

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.17/I of 1999.

1. Rawato s/o Chatro Hindu, Caste Kolhi, r/o Sindhian-Jo- Wandhi, Taluka, Nangarparkar, Distt: Tharparkar	Appellants
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2. Maghno s/o Mako, Hindu, Caste Kolhi, r/o Adhigam, Taluka Nangarparkar, Distt: Tharparkar		
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Versus

The State	Respondent
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Counsel for the appellants	Mr.Rasul Bux Paliyo, Advocate
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Counsel for the State	Mrs.Qamur-un-Nisa, Advocate
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FIR No. Date and Police Station	16/97 dated 9-7-1997 P.S Nangarparkar
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Date of Judgment of the trial Court	13-1-1999
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Date of Institution	24-2-1999
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Date of hearing	16-4-1999
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Date of decision	16-4-1999
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JUDGMENT :

ABDUL WAHEED SIDDIQUI, J:- Appellants have assailed a judgment delivered by the Court of Sessions Judge, Tharparker at Mithi on 13-1-1999, whereby appellant Rawato 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 sentenced to R.I for 7 years and appellant Maghno has been convicted u/s 109 P.P.C read with Article 10(3) of the said Ordinance and has been sentenced to R.I for 2 years. Both of them have been extended the benefit of Section 382-B Cr.P.C. By the same judgement co-accused Dheengo has been acquitted u/s 265-H Cr.P.C by extending benefit of doubt to him.

2. Succinctly, the story of prosecution is that one Peter s/o Ramji (PW-1), christian, appeared at P.S Nangarparkar on 9-7-1997 at 19-40 hours and lodged an FIR wherein he stated that he is a teacher at Christan Hostel Nangarparkar and also resides at the same place alongwith his family. He has 6 sons and two daughters. His brother-in-law Karmshi (PW-2) also resides with him. His elder daughter Anjleena (PW-3)

is unmarried and of about 16 years of age. On 13.6.1997 he and his wife Bano (PW-6) had gone towards Quetta to attend a meeting called by christians. After the culmination of the meeting, he alongwith his spouse returned back on 29.6.97 and reached their house at about 9 P.M. On return his elder daughter, while weeping, narrated that in between the night of 15/16 of June 1997 she was sleeping inside a masquito-net in the court yard of her house. Near her were sleeping her brother Yaqub and maternal uncle Karmshi (PW-2). All of them were having mosquito nets on their carts. Suddenly then appellants Rawato and Maghno jumped from the wall inside the house. They were known to her previously and used to tease her some times. They gagged her mouth and tied her hands with hand-kerchifs. Then Rawato opened her string of shalwar and committed Zina-bil-Jabr with her. She freed her mouth from hand-kerchief and started crying. Upon this, her brother and maternal uncle got awakened who were sleeping nearby. Realising this situation, both the culprits went towards northern wall. Then they saw that another co-accused Dheengho also ran away alongwith the two above-mentioned offenders. All the three scaled over the wall of the house and ran away. They were also seen by the victim's brother and maternal uncle. After that she informed both the witnesses about the

happenings. At the morning time their nekward Heero came who was intimated about the incident and was shown the foot prints of the culprits.

On having come to know, the complainant went towards Badin where father Thomas was informed who directed him to lodge a report with the police station. Hence the report.

After necessary investigation all the three nominated accused were challaned and were charged under Article 10(3) read with Article 16 of the said ordinance as well as under Sections 342 and 109 P.P.C to which none of them pleaded guilty.

3. To prove its case, prosecution examined 9 witnesses. Peter (PW-1), the complainant has deposed in conformity with the contents of FIR Ex.9-A. He has further deposed that his victim daughter Mst.Anjleena is studying in Ist year in Govt. College, Badin. During the days of incident his daughter had come to Nangarparkar to pass holidays there. On 13.6.1997 he had left for Quetta leaving behind the victim, his brother in law Karmshi (PW-2), and 3 sons aged about 14 years, 9 years and 6 years. He and his wife remained in Quetta for about 10 days and then returned back on 26th June, 1997 at Kotri. From Kotri they had gone to Matli where he reported about the family meeting at Quetta. They stayed for 2 days

and then came to Nangarparkar on 29-6-1997 at 9-00 P.M

when the victim narrated to them facts of this incident. She informed that in the night of 15th June, 1997 she was sleeping on cot in a court yard of her house and her younger brother aged about 6 years was also sleeping with her on the same cot. The victim further informed that the accused/appellant Maghno had closed her mouth and tied her hands behind.

