

IN THE FEDERAL SHARI AT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE MUHAMMAD ZAFAR YASIN
MR.JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL No.328/L/2004

Bashir Ahmad alias Kashif son of Fazal Din, caste Rajput Kumhar, R/o
Basti Bhutta Tatay Pur, Multan.

..... Appellant.

Versus

The State.

..... Respondent

Counsel for the appellant: Syed Athar Hussain Shah, Advocate.

Counsel for the State: Mr.Arif Karim, D.P.G.

Hudood Case No. 14/H of 2003.

Hudood Trial No. 3/T of 2003

Police Station Bhowana, Jhang.

F.I.R No.dated, P.S: 192/2002, dated 16.11.2002, under
sections 10/11/13

Date of judgment
of trial court 15.02.2005

Date Of Institution 16.03.2005

Last Date Of Hearing 02.01.2009

Date Of Decision 02.01.2009.

Date of Judgment 17.01.2009.

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JUDGMENT

JUSTICE SYED AFZAL HAIDER, J: This appeal, filed by Bashir Ahmad alias Kashif, hereinafter called “ the appellant”, is directed against the judgment dated 23.09.2004 passed by learned Additional Sessions Judge, Multan, whereby the appellant has been convicted and sentenced as under:-

Under section 11 of the Offence Life imprisonment and fine of of Zina (Enforcement of Rs.10,000/-, in default whereof, Hudood) Ordinance VII of 1979 to further undergo one month's rigorous imprisonment.

Under section 13 of the Offence Life imprisonment and fine of of Zina (Enforcement of Rs.10,000/-, in default whereof, Hudood) Ordinance VII of 1979 to further undergo one month's rigorous imprisonment.

Under section 364 of the 10 years' rigorous imprisonment Pakistan Penal Code and fine of Rs.10,000/, in default whereof to further undergo 1 month's rigorous imprisonment.

Under section 10(3) of the 10 years' rigorous imprisonment, Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979

All the sentences were ordered to run concurrently with benefit of section 382-B of the Code of Criminal Procedure.

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2. Brief facts leading upto this appeal are that Muhammad Mujahid, hereinafter called "the complainant" lodged case F.I.R No.192/2002 dated 16.11.2002 under sections 10, 11 and 13 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 read with section 364 of the Pakistan Penal Code at Police Station Bhowana, district Jhang, stating that he was resident of Tataypur and his mother Mst.Bharanwan and sister Mst.Sughran, hereinafter called "the victim" were also living with him. On 24.04.2002; Mst.Sughran and Mst.Bharanwan were going to Multan for their personal work. At Bus Stand Tataypur, the accused Bashir Ahmad alias Kashif, hereinafter called the appellant met them who told his mother that Mst.Sughran be engaged with his relative, resident of Chak B.C.G and for this purpose, they may enquire upon status of the said relative. On his inducement, both Mst.Sughran and Mst.Bharawan went with the appellant who led them to the house of Mst.Nusrat accused near Allah Wasaya Mills where they were given

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intoxicated milk and both became unconscious. When Mst.Sughran regained senses, she found herself in a mountainous region where she asked the appellant about her mother. The appellant is alleged to have sold Mst.Sughran his sister to some one else and Mst.Bharawan has so far not traced. His sister, the complainant further alleged, was recovered by Military men who informed him (complainant) and he brought his sister from Dera Ismail Khan on 21.10.2002. After receiving the report of the occurrence, Muhammad Ilyas, Assistant Sub Inspector, recorded the statement, Ex.PA of complainant which was registered as F.I.R No.192/2002 bearing mark Ex.PA/1.

3. As a consequence of the registration of the Crime Report, Police initiated investigation as a result whereof the appellant sent up to face the trial before the learned Additional Sessions Judge, Multan. The appellant was charged under sections 11, 10(3) and 13 of the Offence of Zina (Enforcement of Hudood)

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Ordinance VII of 1979 by the learned trial Court on 13.05.2003. He pleaded not guilty and claimed trial.

