

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTISCE SYED AFZAL HAIDER

MR. JUSTICE MUHAMMAD AFZAL SOOMRO

CRIMINAL P.S.L.A. NO. 2/I OF 2008

Nazir Hussain son of Soona Khan,
r/o Mouza Basti Lurrka Tehsil and
District Dera Ghazi Khan

... Appellant

Versus

1. The State
- 2, Bilal son of Ghulab resident of Police Station, Kot Chutta, District D.G.Khan.
3. Safdar Hussain son of Ahmed Bux resident of Basti Lurrka D.G.Khan

... Respondents

Counsel for appellant

...

Mr. Muhammad Umair Baloch,
Advocate

Counsel for State

...

Miss. Shabnam Rasheed Abbasi
Deputy Prosecutor General

FIR No. Date &
Police Station

...

351/2004 Dated 09.11.2004
Kot Chutta, D.G.Khan

Date of judgment of
trial court

...

02.04.2008

Date of Institution

...

28.06.2008

Date of hearing of Appeal

...

31.03.2009

Date of decision by
Federal Shariat Court

...

31.03.2009

JUDGMENT

SYED AFZAL HAIDER, Judge.- Through this Petition for Special Leave to Appeal Nazar Hussain Complainant has challenged the judgment dated 02.04.2008 delivered by learned Additional Sessions Judge, Dera Ghazi Khan by which respondents Bilal and Safdar Hussain were acquitted in the case registered as complaint 61/2007 initiated upon a private complaint filed by the complainant on 13.04.2005 before the trial court.

2. Brief facts of the case as given out in the complaint moved under section 200 of the Code of Criminal Procedure before the trial court are that Mst. Nasreen, daughter of the complainant, was married with Safdar Hussain respondent three years before the institution of the complaint while Mst. Tasleem Mai aged 14/15 years, the other daughter of the complainant was unmarried. On 8.11.2004 accused Safdar Hussain alongwith Bilal respondent No.2 came to the house of the complainant and took Mst. Tasleem Mai alongwith other female residents of the village for plucking cotton. At about 4.00.p.m. the women folk returned without Mst.

Tasleem Mai. Complainant and his wife set out to search the girl and were told on the way by Zafar Hussain and Bilal sons of Atta Muhammad that they had seen Mst. Tasleem Mai being driven on a motorcycle by Bilal and accused Safdar Hussain. The information was that all the three were heading westward in great speed. It was also alleged by the complainant that Bilal and Safdar accused had abducted his daughter with the object of Zina.

3. Complainant Nazar Hussain on 09.11.2004 appeared before Abdul Sattar S.I. Police Station Chutha and made an oral statement disclosing commission of an offence cognizable under Hudood law. The Police Officer reduced the complaint into writing Ex.P/A and sent the same to the Police Station for formal registration of case. PW.5 Khadim Hussain ASI had registered FIR Ex.PA/1 No.351-2004 at 7.00 p.m. on 09.11.2004, on receipt of written complaint Ex.PA. Police investigation ensued as a consequence of the crime report. Investigation was undertaken by Abdul Sattar S.I. who appeared at the trial as C.W.1.

4. The investigating officer proceeded to the spot and performed codal formalities. The abductee was recovered on 09.11.2004. Safdar Hussain accused was medically examined after his arrest. According to the Investigating Officer Bilal accused was not involved in the case. It is stated that the complainant being dis-satisfied with the investigation moved higher authorities for transfer of investigation on the ground that Bilal accused was declared innocent due to his complicity with the police officer and that recording of the statement of abductee under section 164 of the Code of Criminal Procedure was intentionally delayed.

5. Abdul Sattar S.I. arranged for the medical examination of Mst. Tasleem Mai on 12.11.2004 whereafter she was handed over to her father. According to the report of the lady Doctor the abductee was found a sex habitual. Bilal accused was declared innocent. The investigation was transferred to Malik Nazir Ahmed Inspector who found that the abductee Mst. Tasleem Mai herself was hit by the mischief of the offence of Zina. Incomplete "Challan" was submitted by police on 11.03.2005. The complainant thereafter filed a private complaint against Safdar Hussain and

Bilal accused. Both of them were summoned. Charge was framed on 18.02.2006 under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 against both accused who did not plead guilty and claimed trial. Trial commenced thereafter.

6. The prosecution in order to prove its case produced five witnesses at the trial. Mst. Tasleem Mai appeared as P.W.1. She narrated the story of her abduction by the accused. She also alleged Zina against both the accused. P.W.2 Nazar Hussain, complainant reiterated the facts recorded in his complaint as well as the FIR. Ghulam Mustafa appeared as P.W.3 and deposed that he alongwith complainant in the company of police went to Shakoor Abad colony from where accused Safdar and abductee Mst. Tasleem Mai were recovered and the accused Safdar was arrested by the police. Lady Dr. Farkhanda Jabeen, who had medically examined Mst. Tasleem Mai and issued Medico Legal Report Ex.PB, appeared as P.W.4. She gave the details of medical examination of abductee. Lastly Khadim Hussain appeared at the trial as PW 5. He had registered the FIR on 09.11.2004 after receiving the complaint. Abdul Sattar Pittafi,

Inspector/SHO on court call appeared as C.W.1 and deposed about the investigation conducted by him. He had visited the place of occurrence, prepared scaled site plan without scale, recorded statements of the witnesses under section 161 of the Code of Criminal Procedure, recovered Mst. Tasleem Mai on 09.11.2004 and arrested accused Safdar Hussain. After investigation accused Bilal was not found involved in this case. The investigation of the case was transferred from him on 02.12.2004. On 13.03.2005 investigation of the case was again entrusted to him regarding the remaining accused.