Whereas accused Rawto forcibly committed zina on her. She further informed that after committing rape on her, she raised noise but accused Rawto again put his hands on her mouth when in the meantime, children woke-up and thereafter accused ran away from the scene of offence from back side of the courtyard. The victim further informed him that she saw accused Dheengo ^{running} away after scalling over the wall thereafter. The witnesses namely Karmshi, his wife and his son Yaqoob had also seen the accused persons running away from the wardat. She further informed that the foot prints of the accused were also covered at the wardat, which were shown to Heero, the neckmard/community. She further informed that the neck-mard Heero tracked the foot prints which ended in the house of accused persons. Heero had further informed him that the accused persons had admitted their guilt in his presence. The complainant and Heero thereafter informed

Ex.Chairman of their locality, Usman by name, who directed them to lodge the FIR. He and Heero went to P.S Nangarparkar but the police refused ^{to lodge} the FIR. They approached Abdul Rahim who called Abdul Latif, Additional SHO of P.S Nangarparkar and directed him to register this FIR. The ASI verbally promised before Abdul Rahim to record the FIR but due to the pressure of the accused party he did not record it. On 1st July, 1997, Complainant went to Matli to approach Father Thomas and narrated to him the facts of the incident with ^{he went} whom/to one Shakil Pathan at Hyderabad where he had given application to him about this incident. Shakil Pathan directed him to go back to Nangarparkar and lodge report. On reaching Nangarparkar, the complainant met with ^a news reporter namely Ghazi and requested him to accompany him to P.S Nangarparkar for lodging the report. The SHO kept them on promises that he will record their FIR within 3/4 days. The complainant again contacted on telephone with Shakil Pathan at Hyderabad and informed him that FIR of this incident was not being registered. Shakil Pathan telephoned to Deputy Commissioner Mithi. The said Deputy Commissioner on receiving telephonic message arrived at Nangarparkar on 8-7-1997. He called Heero and obtained information about this incident. The Deputy Commissioner then called the

complainant party at Inspection Bangalow at Nangarparkar. He obtained facts from him^{and} his wife and his victim daughter Anjleena. The Deputy Commissioner then directed ~~_____~~ for lodging report. Then this FIR was lodged at P.S Nangarparkar which has been produced as Ex.9-A. This witness has proved the FIR to be correct and bears his signature and has further deposed that the accused persons present in the Court were previously known to him. They were on visiting terms with the house of the complainant prior to this incident. Karmshi (PW-2), has deposed in conformity with the FIR. He has also deposed that 5/6 days prior to this incident the parents of victim Mst.Anjleena had gone to Quetta. His house and the house of complainant are separate but within the same enclosure. In the night of incident he was sleeping at a distance of 8/10 paces from the cot of the victim. He has further deposed that he , his wife, Yaqoob and the victim alongwith her minor brothers were sleeping in the courtyard of the house. They were in a fast sleep and woke up at the cries of the victim. He, his wife and Yaqoob woke up and saw all the accused running away and he followed them. The house of the accused and their house is separated by a small wall which is in between. The accused ran away by scalling over the wall and went towards their house. The

victim disclosed to his wife that zina had been committed upon her. She further informed his wife that accused Rawto had committed zina with her forcibly by tying her mouth and hands again said the victim disclosed the all facts to him ~~and~~

There were foot prints of three persons at the wardat which were covered by them. It was ~~dark~~ moon-lit night. In the morning he informed Heero who was shown foot prints available at the wardat. Heero had gone to the houses of accused and met them and then informed that the accused were repenting their guilt. The victim requested him that he may keep secret this matter till arrival of her parents. Mst. Anjeena (PW-3), the victim, has deposed that she is not definite about the actual time of the incident. During the night in between 15/16 June, 1997 she was sleeping alone on her cot, whereas her younger brothers Janwaris and Aneel aged about 10 years and 7/8 years were sleeping on another cot. She was fast asleep. Suddenly ^{she} opened her eyes when ^{some one} closed her mouth and tied her hands. ^{identified} She/two persons namely Rawto and Maghno as they were previously known to her. Rawto untied her shalwar and forcibly committed sexual inter-course with her. After commission of sexual inter-course upon her, her body was stained with semen. Thereafter her mouth and hands were opened by accused Maghno. This Maghno was standing at some

distance at that time. Thereafter she raised cries which attracted Karamshi and Keshu. They saw the accused persons running away from her house. She had no enmity with the accused. Again said that the accused persons used to tease her and express vulgar talks with her when she used to pass near their house. She had disclosed to her maternal aunt about this incident and then her maternal aunt disclosed this fact to her maternal uncle who informed the matter to their neck-mard Heero. Heero directed to report the matter with police but she requested that they may wait till the arrival of her parents. On 29.6.1997 she narrated the incident to her father. She did not know as to whom approached her father in connection with registration of this case. So far as she remembers, no person had sympathised with her father relating to this incident. Her statement was recorded by police and all the accused persons present in the Court are same. Dr.Kanta (PW-4), woman medical officer, RHC, Islamkot has proved medical examination of the alleged victim on 10.7.1997. According to her, the examinee was aged about 16 years, was unmarried and any sort of injury on her person was not detected

