

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR.JUSTICE ABDUL WAHEED SIDDIQUI


Criminal Appeal No.10/I/1999

| | | |
|--|--------|------------------------------------|
| Muhammad Abdul Qadoos Tariq s/o Hafiz Akbar Ali, Caste Rajput, r/o Chak No.33/12-L P.S Chicha Watni Distt: Sahiwal | | Appellant |
| | Versus | |
| The State | | Respondent |
| Counsel for the appellant | | Malik M.Aziz Kausar, Advocate |
| Counsel for the State | | Mr.M.Sharif Janjua, Advocate |
| FIR No. Date and Police Station | | 278 dated 22-11-1992 P.S Murree |
| Date of judgment of the trial Court | | 3-12-1998 |
| Date of Institution | | 4-2-1999 |
| Date of hearing | | 28-6-1999 |
| Date of Decision | | 25-8-1999 |

JUDGMENT

ABDUL WAHEED SIDDIQUI, J:- Appellant has assailed a judgment delivered by the court of Additional Sessions Judge, Rawalpindi on 03-12-1998 whereby he has been convicted under article 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, hereafter to be referred to as the said ordinance, and is sentenced to R.I. for ten years. Benefit of section 382-B Cr.P.C. has also been extended to him.

2. One Faiz Mohammad (PW-1) lodged a complaint Ex-PA on 22-11-1992 addressed to SHO P.S. Murree wherein he alleged that he was resident of village Dewal and the appellant, originally resident of Chichawatni was residing in his neighbour since 3/4 years alongwith his wife and children.


 The appellant had shifted to another house at a distance of about one kilometer from the house of the complainant and about two/three months prior to the complaint. The appellant was a painter by profession and alongwith him his brother-in-law Amar Sohail was also residing. Appellant used to teach Mst. Shazia, a daughter of the complainant, who was 13/14 years of age. On 14-11-1992 at about 6.00 a.m. when the complainant got awakened from his sleep, he found his daughter above named missing as she was not on her bed. She was being searched but could not be found. Muhammad Sadiq (PW-3) and Waheed (PW-2) had seen the appellant accompanied by his daughter at Adda Pirwadhai, Rawalpindi.

Consequently an FIR was lodged at P.S. Murree on 22-11-1992

under articles 11 and 10 of the said ordinance to which he did not plead guilty.

3. To prove its case, prosecution, examined nine witnesses.

Faiz Muhammad (PW-1), the complainant, has deposed while confirming the contents of his complaint Ex-PA. He has further deposed:-



"I was sleeping in a separate room while my daughter Mst.Shazia aged 14 years and Fiaz Ahmad was sleeping in adjoining room. Imtiaz Ahmad my minor son was also sleeping with Mst.Shahzia.Early in the morning at about Fajar prayer I found my daughter Mst.Shahzia absent from the room.On 21-11-1992 I went to the house of Muhammad Sadiq PW who told me that he had seen Abdul Qadoos accused alongwith his wife Mst.Hazra Bi and my daughter Mst.Shahzia travelling in a bus at Adda Pirwadhah which was going towards Lahore. I joined the police investigation. I contacted Aamir Sohail, who was arrested by Gujranwala police.He made disclosure about the abductee and also promised that he would restore Mst.Shahzia PW.'hereafter, local police of Murree, got recovered Mst.Shahzia, and thereafter she has been produced before R.M.and her statement under section 164 was recorded by R.M.Murree!"

Muhammad Waheed (PW-2) has corroborated the complainant(PW-1)

and so is the deposition of Mohammad Sadiq (PW-3). Muhammad Ramzan

(PW-4) ASI has deposed that on 22-11-1992 he was posted as Moharar at

P.S.Murree. On the same day, the complainant handed over to him a

written application on the basis of which he drafted formal FIR Ex.PA/1.

He has further deposed as under:-

"The original application and copy of FIR has been forwarded to Mehrban SI for investigation through Mohammad Iqbal constable, On 6-12-1992, Mohammad Latif constable, Moharar police past Pagwari handed over to me one sealed envelope, two sealed phails and after preparing the necessary documents. I handed over the same to Mohammad Latif constable aforcementioned for onwards transmsion to the office of chemical examiner Rawalpindi. The said parcel remained in my custody about half an hour. During that period no one tampered them!"

