

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL No. 47/L of 2009

Saudi Ahmad son of Muhammad, resident of Chak No.405/GB,
Kamiana, Tehsil Tandlianwala, District Faisalabad.

	Versus Appellant
The State	 Respondent
Counsel for the appellant	...	Mr. Zafar Iqbal Tarhana, Advocate.
Counsel for State	...	Mr. Arif Karim Chaudhry, Deputy Prosecutor General
F.I.R No. Police Station	...	769/05, 06.09.2005 Tandlianwala, District Faisalabad.
Date of judgment of trial Court	...	31.03.2006
Date of Institution	...	28.04.2009
Last date of hearing	27.07.2009
Date of Judgment	27.07.2009

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JUDGMENT:

Justice Syed Afzal Haider, Judge: Appellant Saudi

Ahmad has through this appeal challenged the judgment dated 31.03.2009 delivered by the learned Additional Sessions Judge, Tandlianwala whereby he has been convicted under section 10(3) Of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to seven years rigorous imprisonment with fine of Rs.10,000/- or in default whereof to further undergo one month simple imprisonment. He has further been convicted under section 338-C of the Pakistan Penal Code and sentenced to five years rigorous imprisonment and to pay 1/20 of Diyat with direction that the amount of Diyat will be paid to the victim in lump-sum. Both the sentences have been ordered to run concurrently with benefit of section 382-B of the Code of Criminal Procedure.

2. The prosecution case in brief is that complainant Nazar Muhammad PW.8 lodged a crime report F.I.R

No.769/05 dated 06.09.2005, Ex.PF, under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and under section 338-B of the Pakistan Penal Code at Police Station Tandlianwala, District Faisalabad wherein he alleged that about three months before lodging the crime report his widow sister-in-law Mst. Gullan Bibi victim was washing clothes at water-course near the Dhari of Saudi Ahmad accused. E.I

The accused emerged there, caught hold of her arm, took her in the sugar-cane crops of one Muhammad Rafique and committed zina-bil-jabr with her under the threat of her murder. In the meanwhile on hearing her alarm Qari Farooq PW.10 and Ijaz Ahmad PW.11 attracted to the spot and witnessed the occurrence. On seeing them the accused fled away. The complainant party did not report this matter to fear of the accused and for the sake of honour. The complainant further stated that the accused occasionally came to the house of the complainant and committed zina bil jabr with Mst. Gullan Bibi

due to which she became pregnant. When the accused came to know about her pregnancy he forcibly administered her tablets resulting abortion of her pregnancy.

3. Police investigation ensued as a consequence of registration of crime report. After completion of investigation the Station House Officer submitted report under section 173 of the Code of Criminal Procedure before the Court on 28.02.2007 requiring the accused to face trial.

6.1

4. The learned trial court framed charge against the accused on 30.06.2007 under section under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and under section 338-C of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

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

(i) PW.1 Munawar Hussain Head Constable deposed that on 24.09.2005 non-bailable warrants Ex.PA of arrest of accused Saudi Ahmad was entrusted to him for execution. He tried his best but failed. He was also entrusted with proclamation Ex.PB under section 87 of the Code of Criminal Procedure for execution. He affixed one copy of said proclamation on the door of the house of the accused, second copy on outer gate of court premises.

(ii) PW.2 Muhammad Sarfraz Constable had deposited one sealed phial and a sealed parcel in the office of Chemical Examiner, Lahore handed over to him by the Moharrer.

(iii) PW.3 Zulfiqar Ali Assistant Sub Inspector stated that on 06.09.2005 Shaukat Ali Sub Inspector handed over to him one sealed phial for onward

transmission to the office of the Chemical Examiner, Lahore and on 19.09.2005 he delivered the said sealed phial to Muhammad Sarfraz Constable for onward transmission to the office of the Chemical Examiner, Lahore intact.

(iv) PW.4 Muhammad Nawaz, Sub Inspector had investigated the case. According to his investigation the accused was found innocent and he placed the accused in Column No.2 of the report under section 173 of the Code of Criminal Procedure.

(v) Lady Doctor Shameem Akhtar appeared as PW.5. She had medically examined Mst. Gullan Bibi on 06.09.2005 and observed as under:-

“External Examination

No marks of violence or injury were found on her body. Areolea were vital and

darker and milk could be squeezed out from the breasts.

Internal Examination

No fresh injury was found on vulva and vagina. Her hymen was torn. Tears were old. Vaginal orifice admitted two fingers easily. Vagina was lax due to children birth. Size of uterus was 8 to 10 weeks. Os of cervix was open one finger, bleeding from uterus was present. Two vaginal swabs were sent to Chemical Examiner, Lahore for detection of semen.”

