

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

**MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE SYED AFZAL HAIDER**

CRIMINAL APPEAL NO. 105/L OF 2008

Sarfraz son of Rab Nawaz R/o Ghareeb Abad, Multan	...	Appellant
	Versus	
The State.	...	Respondent
Counsel for appellant	...	Rana Khalid Mehmood, Advocate
Counsel for State	...	Mr. Shafaqat Ullah Butt, Advocate
FIR No. Date & Police Station	...	29, Dated 03.02.2005 Cantt. Multan
Date of judgment of trial court	...	06.11.2008
Date of Institutions	...	05.12.2008
Date of hearing of Appeal	...	14.05.2009
Date of decision by Federal Shariat Court	...	14.05.2009

JUDGMENT

SYED AFZAL HAIDER, Judge. Appellant Sarfraz has through this appeal challenged the judgment dated 06.11.2008 delivered by learned Additional Sessions Judge, Multan whereby he was convicted under sections 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to imprisonment for life with a fine of Rs. 100,000/- and in default whereof to further suffer two years simple imprisonment. He was also convicted under section 10(3) of the said Ordinance and sentenced to ten years rigorous imprisonment and to pay a fine of Rs. 50,000/- and in default whereof to further suffer one year simple imprisonment. The benefit of section 382-B of the Code of Criminal Procedure has also been granted to the appellant. Sentences on both counts shall run concurrently.

2. The case arose out of a crime report registered as FIR. No. 29/2005 with Police Station Cantt. Multan on 03.02.2005 on the written complaint Ex.PA of Muhammad Hayat, complainant P.W. 2 regarding an occurrence of abduction of Mst. Amna Bibi alleged to have taken place on 16.11.2004 in the area of Basti Khuda Dad Colony, Multan.

BACK GROUND

3. The brief facts of the case as narrated in the FIR are that one Mst. Rehana, the acquitted accused, a neighbour of the complainant, was employed by him for collecting solid waste of cattle from the house. On 16.11.2004 Amna Bibi, daughter of the complainant went to the house of her teacher and an hour later the complainant's son went to collect his sister Amna when he was informed that she had already left alongwith Mst. Rehana. A search commenced thereafter Haji Abdul Latif Arby and Muhammad Ishaque PWs had reportedly seen Mst. Amna Bibi alongwith Mst. Rehana, Mst. Zarina and Sarfraz accused going towards railway station on a rickshaw. Two unidentified persons were also seen sitting in the front seat of the rickshaw. The complainant expressed his suspicion that the persons mentioned in the crime report had abducted his daughter and hence he demanded action against them.

INVESTIGATION

4. Investigation ensued as a consequence of the registration of the crime report. Initially investigation was taken by Qaisar Abbas, an ASI at

the time of registration of FIR. He appeared at the trial as P.W.4. He sent application Ex.PA, submitted by the complainant, to the police station for registration of the case and proceeded to the place of occurrence. He prepared rough site plan Ex.PB on the pointation of complainant and the witnesses. He also recorded statements of witnesses under section 161 of the Code of Criminal Procedure. He obtained proclamation of arrest of accused Sarfraz and Zarina from the court of competent jurisdiction and fulfilled all codal formalities. The learned Illaqa Magistrate declared both the accused as proclaimed offenders.

5. Thereafter investigation of the case was handed over to Muhammad Ashraf, S.I. P.W.7 who on 23.11.2006 arrested accused Sarfraz after dismissal of his pre-arrest bail. He got him medically examined regarding his potency on 24.11.2006. At the conclusion of the investigation the police submitted an incomplete report under section 173 of the Code of Criminal Procedure in the court on 30.11.2006 requiring the accused to face trial.

