

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTISCE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 91/L OF 2007

Ijaz Hussain son of Allah Ditta,
r/o. Alamdi Sura, Suraj Miani, Multan.

Appellant

Versus

The State

Respondent

Counsel for appellant

Mr. Saeed Khursheed Ahmed
Advocate

Counsel for State

Miss. Shabnam Rasheed Abbasi,
Deputy Prosecutor General

FIR No. Date &
Police Station

100, Dated 23.06.2003
Sadar, Multan

Date of judgment of
trial court

27.02.2007

Dates of Institution

07.05.2007

Date of hearing of Appeal

30.03.2009

Date of decision by
Federal Shariat Court

30.03.2009

JUDGMENT

SYED AFZAL HAIDER, Judge.- Through this appeal Ijaz

Hussain has challenged the judgment dated 27.02.2007 passed by learned Additional Sessions Judge, Multan whereby the appellant has been convicted under section 377 of Pakistan Penal Code and sentenced to ten years rigorous imprisonment and to pay a fine of Rs.10,000/- and in default whereof to further undergo two months simple imprisonment. He has further been convicted under section 337-J of the Pakistan Penal Code and sentenced to five years rigorous imprisonment. Both the sentences have been directed to run concurrently. Benefit of section 382-B of the Code of Criminal Procedure was also extended to the appellant.

2. Brief facts of the case are that on 06.06.2003 at about 3.00.p.m. Haji Ijaz Daya and Naeem Shah took along Nadir Ali victim, son of the complainant to the house of Ijaz where both of them committed sodomy with him after administering intoxicant to the victim. The incident was reportedly witnessed by Bashir Ahmad alias Shabbir and Tanvir Hussain. The witnesses informed the complainant about the incident. The

complainant along with Tanvir Hussain proceeded towards the house of Ijaz and saw the accused escorting the victim who was intoxicated. The accused dropped the victim in the street and made good their escape after having seen the complainant. The complainant Talib Hussain, father of the victim, reported the matter to police where only a "Rapt" was entered in the Daily Diary. The victim was medically examined on 06.06.2003 and the contaminated swabs were sent to the Chemical Examiner. Positive report was received by police on 23.06.2003 whereafter FIR No.100, Ex.PB was registered formally on 23.06.2003. As a consequence of registration of the crime report the investigation of the case was undertaken by Azmat Khan SI PW.12. The witness visited the place of occurrence and prepared the site plan. Statements of witnesses including the victim was recorded by the Investigating Officer. On 06.06.2003 Ghulam Ali, ASI, PW.5 had sent the victim for medical examination through Asif Ali constable PW 7. PW.12 conducted raids for the arrest of accused who had absconded and were evading interrogation. On 17.7.2003 he obtained non-bailable warrants against both the accused from the Illaqa Magistrate. PW.4' Muhammad

Tahir Constable/Process server was entrusted the execution of warrants against Ijaz and Naeem accused. Copies were affixed at the houses of the accused/Court premises. However Ijaz was arrested on 08.11.2004 from a hotel in Alamdar Chowk Multan. The accused was then medically examined. After completion of investigation the SHO submitted a report under section 173 of the Code of Criminal Procedure in the court on 20.11.2004 requiring the accused to face trial.

3. The trial court framed charge on 04.05.2005 against Ijaz Hussain accused under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and section 377 of the Pakistan Penal Code. The trial court also framed charge under section 337-J of Pakistan Penal Code against the accused as he and Naeem Shah co-accused had thrown the victim Nadir Ali out of the house in naked condition after committing sodomy in unconscious position due to which the victim sustained injury. The accused did not plead guilty and claimed trial. Naeem Shah had been declared a proclaimed offender as he could not be arrested even after

completing the formalities required under sections 87 and 88 of the Code of Criminal Procedure.

4. The prosecution produced 12 witnesses at the trial in order to prove its case. The detail of the deposition of witnesses is as follows:-

- i. Dr. Fayyaz Khan Durrani appeared as P.W.1. He had undertaken the medical examination of accused Ijaz Hussain and found him potent to perform sexual intercourse.
- ii. Statement of Muhammad Rafique, Head Constable No.1001 was recorded as P.W.2. He had drafted the FIR Ex.PB after receiving the complaint.
- iii. Abdul Hafeez, S.I. appeared as P.W.3. He arrested the accused Ijaz Hussain on receipt of spy information on 08.11.2004 and produced him before the Illaqa Magistrate whereafter he was sent to judicial lock up.
- iv. Muhammad Tahir, Constable/Process Server appeared as P.W.4. On 18.7.2003 he was entrusted proclamation marked A & B for execution against Ijaz Hussain and Naeem Shah.
- v. Ghulam Ali, ASI deposed as P.W.5. He had recorded statement of Talib Hussain, complainant on 06.06.2003 and got the victim Nadir Ali medically examined through Khalid Zahoor constable. On 23.06.2003 he drafted the complaint after receipt of report of the Chemical Examiner and sent the same to the police station for registration of FIR.