Mohammad Latif (PW-5) constable has deposed as under:-

"On 5-12-1992, Muhammad Mehrban SI handed me over one sealed envelope and two sealed phail for the safe custody in police malkhana. I kept the same in the malkhana intact. On 6-12-1992, I took both parcels firstly to the Muhammad Ramzan Moharrior ASI P.S.Murree and thereafter I deposited it those parcels in the office of the chemical examiner, Rawalpindi intact!"

Dr.Aftab Ahmad Khan (PW-6) has proved medical examination of the appellant for potency on 5-12-1992 and the result is positive.

Mst.Shazia Bibi (PW-7), the alleged victim, has deposed as under:-

"On 14-11-1992 at 4/5 a.m. I was sleeping in my house, Abdul Qadoos accused present today in court went there, I thought that my mother was there who got up for saying prayer but I saw that accused was present there. Accused Abdul Qadoos then forcibly abducted me. He has taken me to a city which was not known to me. He kept me there for about 20 days. Meanwhile he subjected me to zina-bil-jabr. I was then recovered by police from there. Police brought me to P.P.Paghwari. Police took me to hospital there my medical examination was got conducted. I also recorded my statement before R.M. Murree. After recording my statement I was sent alongwith my maternal uncle to Rawalpindi!"

Dr.Fauzia Bajwa (PW-8) has proved medical examination of the alleged victim on 5-12-1992. According to her the age of the examinee was 13/14 years. The results of the examination are narrated in the following words:-

"External examination

Secondary sexual characteritic well developed. No mark of violence seen on any part of the body. She is mentioning further as under:

Local examination

Hymen absent. Margins well defined. Granular tags seen. Vagina allows two fingers easily. Fingers stained with brownished discharge. Two speciman from external vagina orifice and saw from internal farnice taken and sent to Chemical Examiner for detection of semen. In the

The carbon copy of my report is Ex.PD which is in my hand and bears my signatures."

Raja Mohammad Mehrban (PW-9) , S.I. and I.O. of the case has proved various steps taken by him during investigation of the case.

In his statement under Section 342 Cr.P.C to question No.2 as to whether he abducted Mst.Shazia Bibi forcibly he has replied as under:-

"It is incorrect. I was present at Lahore. Mst.Shazia PW came to my house at Lahore, where I was putting up with my wife and children. She went to Lahore with her own free will. On 18-11-1992 she sworn an affidavit and solemnized nikah with me."

To question No.4 he has replied:-

"It is incorrect. When I and Mst.Shazia PW came to know that a case was registered against us we both voluntarily appeared in P.S. Murree."

To question No.11 as to why PWs have deposed against him, he has replied as under:-

"The father of Mst.Shazia Bibi PW since wanted to get the divorce of her daughter from me, owing to that Mst.Shazia a PW has got recorded her statement against me under pressure of her father. Other PWs have deposed against me because all are related to Mst.Shazia and complainant."

The appellant has examined himself on oath under Section 340(2)

Cr.P.C. and has deposed as under:-

"On 16-11-1992 I was present at Lahore at Tanki Chungi Amarsudho. One a person namely Siddique Ahmad came to me and told me that some one had come to see me. He told me that I was called at house of Pir Nazir Ahmed. I went there and found that Mst. Shazia PW present there. She told me that she had come after me and if I had not married with her, she would die after taking poison. Mst. Shazia stayed on that night in the house of Pir Nazir. The family members of Pir Nazir Shah also slept there in that house in the above mentioned night. In the presence of Mushtaq Bhatti and Abdul Qadir declared that I have not solemnized nikah with her she would die after taking poison. Mst. Shazia went to model town Katchery where she sworn affidavit. The affidavit was sworn by Mst. Shazia before a Magistrate in Lahore. We came back to said Pir Nazir. The time was 10/11 p.m. Before Abdul Qadir, I and Mst. Shazia solemnized the nikah. I and Mst. Shazia both signed nikahnama Ex.DA Besides me, Shazia, Mushtaq and Abdul Qadir also signed nikahnama Ex.DA. After nikah Mst. Shazia remained in my house. I went to Lahore from Murree 15/20 days earlier than 18-11-1992. Shazia PW had my address with her when she reached Lahore. I did not abduct Mst. Shazia PW"

Mushtaq Ahmed defence witness No.1 has deposed:

On .17.11.1992, I was present at Lahore since I used to serve there and was residing at Bostan Colony. On the same day, Pir Nazir called me at his home at Bostan Colony and informed me that Shahzia had come to his house and upon to contract marriage with Abdul Qadoos accused present in the court. I saw Shahzia who was present with the family members of Pir Nazir. I and Pir Nazir asked her to go back to her home but she was adamant to marry with Abdul Qadoos. She was approximately aged about 17./18 years. Me, Abdul Qadoos his first wife, Abdul Qadir and Shahzia went to the court to some stamp vendor papers and Shahzia purchased the stamp paper and it was the clerk of the advocate who wrote the stamp paper and it was got written by Shahzia. I also signed Ex.D1 as witness. Ex.D.1/1 is my thumb mark and signature. It was also signed by Abdul Qadir as witness and Shahzia also affixed her thumb mark. Then we appeared before the Magistrate alongwith the counsel. It was Rana Zahid Sharif who was the Magistrate. The Magistrate inquired from Shahzia as to whether she was contracted marriage with her consent and she verified it and the Magistrate



4. I have heard the counsel for appellant and State. At the outset the learned counsel for appellant has referred to the following admissions of Mst.Shazia Bibi (PW-7) to the effect that Nikah existed between the appellant and alleged victim.

Ex.DB is a memo of the suit for dissolution of marriage in which

by the alleged victim as under:

الف۔ یہ کہ عدلیہ نے ۱۹۹۶ء میں نااہل شخص اور عیقہ سائنس دانوں کو جج بنانے سے روک دیا تھا۔

[illegible]

بسم الله الرحمن الرحيم
الحمد لله رب العالمين
والصلاة والسلام على سيدنا محمد
الذي جاء به الهدى والرحمة
والهدى والرحمة
والهدى والرحمة