She has further deposed as under:

"From internal PV (per vaginal) examination, I found her Hymen ruptured. Which easily admits 2 fingers and therefore, from her external and internal examination, on the P.V. I came to the conclusion that the rape was committed upon the said lady, about 2/3 weeks prior to the issuance of certificate. I prepared such certificate, which I produce as Ex.12-A, it is same correct and bears my signature.

Heero(PW-5) has deposed that he is a member of Union Council and Nek-Mard of Christian community. He has further deposed as under:

"Karamchi had informed me that accused Rawto committed rape with Mst. Anjleena alongwith Maghno and Dheengo. I had also seen the foot prints in the courtyard of the house of Mst. Anjleena. There were foot prints of 3 culprits. The foot prints were upto the Cot of Mst. Anjleena. The foot prints were with shoes. I had contacted with the accused and disclosed to them that their foot prints are available in the courtyard of the house of Anjleena and therefore, they are responsible for committing of rape. All the accused had admitted before me having entered into the house of Peter and committed rape with Anjleena but further disclosed that it is a matter in between them and the father of the girl Peter and let him to come back and thereafter they will settle the same. I then returned back and met with Anjleena and I directed her to lodge the report. But she expressed that since her father and mother had are to Quetta therefore, she alone will not report the matter to Police in absence of her father and mother. Peter and his wife returned back from Quetta

from 29th June, 1997, and the FIR was registered after approaches from various authorities on intervention of Deputy commissioner. Prior to this, local police was not ready to register the FIR due to influence of the accused.

Mst. Bano (PW-6), the mother of alleged victim, has

deposed:

"We returned back to Nangarpakar from Quetta on 29-6-1997. As soon as I reached in the house, my daughter Anjleena started weeping. She informed that Rawto had committed rape upon her. She further informed that Maghno and Dheengo were also with him. Anjleena informed that while she was sleeping, on the Cot at the night time, her hands and mouth was tied by Maghno while Rawto committed sexual intercourse with her. She further informed me that after sexual inter course, her hands mouth were opened by the accused, who thereafter ran away. She further informed me that she raised cries, which attracted her maternal uncle and brothers, who woke-up and followed the accused but the accused went-away to their houses. We then informed our Head Master Peter and the people of the vicinity and went to report ~~the~~ the matter but no one had listened to us, for the reasons best known to Police. We then went to Badin. Where we approached the head of our institution. I had also approached Shakeel Pathan. Shakeel Pathan then directed to us to go to Nangarparkar, and if the FIR is not registered by Police, then we may report to him about the matter, but the Police even then could not register our FIR. Master Peter then again approached Shakeel Pathan, and informed him that the FIR is not being registered. Shakeel Pathan then contacted D.C, who arrived at Nangarparkar and with his influence, our FIR was recorded. "

Muhammad Jaman (PW-7) is a mashir of arrest of appellant

Rawato on 23-7-1997 and proved such mushirnama as Ex.20-A.

Sono (PW-8) is a mashir of vardat. He has deposed:

"Peter is complainant in this case. I went inside the house. There were some foot-prints at the vardat. Police had shown me the place where the cot were lying at the time. such mashirnama was prepared which I produce as Ex.21-A, it is same and bears my signature. Co-mashir was one Kolhi, but I do not remember his name."

Nabi Baksh (PW-9) I.O has proved working as S.H.O P.S. Nangarparkar on 9-7-1997 on which date he recorded FIR Ex.9-A.

After completing investigation, he submitted challan. In

(2)
his statement on oath u/s 340/Cr.P.C, appellant Rawato has
deposed as under:

" The complainant party were also proviously Kolhis, and they wree converted to Christaianity, therefore, they appreached us to change our religion. The complainant also preached his religion to Kolhi students, residing in the hostel, and I had shifted those Kolhi students in my own hostel to save them from conversion, and due to that reason, the complainant has involved me in this case at the instance of Christaian mashinery. I pray for justice. One Chhagan boy was being converted as Christian, but due to my efforts, he was saved. Voluntarily say some of our Kolhis have changed their religion, but they again were converted in their own religion.

