IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

MR.JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 290-L-2006

Muhammad Saleem son of Muhammd Sharif resident of House No.225/A. Gulistan Colony No.2, Amer Sidhu, Lahore

..... Appellant

Versus

The State

..... Respondent

Counsel for the appellant ...		Mr. Muhammad Aslam Khan Buttar, Advocate
For the State	...	Mr.Arif Karim Chaudhry, Deputy Prosecutor General
No.& Date of F.I.R Police Station	..	265/2004, 19.07.2004 Manawan, Lahore
Date of judgment of Trial Court	...	18.10.2006
Date of Institution	...	27.11.2006
Date of hearing	...	28.07.2009
Date of Judgment	...	28.07.2009

JUDGMENT:

Justice Syed Afzal Haider, Judge: Appellant Muhammad Saleem has through this appeal challenged the judgment dated 18.10.2006 delivered by the learned Additional Sessions Judge, Lahore whereby he was convicted under section 468 of the Pakistan Penal Code and sentenced to four years rigorous imprisonment with fine of Rs.20,000/- or in default whereof to further undergo six months simple imprisonment with benefit of section 382-B of the Code of Criminal Procedure. However he was acquitted from the charge of abduction. His co-accused namely Ijaz Ahmad and Zubaida Bibi were acquitted from the charges levelled against them by the trial court.

2. Brief facts of the case are that complainant Abdur Rasheed PW.3 moved an application Ex.PA dated 19.07.2004 before the Station House Office of Police Station Munawan, Lahore alleging therein that his daughter Mst. Shakeela Bibi aged about 14/15 years was enticed away on 10.07.2004 at

abou 10/11 a.m. from his house in his absence by Muhammad Riaz alias Raja, Zubaida Bibi, Fauzia Bibi and Ijaz with intention to commit zina with her. The occurrence was reportedly witnessed by Niamat Ali PW.11 and Muhammad Siddique who had seen the victim alongwith the accused persons at Sky Land Road. The complainant approached the accused persons for return of his daughter but they did not oblige.

3. The written crime information Ex.PA dated 19.07.2004 was formally registered as FIR No.265/04 Ex.PB with Police Station Manawan, Lahore on 19.07.2004 by Muhammad Imran, Sub Inspector PW.4. Investigation ensued as a result of registration of crime report. Investigation was entrusted to Shaukat Ali, Sub Inspector PW.9 on 19.07.2004 who inspected the place of occurrence and recorded the statements of prosecution witnesses under section 161 of the Code of Criminal Procedure. He also recorded statement of

Mst. Shakeela abductee under section 161 of the Code of Criminal Procedure on 23.08.2004 who was produced at police station by Abdur Rasheed complainant. The abductee was then produced before the learned Illaqa Magistrate on 23.08.2004 for recording her statement under section 164 of the Code of Criminal Procedure and for obtaining permission for her medical examination. The learned Illaqa Magistrate refused the request of recording her statement but allowed application for her medical examination. The Investigating Officer arrested accused Muhammad Ijaz and Muhammad Riaz on 10.09.2004. He got accused Muhammad Riaz medically examined. The accused were then sent to judicial lock up on 11.09.2004. The remaining three accused were on pre-arrest bail. After completion of investigation the Station House Officer submitted report under section 173 of the Code of Criminal Procedure before the court on 01.10.2004, placing accused Muhammad Riaz and Ijaz Ahmad in Column No.3 and Muhammad Saleem,

Mst. Zubaida and Mst. Fauzia accused in Column No.4 requiring the accused to face trial.

4. The learned trial Court framed charge against the accused persons on 09.05.2005 under sections 11 & 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under sections 467 & 468 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

5. It is noteworthy that during trial accused Muhammad Riaz and his wife Mst. Fauzia accused were declared proclaimed offenders and their case was separated vide order dated 08.09.2006 of the learned trial Court.

6. The prosecution produced twelve witnesses to prove its case. The gist of the deposition of the prosecution witnesses is as follows:-

(i) PW.1 Akhtar Ali Constable deposed that on 26.08.2004 Muhammad Saleem Muharrir/Head Constable handed over to him sealed sample parcel

for dispatch and transmission to the office of Chemical Examiner, Lahore which were duly deposited on 26.08.2004.

(ii) PW.2 Muhammad Anwar, Assistant Sub Inspector stated that he was on patrolling duty on 19.07.2004 when Abdur Rasheed complainant submitted his written application Ex.PA before him upon which he drafted a report and sent the same through Muhammad Arshad constable to the police station for registration of case.

(iii) Abdur Rasheed complainant appeared as PW.3 and endorsed the contents of his complaint Ex.PA.