۹-۱۰-۱۱-۱۲-۱۳-۱۴-۱۵-۱۶-۱۷-۱۸-۱۹-۲۰-۲۱-۲۲-۲۳-۲۴-۲۵-۲۶-۲۷-۲۸-۲۹-۳۰-۳۱-۳۲-۳۳-۳۴-۳۵-۳۶-۳۷-۳۸-۳۹-۴۰-۴۱-۴۲-۴۳-۴۴-۴۵-۴۶-۴۷-۴۸-۴۹-۵۰-۵۱-۵۲-۵۳-۵۴-۵۵-۵۶-۵۷-۵۸-۵۹-۶۰-۶۱-۶۲-۶۳-۶۴-۶۵-۶۶-۶۷-۶۸-۶۹-۷۰-۷۱-۷۲-۷۳-۷۴-۷۵-۷۶-۷۷-۷۸-۷۹-۸۰-۸۱-۸۲-۸۳-۸۴-۸۵-۸۶-۸۷-۸۸-۸۹-۹۰-۹۱-۹۲-۹۳-۹۴-۹۵-۹۶-۹۷-۹۸-۹۹-۱۰۰-۱۰۱-۱۰۲-۱۰۳-۱۰۴-۱۰۵-۱۰۶-۱۰۷-۱۰۸-۱۰۹-۱۱۰-۱۱۱-۱۱۲-۱۱۳-۱۱۴-۱۱۵-۱۱۶-۱۱۷-۱۱۸-۱۱۹-۱۲۰-۱۲۱-۱۲۲-۱۲۳-۱۲۴-۱۲۵-۱۲۶-۱۲۷-۱۲۸-۱۲۹-۱۳۰-۱۳۱-۱۳۲-۱۳۳-۱۳۴-۱۳۵-۱۳۶-۱۳۷-۱۳۸-۱۳۹-۱۴۰-۱۴۱-۱۴۲-۱۴۳-۱۴۴-۱۴۵-۱۴۶-۱۴۷-۱۴۸-۱۴۹-۱۵۰-۱۵۱-۱۵۲-۱۵۳-۱۵۴-۱۵۵-۱۵۶-۱۵۷-۱۵۸-۱۵۹-۱۶۰-۱۶۱-۱۶۲-۱۶۳-۱۶۴-۱۶۵-۱۶۶-۱۶۷-۱۶۸-۱۶۹-۱۷۰-۱۷۱-۱۷۲-۱۷۳-۱۷۴-۱۷۵-۱۷۶-۱۷۷-۱۷۸-۱۷۹-۱۸۰-۱۸۱-۱۸۲-۱۸۳-۱۸۴-۱۸۵-۱۸۶-۱۸۷-۱۸۸-۱۸۹-۱۹۰-۱۹۱-۱۹۲-۱۹۳-۱۹۴-۱۹۵-۱۹۶-۱۹۷-۱۹۸-۱۹۹-۲۰۰-۲۰۱-۲۰۲-۲۰۳-۲۰۴-۲۰۵-۲۰۶-۲۰۷-۲۰۸-۲۰۹-۲۱۰-۲۱۱-۲۱۲-۲۱۳-۲۱۴-۲۱۵-۲۱۶-۲۱۷-۲۱۸-۲۱۹-۲۲۰-۲۲۱-۲۲۲-۲۲۳-۲۲۴-۲۲۵-۲۲۶-۲۲۷-۲۲۸-۲۲۹-۲۳۰-۲۳۱-۲۳۲-۲۳۳-۲۳۴-۲۳۵-۲۳۶-۲۳۷-۲۳۸-۲۳۹-۲۴۰-۲۴۱-۲۴۲-۲۴۳-۲۴۴-۲۴۵-۲۴۶-۲۴۷-۲۴۸-۲۴۹-۲۵۰-۲۵۱-۲۵۲-۲۵۳-۲۵۴-۲۵۵-۲۵۶-۲۵۷-۲۵۸-۲۵۹-۲۶۰-۲۶۱-۲۶۲-۲۶۳-۲۶۴-۲۶۵-۲۶۶-۲۶۷-۲۶۸-۲۶۹-۲۷۰-۲۷۱-۲۷۲-۲۷۳-۲۷۴-۲۷۵-۲۷۶-۲۷۷-۲۷۸-۲۷۹-۲۸۰-۲۸۱-۲۸۲-۲۸۳-۲۸۴-۲۸۵-۲۸۶-۲۸۷-۲۸۸-۲۸۹-۲۹۰-۲۹۱-۲۹۲-۲۹۳-۲۹۴-۲۹۵-۲۹۶-۲۹۷-۲۹۸-۲۹۹-۳۰۰-۳۰۱-۳۰۲-۳۰۳-۳۰۴-۳۰۵-۳۰۶-۳۰۷-۳۰۸-۳۰۹-۳۱۰-۳۱۱-۳۱۲-۳۱۳-۳۱۴-۳۱۵-۳۱۶-۳۱۷-۳۱۸-۳۱۹-۳۲۰-۳۲۱-۳۲۲-۳۲۳-۳۲۴-۳۲۵-۳۲۶-۳۲۷-۳۲۸-۳۲۹-۳۳۰-۳۳۱-۳۳۲-۳۳۳-۳۳۴-۳۳۵-۳۳۶-۳۳۷-۳۳۸-۳۳۹-۳۴۰-۳۴۱-۳۴۲-۳۴۳-۳۴۴-۳۴۵-۳۴۶-۳۴۷-۳۴۸-۳۴۹-۳۵۰-۳۵۱-۳۵۲-۳۵۳-۳۵۴-۳۵۵-۳۵۶-۳۵۷-۳۵۸-۳۵۹-۳۶۰-۳۶۱-۳۶۲-۳۶۳-۳۶۴-۳۶۵-۳۶۶-۳۶۷-۳۶۸-۳۶۹-۳۷۰-۳۷۱-۳۷۲-۳۷۳-۳۷۴-۳۷۵-۳۷۶-۳۷۷-۳۷۸-۳۷۹-۳۸۰-۳۸۱-۳۸۲-۳۸۳-۳۸۴-۳۸۵-۳۸۶-۳۸۷-۳۸۸-۳۸۹-۳۹۰-۳۹۱-۳۹۲-۳۹۳-۳۹۴-۳۹۵-۳۹۶-۳۹۷-۳۹۸-۳۹۹-۴۰۰-۴۰۱-۴۰۲-۴۰۳-۴۰۴-۴۰۵-۴۰۶-۴۰۷-۴۰۸-۴۰۹-۴۱۰-۴۱۱-۴۱۲-۴۱۳-۴۱۴-۴۱۵-۴۱۶-۴۱۷-۴۱۸-۴۱۹-۴۲۰-۴۲۱-۴۲۲-۴۲۳-۴۲۴-۴۲۵-۴۲۶-۴۲۷-۴۲۸-۴۲۹-۴۳۰-۴۳۱-۴۳۲-۴۳۳-۴۳۴-۴۳۵-۴۳۶-۴۳۷-۴۳۸-۴۳۹-۴۴۰-۴۴۱-۴۴۲-۴۴۳-۴۴۴-۴۴۵-۴۴۶-۴۴۷-۴۴۸-۴۴۹-۴۵۰-۴۵۱-۴۵۲-۴۵۳-۴۵۴-۴۵۵-۴۵۶-۴۵۷-۴۵۸-۴۵۹-۴۶۰-۴۶۱-۴۶۲-۴۶۳-۴۶۴-۴۶۵-۴۶۶-۴۶۷-۴۶۸-۴۶۹-۴۷۰-۴۷۱-۴۷۲-۴۷۳-۴۷۴-۴۷۵-۴۷۶-۴۷۷-۴۷۸-۴۷۹-۴۸۰-۴۸۱-۴۸۲-۴۸۳-۴۸۴-۴۸۵-۴۸۶-۴۸۷-۴۸۸-۴۸۹-۴۹۰-۴۹۱-۴۹۲-۴۹۳-۴۹۴-۴۹۵-۴۹۶-۴۹۷-۴۹۸-۴۹۹-۵۰۰-۵۰۱-۵۰۲-۵۰۳-۵۰۴-۵۰۵-۵۰۶-۵۰۷-۵۰۸-۵۰۹-۵۱۰-۵۱۱-۵۱۲-۵۱۳-۵۱۴-۵۱۵-۵۱۶-۵۱۷-۵۱۸-۵۱۹-۵۲۰-۵۲۱-۵۲۲-۵۲۳-۵۲۴-۵۲۵-۵۲۶-۵۲۷-۵۲۸-۵۲۹-۵۳۰-۵۳۱-۵۳۲-۵۳۳-۵۳۴-۵۳۵-۵۳۶-۵۳۷-۵۳۸-۵۳۹-۵۴۰-۵۴۱-۵۴۲-۵۴۳-۵۴۴-۵۴۵-۵۴۶-۵۴۷-۵۴۸-۵۴۹-۵۵۰-۵۵۱-۵۵۲-۵۵۳-۵۵۴-۵۵۵-۵۵۶-۵۵۷-۵۵۸-۵۵۹-۵۶۰-۵۶۱-۵۶۲-۵۶۳-۵۶۴-۵۶۵-۵۶۶-۵۶۷-۵۶۸-۵۶۹-۵۷۰-۵۷۱-۵۷۲-۵۷۳-۵۷۴-۵۷۵-۵۷۶-۵۷۷-۵۷۸-۵۷۹-۵۸۰-۵۸۱-۵۸۲-۵۸۳-۵۸۴-۵۸۵-۵۸۶-۵۸۷-۵۸۸-۵۸۹-۵۹۰-۵۹۱-۵۹۲-۵۹۳-۵۹۴-۵۹۵-۵۹۶-۵۹۷-۵۹۸-۵۹۹-۶۰۰-۶۰۱-۶۰۲-۶۰۳-۶۰۴-۶۰۵-۶۰۶-۶۰۷-۶۰۸-۶۰۹-۶۱۰-۶۱۱-۶۱۲-۶۱۳-۶۱۴-۶۱۵-۶۱۶-۶۱۷-۶۱۸-۶۱۹-

