

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

MR.JUSTICE S.A. MANAN
MR. JUSTICE SAEED-UR-REHMAN FARRUKH

Criminal Appeal No.29-I of 2002
Criminal Revision No.15/L of 2002

1. Muhammad Faisal son of Muhammad Nazir,
Caste Qazi.
2. Asjad Mehmood son of Akram,
Caste Qazi.
3. Muhammad Tariq son of Ghulam Murtaza,
Caste Kumhar.

(All residents of Chak Musa, police station Jhawarian,
Tehsil Shahpur, District Sargodha)

---- Appellants

Versus

The State	---	Respondents
Counsel for the appellants:	---	Malik Rab Nawaz Noon, Advocate
Counsel for the complainant:	---	Sahibzada Ahmad Raza Qasuri Advocate
Counsel for the State:	---	Mr.Muhammad Sharif Janjua, Advocate
No.& Date of FIR & police station:	---	No.39 dt.27-3-2001 P.S. Jhawarian
Date of decision of trial court:	---	6-2-2002
Date of Institution:	---	11-2-2002 & 6-3-2002
Date of hearing:	---	11-6-2003
Date of decision:	---	12-6-2003

JUDGMENT

SAEED-UR-REHMAN FARRUKH, J., -. By this judgment we propose to dispose of following two matters as they arise out of the same judgment dated 6-2-2002 by Additional Sessions Judge Sargodha:-

- (i) Criminal appeal No.29/I of 2002
- (ii) Criminal Revision No.15/L of 2002

Though the impugned judgment, learned trial Judge convicted the appellants under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to undergo R.I. for life each. Muhammad Faisal and Asjad Mehmood were convicted under section 377 PPC and sentenced to undergo R.I. for ten years each. Muhammad Tariq accused was convicted under section 377 read with section 109 PPC and sentenced to undergo R.I. for five years. The appellants were also convicted under section 292 PPC and sentenced to undergo three months R.I. each. All the sentences awarded to the appellants were directed to run concurrently. They were extended the benefit of section 382-B Cr.P.C.

The appellants, through their appeal, have challenged their convictions and sentences aforementioned.

In the connected revision petition the complainant, Muhammad Younas, has assailed the same judgment and sought enhancement of the sentence of the convicts to death under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with sections 377/511,292 PPC.

It may be stated, at this stage, that criminal Misc.application bearing No.117/I of 2002 was moved by the complainant under section 428 Cr.P.C. for recording additional evidence. Notice was issued on this application vide order dated 29-11-2002. Through this application, it was prayed that since in the challan report under section 173 Cr.P.C. there was a specific mention of Camera alongwith the Film which were taken into possession by the local police but the same was not produced in evidence during the course of trial although Camera Ex-PB and prints of the nude photographs P1 to P12 Ex-PC were produced before the court, therefore, additional evidence under section 428 Cr.P.C. with regard to the Camera and the flim may be recorded, which are in the custody of the local police.

2. We have heard the learned counsel for the parties in the two connected matters, above-mentioned, and perused the record with their assistance.

3. Learned counsel for the complainant addressed elaborate arguments qua his plea for recording additional evidence (Misc.application No.117/I of 2002.

Prosecution story, as revealed in the FIR (Ex_PD) dated 27-3-2001, registered at police station Jhawarian at the instance of Muhammad Younas PW-4, resident of Chak Musa, is that he was student of 7th class. At about 3.30 p.m. he was present at canal bank Jhawarian alongwith Muhammad Rizwan PW-5 when the appellants met them and asked

to accompany them. Both Muhammad Younas and Muhammad Rizwan were taken into a deserted Haveli where Muhammad Rizwan was threatened to move away whereafter Haveli was bolted from inside. According to the complainant he was forced to remove his shalwar but he refused. The appellants forcibly stripped him naked. Muhammad Faisal appellant took off his own shalwar and committed un-natural offence with him but he ejaculated without penetration whereafter Muhammad Asjad committed this act with him and he too ejaculated in a similar manner. In the meantime, Muhammad Rizwan, Qadir Bakhsh and Muhammad Yar entered the Haveli by scaling over the wall and challenged the appellants who ran away leaving the complainant in naked condition. At that stage Muhammad Rizwan made disclosure that 3/4 days prior to this incident the appellants had also committed sodomy with him and taken his nude photographs but out of fear/shame he did not inform any body.

4. Investigation was intitiated in the matter. Muhammad Arshad ASI(PW-6) paid a visit to the spot, prepared site plan, Ex-PE, recorded statements of the witnesses under section 161 Cr.P.C. whereafter investigation was transferred to Ghulam Abbas Shah S.I./SHO of police station Jhawarian.

Ghulam Abbas Shah S.I. (PW-8) carried out further investigation.

