

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

Present.

Hon' Mr. Justice Abdul Waheed Siddiqui

Criminal Appeal No. 131/I of 1998

Hazoor Bakhsh son of Kaura Khan
Cast Mastoi, r/o, Mauza Gul Qaim Mastoi,
Police Station Qureshi, Distt. Muzaffargarh. Appellant

versus

The State

Respondent

Counsel for the Appellant

Malik Ashiq Hussain Chan, Advocate

Counsel for the State

Miss. Rukhsana Malik Advocate

FIR No. Date & P.S.

102, 4-6-95 P.S. Qureshi, M. Garh.

Date of decision of
trial Court.

07-09-1998

Date of institution

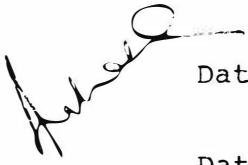
15-09-1998

Date of hearing

06-10-1998

Date of decision

19-04-1999.



JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellant has assailed a judgment delivered by the court of Sessions Judge, Muzaffargarh on 7-9-1998 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 has been sentenced to R.I for 10 years and a fine of Rs.20,000/- in default of which he has to suffer further R.I for one year. Benefit of section 382-B Cr.P.C has also been extended to him.

2. One Mst.Hasina Mai (PW-1) appeared at P.S Qureshi District Muzaffargarh on 4-6-1995 at 2.30 P.M and lodged an FIR (Ex.PA) wherein she alleged that on 2-6-1995 she was present in her house at village Gul Qaim Mastoi Chah Bhurewala, alongwith her mother. At about 10 A.M she went out towards East of her house near a dust dune for urination. After easing, when ^{she} stood and was wrapping her azarband, the appellant appeared and took her from her arm and asked for evil-doing, On her refusal, he made her to fall on the ground. He opened his shalwar as well as her shalwar and took upon him her legs and made penetration and started Zina-bil-Jabr with her. Due to pain she started crying which attracted her mother Mst.Nooran (PW-3) and her grand father Gamon Khan. Finding them coming, the appellant ran away. Then her mother made her wear the Shalwar. In the evening her father Ghulam Fareed came and was informed about

the incident. Upto the date of report appellant remained requesting not to report, but finally the complainant party did not agree and reported.

Appellant was arrested, challaned and charged under article 10(3) of the said Ordinance to which he did not plead guilty.

3. To prove its case, prosecution examined 7 witnesses. Mst.Hasina Maai(PW-1) has proved FIR(Ex.PA) Muhammad Bilal(PW-2) Moharrir H.C. has deposed that on 4.6.1995, the S.H.O handed over to him a Shalwar Ex.P/1 of the victim for safe custody. Next day one sealed envelope and a phial of swabs was handed over to him for safe custody in the police malkhana. On 7.6.1995 he handed over all this material to constable Ghulam Sarwar(PW-7) for onward transmission to the office of the Chemical Examiner intact. Mst. Nooran (PW-3), the mother of the victim has corroborated the complainant(PW-1). Irshad Hussain(PW-4), P.C, has deposed that on 26.6.1995 Muhammad Bilal (PW-2) Moharrir handed over to him a sealed parcel allegedly containing shalwar which was handed over to the office of the Chemical Examiner intact. Barkhurdar Ahmad Khan(PW-5) P.I/S.H.O has proved recording of FIR (Ex.PA). On the dictation of the complainant, he investigated the case and submitted challan. Lady Doctor Rahat Khan(PW-6) has proved medical examination of the victim on 5.6.1995. According

to her observation the victim was of 11/12 years of age. Her observations are repeated in her own words as under ;

"A young, un-married girl.

No mark of violence on private part or elsewhere on body. Breast not developed yet axillary and pubic hairs were absent. She was not menstruating

P/V VALVA EXAMINATION.

Hymen was intact. Vagina admitted tip of finger, no bleeding P/V.

Two vaginal swabs were taken for chemical examination and detection of semen in sealed bottle and handed over to the police with MLC 18/95 in a sealed envelope and sent to chemical Examiner Multan. Swabs report S-945/CE dated 18.6.1995 was received and according to that report the swabs were stained with semen. In view of that report of the Chemical examiner, I am of the opinion that no sexual intercourse had taken place with the examinee because hymen was intact in view of my original report."

Ghulam Sarwar (PW-7) P.C, has corroborated the deposition of PW-2.