2. 1912

Competent family court framed issues on 3.7.1997. Relevant issue

No.2 reads:

"Whether the Nikah of the plaintiff with the defendant was not with free will.

This issue has been resolved as under:


"Plaintiff was burdened to prove this issue, who appeared as PW-1 and stated that on 12.11.1992 at 4 AM early in the morning some one knocked her door when she opened the door, defendant was standing who threw a sheet of cloth over her and put her body on his shoulders. She stated that after that she became unconscious and when she came ^{to} senses she was in a big city where she was forced to live for 20 days and the defendant committed illegal sexual intercourse with her against her will and got her signature on a plain paper forcibly. She stated that she never married with defendant with her free consent. She stated that at the time of abduction she was underage. She stated that she developed hatred against him, therefore, it is not possible to live with him as wife. She answered in cross-examination that she went to Lahore with defendant in a bus in which number of other person were also sitting. This answer clearly shows that the plaintiff travelled with defendant in a public transport and if at all she senseless for some time but she throughout travelled in that bus with her full sense and she did not raise any ^{hue and} cry for her safety. It is also noticeable that when the defendant allegedly knocked the door of plaintiff and the plaintiff came out the defendant threw a cloth over her. The question arises that why she did not cry at once because it is not possible that she lost her senses within no time. There was sufficient time for her to raise hue and cry at that time also. Therefore, it clearly shows that she left her house with her free consent, however it is proved that she was only 14 years old at that



