

No.F.1(6)/2009-FSC
Federal Shariat Court

Islamabad the January 12,2009.

- From: **The Registrar,**
Federal Shariat Court,
Islamabad.
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Urdu Bazar, **Lahore.**
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Lahore.
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Civil Law Cases
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Monthly Law Digest,
35-Nabha road,
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Through :- The Additional Registrar,
Federal Shariat Court,
Bench Registry, Lahore,
High Court Building, **Lahore.**

- Subject:-1. Cr.Appeal No.87/L/2006 L/W.**
Zafar Versus The State
Cr.Appeal No.91/L/2006 L/W.
Zulfiqar Masih Vs. the State
Cr.Murder Ref. No.5/L/2006
The State Vs. Zafar and Zulfiqar Masih
- 2. Cr.Misc.15/I/2008 L/W.**
Mudassar Iqbal etc. Vs.The State
Cr.Misc.49/I/2008
Ajab Khan Vs. The State

I am enclosing herewith two copies of the judgment in the above cited cases containing total number of pages (16), (07 & 02) for reporting in your legal Digest in the forthcoming issue.

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(Hafiz Muhammad Afzal Tunio)
Assistant Registrar (R&S)
For Registrar

No.F.1(6)/2009-FSC
Federal Shariat Court

Islamabad the January 12, 2009.

From: The Registrar,
Federal Shariat Court,
Islamabad.

To : Sindh Balochistan Law Reporter,
8/29, Arkey Square, Shara-e- Liaqat,
New Challi, **Karachi**.

Through:- Assistant Registrar,
Federal Shariat Court,
Bench Registry, Sindh,
High Court Building, **Karachi**.

Subject: **1. Cr.Appeal No.87/L/2006 L/W.**
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(Hafiz Muhammad Afzal Tunio)
Assistant Registrar (R&S)
For Registrar

IN THE FEDERAL SHARIAT COURT
(Appellate jurisdiction)

Present

MR. JUSTICE HAZIQUK KHAIRI, CHIEF JUSTICE
MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.87/L OF 2006

Zafar son of Muhammad Javed,
Resident of Chamanzar Colony,
Street No.3, P.S. Batala Colony,
Faisalabad. Appellant.

Versus

The State.

For the appellant

Mr. Khalid Mian,
Advocate.

For the State

Syed Ali Imran, DPG.

CRIMINAL APPEAL NO.91/L OF 2006

Zulfiqar Masih son of Gulzar Masih,
Resident of Chamanzar Colony,
Street No.2, P.S. Batala Colony,
Faisalabad.

For the Appellant

Syed Zaman Haider,
Advocate.

For the State

Syed Ali Imran, DPG.

CRIMINAL MURDER REFERENCE NO.5/I OF 2006

The State –Versus- Zafar and Zulfiqar Masih

No. & Date of FIR/PS

No.21/2005, 13-1-2005,
P.S. Batala Colony, Faisalabad.

Date of impugned judgment

8-4-2006

Date of filing appeals

18-4-2006 & 20-4-2006

Date of hearing

16-9-2008

Date of decision

24-10-2008

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JUDGMENT:

Justice Haziqul Khairi, Chief Justice:- These two criminal appeals No.87/L/2006 filed by Zafar and No.91/L/2006 filed by Zulfiqar Masih are directed against the judgment dated 08.04.2006 of the learned Additional Sessions Judge, Faisalabad whereby both the appellants were convicted under Section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to death each.

2. Briefly stated on 12.01.2005 at noon time, Mst. Tahmina victim (PW.7) aged 16-years, daughter of complainant Abdul Ghafoor (PW.10) was returning home after seeing her friend Mst. Shahnaz, when three accused persons known Yasar, Zulfiqar and Zafar were standing in front of Hair Fashion Shop, Street No.2, Chamanzar Colony, Faisalabad, caught hold of her and forcibly took her into a room of Nadeem Dance Academy and committed Zina-bil-jabr with her turn by turn. On her hue

12/1/05

and cry, Anwar-ulHaq (PW.5) and Muhammad Ashfaq (PW.8) were attracted to the spot and saw that the victim was laying naked in un-conscious condition. On seeing them, the accused fled away. The victim and the PWs, told the whole incident to the complainant, her father who got registered the FIR on the following day, i.e. 13.01.2005.

