

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

MR.JUSTICE FAZAL ILAHI KHAN, CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN

CRIMINAL APPEAL NO: 95/1 OF 2001

Abdul Sattar son of Ahmad Yar,
Resident of Wan Bachhran,
presently resides at Mohallah
Qadrabad, MIANWALI

.... APPELLANT

VERSUS

The State

.... RESPONDENT

Counsel for the appellant

.... Mr. Muhammad Aslam Uns,
Advocate

Counsel for the complainant

.... Syed Abdul Aziz Shah and
Syed Iftikhar Ali Shah, Advocates.

Counsel for the State

.... Mr.Muhammad Sharif Janjua,
Advocate

No.Date of FIR and
Police Station

.... 228, dated 30.5.2000
Mianwali City.

Date of decision of the
Trial court.

.... 10.4.2001

Date of Institution

.... 25.4.2001

Date of hearing

.... 10.9.2002

JUDGMENT

DR.FIDA MUHAMMAD KHAN,J. This appeal preferred by Abdul Sattar son of Ahmad Yar, resident of Mohallah Qadrabad, Mianwali assails the judgment dated 10.4.2001 passed by the learned Additional Sessions Judge, Mianwali whereby he has convicted him under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, hereinafter referred to as the said Ordinance, and sentenced him to 25 years R.I. as tazir. He has further convicted him under section 11 of the Ordinance and sentenced him to suffer imprisonment for life with a fine of Rs.20,000/- or in default thereof further two years R.I. The benefit of section 382-B Cr.P.C has been extended to him. It has been directed that both the sentences shall run concurrently.

2. Briefly stated the case of prosecution as disclosed in FIR Ex.PA recorded on the statement of Muhammad Zubair Shah, father of Sadia Parveen, the victim, aged 12 years, who was studying in fifth Class, was abducted by the appellant/accused while she was going to her school alongwith Mst. Munira and Sumaira, both aged 10 years from near the railway crossing. It was alleged that the appellant/accused was armed with pistol. When the complainant got the information he alongwith his wife and his brother, namely Amir Abbas, went out

in her search and at about 12.30 noon found her while she was weeping. She informed that the appellant/accused Abdul Sattar had abducted her, taken her to Wan Bachhra, where he subjected her to zina-bil-jabr, and thereafter left her at aforementioned place. The appellant/accused was subsequently arrested and after necessary investigation challaned to face trial.

3. At the trial prosecution examined eight witnesses in all. P.W.1 is Muhammad Zubair Shah, complainant who reiterated his statement as mentioned hereinabove. P.W.2 is Mst.Sadia, victim girl. She deposed in the following words:-

"I knew accused Adul Sattar present in the court. He was known to me for the last five six years prior to the occurrence. He was residing with his maternal uncle our neighbourer. I am studying at Primary school Mohallah Goshala, Mianwali in 5th Class. Mst.Munira and Mst. Sumera also studied at the above school. They have their residence at Mohallah Qadrabad, in my house.

The occurrence took place with me approximately five months ago at about 7.30 a.m. I was going to my school alongwith Mst. Munira and Sumera PWs. I reached alongwith the above said PWs at southern signal of railway towards its west, where the accused came armed with pistol, caught hold me and on the pin point of the pistol asked me to go with him. He took me to the wagons stand for wan Bachhran at Mianwali on the pin-point of the pistol forcibly. He took me to Wan Bachhran on the Wagon from Mianwali. We deboarded from the wagon at a chowk at Wan Bachhran and from where he took me to a Haveli. He committed zina-bil-jabr with me in a room of the above said Haveli. I made hue and cry, but the accused put his hand on my mouth. After committing zina bil jabr the acused took me to Chowk at Wan Bachhran deboarded me on a wagon and took me to Mianwali wagons stand. He deboarded me to Riksha from Mianwali wagons stand and left me at near southern signal of railway crossing. He went away on the abovesaid Riksha who brought me there. I was

going to my house when I met my father, mother and uncles PWs, near the railway crossing. I told them the occurrence.

I recorded my statement to the police. I was medically examined through a lady doctor. I took the police to the place where the accused committed zina bil jabr with me and showed the same to the police."