In his statement on oath u/s 340(2) Cr.P.C appellant

Maghno has deposed:

" I did not trespass alonwith Rawto Kolhi and Dheengo to the house of complainant nor helped Rawato in committing sexual offence with Mst. Anjleena. I had forced the boys of my community not to ,mix-up with the complainant , and to remain on their own religion. This annoyed the complainant party and has involved me in this case.

Mirzo Khan(DW-1), a Contractor by profession, has deposed.

"Peter is Christian by religion. While Rawato and Maghno are Kolhi by religion. I heard that Peter had filed criminal case against accused Rawato and

Maghno. But actually no such incident had taken place in Nangarparkar town. The accused are involved in this case due to religious differences.

Paroo Mal (DW-2) has deposed:

"I am Ex-member of District Council Mithi. I used to visit Nangarparkar in connection with my personal affairs. I know complainant Peter as well as accused Rawato and Maghno. I have not heard any such incident occurred in Nangarparkar, with regard to rape with the daughter of complainant. When the report was registered at PS Nangarparkar, I came to know about this incident. Complainant Peter and P.W Heero are Christian, while accused are Kolhi by religion. There is the religious difference in between Christian community and Kolhi community.

4. I have heard the counsel for appellants and State.

At the out set, the learned counsel for appellant Mr. Rasool Bakhsh Palejo has argued in favour of taking a judicial notice of the religiously charged atmosphere in such localities of Pakistan and India where Christian missionaries are active in converting scheduled and lower caste Hindus to Christianity. Such localities include deserts and marshes of Badin, Tharparkar, Katch, Kathiawar, Maharashter areas. Of recent the law and order situations in Gujrat, Maharashter areas of India had worsened to an extent that many churches were burnt and simultaneously hundreds of vexations and frivolous criminal cases had cropped up between Hindus and Christian missionaries to an extent that even international media remained active in reporting for many months. The learned counsel for appellant has made a reference to the following ruling of a DB of

this court reported as NLR 1998 SD 593 in which the havocs played by religious differences in a charged atmosphere are highlighted.

" Before entering into the arena of the case, the first and foremost fact about which we have taken a ^{of} judicial notice is the existence of the circumstances/ extreme hatred amongst the citizens of Pakistan on petty sectional differences and nefarious activities ~~carried against each other in violation of~~ ^{in violation of} ~~inter~~ alia, the following injunctions of Islam and the Fundamental Rights as conferred by the constitution of the Islamic Republic of Pakistan. On the other hand, under such circumstances, in the courts of Pakistan such false cases are cropping up in which allegations of incest, sadism, bestiality, lesbianism, coitus per os, murder after commission of rape, gang rapes, urinating into the mouth and carnal intercourse against the order of nature with one's wife, daughter and son, intercourse with a dead female etc. are made and due to the hatred generated by extreme sectarianism.

When we look at the present case before us in this general perspective, we find certain mysteries of the case unfolding themselves before us in the following manner.

The Counsel has contended that the appreciation of evidence in the present case needs a highly cautious dealing in ^{by a DB of} view of the above-mentioned judicial notice taken/ this Court. The learned counsel for State has admitted that such a charged atmosphere is existing in the locality to which this case belongs as well as in the contiguous areas which are falling on the Indian side of Karunjhar mountains and continue upto Gujrat and Maharashtar. I do agree with both the counsel that the present case needs a microscopic dealing to satisfy the needs of justice.

5. Admittedly, the parties belong to two different religions namely Sanatan (commonly known as Hindus) and Christianity. The Christians are neo-Christians and have been converted from Kolhis and other scheduled as well as non-scheduled low castes of Hinduism. They are the complainant party. On the other side are the appellants and their acquitted co-accused who are Kolhi Hindus. Peter (PW-1), the complainant, has admitted that he is matriculate and has shown his occupation to be Hostel Incharge in the title of his deposition. In FIR he has stated that he is a teacher in Christian hostel Nangarparkar. During cross he has admitted that he has been converted from Kolhi religion to Christianity and that he resides in Nangarparkar from 16 years and knows the entire Kolhi community of the area including the appellants and their original residential villages near Nangarparkar. He has also admitted that at the relevant time, his victim daughter was studying in Saint Michael Convent High School, Mirpurkhas where a foreigner Mother Marjeena was Principal who was murdered on 28-6-1997. This admitted position of the complainant needs to be compared with the admitted position of the appellants. Rawato has declared in his statement on oath that he is

a Hindu by caste a Kolhi, by occupation a teacher. During his examination-in-chief he has stated that due to conversions there was some resentment. It appears that there was one hostel in which Kolhi students were residing and were being converted by the hostel-keepers who were Christians. Appellant Rawato, being a teacher, shifted the Kolhi students to his own hostel to save them from conversion. During cross, prosecution has utterly failed to create a dent in the above-mentioned statement u/s 340(2) Cr.P.C. On the contrary, appellant Rawato has further proved his plea of defence in the following words;

