IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH.EJAZ YOUSAF.

CRIMINAL APPEAL NO.174/I OF 1998

Afzaal Ahmad son of Habib Ullah Awan,Mohallah Sultan Abad,Rawalpindi.

Versus

The State	...	Respondent
For the appellant	..	Malik Rab Nawaz Noon
For the State	...	Malik Shaukat Hussain Advocate With Mrs.Rukhsani Malik,A.A.G.
No.& date of F.I.R Police Station	...	No.207,dt.14.4.1991 P.S Ganj Mandi,Rawalpindi.
Date of judgment of the trial court	...	17.11.1998
Date of Institution	...	23.11.1998
Date of hearing	...	19.11.1999.
Date of decision	...	31.1.2000.

CRIMINAL APPEAL NO.182/I OF 1998.

Mst.Attia Khaliq w/o Arshad Mehmood Mughal,r/o Muslim Town,Rawalpindi.

Versus Appellant

Afzaal Ahmad and others Respondent

For the appellant	...	Mr.Muhammad Munir Paracha, Advocate.
Date of institution	...	4.12.1998.
Date of hearing	...	19.11.1999.
Date of decision	...	31.1.2000.

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JUDGMENT

CH.EJAZ YOUSAF,J.- Criminal Appeal No.174/I of 1998 and Criminal Appeal No.182/I of 1998 have come before me under section 427 of the Criminal Procedure Code because my two learned brothers namely,Justice Abdul Waheed Siddiqui,J and Justice Muhammad Khiyar,J, who have heard the same at first instance,were not agreed as to the order that should be passed, the former being of the opinion that Criminal Appeal No.174/I of 1998 be accepted and appellant be acquitted of the charge and Criminal Appeal No.182/I of 1998 be dismissed and the latter of the opinion that conviction and sentences recorded against Afzal Ahmad appellant in Criminal Appeal No.174/I of 1998 be dismissed.

2. Criminal Appeal No.174/I of 1998 has been filed by appellant Afzal Ahmad against judgment dated 7.11.1998 passed by learned Additional Sessions Judge,Rawalpindi whereby he has been convicted under section 10(3) of the Offence of Zina(Enforcement of Hudood) Ordinance,1979 (hereinafter referred to as "the Ordinance") and sentenced to R.I for five years whereas, Criminal Appeal No.182/I of 1998 has been filed by Mst.Attia Khaliq,the victim and she has prayed for the enhancement of sentence recorded against

appellant Afzal Ahmad by the trial court.

3. Briefly stated, the prosecution case as gathered from the record is that on 14.4.1991 at 2.00 P.M complaint Ex.PB was lodged by one Abdul Khaliq son of Haji Feroze Khan, wherein it was alleged that he was resident of Sultan Abad and his daughter namely Mst.Attia Khaliq,aged 22 years also resides with him. On the previous night,he had gone to the mosque,for offering Taravih prayers. At about 9.00 P.M when he returned, he found that Mst.Attia Khaliq was missing. On search it transpired that she was abducted by appellant Afzal Ahmad, their neighbour. It was further alleged that both of them i.e Afzall Ahmad as well as Mst.Attia Khaliq were seen while boarding a suzuki around 9.00 P.M on 13.4.1991 at Dhoke Hussu by PW Muhammad Iqbal and one Tasawar. It was further alleged that Mst.Attia Khaliq had also taken away with her golden ornaments weighing ten tolas,clothes and a sum of Rs.15,000/-. Finally, it was alleged that Mst.Attia Khaliq was enticed away by Afzall Ahmad through deceitful means in order to perform nikah with her. On the basis of the above report formal F.I.R bearing No.207 dated 14.11.1991 was registered under section 11 of"the Ordinance" at police station Canjmandi and investigation was carried out in pursuance theeof. It would be pertinent to mention here that in the course of investigation on 19.4.1991 abductee Mst.Attia-

Khaliq was produced by her father before the police, who told altogether a different tale that: she was taken away forcibly by Afzaal Ahmad, on gun point. She further disclosed that initially she was kept at Rawalpindi and was subjected to zina-bil-jabr by the appellant however, was later on taken to Peshawar and was confined there. She was also compelled to sign a blank paper while confined at Peshawar, she found an opportunity and made good her escape. On the completion of investigation appellant was challaned to the court for trial.