- vi. Statement of Abdul Rehman Constable was recorded as P.W.6. He deposed that on 10.06.2003 he received a sealed envelope and sealed bottle and delivered the same in the Office of Chemical Examiner, Multan on the same day intact.
- vii. Muhammad Asif, Constable No.49 appeared as P.W.7 and stated that on 06.06.2003 he got the victim Nadir Ali medically examined from Nishtar Hospital, Multan and received medico legal report. One sealed bottle and one envelope was handed over to the Moharrir for safe custody in the Malkhana.
- viii. Talib Hussain, complainant appeared as P.W.8. He affirmed the contents of his complaint Ex.PD.
- ix. Tanveer Hussain, a neighbour of the complainant, appeared at the trial as PW.9 and stated that on the day of occurrence he saw Ijaz and Naeem taking away victim Nadir Ali towards the Dera of Ijaz Hussain near Jafaria Bazaar. He further alleged that he alongwith Shabbir P.W. entered the Dera of Ijaz Hussain and saw through the holes that accused were administering liquor to Nadir Ali. The P.W. also averred that both the accused committed sodomy with the victim.
- x. Nadir Ali victim appeared as P.W.10 and corroborated the statement of his father Talib Hussain. He further stated that both the accused had committed sodomy with him.
- xi. Dr. Waseem Sarwar, Medical Officer Nishtar Hospital, Multan appeared as P.W.11 and deposed having medically examined victim Nadir Ali on 06.06.2003. He gave details of his examination.

xii. Azmat Khan, S.I. had investigated the case. He appeared as P.W.

12. The detail of his investigation has already been mentioned in an earlier paragraph of this Judgment.

5. Learned DDA closed the prosecution case on 31.01.2007. The

learned trial court thereafter examined the accused Ijaz Hussain under

section 342 of the Code of Criminal Procedure wherein he made the

following statement:-

“I have been falsely involved in this case because of the revenge of complainant who is the father of victim Nadir Ali with my sister namely Mrs. Shahnaz and the complainant who is property dealer by profession had unlawfully taken Rs.93000/- from her. On our demand for the return of money, the complainant developed revenge and he threatened of dire consequences and due to the above grievance I have been falsely involved in this case. The complainant party offered to withdraw from the case if me and my family had withdrawn from the claim of Rs.93000/-. The complainant even previous had done similar act when his brother had got lodged FIR No. 11/88 dated 18-1-1998 for the offence u/s 377-PPC read with 12/7/79 Islamic Law of P.S Saddar District Multan and similar allegation of un-natural offence with the complainant of that case Fida Hussain had been made therein. Copy of the FIR has been produced as Ex.D.B. Thereafter the compromise between

the victim and complainant of that case took place and in result thereof the witness sworn their affidavits before the Court that they were not even present at the spot and had not seen any occurrence. The witness Allah Wasaya was identified by Talib Hussain complainant in this case. Copy of the affidavit is Ex.D.C. The complainant had given up one witness for his own reason, all the other private witnesses stated against each other. The names of witnesses who appeared as PWs in this case have been mentioned different places. Even the name of father of co-accused has been mentioned different at different places. I am innocent and had committed no offence. I do not have any friendly relations with Nadir Ali victim or with Naeem Shah alleged co-accused/P.O.

Neither the accused made statement on oath under section 340(2) of the Code of Criminal Procedure nor produced any evidence in his defence.

6. The learned trial court heard the learned counsel for the defence as well as the learned DDA assisted by the learned counsel for the complainant. The learned trial court after assessing the evidence in the light of the arguments of the parties came to the conclusion that the charge against Ijaz accused/appellant stood proved beyond any shadow of doubt.

Therefore he convicted the appellant on 27.02.2007 vide the impugned

judgment under sections 377 and 337-J of Pakistan Penal Code and sentenced him as noted above. Hence this appeal against his conviction and sentence.

7. I have seen the file. The evidence of the prosecution as well as the statement without oath made by the accused and the documents placed on record have been perused. Relevant portions of the judgment have also been scanned. The arguments of the learned counsel for the parties have been heard and considered in the light of material available on record.