Opinion

In my opinion she was used to sexual intercourse. Opinion about fresh intercourse was to be given after the receipt of vaginal swabs from the office of Chemical Examiner, Lahore. She had aborted within 3 to 5 days.”

- (vi) PW.6 Shaukat Ali, Sub Inspector had investigated the case. He reached at the place of occurrence, interrogated persons present there, recorded statements of PWs under section 161 of the Code

of Criminal Procedure, prepared site plan of the place of occurrence and got medically examined Mst. Gullan Bibi. On 24.09.2005 he got non-bailable warrants of arrest Ex.PA of the accused and deputed Munawar Hussain Constable for execution. He recorded statements of Zulfiqar Ali, MHC and Muhammad Sarfraz Constable under Section 161 of the Code of Criminal Procedure regarding transmission of sealed phial and parcel to the office of Chemical Examiner, Lahore. On 11.10.2005 he got proclamation Ex.PB under section 87 of the Code of Criminal Procedure, entrusted the same to Munawar Hussain Constable for execution and recorded his statement under section 161 of the Code of Criminal Procedure regarding warrants and proclamation.

(vii) Muhammad Arshad, Assistant Sub Inspector had recorded FIR Ex.PF on the basis of written application Ex.PF/1.

(viii) Nazar Muhammad complainant appeared as PW.8 and reiterated the same story as mentioned in the crime report Ex.PF.

(ix) Mst. Gullan Bibi victim appeared as PW.9 and corroborated the statement of complainant PW.8.

(x) PW.10 Qari Muhammad Farooq and PW.11 Ijaz Ahmad also corroborated the statement made by the complainant PW.8.

(xi) PW.12 Muhammad Iqbal, Assistant Sub Inspector stated that on 06.09.2005 he prepared injury statement Ex.PC of Mst. Gullan Bibi and sent her with Sher Muhammad Constable with injury statement to THQ Hospital for her medical

examination. On the same day, Sher Muhammad Constable produced before him medical certificate No.147/05 of Mst. Gullan Bibi, one sealed phial and one sealed parcel which he handed over to Shaukat Ali, Investigating Officer.

6. The prosecution closed its case on 25.03.2009. P.I.

Thereafter the learned trial Court recorded statement of accused under section 342 of the Code of Criminal Procedure. He denied the allegations leveled against him and stated in answer to question, "why this case is against you and why the PWs have deposed against you?" as follows:-

"The case was got registered against me falsely on the asking of Mushtaq Gujjar etc. due to political party friction in the village. Mushtaq Gujjar and Abdul Rehman Kamiana contested elections of Local Bodies as a Nazim against each other, complainant was Tractor driver of brother of said Mushtaq Gujjar and I was servant with Abdul Rehman Kamiana at that time, at time of polling, I was poling agent of Abdul Rehman Kamiana

against Mushtaq Gujjar, there exchange of hot words took place as a result of said facts Mushtaq Gujjar got registered this false case against me by complainant and victim of this case. The PWs are closely relative with each other, complainant PW is servant of brother of said Mushtaq Gujjar and they all deposed falsely against me only on the asking of said Mushtaq Gujjar due to party friction and criminal litigation between the parties in village. Muhammad Farooq PW cultivated my land on lease prior to this occurrence. I take over the possession of said land prior to completion of lease period, due to this grudge, he deposed against me and he forced other PWs to depose against me. All the PWs are close relatives of said Qari Farooq PW.”

7. Learned trial Court after hearing learned counsel for the parties and assessing the evidence convicted the appellant as mentioned above.

8. I have gone through the record of the case. The statement of witnesses as well as the statement of accused have been perused. Relevant portions of the impugned judgment have been considered.

9. The points that found favour with the learned trial Court while recording conviction of accused may be summarized as follows:-

(i) That all the four witnesses namely, the complainant, the victim and the two alleged eye witnesses, have categorically stated that Saudi Ahmad accused committed zina bil jabbar with Mst. Gullan Bibi as a result of which she became pregnant and the accused thereafter procured pills to induce abortion. The victim aborted after taking the medicine.

(ii) That the accused did not cross-examine the witnesses on the question of pregnancy and therefore, the allegation stood proved.

(iii) That the complainant and eye witnesses were natural witnesses and were consistent in their statement.

(iv) That the ocular account was corroborated by medical evidence because the Lady Doctor had observed that abortion took place within 3-5 days;

(v) That reliance could not be placed on Ex.DA/1, the affidavit sworn by the victim wherein she exonerated the accused, for the reason that accused in whose favour the affidavit was sworn did not appear in Court and his bail application was dismissed on account of non-appearance.

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10. It is not safe to agree with the findings of the learned trial Court because the evidence available on record has not been read in the proper perspective. The following points required consideration:-

(i) The complainant was *not an eye witness*. His presence at the spot was neither claimed by the victim herself nor asserted by the alleged eye witnesses PW.10 and PW.11. The complainant,

PW.8, himself admitted that he was informed about the incident by the victim and witnesses. The statement of complainant, therefore, cannot be characterised as legal evidence. It has to be excluded from consideration altogether.