4. Charge under sections 10,11 of the Ordinance read with section 34 PPC was accordingly framed to which the appellant pleaded not guilty and claimed trial.

5. At the trial,the prosecution,in order to prove the charge and substantiate the allegations levelled against the appellant, produced eight witnesses, in all.

P.W.1 Abid Hussain Moharrir Head Constable,had kept in malkhana the sealed parcel said to contain swabs and then handed the same over to Ashfaq Ahmad,Constable for its transmission to the office of the Chemical Examiner.

P.W.2 Abdul Khaliq is the complainant. He,at the trial, reiterated the version contained in the complaint/F.I.R.

P.W.3 Abdul Rauf,S.I had incorporated the contents of the complaint into F.I.R Ex.PB/1. P.W.4 Muhammad Iqbal claimed that on 13.4.1991 at about 8.30/9.00 P.M he while standing outside the Carriage Factory of Officers Colony Rawalpindi had seen Afzaal Ahmad appellant and Mst.Attia Khaliq in a taxi. P.W.5 lady Dr.Salma Akram had on 21.4.1991 at 1.30 P.M examined the prosecutrix and observed as under:-

> "She was a young girl brought by police women. On examination no mark of violence was found on any part of her body including private parts. According to vaginal examination hymen old torn and healed up. Uterus was of normal size and anti-verted. Vagina orifice was tight and admitted two fingers with difficulty. Two vaginal swabs were taken and sent to Chemical Examiner for semen analysis. In my opinion Mst.Attia Khaliq had under went sexual intercourse."

She also produced report of the Chemical Examiner Ex.PE pertaining to vaginal swabs, which were found to have been stained with semen. She also produced in court her report Ex.PD. In her opinion the victim was not habitual to sexual intercourse. P.W.6 Mst.Attia Khaliq deposed that she was residing with her parents. On 13.4.1991 her father and brother had gone to mosque to offer Taravih prayers while her mother was busy in offering prayer in another room. At 8.15 P.M door bell rang.She opened the door. Suddenly, Afzaal Ahmad appellant armed with pistol,forced his entry in the house,took her on the gun point and asked her to accompany him by taking away clothes as well as ornaments.

She was forced to board a taxi which at the relevant time was parked outside the house. On the way Mst.Mukhtar Begum mother of the appellant also joined them. Initially, she was taken to Bakra Mandi where Zulfiqar alias Bhutoo and Arshad accused also joined the appellant. Next morning at about 6.00 P.M, she was taken to Rawal Dam where, she was kept in a house belonging to said Arshad uncle of the appellant. There appellant Afzaal Ahmad committed zina with her. Later on, she was taken to Peshawar in a bus and was kept in the house of Balawal Shah. At Peshawar too,she was subjected to zina-bil-jabr and was also compelled to sign a blank paper. On 19.4.1991 when all the accused persons were sleeping,she found an opportunity to make good her escape. She as such came out of the house, met a ricksha driver and reached the bus stop,where-from she came to her parents and narrated the occurrence to them. She further stated that she had filed a suit for jactitation of marriage which was decreed in her favour. In the course of her cross-examination she denied the suggestion as incorrect that she married the appellant Afzaal-Ahmad with her free will and consent and in token of nikah had put her signatures on the nikahnama Ex.PC. P.W.7 Adalat-Hussain,S.I is the investigating officer of the case. P.W.8 Ishfaq Ahmad deposed about handing over the sealed parcel in the office of Chemical Examiner. In addition to

above witnesses one Ayaz Ahmad Farooqi,Ahlmad of the Court of Abdul Rehman Khalid,Magistrate was also summoned as C.W. He proved the statement of Mst.Attia Khaliq under section 164 Cr.P.C as the Magistrate,who recorded the statement had died.

6. On the completion of prosecution evidence accused persons were examined under section 342 Cr.P.C. In their statements they denied the charge and pleaded innocence. The appellant,however in answer to the question as to why this case against him, stated that Mst.Attia Khaliq had gone to Peshawar,entered into a valid nikah with him,with her free will and consent and that the nikah was duly registered. However, since the said nikah was against the wishes of her parents,therefore, the appellant was pressurized and was asked to return Mst.Attia Khaliq so that she may be properly sent off. Since Mst.Attia Khaliq was not willing to the above proposal and on his persistence had joined her parents, therefore, she turned hostile towards him and got registered the instant case,falsely. The accused persons however, refused to lead any evidence in their defence or to appear themselves as their own witnesses in terms of section 340(2) Cr.P.C.