time and her consent did not counted. Further more the defendant not only himself appeared as DW-1 but also examined Abdul Qadeer s/o Mukhtar Ahmed in his support. He also produced copy of nikahnama Exh/DW.1/2. Mst.Shazia has clearly put her signature in front of relevent column, however at the time of said Nikah/^{no}one from her parents side was present at that time and according to Shariah the Nikah of underage girl could not be solemnised without the presence and consent of her wali. Therefore, that Nikah was void in eye of law. Issue No.1 is accordingly decided in the above terms that Nikah of plaintiff was solemnised with her free consent without the presence of her wali as such she was underage at that time, therefore, that Nikah was void in the eye of Shariah and was also an offence in view of prevailing law of the country."

The allegation of abduction of the alleged victim has neither been believed by the family Court nor by the trial Court. That is why the trial Court has acquitted the appellant from the charge under Article 11 of the said Ordinance.

In its para No.22 of the impugned judgment the trial Court has declared:



"The evidence clearly show that the victim was a consenting party to the commission of zina but since she was a minor so her consent was immaterial. The offence under Section 10 (3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, is fully proved against the accused. However, since the victim was a consenting party, so taking the lenient view I convict and sentence the accused under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to TEN YEARS R.I."


Three questions arise here which need resolution:

- (1) Whether the alleged victim was a minor in the sense of being a pubert but having not attained the status of a sui juris at the time of being a consenting party to the commission of zina.

(ii) Whether the admitted sexual intercourse between the appellant and alleged victim was falling within the meaning of zina as defined in Article 4 of the said Ordinance.

(iii) In case the offence is that of zina with consent of the minor but pubert female, does it attract conviction under Article 10(3) of the said Ordinance?

So far as the first question is concerned, I find that Dr.Fauzia Bajwa (PW-8), W.M.O, examined Shazia Bibi, the alleged victim, on 5-12-1992 and determined her age to be 13/14 years approximately. During cross this witness has replied to a suggestion:


 "Since the examinee was manstruating therefore she was a major girl. It is incorrect that Mst.Shazia was of 19 years of age. It is correct that determination of age a specific test is to be given. I had given the test to the examinee for the determination of age which I have also recorded in my M.L.R. Ex.PD. I had advised for X-Ray for determination of her age as well as which was conducted however report of X-Ray is available in the hospital record. I did not collect the hairs of the examinee. I had obtained the X-Rays of the bones of the examinee for the determination of age. It is correct said X-Rays are not available in court today. The report of X.Ray is to be given by the Radiologist. I do not remember that besides police any other was accompanied the examinee."

It transpires, then, that the X-Rays and ossification Report were not exhibitted in the trial Court. In view of

this situation I referred to the X-Rays and ossification report available on the record due to the fact that without expert opinion, the opinion of the Lady Medical Officer (PW-8) about age remains a baseless speculation. This is where leads following insertions into the MLR Ex.PD.

"For determination of age: Advised
X-Ray wrist left-right X-Ray elbow
left-right."

This advise was made on the date of examination i.e 5-12-1992. It appears that this advise was not followed for a period of about 6½ years. Then a letter No.965/Ms dated 12-6-1999 was issued by the Medical Superintendent Murree to the M.S, DHQ Hospital Rawalpindi which reads as under:-



"Subject: MLC
The X-Ray of MLR case Shazia Bibi d/o
Faiz Mohammad are being sent to your
office for expert opinion and report by
the concerned Radiologist in your institution,
through Dilawar Ali ASI police station Murree,
for needful.

On the back of this letter, the M.O, Radiology, RGH,
Rawalpindi is replying on the same date as under:

"X-Ray Films are of poor quality and are
too old/^{to}be reported upon. Moreover, the
film have not been certified properly to
be of the same patient as mentioned
in the MLR."