"The complainant party were also previously Kolhis, and they were converted to Christianity, therefore, they approached us to change our religion. The complainant also preached his religion to Kolhi students, residing in the hostel, and I had shifted those Kolhi students in my own hostel to save them from conversion, and due to that reason, the complainant has involved me in this case, at the instance of Christian missionary. I pray for Justice. One Chhagan boy was being converted as Christian, but due to my efforts, he was saved. Voluntarily say some of our Kolhis have changed their religion, but they again were converted in their own religion."

to
Appellant Maghno has replied/a suggestion by prosecution as under:

"Complainant is Priest of Christian community/religion. Since my childhood, I know complainant is a Priest."

From this admitted position of the parties, it stands clarified that the appellant Rawato was a teacher and was

resisting the missionary activities of the complainant which had generated enmity which has been admitted by Mst. Anjaleena (PW-3) during cross. To this effect is the following piece of admission by Heero (PW-5);

"Voluntarily says that recently about 20 days back due to pressure of Kolhi teachers, some of the students of Peter had left his hostel and joined with Kolhis.

Even the Investigation Officer Nabi Bakhsh PW-9 has admitted existence of animus between the two communities in the following words:

" I knew that accused Dheengo was Vice-Chirman of UC Adhigama and was a respectable person. It is correct to suggest that there was dispute in between Christian community and accused community over conversions of religion before this incident."

6. The learned counsel for appellant has vehemently contended that the delay in lodging FIR has not been explained plausibly and that there is conflict among the material witnesses about the computation of this delay per se. According to Peter (PW-1), the complainant, occurrence had taken place in between the nights of 15/16 of June 1997 and he had returned from Quetta on 29 of June 1997 and was immediately informed about the crime. On this point he has been corroborated by Mst. Anjaleena (PW-3), the victim. They have been contradicted by Karmshi (PW-2) who has deposed that 5/6 days prior to the incident, the parents of the alleged victim had gone to Quetta and it was the night of 15th June 1997 when the incident had taken place.

Meaning there by that the complainant (PW-1) had returned by 20th or 21 Ist of June 1997 and was informed accordingly. But during cross he has stated that the complainant had returned on 19-6-1997. The F.I.R was actually lodged on 9.7.1997. Consequently the F.I.R was lodged 24 or 25 days after the incident, but from the date of knowledge of complainant the computation becomes conflicting. In case Karmshi (PW-2) is believed it will come to a delay of 19 or 20 days, and according to complainant it stands computed as 10 days. Even if this conflict is ignored, the question arises as to whether explanations about delay are plausible.

The learned counsel has contended that this delay in lodging F.I.R is divisible into two periods and each period lacks a plausible explanation. First is the period between the date of occurrence and the date of the knowledge of the complainant. About this period Karmshi (PW-2) is forwarding the folloing exaplanation:

— "Mst. Anjleena requested me that I may keep secret this matter till arrival of her father and mother."

According to this witness, this period terminated on 19-6-97. Mst.Anjaleena (PW-3) has corroborated (P W-2) on the point that she had requested not to report till arrival of her parents but she is in conflict with PW-2

on the date of arrival which, according her , is 29-6-97 and not 19-6-97. In conflict with this piece of evidence, she has admitted during cross that she had not stated in her police statement that she requested not to report till arrival of her parents. It means that improvements are made to create a pretext for not lodging the report during this first period of delay. This view is further strengthened by the fact that FIR is silent about this explanation. Here then I am constrained to make a reference to the following authorities specially when enmity between the parties stands proved as discussed above.

- (1) In their classic " Understanding the Rape victim" no less an experts than Sedelle Katz and Mary Ann Mazur of the Department of Psychiatry, Washington University, are opinig in Chapter 13 as under;

BEWARE THE FALSE REPORT OF RAPE.

The Lord Hale Statement to juries

Legal codes throughout the ages havily weighted to protect the innocent rather than to punish the guilty, and, thus, they have made the accusation of rape difficult to prove.

Sir Matthew Hale(1778), an 18 Century English barrister, successfully defended a 53 year old man charged with the rape of a 14 years old girl (Simpson,1957). He proved the man medically incapable of the crime, and his closing remarks to the jury are enshrined in most legal codes. Rape is an accusation easily to be made and one made hard to be proved, and harder to be defended by the party accused, tho/^{never}so innocent. (Simpson,1975; Brownmiller, 1975; Weis and Borges,1973; Sagarin 1977).