P.W.3 Lady Dr.Sadat Balqees, medically examined Mst. Sadia on 30.5.2000. She

mentioned her age as 11 years and made the following observations:-

On general examination:

- 1- No suspicious stain on her clothes.
- 2- No mark of violence on her body.
- 3- P/V examination, hymen is freshly torn and bleeding present from a small vagina tear on six 'O clock position. Vagina admits one finger. Tenderness present on P/V examination. There is evidence of fresh intercourse."

She took three vaginal swabs for detection of semen and grouping. Report of

Chemical Examiner reveals that the above swabs were stained with semen. P.W.4

Altaf Hussain, Constable received sealed phial of swabs on 31.5.2000 and

delivered the same to the office of Chemical Examiner on 1.6.2000. P.W.5 is

Dr.Muhammad Zaheer-ud-Din. He medically examined the appellant/accused

and opined that there was nothing to suggest that he was not able to perform

sexual intercourse. P.W.6 is Ghulam Yasin, MHC. On 31.5.2000, he received one

sealed phial from Sher Khan, SI for safe custody. He handed over the same to

Muhammad Altaf, Constable for onward transmission to the office of Chemical

Examiner. P.W.7 is Ghulam Ahmad, ASI. He produced Mst. Sadia before

Medical Officer for her medical examination. P.W.8 is Sher Khan, SI. On 30.5.2000 he drafted formal FIR Ex.PA on the statement of Zubair Shah while he was accompanied by Amir Abbas and Sadia Parveen. He investigated the case. He arrested the appellant/accused on 2.6.2000 and got him medically examined. On 2.6.2000 the complainant produced school certificate, Ex.PB, of Mst.Sadia Parveen and he took the same in possession vide recover memo Ex.PC.

4. The appellant/accused made a statement under section 342 Cr.P.C wherein he denied the allegation and pleaded innocence. While responding to a question "why the case has been made against you and why the PWs appeared against you"? he made a statement in the following words:-

"The case against me is based on malafide and ulterior motive on the part of complainant and the alleged victim Mst. Sadia Parveen. The alleged eye witnesses of this case Mst. Munira and Mst. Sumera did not come to give their evidence. Mst.Sadia Parveen testified against me on the instigation of her father Muhammad Zubair Shah. Actually some days prior to the occurrence, when I and some other boys were playing cricket in a play ground in front of complainant's house the ball went to the complainant's house and I went to collect the same. There I made a quarrel with the complainant, therefore, due to this grudge he registered a false and fabricated case against me."

He declined to make a statement on oath nor produced any evidence in

defence.

5. We have heard learned counsel for the parties and have perused the record with their assistance. Learned counsel for the appellant submitted that as far as abduction is concerned no legal and cogent evidence is available on record to support the charge in this respect. Elaborating his point he submitted that two eye-witnesses of the occurrence, at the first instance, namely Munira and Samera have been given up on the application of complainant and as such their evidence has not been recorded. Likewise Amir Abbas, real brother of complainant, and Mst. Shamim Akhtar, wife of the complainant, witnesses of the occurrence at the other end, have been given up. Regarding the charge under section 10(3) of the Ordinance, he submitted that the prosecution has failed to determine exact age of the victim girl, namely Sadia, as no ossification test was ever conducted. He submitted, the MLR reveals that no marks of violence were found on the body of Sadia and it clearly shows lack of any resistance. He further submitted that the pistol, allegedly possessed by the appellant at the time of occurrence, has also not been recovered. Dilating further on the point he elaborated that the house where the rape was allegedly committed was inhabited and lot of people were also admittedly available throughout on the way leading to that house but Sadia raised no hue and cry. In view of these factors he concluded that it appears a case



of consent which, at the most, falls within the purview of section 10 (2) and not of section 10(3) of the Ordinance and, therefore, the sentence awarded to the appellant could be reduced.