THE TRIAL

6. The learned trial court thereafter proceeded to frame charge against the accused on 30.05.2007 under sections 11 and 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

7. The prosecution produced seven witnesses at the trial in order to prove its case. The gist of deposition of witnesses is as under:-

- i. Mst. Amna bibi, victim appeared as P.W.1 and deposed as under:-

“On 16.11.2004, it was about 12 Noon time when I was coming from Madrisa, Rehana Bibi accused present before the court met me. She was previously known to me she informed me that my parents met with an accident and they were in the hospital. She took me to Tehsildar More where Zarina accused (P.O) was present alongwith Sarfaraz accused present before the court alongwith two unknown accused persons. They took me to unknown place and illegally confined me over there for two days. Sarfraz accused forced me to contract Nikah with him, on my refusal, he committed Zina-bil-Jabr with me. Thereafter I was sent to Karachi with three unknown accused persons. There

I was kept in illegal confinement for 15 days. Sarfraz accused came there at Karachi. He again insisted me to perform marriage with him, on my refusal he again committed Zina bil Jabr with me at Karachi and sold me to Mst. Sultana resident of Lalu Khate Karachi. She performed my Nikah with Waseem Ahmed, through a letter I informed my parents about my presence at Karachi. I came back to Multan. Police had recorded my statement on the direction of Justice of Peace/Additional Sessions Judge, Multan”.

- ii. Muhammad Hayat, complainant appeared as P.W.2 and endorsed the facts narrated in the complaint Ex.PA.
- iii. Statement of Muhammad Akram, S.I. was recorded as P.W.3. He stated that S.P. Investigation Multan had handed over the file to him. He investigated the case partly and found the accused guilty in this case.
- iv. Qaisar Abbas, S.I. also investigated the case partly. He appeared as P.W.4 and gave the details of the investigation conducted by him which detail has already been given in an earlier paragraph.
- v. Dr. Asif Jameel Ansari was examined as P.W.5. He stated that he medically examined Sarfraz accused regarding his potency and found him fit to perform sexual act.
- vi. Allah Ditta, ASI had partly investigated the case. He appeared as PW.6. Mst. Zarina (since P.O.) joined the investigation on

12.09.2005 after her pre-arrest bail was cancelled. The ASI had recorded her statement, but he could not form any opinion as the complainant had not turned up.

- vii. Muhammad Ashraf, S.I. appeared at the trial as P.W.7. He had also investigated the case. The detail of his investigation has already been mentioned in para 5 of this Judgment.

Haji Abdul Latif Arby and Muhammad Ishaque, the two witnesses mentioned in the FIR, regarding allegation of abduction, were not produced at the trial.

STATEMENT OF ACCUSED

8. The statement of accused Sarfraz was recorded under section 342 of the Code of Criminal Procedure after close of the prosecution evidence. The accused in reply to the question, "Why this case against you and why the P.Ws have deposed against you?", stated as follows:-

"This is false case. My two sisters are wives of brothers of Mst. Amna and her mother is my real Phuphi. The allegation of abduction of Mst. Aman is absolutely incorrect. I cannot think to indulge in such like nefarious and abs cord activities. She is my real sister like. I neither abducted Mst. Amna nor I went to Karachi. In fact she

was eloped with the blessing of her teacher with one Waseem who is now her husband who took her to Karachi where she without entering into Nikah ceremony with Waseem, she gave birth to a son and thereafter she informed her father Mohammad Hayat P.W. who went to Karachi and brought Mst. Amna and Waseem to Multan and then performed their Nikah in Basti Khuda Dad and Nikah Nama was also got registered in Basti Khuda Dad. There is no witness who deposed against me that I abducted her at Multan and took her to Karachi. I have two wives and have children from two wives. I am leading happy and satisfactory life with my wives”.

IMPUGNED JUDGMENT

9. The learned trial court after close of the prosecution evidence heard the arguments of the contending parties. After assessing the evidence he found accused Sarfraz guilty under sections 11 and 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused was accordingly convicted and sentenced as mentioned in the opening paragraph of this Judgment. Hence the present appeal against conviction and sentence on both the counts.