(iv) PW.4 Muhammad Imran, Sub Inspector stated that on 19.07.2004 he received a complaint through Muhammad Arshad Constable sent by Anwar ASI on the basis of which he formally registered FIR No.265/2004 Ex.PB.

(v) Muhammad Saleem constable appeared as PW.5 and to state that on 24.08.2004 the Investigating Officer handed over to him a sealed parcel/box for transmission to the office of Chemical Examiner which he got transmitted to the office of Chemical Examiner, Lahore through Akhtar Constable on the same day.

(vi) Mst. Shakeela Bibi abductee appeared as PW.6 and stated as follows:-

"Muhammad Riaz and Mst. Foazia were our tenants alongwith their siblings. They remained our tenants for about two months. On 10.07.2004 Muhammad Riaz, Ijaz and Mst. Zubeda came to me and asked me to accompany them for visiting some place. Now said Fozia had also accompanied them when they came to me. They brought me to Sky Land Park. When we reached at Sky Land Park they said that they have certain appointment at Chungi Amarsadhu and after going to Chungi Amrsadhu they would then come to the park. They

brought me to Chungi Amarsadhu in the house of their cousin Saleem and then confined me in a room. Saleem put a pistol on me and threatened that I would have to remain there for ever and would not leave that place. They brought me to some other place the next day and informed that it is a court of law. They also put some papers before me and asked me to mark my thumb impression on the same. I put my thumb impressions on those papers and the next day I was informed that my 'Nikah' had been solemnized with Riaz accused. Riaz remained committing zina with me. Then Saleem brought me to his parental house at 'Lalyani' and there again Riaz remained committing zina with me. They also remained threatening me that I have to reside there and would not leave that place. They were sleeping when on 23.8.2004 I found an opportunity and escaped and came to the house of my parents. Then I was brought to the police station by my father and we informed about the occurrence to the police and got registered the present FIR. I also recorded my statement before the Court."

(vii) PW.7 Dr. Sameera Alam had medically examined Mst. Shakeela on 24.08.2004 and observed as under:-

"**ON Examination**

No mark of any injury or violence seen on her body.

LOCAL EXAMINATION

Hymen torn, old healed tears present. No fresh tear, redness or swelling seen. Three swabs were taken:

i) Vulva region

ii) Pre-hymen area

iii) Posterior fornix

and were sent to the Chief Chemical Examiner Punjab, Lahore, for detection of semen, blood and for grouping.

Her LMP was 07/08.8.2004.

OPINION

According to my opinion the girl was subjected to sexual act."

(viii) Mr. Shahid Farid, Special Judicial Magistrate appeared as PW.8 and stated that the abductee Mst. Shakeela Bibi was produced before him on 23.08.2004 by the Investigating Officer for recording her statement under section 164 of the Code of Criminal Procedure but he declined to record her statement due to non-availability of the accused. Later on, on 25.08.2004 the abductee again moved through her learned Counsel Rana Zahid, Advocate requesting for recording her statement as its postponement due to non-availability of the accused was against the observations of the Superior Courts. The learned Magistrate thereafter recorded statement of the abductee under section 164 of the Code of Criminal Procedure.

(ix) Shaukat Ali, Sub Inspector appeared as PW.9. He had undertaken investigation whose details have already been mentioned in paragraph 3 of this judgment.

(x) Miss Samina Ijaz Cheema, Judicial Magistrate appeared as PW.10 and stated that on 23.08.2004 the abductee alongwith her father was produced before her by the Investigating Officer for obtaining permission for her medical examination with application Ex.PC which permission was granted vide her order bearing her signature Ex.PC/1.

(xi) Pw.11 Niamat Ali, the alleged eye-witness, stated that on 10.07.2004 at about 10/11.00 a.m. he had seen Mst. Shakeela abductee in the company of accused persons going towards Sky Land Park. On

his query, Riaz accused told him that they had come there to buy medicine for Mst. Fozia and they brought Mst. Shakeela for taking medicine of Mst. Fozia and would return her to her parental house.

(xii) Statement of Muhammad Malik, Nikah Khawan/Nikah Registrar was recorded as CW.1 who stated that on 05.07.2004 Mst. Shakeela and Muhammad Riaz alongwith three witnesses namely Muhammad Shafique, Muhammad Aslam and Muhammad Saleem, came to his office for performance of Nikah between Mst. Shakeela and Muhammad Riaz. He, after having satisfied regarding the free will and consent of Mst. Shakeela, performed Nikah between Shakeela Bibi and Muhammad Riaz. He also got her

Nikahnama registered and sent its copy to the office of Union Council 132, Township, Lahore.