6. Rebutting the arguments of learned counsel for the appellant, learned counsel for the complainant contended that this is a case wherein FIR was lodged without delay and this factor excludes the possibility of any deliberation for false implication. He submitted that there was no possibility of any substitution also as in such like cases substitution is a rare phenomena and, moreover, no sane person could ever think of spoiling the career of his unmarried young daughter. Regarding the charge of abduction, the learned counsel submitted that the tender aged poor girl was taken away by the appellant to a far off place, situated at a distance about 20 miles, where he subjected her to zina-bil-jabr. He further submitted that the two eye-witnesses Munira and Samera who were accompanying Sadia, victim of the case, at the time of occurrence and the appellant/accused had submitted application for their production in defence but later on he withdrew that application and it was dismissed as withdrawn. Regarding quantum of sentence the learned counsel vehemently contended that the sentence was appropriate and just and the appellant deserve no leniency as

he is guilty of committing a heinous offence by committing rape on a tender aged innocent girl. Learned counsel for the State supported the impugned judgment and added that according to MLR, age of the victim girl was stated 11 years but it was never challenged in cross-examination and as such it stood proved on record.

7. We have duly taken into consideration arguments put forward by learned counsel for the parties and have anxiously perused the record in the light of their submission. It transpires that the occurrence took place in the morning while the complainant was present in his house. When he received information at about 8.05 a.m., he immediately went out to search his daughter. At about 12.30 he succeeded in finding her out. He accordingly reported the matter to police then and there. The FIR reveals that initially the matter was reported to police on the same day at about 10.30 and details of the occurrence were subsequently disclosed at police station after recovery of the victim. This shows that the complainant party lost no time to report the matter to police and also continued searching her out also on their own. The appellant/accused has been duly nominated in the FIR. In the absence of any serious enmity, the possibility of any deliberations or substitution of the real culprit on the part of complainant party is

excluded. The available record does not even show any such enmity. So far as identity of the appellant is concerned that has been established on record. He was well known to the complainant party. Even the appellant does not deny the same. Nor it is his plea that he was misidentified. The suggestion regarding a quarrel that took place some days prior on account of cricket ball has been denied by P.W.1 and not established by any cogent piece of evidence by the appellant. His identity was confirmed by Mst. Sadia also in her statement. She has made a confidence inspiring statement wherein she has charged the appellant for her abduction as well as her subjection to zina-bil-jabr. Her statement finds full corroboration in material particulars from the MLR reproduced hereinabove. It reveals that the hymen was freshly torn and bleeding was present from a small vagina tear. Tenderness was also observed therein. It was opined that fresh intercourse has been committed. Positive report of the Chemical Examiner further confirmed the same position. P.W.1 Muhammad Zubair Shah, complainant who reported the matter to police has also made deposition. His statement also inspires confidence. That provides circumstantial evidence. The abductee met them in weeping condition after the occurrence. The house where the victim girl was subjected to zina-bil-jabr was

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duly pointed out by her to the Investigating Officer. Mother of the accused was present therein.

8. So far as the age of victim girl is concerned that finds mention in three places; firstly in FIR, then in MLR and thereafter in Certificate Ex.PB. The age shown in FIR is 12 years, in MLR 11 years and in Certificate 12/13 years. The accused party has not challenged the age anywhere. No cross-examination was made even on P.W.3 Dr.Sadat Bilqees in this respect. In any case she appears to be minor as, at the time of occurrence, she was student of fifth class and apparently the age shown in the MLR properly reflects her age. Regarding non recovery of pistol or non production of the given up PWs or non grouping of semen, it suffices to mention that no adverse inference could be drawn against the prosecution for that reason, as the same is altogether immaterial and inconsequential in the context of this case. The pistol was allegedly shown only to pressurise the victim and was not actually used. Although the tender aged small girls did not appear as PWs, as they were stated to have been won over, but it is noticeable that they were also not produced in defence. The application in this respect was withdrawn by the accused party and was therefore, dismissed as withdrawn in the trial. The victim was a tender aged girl and naturally she

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was not in a position to put physical resistance to the young appellant who was of about twenty years old at that time.

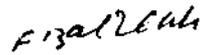
9. Since the appellant/accused has been found guilty of committing rape on a tender age girl and, besides spoiling her career, has also brought the whole family in disrepute, he deserves no leniency and, as such, we are not inclined to reduce his sentences.

10. Consequently for the reasons stated above, we maintain conviction and sentences of the appellant and dismiss his appeal. Order of the learned trial Court in respect of concurrence nature of the sentences is however maintained.

The benefit of section 382-B Cr.P.C extended to him by the learned trial Court shall also remain intact.



(Dr. Fida Muhammad Khan)
Judge



(Fazal Ilahi Khan)
Chief Justice

Islamabad, 10.9.2002
M. Arshad Khan.