IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT

Mr.Justice Aftab Hussain — Chairman
Mr.Justice Ch:Muhammad Siddique — Member
Mr.Justice Muhammad Taqi Usmani — Member

CRIMINAL APPEAL NO.12/L OF 1981

Ghulam Rasool	----	Appellant
	Versus	
The State	----	Respondent
For the appellant	----	Chaudhary Hafiz Ahmad Advocate.
For the respondent	----	Hafiz S.A. Rahman Advocate.
Date of hearing	----	7-7-1981

JUDGMENT:

SH:AFTAB HUSSAIN, CHAIRMAN: This is an appeal by Ghulam Rasool against the order of his conviction under Section 10(3) of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 passed by Malik Shah Nawaz Khan Addl:Sessions Judge Multan (camp at Khanewal) on 8-4-1981. The learned Addl: Sessions Judge sentenced the appellant to 14 years rigorous imprisonment, 15 stripes, and a fine of Rs.5000/-, in default of payment of which he was to undergo further rigorous imprisonment for a period of 2 years.

2 The occurrence in this case is on the 11th September, 1979 at degerwela in Chak No.11/8.R abadi Doctor Wali Dakhli 10 miles from Police Station Tulamba. The prosecution version is that on the said date and time Mst.Nasim PW.2 was all alone

in her house when the appellant entered there and took her to a room in which the house-hold luggage is kept. He committed zina with her forcibly with the result that this 11 years old child received internal injuries. She profusely bleeded and kept on bleeding even till the time of medical examination which was held by Doctor Tahira Riffat PW.1 at 8.30 P.M that day. As a result of the injuries she had to be kept in the Hospital from 11th September, 1979 to 19th September 1979. The occurrence was seen by her sister Mst.Kaniz Mai PW.3, who had gone out at that time and while returning she was attracted to the spot by the cries of the victim.

3. A first information report of the offence was given in the Police Station within a short time at 6.30 P.M, since Mst.Kaniz Mai PW.3 despite absence of her parents from the village, approached the Local Council Member, Muhammad Afzal, who took her in his car to the Police Station. Mst.Nasim followed them in a Trolley. She, as stated above, was medically examined by Doctor Tahira Riffat PW.1, who found the following injuries on her person:-

" 1. Hymen torn posteriorly and lateraly old tear.

2. Vaginal orifice admits two fingers tightly.

3. Posterior torn, one inch tear bleed--ing profusely.

4. Two vaginal swabs taken for semen Analysis.

5. Her leg and Shalwar were wet with blood.,,

She removed the shalwar of Mst.Nasim and handed it over to the Police. In her opinion the girl, who was 11 years old, was raped. Duration of injuries were fresh. In her cross-examination she explained injury No.1 that the victim might have also been

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subjected to sexual intercourse earlier i.e. a week before. She was recalled for clarification of her report and, thereon stated that though injury No.1 was of at least one week, duration, injury No.3 on the person of Mst.Nasim was fresh and could be about two to three hours old. In cross-examination by the defence counsel she sated that Mst.Nasim was not accustomed to inter-course.

4. Ghulam Haider Shah, Sub Inspector PW.8 recorded the FIR Ex.P.B. He proceeded to the spot and saw Mst.Nasim PW.3 at Adda Larian Tulamba. He prepared her injury statement Ex.PE and directed Niaz Muhammad ASI PW.6 to take Mst.Nasim to the Medical Officer Mianchannu for her medical examination. He collected blood stained earth from the place of occurrence and made it into a sealed parcel. The memo of recovery of blood stained earth is Ex.PD. He prepared site plan Ex.PF. Niaz Muhammad Khan ASI PW.6 produced before him blood stained shalwar, Ex. P1, which he made into a sealed parcel and took into possession by memo Ex.PC. He arrested the appellant on the 12th September 1979 and got him examined for potency from Doctor Zafrul Haq PW.9.

5. The sealed parcels of shalwar and blood stained earth were given by the Investigating Officer PW.8, to ASI Wahid Bakhsh PW.5 for safe custody. On the 15th September, 1979 he handed them over to Muhammad Yousaf Constable PW.4 for transmission to the office of the Chemical Examiner, Lahore, where he delivered them on the 16th September, 1979.

6. Report of the Chemical Examiner Ex.PH on the articles of these two parcels was positive and they were found by him to be stained with semen and blood.

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7. The prosecution evidence of the two eye-witnesses Mst.Nasim and Mst.Kaniz Mai PW.2 and PW.3 on the actual occurrence is free of any blemish. The learned counsel pointed out certain discrepancies but they do not affect the merits of the case nor are material. He however submitted that at least one discrepancy about the presence of cycle is material. According to PW.2 the appellant had come on a cycle, which he had brought inside the house but PW.3 denied that there was any cycle. This is no contradiction in this because PW.2 had categorically stated having seen the cycle and the fact that PW.3 did not see it, cannot lead to the conclusion that it was not there. She was attracted to the spot by the cries of PW.2 and cannot be expected to observe everything in the house, when she must have entered directly to the room where the offence was committed. Her statement therefore, can only mean that she had not seen the cycle.

8. The other contradiction pointed out by the learned counsel is on the point whether PW.2 had been taken to the house of Muhammad Afzal or not, and whether Muhammad Afzal and the recovery witness of blood stained earth Ghulam Rasool Lambardar had been together at the time of recovery. Ghulam Rasool had denied the presence of Muhammad Afzal, but PW.8 admitted his presence throughout. These discrepancies have been pointed out by the learned counsel in an attempt to establish the defence version that though there is no enmity between the appellant and the witnesses, particularly the victim and her sister but the appellant has been roped in because of the inimical relations of Muhammad Afzal and his father-in-law Akbar, since both of them had fought election

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of the local council, and Akbar after having been defeated in the contest had filed election petition which was pending.