(xiii) Khalid Salim, Sub-inspector appeared as PW.12 and stated that Shaukat Ali SI/IO of the case was on leave for three days, therefore, on 28.09.2004 he produced record before the learned Sessions Court, Lahore when the bail applications of Muhammad Saleem, Zubaida Bibi and Fauzia Bibi were confirmed. He recorded their statements. He further stated that Mst. Fauzia Bibi co-accused stated that her husband Muhammad Riaz had obtained permission from her for contracting second marriage. Had she not accorded permission for second marriage he would have divorced her and that she was involved in the abduction of any person.

(xiv) Statement of Muhammad Nazrullah, Assistant Sub Inspector was recorded on 14.07.2006 who had deposed that he was entrusted with proclamation issued under section 87, 88 of the Code of Criminal Procedure against accused Muhammad Riaz and Mst. Fauzia. He had pasted one copy of the proclamation at the dwelling house of the accused and one copy each at conspicuous places and other copy at the notice board of the court. He further stated that he contacted the Patwari Halqa who reported that the accused persons did not own any movable or immovable property.

7. The prosecution closed its case on 27.09.2006. Thereafter statements of accused were recorded under section 342 of the Code of Criminal Procedure were recorded on 29.09.2006. They denied the charges. Appellant Muhammad

Saleem in answer to question, "Why this case against you and why the PWs deposed against you?" stated as under:-

> "I have been implicated in this case due to my relationship with Riaz accused. I am innocent and I have no concern with the alleged offence or occurrence. I have also no knowledge about the occurrence. I am innocent and I have been falsely involved by the complainant. The PWs also deposed on the asking of complainant."

8. Learned trial Court after completing the codal formalities of the trial proceeded to convict and sentence the appellant as indicated in the opening paragraph of this Judgment. The co-accused were however acquitted. Hence this appeal.

9. I have gone through the file. Evidence of witnesses of prosecution and statement of the accused have been perused. Relevant portions of the impugned judgment have been scanned.

10. I have noticed that learned trial court found that appellant Muhammad Saleem was a witness of the marriage of

Nikahnama Marked as C.W.1/1 and he had put his signatures on the same. The Nikahnama was found to be fabricated and hence he was convicted under section 468 Pakistan Penal Code and awarded a sentence of rigorous imprisonment for four years with a fine of Rs. 20,000/-. I have also gone through the statement of accused dated 29.09.2006 recorded by the learned Additional Sessions Judge, Lahore which is spread over three pages and consists of 12 questions. I asked the learned Deputy Prosecutor General to search these questions and find out whether appellant was ever asked that he had put his signatures on the Nikahnama between Mst. Shakeela Bibi and Muhammad Riaz. Learned Deputy Prosecutor General was unable to refer to any question.

11. Section 342 of the Code of Criminal Procedure deals with the examination of accused without oath. The basic object of section 342 is to question the accused generally on the given case after the witnesses for the prosecution have been

examined and placed its account before the trial before the accused is called upon "is called for his defence". A piece of evidence which is not put to an accused at the time his statement is recorded without oath cannot be legally used against him. No one can be condemned un-heard. Unless and until an accused person is given a formal notice, by way of a question on an incriminating item, with a view to obtaining his explanation, such a piece of evidence cannot be made the basis of his conviction. The question to be put to the accused has to be certain, definite and specific. The answers given to the various questions recorded under section 342 of the Code of Criminal Procedure have to be taken into consideration by the trial court as a whole. The accused has to be given an opportunity to rebut the allegation. That the statement of the accused has to be read as a whole. It is infact the bounden duty of the trial court to ask such questions from an accused which relate to the offence with which the accused is charged. The

provisions of section 342 are mandatory. Non compliance is not curable under the Code. Non compliance is an illegality, it is miscarriage of justice. The appellant could have claimed that he had never signed the Nikahnama. The prosecution had not proved that the signatures on the disputed document belong to the accused There has been no comparison of signatures. The accused did not admit the signatures. An analysis of section 342 shows that the very first clause states" For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any enquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. "This aspect is a clear pointer to the fact that the second part of the clause contemplates an all embracing examination in so far as the

prosecution version is concerned and it is not merely a legal formality but is a legal requirement and it compliance is essential. Non observance can cause serious prejudice to an accused. Omission to draw attention of an accused towards an incriminating piece of evidence is fatal.

12. In this view of the matter the trial of the accused stands vitiated. Consequently the impugned judgment dated 18.10.2006 delivered by the learned Additional Sessions Judge, Lahore is set aside. Criminal Appeal No.290/L of 2006 succeeds. The appellant is present on bail. His sureties are discharged and he is free to move about.

Sd/-

JUSTICE SYED AFZAL HAIDER

Lahore the 28th July, 2009.

UMAR DRAZ/

Fit for Reporting

Sd/-

JUSTICE SYED AFZAL HAIDER