

**IN THE FEDERAL SHARIAT COURT**  
**(Appellate Jurisdiction)**

**PRESENT**

**MR. JUSTICE SYED AFZAL HAIDER**

**CRIMINAL APPEAL NO.77/L/2007**

Zahid Ali son of Safdar Ali, caste Maachi, R/o Mohallah Mughalpura,  
Police Station City Hafizabad (confined in Central Jail, Gujranwala).  
..... Appellant

Versus

The State.

..... Respondent

Counsel for the appellant ...

Nemo

For the State ...

Qazi Zafar Iqbal,  
Addl. Prosecutor General.

F.I.R No. Date and ...

254/06, dated 20.04.2006,

Police Station, district ...

City Hafizabad,  
Hafizabad.

Date of Judgment of  
trial Court ...

06.01.2007

Date of Institution ...

21.04.2007

Last date of hearing: ....

02.03.2009

Date of Judgment ....

02.03.2009

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**JUDGMENT:**

**Justice Syed Afzal Haider, Judge:** Appellant Zahid

Ali has assailed the judgment dated 06.01.2007 delivered by the learned Sessions Judge, Hafizabad whereby he has been convicted under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to four years rigorous imprisonment with fine of Rs.6000/- or in default to undergo an additional term of simple imprisonment for three months. He has further been convicted under section 457 of the Pakistan Penal Code and sentenced to four years rigorous imprisonment with fine of Rs.6000/- in default whereof to further undergo three months' simple imprisonment. 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 Muhammad Aslam PW-3 lodged a crime report F.I.R No.254/06 dated 20.04.2006, Ex.PB/1, under section 10 of the

Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 at Police Station City District Hafizabad wherein he alleged that his brother Hanif died leaving young children and he used to sleep in his house during the night. On 20.04.2006 at about 3.30 a.m, Zahid Ali accused entered the house by scaling over the wall. He entered the room of his niece Mst. Kalsoom Bibi PW-4 and woke her up. He was armed with a dagger. He started committing Zina-bil-jabr with her. The complainant heard some voices and saw that the room of Kalsoom Bibi was lit. He asked his sister-in-law Mst.Amin Bibi and his nephew Sabir Ali to wake up. They went towards her room and pushed the door. They saw that the accused was committing Zina-bil-Jabr with Mst. Kalsoom Bibi. Mst. Kalsoom was trying to rescue herself by weeping but the accused was forcibly committing Zina-bil-jabr by threatening her with Churra. On seeing the complainant and the PWs, the accused fled away by waving Churra.

3. Police investigation ensued as a consequence of registration of crime report. Ghulam Mustafa Assistant Sub Inspector, PW-8, investigated the case. He inspected the place of occurrence, prepared the site plan Ex.PD and recorded the statements of prosecution witnesses. On 22.04.2006 he arrested accused Zahid Ali and got him medically examined on 23.04.2006 regarding potency. The Station House Officer submitted report in the trial Court under section 173 of the Code of Criminal Procedure on 27.04.2006 requiring the accused to face trial. The charge was framed on 31.05.2006 against the accused under section 457 of the Pakistan Penal Code and under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. He pleaded not guilty and claimed trial.

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

(i) PW.1 Muhammad Akram Constable deposed that on 22.04.2006 he deposited one sealed phial alongwith sealed envelop intact in the office of Chemical Examiner, Punjab, Lahore which was handed over to him by Munir Ahmed Moharrar.

(ii) Doctor Tayyaba Farooq PW-2 stated that on 20.04.2006 she medically examined Mst.Kalsoom Bibi and observed as under:

“On vaginal examination, vulva, vagina was healthy with pink reddish colour. Hymen admitted one loose finger. Very tiny laceration were present on the perineum. No bleeding or bruising was seen. High vaginal swabs were taken for final conclusion for detection of semen, if any. No report of the Chemical Examiner was received at the hospital so I have not given the final opinion. Ex.PA is the correct carbon copy of said MLR which is in my hand with my signatures.”

(iii) PW.3 Muhammad Aslam complainant reiterated the story as mentioned in the crime report.

(iv) Mst. Kalsoom Bibi victim appeared as PW-4 and supported the incident narrated by the complainant in the crime report.

(iv) PW.5 Nasarullah Khan Sub Inspector recorded F.I.R Ex.PB/1 on the basis of an application Ex.PB submitted by the complainant.

(v) PW.6 Doctor Captain Khalid Farooq deposed that he medically examined Zahid Ali accused and found him sexually potent.

(vi) PW-7 Munir Ahmad Assistant Sub Inspector/Moharrar, deposed that he received one sealed phial and one sealed envelop from Ghulam Mustafa Assistant Sub Inspector/Investigating Officer which he kept in the Malkhana and on 22.04.2006 he handed over the said articles intact

to Muhammad Akbar Constable for onward transmission to the office of Chemical Examiner, Punjab, Lahore.

(vii) Ghulam Mustafa Assistant Sub

Inspector/Investigating Officer appeared as PW.8.

He had inspected the place of occurrence, prepared its site plan Ex.PD and recorded the statements of PWs. On 22.04.2006 he arrested accused Zahid Ali and got him medically examined regarding potency on 23.04.2006.

5. After close of prosecution case, statement of the accused under section 342 of the Code of Criminal Procedure was recorded on 17.10.2006. He denied the charges and stated that "I have been falsely roped in this case. In fact Mst.Kalsoom Bibi fell in love with one boy known as Raja and in the said affair she wrote many letters to him which fact came into my knowledge and I brought the same in the notice of family of

Mst.Kalsoom Bibi. The family of Kalsoom Bibi felt its insult and by concocting a false story they roped me in this case. The PWs being inter-se related each other have deposed against me falsely.”