RE-ASSESSMENT

10. We have examined the file. Evidence produced by prosecution as well as the appellant including statements of accused, made without oath, have been perused. The relevant portions of the impugned judgment have also been scanned. The arguments advanced before us by the contending parties have been noted for consideration. Our observations after assessing the evidence on record are as follows:-

- i. In order to prove charge under section 11 of Ordinance VII of 1979 the prosecution has to be prove a) abduction/kidnapping of b) a woman, with c) intent that she may be compelled d) to marry any person against *her will*, or in order that she may *be forced or seduced to illicit intercourse*, or knowing it to be likely that she *will be forced or seduced to illicit intercourse*. The punishment contemplated by this section is imprisonment for life. In view of the penalty visualized by law the Court has to be cautious in assessing the evidence.
- ii. In the instant case evidence that force or inducement had been employed by the accused who had the necessary intention to subject her to illegal sex is not available on file. On the point of abduction as well as rape the record contains the solitary statement of Mst. Amna Bibi P.W.1.

There is no corroboration whatsoever. In cases of abduction of grown up young girl, 22-25 years of age, the Court is well advised to look for corroboration to eliminate the element of consensual affair. Not only that there is no direct evidence of abduction or rape but there is no corroboratory evidence to support the allegation of abduction or rape.

- iii. The crime report reveals that two witnesses a) Haji Abdul Latif Arby b) Muhammad Ishaque son of Muhammad Ramzan, who were related to the complainant, and specifically mentioned as witnesses of abduction did not appear at the trial even to allege that the appellant and Mst. Amna Bibi were seen together. The conspicuous absence of these witnesses does not auger well for the prosecution. The prosecution closed its case on 19.05.2008 after the evidence of seven witnesses had been recorded and there was no hint that the two witnesses mentioned in the FIR and cited in the calendar of witnesses were given up as having been won over by the accused, though evidence of the alleged abductee had been recorded only after an application under section 540 of the Code of Criminal Procedure had been allowed by the learned trial court on 17.09.2007.
- iv. The prosecution had alleged that Mst. Amna, the abductee, had written a letter informing her parents about her presence in Karachi where-after the complainant is

reported to have gone to Karachi, but that letter was neither produced before the police during investigation nor at the time of the trial. There was no mention of any abduction in that letter otherwise it would have presumably been produced.

- v. It is further alleged that the accused had sold Mst. Amna Bibi to one Mst. Sultana in Karachi who then passed her on to Waseem who married her on 27.01.2005. It is however strange that neither Mst. Sultana nor Waseem were associated in police investigation or produced at the trial.
- vi. It is not understandable that Mst. Amna Bibi, the abductee, on the one hand claims to have married with Waseem on 27.01.2005 in Karachi but on the other hand her Nikah was *again performed in Multan on 28.10.2006. Second Nikah with the same husband can be performed only after the divorce proceedings had been completed* by the first husband and she has also been validly divorced by the second husband according to the generally accepted principle of Islamic Jurisprudence.
- vii. The occurrence is said to have taken place on 16.11.2004 but the report was lodged on 03.02.2005. There is no explanation for this inordinate delay. This period of almost three months is more than sufficient for deliberations, consultation and planning. Muhammad Akram SI from the Investigation Centre Multan appearing as PW.3 stated that

on 12.12.2005 he received the file of the case. In cross examination he stated that neither any person told him having seen Mst. Amna Bibi with accused nor that Mst. Amna Bibi was detained by the accused. Such an unexplained delay is indeed a circumstance which provides legitimate basis for suspecting improvements and embellishments.

viii. There is no evidence that the abductee was recovered from the accused. In fact she, as wife of Waseem, had come to her parents only after child was born to her as a result of the wedlock. She admitted having remained for two years with her husband Waseem in Karachi. She came around 28.10.2006 when her Nikah for the second time was performed with same person in Multan. Her disappearance from her parent's house is reported to be 16.11.2004. This means that she was not abducted but had gone with Waseem two years ago and lived with him during this period and returned after her marriage for the first time to her parent's house on 28.10.2006 with her husband and son when the second Nikah was performed.

ix. The story of the abduction of Mst. Amna Bibi is also not worthy of credence. She alleged that the co-accused told her that her parents had met an accident and they were in the hospital. She was at that time returning home and was not far away from the residence. Furthermore she was taken to Tehsil More from where she was transported to

an unknown place. In the cross-examination, however, she admitted that her young brother aged 21 years was in the house and she was near her house when she got this information. She also stated that half an hour back when she left her house her parents were also present in the house. It does not appeal to reason that without verifying from her own people present in the nearby house she would permit herself to be taken or seduced away and quietly brought to Karachi by train without any noise being made by her during the long journey or offering any type of resistance. She was not a girl of tender age. She was 23 years old young woman.