9. The learned counsel had to concede that PW.2 was raped, but according to him the rapist may be some other person. This argument is not impressive, since in the circumstances of this case, it is not possible to believe that these two girls would substitute the appellant for the real offender, particularly when the first information report had been lodged without delay and there is no enmity between the appellant and the complainant family.

10. It was urged that Mst.Kaniz Mai PW.3 belongs to the party of Muhammad Afzal, since firstly she had acted as his election agent on the polling booth in the recent election and secondly that she had gone to him directly to report the incident instead of going to Ghulam Rasool Lambardar PW.7, who is her immediate neighbour. This argument is without force, since it is clear that no other person from the neighbouhood came to the spot and it was explained by PW.2 that this was because the appellant was an influential person. There is nothing strange in this explanation, because as stated above, the father-in-law of the appellant had admittedly contested the election of the local council This is proof of his having some influences.On account of this influence no one from the neighbourhood came there, and as such it is not strange if she had to go to Muhammad Afzal. It however appears that he did not lose any time in making arrangements for taking her to the Police Station, for lodging the report and for removal of PW.2 to Tulamba on a Trolley.

11. This possibility also cannot be lost sight of that PW.3 might have approached Muhammad

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Afzal, in view of his new role as Member of the Local Council which is a much more important office than the office of Lambardar or Chowkidar. However in any case this argument cannot throw any doubt on the testimony of PW.2 and PW.3 who cannot be expected to substitute any body else for the real offender.

12. The learned counsel further argued on the basis of the evidence of Doctor Tahira Riffat that the victim might have been subjected to sexual intercourse about a week before the occurrence. We do not find ourselves in agreement with PW.1 on this point. It is strange that though according to the medical report, PW.1 had taken two vaginal swabs of semen for analysis, but there is no evidence that she ever sent them to the Chemical Examiner and in fact she did not even hand them over to the Police Officer. It is possible that she might have intended to send them directly to the Chemical Examiner, but ultimately she did not take this step. She has obviously made this conclusion from a torn hymen that the victim had intercourse prior to one week's time. This time was obvicusly fixed by her, in order to give time for the healing of the torn hymen. But while making this statement she had lost sight of a very important point that rupture of hymen is not the result of coitus only as stated in Modi's Medical Jurisprudence and Toxicology Twenty-Second Edition page 313. Rupture may be caused by an accident, for example, a projecting substance, fence, or while playing at see-saw, introduction of instruments by medical practitioner etc. And it is also strange that in the first act of coitus, if any, no further injury was caused to the girl although the vagina did not fully admit two fingers easily and the posterior was torn only in

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this occurrence. In these circumstances the medical opinion that there was some earlier inter-course with this girl is not believable.

13. The learned counsel argued that since the girl was of bad character it mught be a case of consen In that case, the appellant could be convicted only under Section 10(2) of the Ordinance and sentenced to RI for a maximum period of 10 years. The basis of this argument is injury No.1 about which we have already disbelieved the Doctor who even did not send the vaginal swabs to the Chemical Examiner for reasons best known to her.

14. Lastly the learned counsel argued that the case was being originally tried on the 11th June, 1980 by a Magistrate exercising Section 30 powers who had charged the appellant on the 18th March, 1980 and recorded the evidence of two of the witnesses. After the enforcement of Ordinance amending the offence of Zina (Enforcement of Hadood) Ordinance, 1979, the case was transferred to the Sessions Judge who was given the exclusive jurisdiction to try the offence. The learned counsel argued that this transfer was illegal since the amending Ordinance could not be treated to have been given retrospective effect as the matter involves the appellant's vested rights in so far as if he had been tried by a Magistrate with Section 30 powers, he could not have been sentenced to a term exceeding 7 years RI. In support of his plea the learned counsel relied upon PLD 1969 Supreme Court 187, Idnan Afzal versus Captain Sher Afzal, PLD 1969 Supreme Court 599, Nabi Ahmad & others versus Home Secretary, Government of West Pakistan, Lahore and 4 others, and 1980 Pak Cr.Law J. 1212 (BJ), Muhammad Hussain versus The State,

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15. The authorities fully support the contention of the learned counsel on the argument of prospectivity of even a procedural Law which affected vested rights but the dictum laid down in these authority cannot apply to the above amendment. The principle applies only to cases where there is any doubt whether particular legislation is prospective or being procedural, it can be treated to be retrospective. The procedural law being generally retrospective it may laid down that notwithstanding this it would be prospective if it affected vested rights. But these principles are not applicable to cases where the language of the legislation clearly provides for its retrospectivity or otherwise.

16. In the present case the amendment took away completely the jurisdiction of Section 30 Magistrate, and conferred exclusive jurisdiction on the Sessions Judges. This was done by the addition of another proviso to Sub-section 1 of Section 20 which is as follows:-

> "Provided further that an offence punishable under this Ordinance shall be triable by a Court of Session and not by a Magistrate authorised under Section 30 of the said Code and an appeal from an order of the Court of Sessions shall lie to the Federal Shariat Court."

17. It is clear that a Magistrate Section 30 became functus officio by the addition of the proviso and from the date of such amendment, the jurisdiction to try such offence was vested in the Sessions Judge. The amendment clearly applied to pending cases also. The Magistrate authorised under Section 30 could thus only tranfer the case pending before him before the Sessions Judge. The argument

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though attractive is without force.

18. We find no merit in this appeal which is dismissed.

CHAIRMAN

MEMBER III.

MEMBER VII.

Annexures.

21/7/81

Approved for reporting