(ii) There is no evidence on record to prove that the accused procured abortion inducing pills and gave the same to the victim after he came to know about her pregnancy. How did the complainant or the witnesses or the accused come to know and who informed them about this development is not available on the file;

(iii) PW.10 is the nephew and PW.11 is the grandson of the complainant. Only these two relatives were the waj-takar witnesses of the first episode of rape. No one else had seen the occurrence. PW.10 however admitted that both of them i.e. PW.10 and

PW.11 had not seen the occurrence. But their culpable silence for three months, conceding for a moment that they actually saw the incident, is not at all helpful for the prosecution. Should it be presumed that both of them opted to assume the role of accomplices?

(iv) The delay of more than three months is intriguing.

If the complainant could stomach the incident of rape and repeated amorous visitation of accused in his own house then he had no earthly reason to be agitated on a quiet and a successful abortion.

(v) The record reveals solitary statement of PW.9,

who has alleged Zina, pregnancy and abortion.

Medical evidence of course corroborates bleeding

but it does not pinpoint the accused as a culprit.

The abortion or bleeding could have been

5/1

maneuvered by complainant party to avoid calumny of birth of an illegitimate child.

(vi) One argument that found favour with learned trial Court was that the accused did not challenge the prosecution assertion that he purchased and gave pills to the victim to induce abortion. Consequently the learned trial Court presumed that the accused admitted his guilt. But the prosecution has not brought evidence even to allege that the accused in fact purchased or procured pills from a particular source and forced the victim to consume the said tablets. What was the nature of the tablets no one knows.

(vii) The prosecution has to stand on its legs and the ingredients of the offence have to be proved. It is only when all the ingredients of the offence have been brought on file and there is failure on the part

of accused to cross-examine the witness on crucial points, that a presumption could be drawn that the accused failed to demolish the accusation. Section 338 C of the Pakistan Penal Code under which the accused was charged, contemplates Isqat-e-Janin.

The definition of Isqat-e-Janin in section 338 B is

“whoever, causes a woman with child some of

whose limbs or organs have been formed, to

miscarry, if such miscarriage is not caused in good

faith for the purpose of saving the life of the

woman is said to cause Isqat-e-Janin”. There is no

evidence that the pregnancy had reached the stage

when the limbs or organs of the embryo in the

womb of the victim had been formed. There is no

evidence that bleeding or abortion was the result of

induced abortion and not a natural process. The

element of actual use of pills by victim on the

command of accused has not been established medically.

(viii) It is not at all necessary that accused person must make a statement on oath and produce evidence in defence. The finding of learned trial Court on this aspect in the last sentence of paragraph 22 of the impugned judgment cannot be maintained.

(ix) The learned trial Court has, in paragraph 22 of the impugned judgment, observed that relationship of witnesses inter se and their enmity with the accused is no ground to discard their evidence. The question which had to be considered was: how come that except the close relatives no one was attracted to the spot? In this case PW.10 stated that he and PW.11 saw that victim was found weeping on the water course and on enquiry she nominated the appellant as the culprit. This cousin

of victim does not claim even having seen the occurrence. His testimony relates to the period when the alleged abortion had already taken place.

This makes the very version of prosecution rather dubious.

- (x) Ex.DA/1, the sworn affidavit of the victim, exonerating the appellant, should not be brushed aside only because the accused did not seek benefit of the affidavit by appearing in court. 6.1

- (xi) The victim admitted that on a previous occasion a false case FIR 824/05 under Hudood Ordinance was lodged by her against one Khizar Hayat etc.

11. In view of what has been stated above it is not safe to maintain conviction because a) except the sole testimony of victim there is no direct evidence of Zina, use of pills and induced abortion; b) the prosecution has made a crude effort to put forward two persons as eye witnesses; c) the element of

induced abortion has not been proved; d) the victim and her family members kept quiet at all the four stages namely, rape at the first instance, subsequent carnal activity in the house of complainant and within his knowledge, emergence of pregnancy and manipulated abortion, and e) the conduct of the victim herself in making false allegation of serious offence of Zina at a previous occasion. All these points do not recommend acceptance of her allegation in this case.

12. Consequently the appellant gets benefit of doubt.

Criminal Appeal No.47/L/2009 succeeds. Impugned judgment dated 31.03.2009 delivered in Hudood Case No.246-7A/2007 is hereby set aside. The appellant is acquitted and he is directed to be released forthwith unless required in any other case.

Sruaidan
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Justice Syed Afzal Haider

Dated Lahore the
27th July, 2009
M. Imran Bhatt/*

File for reporting

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