- x. The co-accused of the appellant Mst. Rehana was acquitted by the learned trial court on the ground the prosecution failed to prove that Sarfraz accused and Mst. Rehana accused "made a planning for the abduction of Mst. Amna Bibi". The learned trial court while concluding paragraph 14 observed that complainant at the time of "registration of the case" involved persons not connected with the crime.
- xi. There is yet another strange feature in this story. The two sisters of the appellant are married with the two brothers of the alleged abductee. The latter and the appellant are first cousins. The mother of Sarfraz accused is maternal aunt of Mst. Amna. It is in evidence that the two sisters of accused are enjoying comfortable family life with their

respective husbands. None of the brothers appeared at the trial. Is it not due to the reason that all of them were fully aware that Mst. Amna Bibi had gone on her own with Waseem as suggested in the cross-examination? Moreover the appellant, whose two sisters were married to Mst. Amna's brothers could not think of selling her in Karachi. It does not appeal to reason in our society in the villages.

11. In a case where a grown up young woman claims having been abducted it is advisable to look for corroboration particularly a) when the time of her disappearance from the Punjab coincides with the date of marriage, with some one other than the accused accomplished in a distant city of Sindh and b) she has also given birth to a child. In this case her date of disappearance does not corroborate the allegation of abduction but certainly substantiates the factum of her marriage with Waseem as already indicated that she lived with her husband for almost two years in Karachi. The abduction and consequent zina story is certainly an improvement.

12. In this view of the matter it is not possible for us to maintain the conviction and sentence under both the counts for the reasons that there is neither any evidence of abduction nor any evidence of rape except the solitary statement of the alleged abductee. The accusation of abduction and

zina levelled after three years of free life cannot be accepted to record a conviction. The contention of the learned Deputy Prosecutor General that there was no motive to involve the accused in this case is irrelevant because the conviction has to be based upon evidence. The fact that the complainant had no motive to falsely implicate the accused cannot become the basis of conviction.

13. It is a rule of prudence to look for corroboration where the solitary statement, which does not ring true, and has also been made suspicious due to unexplained delay. Before such a statement can be accepted the Judge must see that it is in accord with all the probabilities and has all the appearance of having been made honestly. The allegation of abduction and rape is not difficult to make particularly when a grown up young woman disappears from her house and marries some one other than the accused in a distant town, without the intervention of her parents. In an effort to justify her elopement she may come out with a cooked up story.

14. We find that the learned trial court while convicting the accused also found that Mst. Zarina accused had been declared proclaimed offenders. The SHO was directed "to arrest her and after associating her in the

investigation submit supplementary challan against her before the court of Illaqa Magistrate". The only role attributed to Mst. Zarina was that she was present with Sarfraz accused at the Tehsil Morr. We are of the view that no abduction took place. No evidence against Mst. Zarina has been placed on record. It would be highly unjust to direct the Station House Officer to initiate another challan in a case of no evidence. The said order qua the absconding accused is set aside.

15. As a consequence of what has been stated above Criminal Appeal No. 105/L of 2008 is accepted and the impugned judgment in entirety is set aside. The Short Order of the acquittal and consequent release of the appellant was announced in open court on 14.05.2009 after hearing the parties. Reasons for the said short order are contained in this Judgment.

Syaidar.

JUSTICE SYED AFZAL HAIDER

Syaidar.

JUSTICE SALAHUDDIN MIRZA

Islamabad the 14th May, 2009

*Umar Draz Sial/**

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Fit For Reporting