In most states tody, judges are required to make this Lord Hale statement to the jury as a warning to beware of the false accusation of rape."

"....male schoolteachers, doctors, lawyers, ministers, and other authoritarian figures are particularly vulnerable to the fantasy rape report (Mac donald, 1971)."

(Publication: John Wiley & Sons, New York, 1979).

Modi in his classic on " Medical Jurisprudence & Toxicology" is giving his expert opinion on the subject as under:

"False Charges.- False charges of rape are not uncommon in India. Occasionally parents may introduce chillies into the vagina of their female child to cause irritation and inflammation or may injure her genital for the purpose of substantiating a false charge of rape brought against an individual with a view to taking revenge or extorting money from him and may tutor their child to tell a circumstantial story of a rape. Modi saw a case in which the father thrust his thumb forcibly into the vagina of his daughter six years old, in order to bring a false charge of rape against his neighbour, who was his enemy, and lacerated the posterior part of the hymen, the posterior part of the vagina and the posterior commissure. At times parents inflict injuries on the private parts of their female child, and then kill her by strangulation or suffocation in order to bring a false accusation of rape and murder against their enemy. If necessary X-rays should be taken to ascertain age.

"It sometimes happens that young girls has given consent to the act of sexual intercourse, but she does not scruple to accuse her partner of rape in order to save her own reputation, when she is discovered by a third party in actual act, or when she cannot account to her mother or other near relation for injury to her private parts or blood or seminal stains on her garments. At times she permits the act, and then brings a false charge of rape with the object of blackmail. If a complaint in such a case is made a few days after the incident, the case is probably one of concoction. It is also necessary to note the previous character of the girl and her relations with the accused."

As to the explanation about the second period of delay

i.e. from the date of knowledge of the complainant and lodgment

of F.I.R, again conflicting depositions of discrepant nature are

apparent on the record. The stories of efforts for lodgment of FIR as told by the complainant (PW-1) and specially about the sympathies of one Shakil Pathan of Hyderabad are clearly falsified by the alleged victim in the following words:

"I don't know to whom my father had approached in connection with registration of this case. So far as I remember, no person had sympathized with my father, relating to this incident."

On consideration of this situation and keeping in view normal natural human conduct about immediate reporting of such heinous crimes, I do not find it safe to consider the explanations about both the periods of delay to be plausible and do hereby declare that the explanations are tutored ones and have been brought on the record after due deliberations.

7. The counsel for appellant has also made a reference to the discrepancies and conflicts with which entire evidence of the witnesses of prosecution is filled which are material to an extent that the credibility of PWs is crumbled.

Some of such substantial discrepancies are highlighted as below:

(1) Karmshi (PW-2) is disclosing that there were footprints of three persons at the wardat which were covered by them and that next day their nekward Heero was shown the said foot prints. Heero (PW-5) has deposed that the three foot-prints were upto

the cot of Mst. Anjaleena and were those of shoes. During cross he has admitted that he had tracked the foot-prints which were leading to the houses of the accused persons and that the foot-prints were covered with iron pot and the same were not shown to the police since Peter (Complainant) had arrived after 15 days of incident , he was not shown the same. Complainant PW-1 has tried to give cover to this story but has been checked by the trial court to be false. Following is the piece of evidence of PW-1 to that effect:

"I have stated in the FIR that the foot -prints of the accused were covered at the time of incident. (Confronted not so recorded)."

In this context Nabi Baksh(PW-9), the investigation Officer, has deposed as under:

"The complaintant has not stated in his FIR that foot-prints of the accused were covered, after the incident by the inmates of his house. P.W Karmshi has not stated in his 161 Cr.P.C statement that he and other inmates of the house had covered the foot-prints of the culprits at the vardat. PW Heero has not stated in his 161 Cr.PC statement that he had contacted with the accused and disclosed them about their foot-prints at the vardat..... I knew that accused Dheengo was Vice-Chirman of UC adhmigama and was a respectable person. It is correct to suggest that there was dispute in between Christian community and accused community over conversions of religion before this incident."

Consequently, the conclusion about the existence of foot-prints or rather shoe-prints is that it is an after thought and has not been proved at all by the prosecution.

(ii) In FIR, the complainant PW-1 has stated that after having come to know about the incident he went to Badin and informed Father Thomas about it. In his deposition, the same witness has deposed that due to the pressure of the accused party the F.I.R was not recorded by the police, so he went to Mat to approach Father Thomas and narrated him the facts of the incident who accompanied him to Shakil Pathan at Hyderabad. Here the venue of Father Thomas has changed from Badin to Matli.