4. The prosecution in support of its case, in addition to documentary evidence, produced ten witnesses.

i) PW-1 Muhammad Mujahid, complainant of the case, stated almost the same facts as narrated by him in the Crime Report.

ii) PW-2 Mst.Sughran Bibi, the victim, also supported the contents of the F.I.R.

iii) Muhammad Hussain PW-3 stated that about two years back while he was driving Bus No.1486/GT, Kashif accused and three women including Mst.Sughran alias Rabia traveled from Totaypur to Multan in his Bus. During cross-examination, he admitted that the victim was related to him.

iv) PW-4 Azhar Abbas, Dispenser, RHC Qadirpur Raan, Multan recognized the handwriting & signatures of Dr.Abdul Ghafoor, Senior Medical Officer (since dead), stated that the application for

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medical examination of Bashir Ahmad Kashif was signed by late

Dr.Abdul Ghafoor.

v) PW-5 Constable Mushtaq Ahmad stated that he was handed over a sealed envelope and one sealed Phial by Khadim Hussain Constable for onward transmission to the office of Chemical Examiner, Multan which was deposited in the said office on the same date intact.

vi) PW-6 Khadim Hussain, Head Constable, Police Station Budhla Sant, Multan, stated that he received one sealed envelope and one sealed Phial from Fateh Muhammad, Sub Inspector, for custody which he kept in the Malkhana of Police Station and on 11.12.2002 he handed over the same to Constable Mushtaq Ahmad for onward transmission to the office of Chemical Examiner, Multan.

vii) PW-7 Dr.Nabila Tariq stated that on 04.12.2002, Mst.Sughran Bibi alias Rabia aged about 17/18 years was examined by her and

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on general examination, she observed no marks of violence or signs of struggle on the body of the victim. On P/V examination, she found:-

“Vulva vagina was healthy, hymen showed multiple old healed, vagina admitted two fingers easily, uterus was of normal size.”

During cross-examination, she stated that sign of struggle or sign of violence indicates the resistance offered by the examinee at the time of incident.

viii) PW-8 Muhammad Ilyas, Assistant Sub Inspector, stated that on 16.11.2002, after receiving application Ex.P-A, he recorded formal F.I.R. During cross-examination, he admitted that he inadvertently missed the word “LAAF HAY”. However, this word was mentioned in application Ex.P-A.

ix) PW-9 Fateh Muhammad, Sub Inspector, stated that on 16.11.2002 the investigation of the case was entrusted to him. He arrested the appellant on 11.12.2002 and during physical remand of

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the appellant, the investigation was transferred from him.

During cross-examination, he stated that Mst.Sughran in her first statement recorded under section 161 of the Code of Criminal Procedure did not level the allegation of Zina against the appellant.

x) PW-10 Mansoor Alam Khan, Inspector, stated that investigation of the case was entrusted to him on 22.12.2002 and then he arrested Mst.Nusrat Bibi on 25.12.2002. He submitted report under section 173 of the Code of Criminal Procedure requiring the accused to face trial. During cross-examination, he stated that he did not visit Dera Ismail Khan for investigation as permission was not granted to him by the Home Department.

5. After submission of report of the Chemical Examiner Ex.PE, the DDA closed the case of the prosecution.

6. We have seen the record of the case and perused the impugned judgment, statements of the witnesses as well as statement

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of the accused recorded under section 342 of the Code of Criminal Procedure. The accused neither opted to appear as witness in his own defence nor produced any defence. However, he made the following statement in reply to question No.7:

“Question No.7: Why this case and why the PWs have deposed against you?

Ans: This is a fabricated case. In fact, Mst.Sughran and her mother Mst.Bharawan had close acquaintance with Mst.Nusrat and Abdur Rehman alias Abdu. Both ladies had gone with their own consent with Mst.Nusrat and Abdur Rehman alias Abdu to Tribble area where Abdur Rehman and one Waqas etc. had been committing Zina as reported where all these accused were apprehended by political agent, from where, Mst.Sughran complainant of this case was also aware about all the said facts and had been commuting between Multan and D.I.Khan. PW namely Mujahid is the real brother of Mst.Sughran and due to that reason he has falsely deposed before this Court, whereas, Muhammad Hussain PW is the real uncle of Mst.Sughran and has enmity with me. Both have made a concocted story against me and involved me in this case falsely.”

7. It is in fact a case which depends upon the solitary statement of Mst.Sughran PW-2. There is no evidence to corroborate the accusation of abduction nor supporting evidence to

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establish rape. The allegation was that she was recovered through some army personnel but no one either from the armed forces appeared to support prosecution version nor did the Investigating Officer deemed it expedient to verify the correctness of the statement of the abductee. The interesting part of the story is that though the abductee alleged rape but neither medical evidence produced by the prosecution through PW-7 Lady Doctor Nabila Tariq establishes signs of struggle or marks of violence on any part of the body of alleged victim nor the three high vaginal swabs taken by the lady doctor from the private parts of the abductee were found contaminated by semen of human origin. The result indicated on Ex.P-E, report of the Chemical Examiner, dated 18.12.2002 states that the "swabs are not contaminated with semen." We are, therefore, left only with the statement of Mst.Sughran Bibi who alleged offences of Zina-bil-Jabr, abduction as well as sale for the purpose of prostitution. In this view of the matter, we will have to

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be cautious while scanning the evidence because the prosecution case rests on the solitary testimony of Mst.Sughran Bibi.