3. Formal charge was framed against eh appellant under Section 10(4) of the said Ordinance but they pleaded not guilty. Prosecution produced as many as 11 PWs.

4. PW.2 Dr. Monaza Khurshid examined the victim Tahmina Bibi PW.7 at 11.40 a.m. on 13.01.2005 and as per her

MLC Ex.PA her observations were as under:-

1. Breasts were well developed.
2. Axillary and public hairs were thick and black.
3. Hymen was torn, tears were old and healed all around the orifice.
4. Vagina admitted two fingers easily on P.V. examination.
5. Uterus was of normal size as closed.
6. Four vaginal swabs were taken, 2 for semen analysis, 2 for semen grouping.

7. Two cc blood was taken for grouping. All these were handed over to police for chemical examiner, Lahore.
8. No marks of violence were seen on her body and private parts.

She opined that the victim was habitual for sexual intercourse. She also signed the police application Ex.PB.

5. PW.6 Dr. Irfan Elahi, Medical Officer, D.H.Q. Hospital, Faisalabad examined the appellants but both of them refused to give semen sample. However, on his opinion there was nothing to suggest that they were unfit for sexual intercourse.

6. PW.7 Mst. Tahmina victim in her deposition stated that about 9 months ago, she was coming to her house from the house of her Khala, when near the Dance Academy, the appellant Zafar present in the Court, caught hold of her and dragged her inside the dance academy. He removed her clothes. He and appellant Zulfiqar forcibly Zina-bil-jabr with her. The accused were three in number. She raised noise. No her hue andry, Anwar and Bao PWs were attracted. The accused were three in number. They committed zina-bil-jabr

12/1

with her turn by turn. On her hue and cry, the PWs entered breaking open the door. The accused after seeing the PWs fled away from the spot. She narrated the occurrence from its start to culmination to the PWs and also told them the name of her father and address. The PWs informed her father, who also arrived there. The police also arrived at the spot and got recorded her statement and the statements of the PWs and her father. She was medically examined by a Lady Doctor through a Lady Constable. In cross examination she stated that she is illiterate. Two persons committed rape with her, turn by turn. Police arrived at the spot and they went to the police station on the same day. She lost her senses at the time of occurrence. When the accused caught hold of her by her arms, she resisted and raised hue and cry, but no one listened to her. The street was empty at that time. On her resistance, appellant Zafar slapped her on her face. She went in comma during the occurrence. She went to see her friend Shahnaz at about 2.00

12/1

p.m. The mother of the Mst. Shahnaz was also present at her house. She remained in the house of her friend for half an hour. She went to the Police Station in the company of her father and brother. The PWs Anwar and Ishfaq were also with them. The police did not record her statement in the in the police station separately. She was medically examined on the following day of the occurrence by a doctor.

7. PW.5 Anwar-ul-Haq in his testimony stated that on 12.01.2005 at about noon time, he alongwith Muhammad Ishfaq alias Bao was passing through Street No.2 of Mohallah Chaman Zar Colony, they heard shrieks of some woman from inside the house which attracted them. They broke open the outer door of the house and entered into the house and saw the accused Zulfiqar and Zafar were running away while lifting the shalwars. The victim told them her name as Mst. Tehmina. She on query told them that the accused Yasar, Zafar

12/1

and Zulfiqar had committed zina-bil-jabr with her. She further told them that when she was passing through the street, the accused present before the court forcibly took her from the street and committed zina-bil-jabr. He and Muhammad Ishfaq PW witnessed the occurrence and informed the father of Mst. Tahmina and the police through telephone. The police arrived at the place of occurrence and also recorded his statement under Section 161 Cr.P.C. In cross-examination he stated that many people were gathered outside the house. Mst. Tahmina came into her senses after 10/15 minutes of the occurrence but she was in her senses at the time of lodging of the FIR. He was in the company of the complainant and victim at the time of lodging the FIR. They had seen the occurrence by their naked eyes. He had not seen the accused Yasar at the place of occurrence. Mst. Tahmina told them that Yasar accused present before the Court committed zina-bil-jabr with her, whereas later on she stated that Yasar had not committed zina-bil-jabr with

12/1

her. The complainant, victim as well as the witnesses, exonerated the said accused in their statements/affidavits before the Court at the time of bail.