(iii) In FIR, the complainant is stating that on 29-6-1997 he returned back from Quetta direct accompanied by his wife. In his deposition, he is deposing as under:-

"I and my wife remained in Quetta for about 10 days. We returned back on 26th June, 1997, at Kotri. From Kotri we had gone to Matli, where we reported about the family meeting at Quetta. We stayed in Matli for 2 days. From Matli we came to Nangarparkar on 29-6-1997, at 9.00 p.m."

According to the learned counsel this improvement to has been made with due deliberation/give further coverage to the issue of delay in lodging FIR.

(iv) In his deposition PW-1 is deposing that he and Heero went to P.S.Nangarparker to lodge FIR on the directions of one Usman, an ex-chairman of the locality. Heero (PW-5) on the other hand is admitting during cross to Mr.Hemraj, Advocate for accused Rawato:

"I had not accompanied with Peter for lodging the report."

(V) Karmshi (PW-2) is admitting during cross that when those sleeping in the same courtyard got up, a brother sleeping with Anjaleena also got up. In conflict to this Anjaleena (PW-3) is deposing that she was sleeping alone on her cot and that her younger brothers aged 10 and 7/8 years sleeping together on another cot.

In fact the entire evidence is full of such improvements and discrepancies, that the story of prosecution gets split into Kaleidoscopic effect and many mutually annihilating versions are coming forward. Consequently I conclude that these discrepancies, conflicts and improvements are material and are reaching the very roots of the story.

8. Another contention is that the only witness of the offence of Zina-bil-Jabr is the victim herself. Karmshi (PW-2) has clearly admitted that he had ^{not} seen the accused committing zina with Mst.Anjleena, otherwise he would have caught hold of them on the spot. No other witness has claimed to be ocular about the very offence for which the appellants have been convicted and sentenced. Now the only witness namely Mst.Anjleena (PW-3), the alleged victim, according to the learned counsel for the appellants is not trust-worthy in view

of the medical evidence and her own discrepant deposition.

Dr.Kanta (PW-4) who examined the alleged victim on 10.7.1997

i.e 25 days after the incident has admitted:

"In my opinion, the victim was used to sexual intercourse."

In her opinion, she is corroborated by her finding that as per vaginal internal examination, hymen was ruptured and vagina admitted two fingers easily. During cross this witness has admitted that the victim did not feel pain at the time of examination.

In view of these findings, the counsel for appellant has vehemently argued that the only witness of the occurrence, the victim herself, stands proved as a lady of easy virtues and therefore her evidence is not inspiring confidence.

Dr.Kanta's revelation that she did not take any vaginal swabs of the lady for examination of the semen as it was not required is in direct conflict with the recent developments in forensic and genetic sciences. Her denial of the staying of semen stains in vagina for a period of one month as she has not read any such fact in her medical jurisprudence is not in accordance with the recent developments in this field of biological sciences.

A division bench of this court has taken pains to decide this intricate question in a ruling cited as 1999 PSC (Cr1) 204 (Ref: Lal Muhammaad @ Laloo and another Vs. State.)

The relevant paras of this ruling read as under:

"In Jensen V. State (153 N.W.2d 566 (Wis. 1967) it was held long ago that presence of seminal fluid in the vagina of the female is a conclusive evidence that coitus has occurred. Seminal fluid (or semen as used in common parlance) consists of two major fractions. One is the spermatozoal fraction secreted by the testes. The other is the prostate secretion. The two major fractions are secreted independently, but the prostatic secretion precedes the spermatozoal secretion. In a classic on Forensic Science edited by Cyril H. Wecht, Vol.2 publication New York 1981 it is discussed as under: "Determination of time from intercourse to examination, based on the presence of spermatozoa is subject to much disagreement. Such disagreement may be, due in part, to the natural variations in the vaginal milieu. It is generally accepted that the amount of vaginal secretion and its chemical constituents have an effect on the residual time for spermatozoa. It is also known that these factors vary with sexual excitement, so the vaginal milieu in cases of rape is probably considerably different than it is in sterility studies." (Quotation from 40-American Journal of Clinical Pathology 1963). Morphologic survival time of spermatozoa in the vaginal milieu is calculated by Pollak to be between 30 minutes to 17 days depending upon the availability of quality and quantity of the activating agents and chemical constituents of the vaginal milieu". All this discussion made above is about non-motile sperms. So far as the minimum and maximum time of finding motile spermatozoa in the vagina is concerned, Dr.S. Siddiq Hussain in his work "A Text Book of

Forensic Medicine and Toxicology" (Published by: The Caravan Book House, Lahore) is giving his authoritative point of view in 1989 as under:

"In the living woman, motile spermatozoa in the vagina can be found over 100 hours after coitus and non-motile spermatozoa as for as long as 17 days. In the dead they may even survive longer (Sharp No. 1963, J.Canad. Med. Ass.89, 513)."