7. The trial court after examining the evidence of the witnesses and completing all legal formalities found the accused innocent and acquitted them of the charge. Hence the present petition has been moved by the complainant for the grant of special leave to appeal from the order of acquittal.

8. Learned trial court in paragraph 5 of the impugned judgment commenting upon the statement of PW1 Mst. Tasleem Mai, the abductee observed as follows:-

“During the trial on her application she was re-examined on 19.03.2008 wherein she deposed that her earlier statement was got recorded under coercion. The accused present in court did not commit Zina bil Jabr with her. Her father got divorce of her sister from her husband Safdar accused.” It is significant to note that copy of the statement of PW1 recorded during her re-examination on 19.03.2008 has not been appended with this petition seeking leave to file an appeal. This paragraph has not been challenged in the grounds taken in the Criminal PSLA No.2/I of 2008 either. Learned counsel for the petitioner had no answer for not doing the needful.

These findings have not been challenged by the learned counsel for the petitioner in this PSLA.

9. The grounds of this petition are silent as regards the contents of paragraph 8 of the impugned judgment dated 02.04.2008. The said paragraph is being reproduced below to appreciate the significance of the observation of learned trial court which has also not been challenged.

“In cross examination she admitted that her sister was married with accused Safdar Hussain three years prior to the occurrence. PW.2 complainant father of victim/PW.1 has admitted in cross examination that her daughter Nasrin got divorce through court. While appearing for re-examination on 19.03.2008 she was cross-examined by learned counsel for complainant.

She admitted that she has conducted marriage with accused Safdar after the divorce of her sister by accused Safdar. On a court question, she deposed that she has been living in the house of her husband accused Safdar since one year. She stated that she has been blessed with a son whose age at this time is about five months.”

10. It is also worth mentioning that lady Doctor Farkhanda Jabeen PW.4 under-took medical examination of Mst. Tasleem, aged 16 years on 12.11.2004 and found “vagina lax and admitted two fingers easily ... she was not virgin and was habitual.” This part of the prosecution version itself not only reflects upon the bona fides of the prosecution story but this aspect has not been assailed by the appellant.

11. The complaint initiated by Nazar Hussain complainant on 13.04.2005 was silent as to when Mst. Tasleem Mai was recovered. But while appearing at the trial he stated in his examination in chief that on the same day i.e. 08.11.2004 the police conducted raid and recovered Mst. Tasleema and arrested Safdar accused at the spot while Bilal accused fled away. This version negates the story narrated in crime report No.351/2004 registered on 09.11.2004 wherein it is clearly mentioned that on 09.11.2004

the complainant was in search of the abductee. This witness also admitted in his cross-examination: "It is correct that brother of Bilal accused registered criminal case against my brother in law." 10

12. A bare perusal of the complaint dated 13.04.2005 reveals vague allegations about abduction and Zina. The complaint was lodged five months after the alleged incident and the alleged recovery of the abducted girl but no reference to the place and time of this continuing offence was mentioned.

13. The complainant has nowhere given any proof that the abductee was a minor at the time of the alleged abduction. Medical evidence however shows that Mst. Tasleem Mai had come of age and was sui juris.

14. The impugned judgment is well reasoned. The evidence has been duly assessed. No adverse inference has been drawn from the proved facts by the learned trial court. There is no element of non-appreciation of the evidence or misreading of evidence leading to miscarriage of justice. The impugned judgment is neither perverse nor whimsical. Learned

counsel for the petitioner seeking permission to file appeal has not been able to point out that the judgment under challenge is opposed to some legal provision or is violative of the established principles of appreciation of evidence. The mere fact that, according to the learned counsel for the complainant, another view could have been possible has never been considered by higher courts as a valid ground to interfere in an acquittal order. It is also not the case of the complainant that he was denied opportunity to prove his case or in other words not having obtained the full opportunity to establish his case. To put it differently it is also not the contention of the learned counsel for the complainant that the verdict of not guilty was recorded without considering the points proved by the complainant. This is also not the case that the order passed by learned trial was slipshod of a nature which has adversely affected its legitimacy. In an appeal against acquittal the appellate court is called upon to consider whether the evidence on record emanated from unimpeachable source. Another important point for consideration is whether the prosecution has proved its case against the accused beyond reasonable doubt. Can the

acquittal not be sustained on the evidence brought on record? The court has not to assess the factor that the accused had failed to prove its defence as pressed by the learned counsel for the petitioner. In the light of what has been stated above the principle involved in the grant or refusal of permission for special leave to appeal against acquittal is to see whether there is any disregard of material evidence on record or misreading of such material evidence or that the court below has consider that evidence which was not brought on record through legal means. The impugned judgment on the contrary is based upon evidence and reason. Learned counsel for the complainant has not been able to show to the contrary. If any authority is needed reference may be made to the case of The Sate Vs. Tanveer ul Hassan reported as 2009 PCr.LJ 199 particularly paragraph 11 through 14 (pages 216-226 of the report) where the various principles relating to appeal against acquittal have been enumerated.

15. In this view of the matter there is no merit in thi's Petition for Special Leave to Appeal filed under section 417 (2A) of the Code of Criminal Procedure praying for reversal of the impugned judgment dated

02.04.2008 delivered in complaint No.61/2007. As a consequence thereof notices need not issue to the respondents. Cr.P.S.L.A No.2/I of 2008 is dismissed.

JUSTICE SYED AFZAL HAIDER

JUSTICE MUHAMMAD AFZAL SOOMRO

Islamabad the 31st March, 2009
*Mujeeb ur Rehman/**

Fit for reporting