In his Statement under section 342 Cr.P.C, appellant has denied all the specific questions. To question No.5, he has replied as under;

"Ans. The PWs are related interse and interested in the prosecution against me. They have involved me in this false case due to previous enmity."

He has declined to be examined on oath, and has produced documents Ex.DB, D C and DD and closed his defence.

4. I have heard the counsel for appellant and state. The counsel

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for appellant has contended that the medical evidence is in direct and fatal conflict with the ocular evidence, that Report of Chemical Examiner is a procured one, that there are material discrepancies among the PWs; that enmity is proved from the record; that FIR is delayed; that semen of the appellant and vaginal swabs of the victim were not sent to the serologist for comparison and grouping; that in the absence of original, photocopy of MLC on the record is not admissible. The counsel for state has contended that the discrepancies are not so material to dislodge the story of prosecution; that the medical evidence does not negate the penetration itself; that the documents submitted in the defence are not proving the enmity in the eyes of law; That exhibit P.C requires fresh enquiry. He supports the judgment.

5. So far as the first contention about the conflict between medical evidence and report of Chemical Examiner is concerned, the matter can easily be resolved. What has happened is that the occurrence took place on 2-6-1995 at 10 A.M with a nubile virgin of about 12 years, but the victim was examined medically 3 days later on 5.6.1995 and her vaginal swabs were taken for chemical examination. The Report of Chemical Examiner Multan is mentioning the date of receipt of the said swabs to be 7.6.1995 in an intact sealed container.

The Report is that the swabs were stained with semen. This way shalwar of the victim received on 26-6-1995 by the chemical examiner was also found to be stained with semen. Lady Doctor Rahat Khan (PW-6) has based her negative opinion on the finding that the hymen of the victim was intact while neglecting the report of the Chemical Examiner. The factual position as it appears^{to} me in the circumstances of the case is that part penetration had taken place with difficulty due to a very young age of the victim and then the ejection took place which has resulted into the positive report of the chemical examiner. The intactness of the hymen, as found by PW-6, is either due to the hymen being of elastic category or due to its being still beyond the reach of the penetrating male organ. In this context following ruling enunciated by a DB of this Court appearing as 1997 SD 589 is worth consideration which appears at pages 594 and 595;

"It has also been contended that if the victim was virgin of 16 years and her modesty was molested by two young healthy persons, at least three times, her hymen must have ruptured, but the Lady Doctor who examined her namely Munira Jalil (PW-3) is silent about this aspect. In this context we find that no question about this aspect has been asked from her or from any other P.W. by the defence. Under such circumstances, the only presumption which can possibly be drawn is that the hymen of the victim was elastic in nature. Taylor's Principles and Practice of Medical Jurisprudence. (Thirteenth Edition) reprinted in 1986 produced by Longman Group (FE) Ltd. Hong Kong at page 75 categorise hymen as under:

"The anatomy of the hymen varies enormously from individual to individual. The membrane may be thin very elastic, thick, rigid or a combination. In shape it may take the form of a very thin crescent with a large orifice; annular with small orifice; congenital frilly with a large orifice; strong midline bar only. Commonly the membrane is deficient anteriorly, and most pronounced posteriorly, and it follows that damage to the hymen occurs almost invariably in the posterior quadrant. Rupture of the hymen on first penetration is of course very common but it is not inevitable, for the thin elastic hymen is quite capable for stretching to accommodate penetration even by an erect adult penis without frank rupture."

Modi's Medical Jurisprudence and Toxicology, twenty first Edition at page 315 forwards following observation;

"Cases are on record, of women having regular marital relations, of pregnant women and even prostitutes in whom the hymen appeared untouched. It is seen that the presence of an intact hymen is not an absolute sign of virginity:

Parikh's Text Book of Medical Jurisprudence and Toxicology Third Edition 1977, published by Medical Publication, Bombay at page 454 describes the matter in the following words:

"The hymen may be intact but this does not prove virginity, if the hymen is thick and distensible it may admit two fingers. In such a case, a sexual connection may not rupture the hymen. Such cases where sexual connection has taken place without rupture of the hymen are known as false virgins. Thus with an intact hymen, there can be true virgins and false virgins."

Another authentic work on the subject namely "The Medico-legal Aspect of Sexual Offences by R.L.Gupta, Second Edition 1984, eastern Book Company, Lucknow at page 57

describes as under:

"In odd cases, the hymen has remained unruptured after coitus and during resultant pregnancy, and has remained intact until ruptured by the birth of child, or until incised to permit the passage of the child. In these rare cases, the hymen has been of annular and distensile type which has permitted the entry of the male organ without rupture."