Now if the time of 100 hours is taken to be the yard stick for calculation of the motile spermatozoa having stuck on the cotton swab prepared by Dr.Zaibun Nisa (PW-1), it shall come to 4 days and 4 hours. Therefore in case the swabs were prepared from inside the vaginal orifice, the motile sperms and naturally semen in its original form were correctly detected by the chemical examiner.

In Forensic Sciences Vol. 2, 25.09 (b) supra, it has been authoritatively declared that spermatozoa deposited on surfaces other than in the vagina will survive for great length of time depending on the preservation techniques that are used. We have recovered spermatozoa from cotton garments six months after deposition."

Fornstein in his work "Investigation of Rape: Medico-Legal Problems" publication 1963 has reported the recovery of spermatozoa on cotton after fifty years storage under special conditions.

Second important fraction of semen i.e. prostatic secretion contains a very active enzyme known as Acid Phosphatase. Its activity is greater than that of any other human body fluid. Although Pinto in his article "Rape for the Defence: Acid Phosphatase" published in the Journal of Forensic Medicine 147 (1959) states that Acid Phosphatase activity disappears after 48 hours in the vagina, but Cyril H.Wechth disagrees with him and states that the original activity of this Acid varies tremendously from person to person and due to this factor, decay rate determination for it in the vagina is subject to a very larger error.

From the above-mentioned discussion two queries raised earlier in this para stand resolved. The first one is resolved in the sense that Dr.Zaibun Nisa (PW-1) has erroneously deposed that semen can be detected within 48 hours of its deposit in the vagina. As shown above, its non-motile sperms can be detected upto 17 days after coitus specially in cases in which female is not a consenting party and therefore her vaginal milieu do not contain chemical constituents absorbing the fittest sperm and destroying the unfits under the principle of nature of the survival of the fittest. It also stands proved that semen in its motile sperm can be detected upto 100 hours after the intercourse. With the development of Genetic Engineering and Paleo-Bacteriology in the Biological Science and Paleology in Geology, new methodology has been developed which can detect deposits of DNA-RNA genetic Codes of a single sperm upto Jurassic Age of Geological Epochs i.e. upto 9 crores of years. Not only that experiments are in continuum in this field in the most advanced laboratories, but even science fictions of high standards like "Jurassic Park" are emerging on the scene dealing with this subject. Thus we find following interesting passage in the "National Geographic" issue May, 1996 page 101:

"The most intriguing idea-cloning a dinosaur from DNA, a scenario featured in the book and movie Jurassic Park-is also the most outlandish."

An age is fastly coming when detection of morphological DNA-RNA indicating sperms of human or non-human origin might enter pre-Cambrian Age i.e more that 12 corers of years earlier than the present day. At page 108, the same issue of the National Geographic reports:

"Can DNA be extracted from dinosaur eggs? Success was reported by a team led by molecular biologist Chen Zhangliang at the College of Life Sciences at Peking University, where he works with paleontologist Zhang Yun."

The second query about the preservation of the spermatozoa on the swabs taken on cotton from the date of procurement to the date of chemical analysis could have been for six months what to say of days as in the present case."

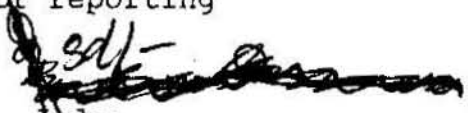
Consequently I find that the prosecution has failed to procure vaginal swabs of the ^{alleged} victim to prove its case through chemical analyser and serologist as well. Another factor to which the counsel has made a reference is that on the one hand the alleged victim is admitting during cross: " I can not say, if the semen emitted from the accused" but in her examination-in-chief she is deposing " After committing sexual intercourse upon me, my body was stained with semen." In view of this clear lie, the victim has lost all the credibility and she can not be believed for the following piece of evidence, " The bed sheet was not stained with semen. There were some white spots on my shalwar We had not given that shalwar to police Police had demanded the shalwar from me, but in the meantime the said shalwar had been washed away by me."

9. In view of the above-mentioned discussion, I had already come to the conclusion that the prosecution has failed to prove the guilt of appellants beyond reasonable

doubt and while extending this benefit of doubt, I had set aside the impugned judgment, accepted the appeal and directed to release the appellants if not wanted in any other case through my short order dated 16-4-1999. These are the reasons for the said order.


(Abdul Waheed Siddiqui)
Judge

Approved for reporting


Judge

Islamabad, the
16th April, 1999.
Zain/*