8. The contentions of the learned counsel for the appellant are as follows:-

i. That the victim, Nadir Ali PW.10 does not enjoy good reputation and was therefore not a reliable witness. On a court question whether there is evidence on record to show that the victim was habitual and was a consenting party, the learned counsel submitted that this point has not been proved but it has been suggested to the witness. Learned Deputy Prosecutor General however referred to the cross-examination of the victim in which he categorically denied having been expelled from the school on the ground that he consumed alcohol.

ii. The learned counsel then submitted that the complainant was in the habit of making false complaints. On a previous occasion the complainant is alleged to have lodged a complaint against brother of accused which was withdrawn later on. In support of his contention reference was made to FIR 11/88 registered under section 377 of the Penal Code read with section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and the affidavit Annex Pand Q respectively produced by accused. On perusal of this crime report it transpired that it was not lodged by the complainant. There is no evidence on record to show that the crime report was withdrawn or that it was made against the accused or his brother. The affidavit Ex.PQ does not throw light on the defence either.

iii. It was next contended that the eye witness Tanvir Hussain had alleged commission of sodomy only against Naeem Shah accused who is an absconder. The evidence of the eye witness is clear that he had alleged commission of sodomy against Ijaz in his examination-in-chief. In the cross-examination he stated "I had seen Naeem Shah committing sodomy with Nadir and Ijaz was only standing nearby." The witness stated that both the accused were in the room alongwith the victim who was being administered intoxicant.

iv. Lastly it was contended that the solitary statement of the victim has not been corroborated and hence it should not be relied upon. However learned counsel for the appellant was asked to refer to the statement of Dr. Waseem Sarwar PW.11 who had examined the victim on 06.06.2003 within four hours of the commission of sodomy and the report of the Chemical Examiner Ex.PC. It is conclusively proved by medical

expert PW.11 that sodomy was committed as "mild redness was present over and margin at 12.0 clock position. Tenderness was present". This observation is further corroborated by the finding of Chemical Examiner who found that "Tranquillizer was detected" in the blood samples sent for examination. Corroboration on both counts is available on record.

9. After concluding his arguments learned counsel for the appellant prayed for reduction of sentence. On a court question the learned counsel stated that the only ground he would urge for reduction of sentence is that the appellant is a first offender. Learned counsel for the appellant relied upon the case of Muhammad Azam Shah versus The State reported as 2008 PCr.LJ 250 where a sentence of 5 years was deemed sufficient.

The facts of each criminal case are different. In the cited precedent the accused was convicted on two counts and sentence was awarded under section 12 of Ordinance VII of 1979 as well as section 377 of Pakistan Penal Code. Moreover the element of administering intoxicant was not available in that case. In that case there was only one accused, while in the instant appeal the crime is compounded as the offence partakes of a group action. It is therefore not a fit case for reducing the sentence to five years.

The appellant is not a young lad like the victim. He is a grown up man of

28 years and as such he is not entitled to the leniency of already undergone as urged by the learned counsel. However in view of the fact that he is a first offender the quantum of sentence awarded under section 377 of the Pakistan Penal Code is being reduced to 6 years rigorous imprisonment.

10. The impugned judgment is well reasoned. The evidence on record as well as the points raised by the appellants before the trial court were duly considered. The allegation of kidnapping or abduction was not found proved and consequently it was declared that charge under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was not proved. The convictions however were recorded under section 377 read with section 337 J of the Pakistan Penal Code. Both the charges were found proved on the strength of evidence of victim as corroborated by the deposition of Dr. Waseem Sarwar, Medical Officer as well as report of Chemical Examiner Ex.PE/Ex.PQ. The defence plea was assessed but found "not believable".

11. In view of what has been stated above the impugned judgment dated 27.02.2007 recorded in Hudood Case no.19 of 2005/Hudood Trial

No.03 of 2005 is being maintained. However sentence of imprisonment recorded under section 377 of the Pakistan Penal Code has been reduced to 6 years rigorous imprisonment. The sentence of fine is being maintained and in default of payment of fine he will undergo an additional term of two months simple imprisonment. The sentences under both the counts shall run concurrently. Benefit under section 382-B of the Code of Criminal Procedure will remain intact. With this reduction in the quantum of sentence of imprisonment on one count alone this Criminal Appeal No.91/L of 2007 is dismissed.

S. Haider

JUSTICE SYED AFZAL HAIDER

Islamabad the 30th March, 2009
*Mujeeb-ur-Rehman/**

Fit for reporting

S. Haider