

# IN THE FEDERAL SHARIAT COURT

( Appellate Jurisdiction )

Present.

MR.JUSTICE AGHA RAFIQ AHMAD KHAN, CHIEF JUSTICE

CRIMINAL APPEAL NO.125/I OF 2008.

Muhammad Ayub s/o Abdur Rasool  
Resident of Khabal Pain,  
Tehsil Oghi District Mansehra. Appellant.

Versus

The State. Respondent

Counsel for the Appellant. ... Ghulam Mustafa Khan Swati,  
Advocate.

Counsel for the State ... Mr.Muhammad Sharif Janjua,  
Advocate,

Case FIR No, date & Police Station. ... No.152 dated 29.6.1996,  
P.S Oghi, Distt: Mansehra.

Date of Judgment of trial Court. ... 10.11.2008.

Date of institutions ... 03.12.2008.

Date of hearing. ... 24.02.2010.

Date of decision ... 24.02.2010.

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JUDGMENT

AGHA RAFIQ AHMED KHAN, Chief Justice,-- Appellant Muhammad Ayub son of Abdul Rasool has come in appeal against the judgment dated 10.11.2008, whereby the learned Additional Sessions Judge Mansehra at Oghi has convicted the appellant under section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, (hereinafter referred to as 'the Ordinance') and sentenced to three years' imprisonment with a fine of Rs.10,000/-, or in default of payment of fine to further suffer one month S.I, He was further convicted under section 10 (2) of the Ordinance and sentenced to five years imprisonment with a fine of Rs.30,000/-, or in default thereof to further undergo three months S.I. He was further convicted under section 344 PPC and sentenced to suffer one year imprisonment and also to pay a fine of Rs.5000/- or in default thereof to suffer fifteen days S.I.

All the above sentences were to run concurrently and the benefit of Section 382-B Cr.P.C has been extended to him.

2. The facts of the prosecution as disclosed from the contents of FIR registered on the basis of written murasila Ex.PA at Police Station Oghi district Mansehra are to the effect that two years back the Nikah of Mst.Sajida Bibi aged about 18/20 years'

daughter of Gul Muhammad Khan complainant, was solemnized with Abdul Hakeem son of Ali Akbar. On 29.6.1996 the complainant Gul Muhammad Khan being teacher was present in mosque school Pattian. His daughter Mst.Khadija came to him and disclosed that her Aunt Mst.Khaista Jan and Sisters Mst. Sajida and Haleema were present inside the house. Mst.Sajida went out of the house in connection with some work when in the meanwhile accused Muhammad Ayub appellant alongwith Fazal-ul-Rehman, Abdul Saleem, Gohar Rehman, Gul Zaman and Khan Gul duly armed emerged and abducted Mst. Sajida Bibi on gun point. Mst.Khadija, Khaista Jan and Bibi Haleema tried to resist who have been beaten and Mst. Khadija sustained injuries on her lower lop and left arm. The accused have abducted Mst.Sajida Bibi for the purpose of marriage with accused Muhammad Ayub. While leaving the spot, the accused made firing for intimidation. During investigation all the accused persons, excluding the present appellant, were arrested, tried and acquitted on 29.01.2003. The appellant/accused seeking was arrested when his pre-arrest bail was not confirmed. He was sent up for trial. The trial court framed charge against him, which reads as under:-

Firstly:- "That you accused alongwith your acquitted co-accused on 29.6.1996 at 09.00 Hrs in the vicinity of village Khabal Pain near the house

of complainant Gul Muhammad Khan within the criminal jurisdiction of P.S. Oghi having coming object formed unlawful assembly armed with deadly weapons and committed rioting and thereby you committed an offence punishable u/s 148/149 PPC and within my cognizance”.

Secondly: “That you accused alongwith your acquitted co-accused on the same date, time and place in furtherance of your common intention/object forcibly abducted Mst:Sajida Bibi d/o Gul Mohammad complainant against her will from the vicinity of her house situated in village Khabal Pain and thereby you committed an offence punishable u/s 11/16 Z.O. 1979 and within my cognizance”.

Thirdly: “That you accused alongwith your acquitted co-accused on the same date, time and place in furtherance of your common intention/object criminally intimidated the abductee and PWs and thereby you committed an offence punishable U/S 506/149 PPC and within my cognizance”.