6. Learned trial Court after hearing learned counsel for the parties and assessing the evidence convicted the accused as mentioned above. For the purpose of deciding this appeal, I have gone through the record of the case and also perused the statements of witnesses as well as the two accused with the assistance of learned counsel for the State. Learned counsel for the appellant has not put in appearance despite service. Since I am going to record acquittal in this case so I do not have to adjourn this case for the learned counsel for the appellant to appear and argue the case. If the accused merit acquittal then the matter need not be delayed.

7. In order to sustain conviction of the accused, the guilt must be established beyond reasonable doubt. This is

possible only if the evidence adduced by the prosecution is consistent, convincing and satisfies ingredients of the offence complained of. After going through the file the following facts have raised doubts in my mind about the veracity of the prosecution case.

- (i) The victim, PW.4 Mst. Kalsoom Bibi in her cross-examination stated:

“It is correct that I had not seen the accused prior to the occurrence. I had not identified the accused at the police station or in the jail. I came to this court many times for evidence in this case. It is correct that whenever I came to the court the accused was produced in the court in my presence. It is correct that Muhammad Aslam PW.3 and Sabir Ali PW asked me to name out the accused being culprit of this case and thus, I mentioned Zahid Ali the accused present in the court being culprit of this case.

After ten minutes of entering the thief into my room, I made hue and cry. The witnesses

watched the occurrence, for five to ten minutes. We did not try to catch the accused. I went to the police station at 11.00 a.m. It is correct that the name of accused being Zahid Ali was stated to the police by my uncle Muhammad Aslam PW.3 and that I did not mention the same.”

- (ii) The site plan, Ex.PD, prepared by the Investigating Officer on 20.04.2006, i.e. on the date of occurrence does not indicate the position of witnesses where they were sleeping in the courtyard. Sabir Ali, brother and Mst.Ameen Bibi mother of Mst.Kalsoom who are the natural witnesses and were cited as witnesses in the crime report have significantly not been produced but PW.3, the complainant, who is uncle of Mst.Kalsoom is the only witness of the occurrence produced by prosecution to corroborate his own complaint. This witness has his own house at a

distance of one and a half acre. There is no plausible explanation as to why he was not sleeping in his own house.

- (iii) PW.2 Doctor Tayyaba Farooq stated that on 20.04.2006 she examined Mst. Kalsoom and the H.V. swabs were sent for chemical examination but in her examination-in-chief recorded on 12.06.2008 she stated that as no report of the Chemical Examiner was available so she had not given final opinion. She was cross-examined on 15.09.2006 but it is strange that the prosecution did not consider it appropriate to send the report of the Chemical Examiner to the lady doctor and obtain her opinion as regards the allegation of rape. The report had, however, been dispatched by Chemical Examiner on 09.05.2006. In the absence of

medical opinion about Zina the statement of the victim remains uncorroborated.

8. It is indeed true that conviction can be maintained on the solitary statement of the victim but it is always safe to seek independent corroboration particularly when the deposition of the victim is not consistent. Medical evidence, coming from an independent source, carries weight. In this case it had become abundantly clear to the prosecution, at least on 12.06.2008 that corroboration on the allegation of Zina was not forthcoming. The lady doctor, PW.1, was cross-examined on 15.09.2006 i.e. thirteen weeks after her examination-in-chief was recorded. No effort was made to recall the lady doctor or make an application at the time when she appeared on 15.09.2006. Prosecution, therefore, deliberately left the statement of Mst.Kalsoom without extraneous support. In this view of the matter the evidence of Mst. Kalsoom Bibi PW.4 has to be scanned with caution.

9. PW-3 Muhammad Aslam, complainant, does not appear to be a natural witness. He has his own house. He admits that there were male member in the house where the occurrence allegedly took place and that the house where the occurrence allegedly took place is located in the Abadi. The house has a road on the north whereas there are "houses on the other sides". No one from the adjoining house either joined investigation or appeared at the trial to support the prosecution case. No corroboration is forthcoming from the neighbourhood particularly in a situation where the real brother and mother of the alleged victim did not appear at the trial to support the complainant. This is a clear pointer to the fact that real facts are being suppressed and the trial Court was not taken into confidence.

10. The appellant has been convicted on two counts. If the very offence of Zina-bil-Jabr is not proved beyond reasonable doubt the offence of lurking house tress-pass by night fades into insignificance. The spirit of the offence under section 457 of the Pakistan Penal Code is that the lurking tress-pass is undertaken for the commission of an offence and if no offence is proved to have been committed the action is not attracted by the mischief of section 457 of the Pakistan Penal Code on the facts and circumstances of this case the offence under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 does not appear to have been committed and consequently the offence under section 457 of the Pakistan Penal Code is not committed.

11. In this view of the matter the criminal appeal No.77/L/2007 is accepted and by giving benefit of doubt

the appellant is hereby acquitted. The impugned judgment whereby conviction and sentence, as mentioned in the opening paragraph of this judgment, is set aside. The appellant shall be released forthwith unless required in some other case.

*S. Haider*

**Justice Syed Afzal Haider**

Announced at Lahore on 02.03.2009.

Fit for reporting

*S. Haider*

**Justice Syed Afzal Haider**

Amjad/\*