IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE S. A. MANAN
MR. JUSTICE S. A. RABBANI

Criminal Appeal No. 164/I of 2003

Naeem-ud-Din Butt son of Saif-ud-Din, resident of Dhaki Mohallah, Tehsil Taxila District Rawalpindi

.... Appellant

Versus

1. Qalb-e-Abbas son of Sakhawat Hussain resident of Potar Street, Dheri Shahan, Rawalpindi

2. The State

.... Respondents

Counsel for appellant	....	Mr.Basharat Ullah Khan, Advocate
Counsel for respondent Qalb-e-Abbas	....	Syed Abdul Aziz Shah Advocate
Counsel for State	....	Mr.M.Sharif Janjuua, Advocate
FIR.No. Date & Police Station	....	94, 07-3-2000 Taxila Distt.Rawalpindi
Date of judgment of trial court	....	06-6-2003
Date of Institution	....	02-8-2003
Date of hearing	....	08-4-2004
Date of Judgment	....	08-4-2004

JUDGMENT

S. A. MANAN, JUDGE.- Naeem-ud-Din Butt has filed this Criminal Appeal No. 164/I of 2003 against the judgment dated 6-6-2003 of the Additional Sessions Judge, Taxila District Rawalpindi, acquitting the respondent Qalb-e-Abbas in FIR.No.94 dated 7-3-2000 police station Taxila under sections 377-PPC and 12 of Offence of Zina (Enforcement of Hudood) Ordinance.

2. Briefly stated, at the instance of Naeem-ud-Din Butt, uncle of the victim the aforementioned FIR was recorded on 7-3-2000 and after investigation the respondent Qalb-e-Abbas was sent up for trial but acquitted vide judgment dated 6-6-2003 of the Additional Sessions Judge, Taxila.

3. The respondent was charge-sheeted but he did not plead guilty and claimed trial and thereafter prosecution evidence was recorded.

4. Learned trial court crystallized the entire evidence on record with due care and caution and acquitted the respondent by giving various

reasons, mainly that the prosecution has failed to prove its case against the respondent.

5. Learned trial court did not believe the evidence of the complainant Naeem-ud-Din Butt which has been fully discussed in para 20 of the impugned judgment. The complainant Naeem-ud-Din Butt stated in the FIR that on 7-3-2000 he was present on the roof top of his house and he heard the cries of the victim Shehr Yar whereupon he (complainant) saw respondent Qalb-e-Abbas committing sodomy with the victim in another house owned by father of the accused. He further stated that the shalwars of the victim as well as that of the accused were removed. It is also stated that after seeing him, the accused decamped.

6. In his statement before the court as P.W.3 he deposed that, " on 7-3-2000 at about 5.00.p.m. I came to my house where all the children of our family were found present but Shehr Yar my nephew was not present in the children, I asked about Shehr Yar who was reported to have gone to mosque. I went on the roof top of my house. I heard the cries of Shehr Yar P.W. from the house of Sakhawat Shah the father of

the accused present in court. I saw Shehr Yar P.W. lying on the ground facing towards ground and his shalwar was removed whereas the accused Qalb-e-Abbas present in court was also without his shalwar and was doing act of sodomy with Shehr Yar P.W. I jumped into the house of Sakhawat Shah, the father of Qalb-e-Abbas. On seeing myself the accused ran away from the site within my view. I tried to chase him but he succeeded in running away".

7. There is a major contradiction in the FIR recorded by the complainant and his statement as P.W.3 before the court. In the former document he was stated to be present at about 5.00.p.m. on the roof top of his house while in his statement he came from out side and inquired from the family as to the presence of the victim whereupon he came to know about his going to the mosque.

8. It is very astonishing to note that the complainant in his statement as P.W.3 deposed that he straight away went to the roof top and saw the alleged occurrence. Normally a person is required to find out the whereabouts of the victim from the locality but in this case he

straight away went to the roof top of the house and saw the occurrence. There is no reason for the complainant to act in such an unnatural manner. The story of the complainant in the complaint is not reconcile with his statement as P.W.3 made before the court. There is no plausible explanation by the complainant as to why he went to the roof top when normally he was suppose to inquire about the victim from the people of the locality.

9. According to the statement of the complainant, he saw the accused committing sodomy with Shehr Yar on the ground while according to the statement of the victim as P.W.2, he categorically stated, " then he (accused) took me into basement, removed my shalwar and then committed badkari with me. My uncle (Naeem Butt), who witnessed from the roof top and heard my cries, came there and confronted his arrival, the accused holding the string of shalwar in his hand, ran away".

It is manifestly clear from the above that there is a contradictory statement regarding the occurrence. The complainant says

that the sodomy was committed on the ground while according to the victim it was in the basement. From the above it is further concluded that the complainant could not be the eye witness of the occurrence from roof top when the occurrence took place in the basement. There is, therefore, major contradiction as to the alleged occurrence. Admittedly there is no eye witness in the case.

10. The lower court has also considered and discussed on this issue and positively concluded that the complainant has not seen the occurrence. The statements of the victim P.W.2 and his uncle P.W.3/complainant do not inspire confidence. It is also unusual on the part of the complainant to have jumped into the house of the father of the accused where the alleged occurrence has happened.