8. The intriguing part of this tale is i) that the complainant Muhammad Mujahid makes us believe that his sister PW-2 Mst.Sughran alongwith his mother were enticed away on 24.04.2002 but he elected not to seek Police help for almost 27 weeks and it was only on 16.11.2002 and that two three weeks after the alleged return of his sister from the clutches of accused persons, that he lodged crime report F.I.R Ex.PA/1 on 16.11.2002 without any hindrance or delaying tactics on the part of the police. It is strange that during this long period he did not even record a report of the missing persons.

ii) It is rather puzzling that the abductee, a grown up girl of 18 years accompanied by her mother on their way to Multan for a personal errand, would be persuaded to accompany a stranger

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altogether, for fixing a match for the young girl. Why should both the women condescend to visit the house of an interloper on the pretext of being engaged to some one related to him?

iii) The complainant embellishes his story by saying that his sister was recovered by Military men and he brought her from Dera Ghazi Khan on 21.10.2002. As stated above, it is not established on record that she was actually recovered by Military men and if she was released from the custody of some offender why that miscreant was not apprehended by the armed personnel. Even the Investigating Officer does neither visit Dera Ghazi Khan nor record statement of that army officer who secured her release. There is, therefore, no evidence of recovery forthcoming either to corroborate the version of Mst.Sughran that she was recovered from a particular place of her illegal detention.

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iii) Another hard question that needs a satisfactory answer is the fact that one character other than the appellant is introduced who had also been committing Zina-bil-Jabr simultaneously with the appellant. This person is identified as Abu who allegedly purchased her from the appellant. For seven months Abu detained her. The place of her detention is village Ghazi Abdullah as disclosed by her. She also disclosed another character by the name of Riaz who was not only present in Dera Ismail Khan at the time of her recovery but was also known to her brother the complainant. But it is strange that neither the said Abu nor Riaz, who could verify the veracity of her statement, were examined by Investigating Officer nor the latter even trace them for supporting prosecution case in the trial Court.

iv) We asked the learned counsel for the State to satisfy us as to the nature of evidence collected by the Investigating Officer to justify submission of a report under section 173 of the Code of

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Criminal Procedure against the appellant, and we were referred to the answer given by Investigating Officer, PW-9, in reply to a question put during cross-examination which reads as under:-

“During my investigation accused present in Court had also admitted his guilt so I framed my opinion about the guilt of the accused though the statement of accused, statements of PWs and victim.”

v) There is another piece of evidence of PW-3,

Muhammad Hussain, Driver, who drives a vehicle from Tataypur to Multan. He states that the appellant alongwith three women including Mst.Sughran boarded the bus that he was driving. He claims to be related to the abducted women but never informed the complainant that his sister and mother had traveled in his vehicle.

vi) Learned counsel for the State then came forward with the argument that the appellant is neighbour of abductee and this is how he abducted the mother and the daughter. Even if this argument is worth considering the question would arise that the complainant

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knows that his sister and neighbour were missing for a long time and yet he took no step to inform the Police.

9. In view of what has been stated above, we have come to the conclusion that the prosecution is suppressing real facts. Unless a complainant takes the Court into confidence and places all the facts before it, the possibility of arriving at the correct conclusion becomes remote. The evidence offered by the prosecution in this case does not inspire confidence as regards the role of the present appellant is concerned. As regards the other accused Mst.Nusrat Bibi, charged alongwith the appellant before the learned trial Court, she had absconded during trial. We have neither examined her role nor intend sitting on judgment over the evidence relating to her. This judgment will cover the case of the appellant Bashir Ahmad alias Kashif alone.

10. As a result of what has been stated above the Criminal Appeal No.328-L of 2004 filed by Bashir Ahmad alias Kashif, whereby the judgment delivered by learned Additional Sessions Judge, Multan in Hudood Case No.14/H of 2003, Hudood Trial No.3/T of 2003 convicting

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and sentencing the appellant as mentioned in the opening paragraph of this judgment, is accepted and the impugned judgment is set aside. The appellant stands acquitted of all the charges. His convictions and sentences are being set aside. The appellant shall be released forthwith unless required in any other case.

These are the reasons for our short order dated 02.01.2009.

S. Haider

Justice Syed Afzal Haider
Judge

M. Z. Yasin

Justice Muhammad Zafar Yasin
Judge

Announced at Lahore on 17.01.2009.

Fit for reporting.

S. Haider

Justice Syed Afzal Haider