On 1-4-2001 Muhammad Tariq appellant, allegedly, produced a Camera alongwith film which was taken into possession vide recovery memo Ex-PB.

On the same day application Ex-PF was moved before the Magistrate for permission to develop the film and preparation of photographs which was allowed Ex-PF/1. After completing the necessary investigation the accused were challaned to court.

During the course of trial, Mokarram Photographer appeared as PW-3 and deposed that negatives of the nude photographs (Ex-P1 to P12) were given to him by the police and he got the same developed. During the course of his cross-examination it transpired that the negatives were neither available on the police file nor on the judicial record.

Muhammad Younas, complainant, entered the witness box as PW-4 and gave detailed statement about the alleged occurrence. According to him he was criminally assaulted by both Muhammad Faisal and Muhammad Asjad appellants but, while they were rubbing their penis inside his buttocks they ejaculated outside his anus. He was subjected to lengthy cross-examination. Photographs P5 to P8 were shown to him. He stated that these were his photographs and were taken while he was in naked condition.

The defence tried to elicit from this witness that there was rivalry over the election of Chairman Union Council between two factions in the village. He admitted that police did not take into possession the cot (whereupon offence was allegedly committed). He asserted that he produced his clothes before the police but the same was not taken into possession. He did not get himself medically examined as, according to him,

the police official had told him that there was no need of such examination. He admitted that on the judicial file there were similar photos of two other boys namely Ghulam Rasool Muslim Sheikh and Javed Gujjar. He denied the suggestion that a false case had been foisted upon the appellants due to enmity.

He deposed that soon after the occurrence he first went to his house, took bath and then proceeded to the police station alongwith his father. He admitted that Muhammad Yar and Qadir Bakhsh cited prosecution witnesses are his relatives, former being his paternal cousin and the latter his Khalazad. Though in his examination-in-chief he alleged that Tariq accused has taken his naked photographs but in his statement before the police under section 161 Cr.P.C. his name did not find mention. He denied the suggestion that nude photographs were provided by Mehr Muhammad Amir. He also repelled the suggestion that he had introduced the story of taking bath so that it may not be objected that there was no semen on his body at the time of report to the police.

The second material witness in the case is Muhammad Rizwan PW-5. In his examination-in-chief, it was claimed by him that he alongwith Muhammad Younas complainant was walking in the bazar when the appellants met them and they were led into a deserted Haveli. He was made to run away under threats and thereafter Muhammad Younas was taken into a room. He returned from there weeping and met Muhammad Yar and Qadir

Bakhsh and told them about the incident who went to Haveli and found its door chained from inside. They scaled over the wall and went into the Haveli and on seeing them the appellants ran away. Muhammad Younas was found in a naked condition, who told them that his nude pictures, four in number, had been taken and thereafter sodomy was committed with him. He alleged that five days before this occurrence, the appellants had taken his nude pictures also and committed sodomy with him but he did not disclose this fact to any one as the appellants had threatened him with dire consequences. He was shown photographs P1 to P4 by the prosecutor and he deposed that these were his photographs, taken in naked condition. He was subjected to lengthy cross-examination by the defence. Certain portions of his examination-in-chief were confronted with his statement made before the police with a view to shake his veracity. He denied the suggestion that he had concocted the story of sodomy with him and of taking nude photographs, earlier. He admitted that he did not get himself medically examined. He, too, refuted the suggestion that these photographs were produced by Mehr Muhammad Amir.

Muhammad Arshad ASI appearing as PW-6 contradicted Muhammad Younas and stated that no clothes of the victim was produced before him during the investigation and he did not take into possession the cot or any bed sheet from the residential room where the alleged occurrence took place and further that he did not get the victim medically examined.

Ghulam Abbas Shah Sub Inspector PW-8 who had completed the investigation also denied the suggestion that film and Camera was produced by Mehr Muhammad Amir and that these were falsely planted upon the accused.

5. After conclusion of the prosecution evidence the statements of the appellants were recorded under section 342 Cr.P.C. wherein they pleaded innocence. They did not offer to lead any defence evidence and also stated that they would not appear as witnesses under section 340(2) Cr.P.C. to vindicate their position.

Above is the resume of the prosecution evidence in the case. We have also looked at nude photographs of both the complainant (P5 to P8) and Muhammad Rizwan (P1 to P4).

6. Muhammad Rizwan, on his own showing, had been subjected to sodomy by the three appellants 4/5 days prior to this occurrence. Significantly he neither mentioned this fact to any one nor he get himself medically examined.

Assuming that such an occurrence had indeed taken place, his bald assertion that he did not make disclosure about it due to fear cannot be accepted on its face value. There are only two possibilities (i) Either he was youngster of perverse nature who did not feel any repulsion qua the indecent act or (ii) he was telling a blatant lie against the appellants with a view to bolster up the case of the prosecution. Judged in whatever

perspective he appears to be a person of debased character. No explanation is forthcoming as to why he accompanied the complainant to the Haveli alongwith the appellants who had few days earlier sexually assaulted him. We are constrained to hold that his testimony about the alleged occurrence is not truthful and merits to be discarded.