11. The trial court has rejected the evidence of the complainant as P.W.3 and no exception can be made to it.

12. Referring to the medical evidence of Dr.Muhammad Shahid P.W.6 who examined the victim it is deposed that , " no bleeding noted, there is no evidence of semen stained around the anus noted. There is

also no semen stained in clothes noted. Little finger mildly painful during examination. However, three rectal swabs taken and sent to Chemical Examiner for detection of semens analysis and grouping".

13. The report/analysis of the Chemical Examiner is different from the opinion of P.W.6 Dr.Muhammad Shahid and according to the former report the anal swabs were found stained with semen. P.W.6 further sent one swab to the Serologist which could have clinched the whole matter but unfortunately the grouping test could not be made as the specimen of semen obtained from the accused was disintegrated.

14. It is in evidence that the accused himself desired that his grouping test should be conducted and it is for this reason that the Additional Sessions Judge passed an order to this effect on 23-5-2000. The semen specimen was collected from the accused and the same was sent to the Serologist but all in vain because according to the report of the Serologist the same could not be conducted for the reason stated above. Normally it was duty of the police to obtain the semen for grouping but in this particular case this was not done for many months

after the registration of the case and, therefore, the accused himself obtained an order from the Additional Sessions Judge. This also goes to show that the accused was interested to bring the truth on the surface.

15. It is also on the record that there was a money dispute between the close relation of the accused and brother-in-law of the complainant who allegedly received a sum of Rupees two lacs for providing employment abroad and this having not been done the amount was returned to the relation of the accused by way of a cheque which was dishonoured.

16. It is also admitted by the complainant that he was working in front of the Passport Office from which the learned counsel for the accused infers that the complainant was the person responsible for the above transaction. It is in the cross-examination of the complainant that his brother-in-law received Rs.20,000/- from one Naeem Mir a friend of the brother of the accused and for that loan as a security he gave a cheque for the said amount.

It is observed that the amount mentioned by the complainant is Rs.20,000/- while the cheque is for Rs.200,000/-.

17. It is contended by the learned counsel for the respondent that he has been falsely involved on account of the money dispute which appears to be correct.

18. According to the FIR the case against the accused is also registered under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance which is relatable to kidnapping or abducting in order to a subject person to unnatural lust. The prosecution has not produced an iota of evidence to prove this charge against the accused nor there is mention in the statement of P.W.3/complainant that the respondent kidnapped the victim. As this charge under section 12 was also not proved it can be inferred that the prosecution has invented the case under section 377-PPC against the accused.

19. Learned trial court held that the alleged place of occurrence is close to the house of the victim and the same is populated area

wherein the victim has not posed any resistance. The learned trial court has rightly held that it was not a case of abduction but sodomy which was not proved.

20. Admittedly the accused has not been medically examined to prove his potency and this was the primary duty of the police in such like case to file an application to get the accused medically examined. This default and negligence of the police is very serious. If the potency examination is not conducted in a particular case the prosecution is bound to suffer. In these circumstances the trial court has rightly held that there was no evidence to prove that the accused was able to perform sexual act.

21. This is a case of acquittal and there is a consistent view that in such a situation the accused enjoys double presumption of innocence. It is further held that the court while examining case of such accused must be very careful and cautious in interference with acquittal order and normally should not set aside the same merely for the reason that some other view was possible. At the same time it has been held that the

interference can be made in case of misreading of evidence or where the trial court has received the evidence illegally. If any case law is needed PLJ-2003-SC-767 (Mst.Jallan Versus Muhammad Riaz and others) referes.

22. The Honourable Supreme Court has also referred many case law such as PLD-1962-SC-269(Nazir & others Versus The State), PLD-1985-SC-11 (Ghulam Sikandar & another Versus Mamraiz Khan and others), 1994-SCMR-1(Iqbal alias Bhala & two others Vs. The State), 2000-SCMR-919 (Abdul Ghafoor Vs. The State), 2000-SCMR-163(Raqib Khan Vs. The State & another), 2000-SCMR-1784(Muhammad Ameen Vs. The State), and PLD-2002-SC-781 (Muhammad Safdar Vs. The State).

23. It has also been held in 1997-SD-SC-756(Muhammad Shafique Versus Akhtar Shah and 8 others) that the Supreme Court is slow to interfere with acquittal judgment unless it is shown that an injustice has been done or it is perverse or reasons having been given in support of it are altogether artificial or shocking.

Similar is the view in PLD-1985-SC-11 holding, " in an appeal against acquittal (Ghulam Sikandar & another Versus Mamraiz Khan and others) the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different from that in an appeal against conviction when leave is granted only for the re-appraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. In another case Duran Bibi Versus Jehanzeb & others decided by Baluchistan High Court, Quetta and reported in 2001-SD-505, the principles regarding appreciation of evidence in an appeal against acquittal were highlighted on the basis of the law laid down by the Honourable Supreme Court. The ratio decided by the Supreme Court is undoubtedly clear and binding on the subordinate courts.

24. In the present appeal against acquittal the learned trial court has canvassed the case from all angles and finally gave the accused

benefit of doubt and acquitted him and we have no reason to differ with the findings of the learned trial court.

25. For reasons stated above, there is no merit in this appeal and the same is dismissed. These are the reasoning in support of our short order dated 8-4-2004.

(S. A. Manan)
Judge

(S. A. Rabbani)
Judge

Islamabad the 8th April, 2004.
UMAR DRAZ/

Fit for reporting.

(S. A. Manan)
Judge