMR 1592 it was held that in a case of two versions of the occurrence both the versions have to be kept in Juxtaposition and the one favourable to the defence is to be preferred if the same gets some support from the admitted facts and circumstances of the case and which also appeals to the common sense. It may also be mentioned that in the case of State of Haryana Versus Indar Singh reported as 2002(3) SC 87 the apex court of India also held that if two views from evidence are possible then the one favourable to the accused has to be accepted.

12. Learned trial court based conviction on the testimony of Saidal, the victim, who appeared as PW 3 which was duly supported by his father Mauj Ali PW 2. Learned trial judge also finds that the medical evidence corroborates prosecution version and the defence version of one shot having been fired is belied by the existence of two injuries on person of PW 3. It is not possible to agree with the findings of learned trial court that the single shot story is belied by medical evidence. Moreover it has not been appreciated that there are no two gun shot injuries. One injury in fact is the entry wound whereas the second injury is everted which means " to turn outward or inside

out". The second injury is therefore the wound of exit. A klashincov wound of entry, which caused blackening and burning, would have shattered even a grown up healthy man. The locale of entry wound is right scapular region on the back of victim whereas the exit wound is his right arm below shoulder. This aspect does not support the two shots prosecution version. Men may lie but the facts do not perjure. In the event of there being one gun shot which caused injury No.1 and 2 on the person of Saidal the plea of accsued gets substantiated and the story of the prosecution alleging two gun shots to two accused persons is automatically demolished. There is yet another aspect available on the medical side. Injury No.3 is declared to have been caused by blunt weapon on 12.4.2005. It is in this background that a sota was shown as recovered from Ramzan accused on 18.4.2005 who was allegedly armed with pistol at the time of occurrence. The object of the prosecution team was to give an explanation for the third wound i.e. the nasal injury. The learned trial court has not appreciated that neither was motorcycle recovered from accused nor were empties found from the place of occurrence. The owner of wheat crop field was not associated in the investigation. There is no evidence of wheat crop having been damaged or motorcycle tyres prints having been found. The

site plan is silent as to the points from where the witnesses saw the occurrence. It is precisely for this reason that Article 20 of Qanoon-e-Shahadat Order, 1984 makes relevant the facts which are the occasion, cause or effect of facts in issue. The failure to produce evidence of this nature does not advance the prosecution case. We are therefore not persuaded to agree with the learned trial Court on the question of fact.

13. The additional argument, advanced by learned trial court, that Najma sister of Rashid appellant should have been produced in defence also does not appeal to reason because no woman would, at least in our society, come forward in a court of law to state that she is maintaining illicit relations with someone else. The other aspect of this case is that a real brother has gone to the extent of making a statement in the Court that Saidal, the injured witness, used to bring massages from his brother Daida for Mst. Najma. On the night of occurrence the boy was found behind the house of Rashid appellant on this errand and he lost temper. It appears that the boy must have received thrashing which caused nasal injury and then what happened is anybody's guess. The rest of the happening is shrouded in mystery and it appears that both the parties have not taken the court into confidence to explain the mode and

manner in which the gun shot injury was sustained by Saidal. It is therefore not possible for us, inter-alia, to agree with the findings of fact arrived at by learned trial court. We are also conscious of the fact that the responsibility of the prosecution to prove the ingredients of the charge increases in proportion to the gravity of the punishment an offence entails.

14. In this view of the matter, we are not inclined to uphold the judgment dated 6.11.2006 passed by learned Additional Sessions Judgde, Jampur District Rajanpur in Hadood Case No.42 of 2005, Hadood Trial No. 02 of 2006 whereby he convicted the three appellants (the fourth accused Pir Bakhsh had died during the trial on 22.7.2006) for various and awarded them sentences as noted in para 1 above. We, therefore, allow the appeal, acquit the appellants by giving them benefit of doubt. They shall consequently be released forthwith unless required in some other case.

JUSTICE SYED AFZAL HAIDER

JUSTICE DR.FIDA MUHAMMAD KHAN

Announced in open Court
on 23rd April,2008 at Islamabad
Mujeeb-ur-Rehman

Fit for reporting