We are thus left with the statement of Muhammad Younas complainant. It is really intriguing that though, allegedly, his father went alongwith him to the police station for lodging the complaint yet he was neither cited as a witness nor produced during the course of trial, in support of the prosecution case.

Learned counsel for the appellants has vehemently argued that since no occurrence, as alleged by the prosecution, had taken place, therefore, the police did not consider it necessary to examine the father of the petitioner. In our society, in case, a youngster whether a boy or a girl, is subjected to sexual harrashment, in the natural course of human conduct, the parents either personally make report to the police or accompany the victim to the police and thereafter actively participate in the investigation so that the culprits are brought to book. This was not done in the instant case and no explanation for this lapse is forthcoming from the prosecution side.

7. The manner in which the investigation into the alleged occurrence was conducted leaves many important questions which remain unanswered.

In case complainant was indeed subjected to sodomy, the police, in due

discharge of its duty, should have taken into its possession the cot or bed sheet, if any, lying upon it by way of corroborative piece of evidence. This was not done. Since according to the complainant, while being subjected to sodomy, the two appellants namely Faisal and Asjad Mehmood had ejaculated outside his anus, therefore, the inner part of his buttocks and thighs would have been stained with lot of semen. The clothes that he allegedly put on after the appellants had run away should have also been stained with semen. Since a prompt FIR was lodged by him before the police no explanation is forthcoming as to why the clothes were not produced by him before the police in support of his allegations.

Muhammad Younas took care, as per his own showing, of taking bath before going to the police and thus the possibility of any trace of semen being left on his body also vanished.

The question as to why he was not got subjected to medical examination, for verification of the alleged occurrence, also assumed significance in the backdrop of the events, as narrated by him. Though allegedly, while being subjected to sodomy, penetration had not taken place yet he would have offered some resistance on being thrown on the cot and then subjected to the shameful act. In the absence of medical examination and admittedly, there being no marks of violence on his body the genuineness of the prosecution story as to sodomy is rendered open to serious doubt. This is particularly so as it is not the case of the

prosecution that Muhammad Younas was a passive agent in the sordid affair.

8. That is not all. We have seen the nude photographs of both the boys. It was noticed that these were not taken while they were being forcibly held by some one and then exposed, in naked position, before the Camera. The shameful postures of both the witnesses even to the extent of exposing their private parts cannot but lead us to the conclusion that the photographs was not taken under duress or coercion. These rather appear to be photographs of willing subjects. No reliance can be placed on the statement of Muhammad Younas complainant about his allegation of being forcibly stripped naked, thrown on the cot and then subjected to sodomy, one after the other, by Muhammad Faisal and Muhammad Asjad appellants.

It will not be unfair to held that, unfortunately, both Muhammad Younas and Muhammad Rizwan appear to youngsters of morbid character. It would be highly unsafe to believe their word for convicting the appellants qua the offence under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

9. It will not be out of place to mention here that Fazal Karim owner of the Haveli was not made to join the investigation. The assertion that it was a deserted Haveli has not impressed us.

There is nothing on record in support of the assertion . No explanation is forthcoming, either, as to why Qadir Bakhsh and Muhammad Yar who allegedly scaled over the wall of the Haveli, alongwith Muhammad Rizwan were not produced before the court in support of the prosecution. Strong adverse inference, per force, has to be drawn against the prosecution that had they been cited as witnesses they would not have supported the prosecution.

There appears some force in the defence plea that political vendetta between two factions in the village was sought to be satisfied through these two wayward boys.

Since we have already found both Muhammad Younas and Muhammad Rizwan PWs to be unreliable witnesses, the offence under section 292 PPC, on the basis of their testimony, is also held to be not proved against the appellants.

10. For what has been stated above we have reached the conclusion that the prosecution has miserably failed to prove its case against the appellants. Accordingly, the appeal is accepted and the impugned judgment is set aside with the result that appellants stand acquitted.

In the facts and circumstances of the case, the application for additional evidence (Misc.application No.117/I of 2002) and criminal revision No.15/L of 2002 are rejected.

Cr.A.No.29/I of 2002
Cr.Rev.No.15/L of 2002

-13-

11. Vide short order dated 12-6-2003, we have announced the judgment allowing the appeal and acquitted the appellants. These are the reasons for the said judgment.


(S.A. MANAN)
Judge


(SAEED-UR-REHMAN FARRUKH)
Judge

Lahore , the 18th June, 2003
Zia

APPROVE FOR REPORTING.


(Saeed-ur-Rehman Farrukh)
Judge