Consequently, there is no conflict between the medical evidence and Report of Chemical Examiner.

6. Following discrepancies have been pointed out by the counsel for appellant:

- (i) Mst. Hasina Mai (PW-1) has deposed that she was wearing shalwar of khaki colour at the time of occurrence. Muhammad Bilal (PW-2), on the other hand has deposed that shalwar Exh.P/1 present before the court is of cream colour. In fact this is no discrepancy as the Khaaki and cream colours are available in different shades and some shades are so close in affinity that the same can be termed both as khaki as well as cream.
- (ii) FIR makes a reference to a shalwar which was worn by the appellant at the time of occurrence. Mst. Nooran (PW-3) has deposed that the appellant was wearing chadar and he ran away having the chadar in his hand after the occurrences and he committed the offence while wearing his chadar. In fact this is no discrepancy as PW-3 has not negated anywhere that the appellant had no shalwar.

7. So far as the delay of 2 days in lodging FIR is concerned, it is plausibly explained in the very FIR itself. Even otherwise this court has repeatedly held that in most of the cases of Zina-bil-Jabr delay in reporting is a normal phenomenon. In this context I am fortified in my opinion, inter alia, by NLR 1997 SD 566, 1997 P Cr.L.J 1500, NLR 1997 SD 544, NLR 1997 S.D 610, PLJ 1997 FSC 154 and 1999 P.S.C(Cr1.) 42. Consequently this contention is repelled.

8. The question of the existence of enmity between the parties is a question which has always worked as a double edged sword. Documents DA to DD have been exhibited in defence. Ex.DA is the statements of Mst. Nooran (PW-3) and Ganmoon khan under section 161 Cr.P.C which read as under:

"بیان ازاں مسماں نوران مائی زوجہ غلام فرید ذات مستوئی سکنہ گل باغ مستوئی زیر دفعہ ۱۶۱ فی بیان کیا کہ بروز وقوعہ قریب ۱۰/۱۱ بجیدن گھر دانے صاف کر رہی تھی کہ مسماں حسینہ پیشاب کیلئے نکلی، کچھ دیر نہ آئی، میں قریبی ڈیرہ پر گئی، مسماں حسینہ کے دھاڑ دھاڑ کی تو میں دوڑ کر دیکھا کہ مسمی حضور بخش مسماں حسینہ کے اوپر سے اتر کر چادر سمٹھالتا بھاگتا جا رہا ہے اور مسماں حسینہ کی شلوار کھلی تھی۔ جو منی آلود تھی جو کی بنا پر دھو ڈالی اور اب پیش کردی ہے۔ میں نے وقوعہ خود دیکھا ہے مسماں حسینہ نے بتلایا کہ حضور بخش نے زبردستی زنا کیا ہے۔

بیان ازاں گانیموں خان ولد اللہ وسایا قوم مستوئی زیر دفعہ ۱۶۱ بیان کیا کہ میرے گھر کے جنوب میں بروز وقوعہ سایہ درخت کے نیچے بیٹھا تھا کہ شور ہوا دیکھا کہ مسماں نوران بھاگ رہی ہے میں بھی بھاگ کر وہاں گیا تو مسمی حضور بخش چادر بھاگتا اور مسماں حسینہ کی شلوار کھلی تھی۔ دریافت پر حسینہ نے بتلایا کہ حضور بخش نے اس کے ساتھ زنا بالجبر کیا ہے۔ اور مسماں حسینہ کی شلوار گیلی تھی۔

Since shalwar of the appellant has not been mentioned, therefore, it has been contended that these statements generate doubt in the story of prosecution. As

discussed above it is neither a conflict nor a discrepancy and does not dislodge the story of prosecution in its material details. Exs.DB, DC and DD are copies of complaints of certain relatives of appellants and the victim inter se but those neither concern appellant himself nor have been proved by any witness of defence. Again those were submitted as before^{as} 1990 and appear to have been compromised later. Such unproved documents are of no avail to the appellant.

8. In view of the above-mentioned discussion, it stands proved that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt. Consequently, the impugned judgment is upheld and the appeal is dismissed. Benefit of section 382-B Cr.P.C

(Abdul Waheed Siddiqui)
Judge

Announced in open

Court on 19-4-1999

(Abdul Waheed Siddiqui)
Judge

Latif Baloch/ Approved for Reporting