All this activity of following the advise of W.M.O after

6½ years got initiated only after my observations and directions made in the order sheet on 11-5-1999 in the following words:

"While the learned counsel for appellant was reading evidence of Dr.Fauzia Bajwa (PW-8) who had examined alleged victim Shazia Bibi on 5.12.1992, it transpired from the cross upon this witness that she had obtained the X-Rays of the bones of the examinee for the determination of age. She has admitted that the X-Rays as well as the Ossification Report of the Radiologist was not available on the date of her deposition. It appears that subsequently also this report was not exhibited. The determination of the age of the alleged victim vis-a-vis her being sui juris on the date of alleged affidavit of free will and nikah shall be necessary in the circumstances of the present case and in the interest of justice. As admitted by PW-8, the relevant record of ossification Report of Radiologist and X-Rays are available in the police records. Call for the police records and in case the same are not available even in the police records, S.H.O of the relevant police station is directed to arrange for the same and submit in this court within one week from receipt of this order."

This conduct of the prosecution is indicative of one fact only and that is that while not following the advise of the examining Lady Medical Officer, it intended to destroy the records of X-Rays of the alleged victim so that the facts about the real age of the said victim remain hidden from the courts. This way the trial court as well as

the Family Court has been hoodwinked on the point of the determination of age.

In the absence of this opinion of Radiologist, the trial court has heavily relied upon a non-exhibited school leaving certificate in the following words of the impugned judgment.

"On the judicial record, the school certificate of Mst.Shazia Bibi is also available which shows her date of birth to be 4/11/78. In this way, also at the time of alleged 'Nikah' Mst.Shazia was aged about 14 years."

The impugned judgment is silent as to who introduced this document into the judicial record and what Exhibit No. was allotted to it. I find that no question about this document has been asked from the appellant in his statement under Section 342 Cr.P.C. Consequently, I arrive at the conclusion that the appellant has been prejudiced by way of sudden and silent introduction of this document into the judicial file. No chance has been given to the appellant to disprove it and, therefore, he has been condemned unheard. In fact the golden principle of *aude alteram partem* has been denied upon him. Hence, I find it in the interest of justice to exclude this document from the judicial record.

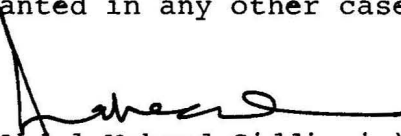
What remains in the field now is a heresay, speculative and filmy evidence about the age of the alleged victim. In the absence of the evidence free from doubt in this respect, specially when through trickery such evidence has been destroyed, I have come to the conclusion that it is the claim of the prosecution that the alleged victim was 13/14 years of age at the time of admitted Nikah and onus of proving it to be so was on the claimant. Prosecution has utterly failed to prove beyond reasonable doubt that the bride (alleged victim) was not a sui juris on the date on which marriage was performed. In the absence of such proof and in the presence of an affidavit Ex.D1 sworn in by the alleged victim on 18-11-1992 showing her age to be 19 years and the love letters written by her to the appellant exhibited as Marks A to H as well as Nikahnama Ex.DA a conclusion which can be safely drawn is that at any rate the bride (alleged victim) Mst.Shazia Bibi (PW-7) was pubert, major and sui juris and a consenting party to marriage without any force, coercion, threat or deceit. Consequently the marriage was valid and cohabitation was not Zina. Hence "Zina" as defined in Article 4 of the said Ordinance is not constituted which article reads as under:

"Zina:- A man and a woman are said to commit 'Zina' if they wilfully have sexual intercourse without being validly married to each other.

Explanation:- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina."

Once zina is not constituted, no question of zina-bil-jabr as envisaged in Article 10(3) of the said ordinance arises.

There are many other contentions raised by the counsel for the appellant but I find the very first contention, as discussed above, enough to come to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt against the appellant. While giving the Benefit of doubt, the impugned judgment is set aside and the appeal is accepted and appellant Muhammad Abdul Qadoos Tariq s/o Muhammad Akbar is acquitted from all the charges. Appellant shall be released forthwith if not wanted in any other case.


(Abdul Waheed Siddiqui)
Judge

Approved for reporting


Judge

Announced in the open Court


Judge

Islamabad, the
25th August, 1999.
Zain/*