8. PW.8 Ishfaq Ahmad stated that on 12.01.2005 at about noon time, he alongwith Anwar-ul-Haq was passing street No.2, Chaman Zaar Colony. When they reached near dance academy, they heard the shrieks of a woman. The said shrieks were coming from the dance academy. They knocked the door but it was not opened by any body. When they pushed the door with force, the door was opened. They entered into the room and saw the victim Mst. Tahmina in naked condition whereas Zafar and Zulfiqar present in the Court were also in naked condition. There was no other person in the room. They handed over a SAFA to the victim for covering her body and in the meanwhile both the accused after lifting their clothes ran away in naked condition. They saw scratches on Tahmina's arm, which occurred because of broken bangles. They contacted the

father of the victim. His whereabouts were given to them by the victim. Thereafter they rang up the police upon which police arrived at the place of occurrence. His statement under Section 161 Cr.P.C. was recorded by the police on the same day at the spot. In cross-examination he stated that on the day of alleged occurrence and on the following day he was on leave and did not go to his job. His house was situated at a distance of 2 K.M from the place of occurrence. After the occurrence people gathered there. He joined the investigation on 12/13.01.2005 and also when the I.O. called him. On the following day of the occurrence, his statement under Section 161 Cr.P.C. was recorded by the I.O, which was recorded at Police Station.

12/13/05

9. PW.10 Abdul Ghafoor the complainant and father of the victim Mst. Tahmina stated that about 9/10 months back, Anwar and Ashfaq alias Baoo PWs informed him of the occurrence with his daughter. He filed an application Exh.PG before the police which was read over and explained to him and

was signed as token of its correctness. In cross-examination he stated that he had gone to his work on the fateful day and was not present at the time of alleged occurrence. He and his daughter had exonerated the accused Yasar in their affidavits before the Court at bail stage due to misunderstanding.

10. PW.11 Rana Ali Ahmad Inspector stated that on 13.01.2005 he was Inspector Incharge Investigation Staff Batala Colony, Faisalabad and investigation of the case was entrusted to him as the case was already registered. He went to the place of occurrence. Complainant and victim were present there. PWs were also there. He recorded the statements of all concerned. He inspected the spot and prepared rough site plan of the place of occurrence. He produced the victim Mst. Samina before the Illaqa Magistrate for effecting her MLC. The victim was medically examined by M.O. D.H.Q. Hospital, Faisalabad. He conducted raid for the arrest of the accused who were arrested on 19.01.2005 thereafter he produced all of them before the

12/1/05

medical officer D.H.Q. Hospital for their potency test. He investigated the case and transmitted the swab of the victim through constable Muhammad Hussain to the Chemical Analyst. He concluded his investigation and recommended for submission of challan against the accused. When he reached the place of occurrence so many people gathered there except PWs.

The place of occurrence dance academy at the time of inspection the door was open. The victim was accompanied with a lady constable at the time of medical examination. He also recorded the statement of lady constable on 13.01.2005.

11. In their statement under Section 342 Cr.P.C. both the appellants stated in their defence as under:-

“I have been falsely involved in this case at the behest of police. I do not have any connection with Nadeem Dance Academy who were said to be involved in the occurrence have been lft off by the police for certain reasons. I and my co-accused could not please the police as well as the complainant. Therefore, I was involved in this case. It is now known that, the complainant party has exonerated Yasar accused after obtaining Rs.25,000/- from him. The PW.7 to 10 have falsely deposed against me due to their

blood relation interse whereas other PWs are chance witnesses.”