Fourthly: “That you accused alongwith your acquitted co-accused in furtherance of your common intention/object on the same date, time and place caused injuries to Mst:Bibi Khadeja d/o complainant and thereby you committed an

offence punishable u/s 337-A (II)/149 PPC and within my cognizance”.

Fifthly: That you accused alongwith your acquitted co-accused in furtherance of your common intention/object wrongfully detained Mst:Sajida Bibi against her will and thereby you committed an offence u/s 344/149 PPC and within my cognizance”.

The appellant/accused pleaded not guilty to the said charges and claimed trial.

3. During trial the prosecution examined as many as thirteen PWs. PW.1 Ali Jan is a marginal witness. PW.2 Molvi Talibul Haq “Pesh Imam” has recited the Nikah of Mst.Sajida with Abdul Hakim. PW.3 is Sardar Khan Inspector/SHO. PW.4 is Gul Muhammad complainant. PW.5 Mst.Khudeja is eye witness of the occurrence and daughter of Gul Muhammad complainant. PW.6 Niaz Muhammad is the son of complainant Gul Muhammad. PW.7 is Chanan Khan ASI. PW.8 Mst.Sajida is victim and daughter of complainant. PW.9 is Shams-ur-Rehman, Inspector Anti-Corruption PW.10 is Muhammad Mukhtar Khan Inspector RTW. PW.11 is Munir Hussain Inspector. PW.12 is lady doctor Tanvir Chaudhry, who examined the abductee Mst. Sajida Bibi. PW.13 is Mushtaq Ahmad constable.

4. After conclusion of the trial and close of the prosecution evidence, the appellant/accused recorded his statement under section 342 Cr.P.C, wherein he denied the allegations of the prosecution. However, he neither wished to produce any evidence in his defence or to record his statement on oath as provided under section 340 (2) Cr.P.C.

5. I have heard the learned counsel for the appellant and also learned counsel for the State and have gone through the material evidence available on the file. Learned counsel for the appellant has relied on SCMR 1995 page 733 (Rehmat alias Rehma Masih.. Vs.. The State).

6. In the present crime besides the appellant five other co-accused namely Fazalur Rehman, Gohar Aman, Lal Khan, Abdul Salim and Khan Gul were also arrested and sent up for trial. Since the present appellant was absconder, therefore, he could not be tried alongwith the above accused persons. They were tried in Hadd case No.14/2 of 1997 by Additional Sessions Judge, Mansehra, under sections 11/16 of Offences of Zina (Enforcement of Hudood) Ordinance, 1979 read with sections 506/337-A(II)/148/149 PPC. After recording the evidence of all the prosecution witnesses including the victim Mst.Sajida. All the above named co-accused persons were acquitted on merits vide

judgment dated 29.1.2003. The learned trial judge disbelieved the evidence of the complainant Gul Muhammad Khan and victim Mst, Sajida Bibi and even acquitted Gohar Zaman who stated to have given butt blow to Mst. Khadija. The said judgment was never challenged either by the complainant party or by the State in any forum.

7. It is very strange that on the basis of same evidence and the circumstances, the present appellant has been convicted by another Additional Sessions Judge after his arrest. Admittedly the victim was not recovered from the present appellant. In her cross examination, she has clearly stated that her statement was recorded in the previous trial against the co-accused persons who were acquitted by the court. According to her, she had correctly charged all the acquitted co-accused for her abduction as well as for committing Zina-bil-jabr with her. No new evidence was brought by the prosecution against the present appellant, therefore, he could not have been convicted on the basis of previous statements of the witnesses which were disbelieved by the trial judge. On the basis of said evidence all the co-accused persons were acquitted against whom there were similar charges. The case of acquitted accused persons was at par with that of the present appellant. His case is not distinguishable from that of

acquitted co-accused, therefore, the conviction based on the same set of evidence could not be sustained.

8. For the reasons and above discussion, I am of the considered opinion that the charge against the present appellant was not proved beyond any doubt, therefore, by giving him the benefit of doubt, I hereby acquit him of the charge. The appeal is accordingly allowed. The appellant is in custody, he shall be released forthwith if not required in any other case.

9. These are the reasons for ~~our~~<sup>the</sup> short order of even date.



JUSTICE AGHA RAFIQ AHMED KHAN  
Chief Justice

Islamabad the  
February 2<sup>nd</sup>, 2010.  
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