12. The above statement under Section 342 Cr.P.C. of the two appellants namely Zafar and Zulfiqar is the same with not a world's difference here or there, which gives an impression that only one was examined by the trial court not the other. This violates the principle that no body should be condemned unheard *audi alteram partem*. The mandatory provisions of Section 342 Cr.P.C. should be strictly adhered to and. However learned Counsel for the appellants Mr. Khalid Mian & Syed Zaman Haider have not raised any such objection either in the memo of appeals or contended verbally during the course of his arguments.

13. What boils down from the deposition of PW Dr. Monaza Khurshid is (i) Four vaginal swabs of victim were taken, two for semen analysis, two for semen grouping. (ii) 2 cc blood was taken for grouping for chemical examiner. According to PW.6 Dr. Irfan Elahi both the appellants were not unfit for

sexual intercourse and they refused to give semen sample. The

testimony of PW.7 Tahmina reveals (i) the appellant Zafar caught hold of her and dragged her inside the dance academy.

He removed her clothes and both the appellants committed zina-bil-jabr with her but the accused were three in number and

committed zina-bil-jabr turn by turn (ii) she lost her senses at the time of occurrence. she went in comma during the

occurrence. (iii) she told PW.5 Muhammad Anwar-ul-Haq and PW.8 Ishfaq Ahmed of what happened to her. The testimony of

PW.5 and PW.8 was to the effect: (i) when they reached near dance academy, they heard the shrieks of a woman (ii) they

broke open the door and saw Mst. Tahmina in a naked condition and the accused after lifting their clothes ran away in

naked condition (iii) they informed the father of the victim and police and recorded their statements under Section 161 Cr.P.C.

(iv) Mst. Tahmina came to her senses after 10/15 minutes of the

1215

occurrence (v) Yasar accused was not at the place of occurrence and was exonerated by the victim.


4 In the first instance Zulfiqar Masih played no role in dragging Mst. Tahmina from the road to the Dance Academy, secondly as per her version, Zafar, Zulfiqar and Yasar one by one had committed zina-bil-jabr with her but later on she had exonerated Yasar. Thirdly, according to her as well as PWs. 5 and 8 she lost her senses during rape. Fourthly both PWs. 5 and 8 saw the appellants running with their shalwars but did not see zina-bil-jabr which if the testimony of the victim for rape is disbelieved would tantamount to an attempt to commit zina-bil-jabr. The appellants in statements under Section 342 cr. P. C. have taken up the plea that "they were falsely involved at the behest of police but the appellants neither examined themselves nor produced any witness in support thereof. There indeed was no inordinate delay in lodging the F.I.R. Similarly she was examined by P.W.2 Dr. Monaza Khurshed immediately after the occurrence.


Although on the basis of testimony of prosecution witnesses, zina-bil-jabr stands established against the appellants, yet there are mitigating circumstances which call for lesser punishment than prescribed under law.

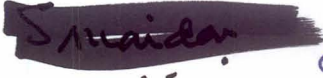
In the case of Bashir Ahmed and two others—Vs-The State, PLD 2002 Supreme Court 775, it was held that when zina-bil-jabr is committed, no other sentence but death is to be awarded because the law does not permit award of any other punishment. However in another case namely Syed Sohail Ahmed and another-Vs-The State 2001 SCMR 2007 two persons were alleged to have committed rape with the prosecutrix as per her F.I.R. but in the Court she alleged that three persons had raped her, which had made it a case for lesser sentence and sentence of death of each accused was altered to imprisonment for life with benefit of Section 382-B Cr. P. C. In the present case also three persons were alleged to have committed zina-bil-jabr with Mst. Tahmina including Yasar but later on she exonerated him.


12/11/06

Accordingly while upholding the conviction of the appellants,
we reduce their sentence from death to imprisonment for life. The
murder reference is replied in negative. Benifit of Section 382-B Cr.P.C
is also granted to the both of appellants.

Sd -

24/10/08
JUSTICE HAZIQUL KHAIRI
Chief Justice

Sd -

JUSTICE SALAHUDDIN MIRZA

S. Maideen

Sd -
JUSTICE SYED AFZAL HAIDER

Approved for

12/11/08
24/10/08