7. After hearing the arguments of the learned counsel for the parties the learned trial court acquitted all the

accused persons of the charge under section 11 of the Ordinance. However, appellant was convicted under section 10(3) of the Ordinance and sentenced to the punishment as mentioned in the opening para hereof. Benefit of section 382-B Cr.P.C was,however, extended to him.

8. I have heard Malik Rab Nawaz Noon,Advocate, learned counsel for the appellant,Mr.Muhammad Munir Paracha, Advocate for the complainant and Mr.Muhammad Sharif,Advocate for the State and have also gone through the evidence minutely.

9. Malik Rab Nawaz Noon,Advocate,learned counsel for the appellant has mainly,raised the following two contentions:-

a) That findings recorded by the learned trial Judge regarding elopement of Mst.Attia Khaliq with the appellant are based upon cogent reasons thus it vitiates the findings qua zina-bil-jabr.

b) That the sole testimony of the prosecutrix without corroboration was not sufficient to establish the charge especially when it was pleaded that she was a consenting party and had gone with the appellant to contact nikah, with her free will and consent.

10. Mr.Muhammad Munir Paracha,Advocate,learned counsel appearing for the complainant, on the other hand, while controverting the contentions raised by the learned counsel for the appellant submitted that it was proved at the trial

through reliable and independent evidence that Mst.Attia-Khaliq was forcibly abducted by the appellant. She was taken to different places and appellant Afzaal Ahmad committed zina-bil-jabr with her. She was made to sign a blank paper on gun point. He added that though solitary statement of the prosecutrix finds support from other sources as well yet, as per law laid down by the superior Courts solitary statement of the victim even without corroboration was sufficient to base conviction thereon. He maintained that in view of the evidence available on record acquittal of the appellant under section 11 of the Ordinance by the trial court was uncalled for and his conviction under section 10(3) of the Ordinance was jusitified though sentence of imprisonment inflicted on him, on that count was inadequate.

11. Miss Rukhsana Malik,Assistant Advocate General, Punjab assisted by Malik Shoukat Hussain Awan,Advocate, while adopting the arguments made by the learned counsel for the complainant supported the impugned judgment and submitted that guilt of the appellant was substantially and materially brought home at the trial through independent and reliable evidence,therefore, the conviction and sentence recorded against the appellant under section 10(3) of the Ordinance was unexceptionable. However, they stated that the trial court had gravely erred in acquitting the respondents

under section 11 of the Ordinance. They,were of the view that the sentence of imprisonment recorded by the trial court against the appellant under section 10(3) of the Ordinance was proper and adequate.

12. I have given my anxious consideration to the respective contentions of the learned counsel for the parties and have also perused the record carefully.

13. In furtherance of his first contention that since plea of the prosecutrix Mst.Attia Khaliq regarding her abduction was not believed by the learned trial court,therefore, findings recorded by the learned trial Judge qua zina-bil-jabr were also not sustainable, Malik Rab Nawaz Noon,Advocate, learned counsel for the appellant vehemently contended that statement of the prosecutrix regarding her abduction was not accepted by the learned trial Judge because it was found that she had not only materially improved her statement at the trial, but on record it lacked corroboration as well,therefore,rest of her statement qua the forcible marriage and zina-bil-jabr was also not believable. It appears that the learned counsel for the appellant has raised the contention perhaps under a misconception because time and again it has been laid down by the superior courts that the maxim "falsus in uno falsus in omnibus" has no universal application and often the grain has to be sifted from the chaff. In a judgment delivered recently

in the case of Ahmad Khan Vs.Nazir Ahmad and 3 others the Hon'ble Supreme Court of Pakistan has been pleased to lay down that the above referred maxim is not applicable for discarding the evidence of the witnesses as a whole and therefore so such of the evidence which is credible can be accepted. It would be advantageous to reproduce herein below the relevant discussion which reads as follows:-

> "All these features noted above established that the prosecution has not come out with whole truth. The cause and the manner in which the main occurrence developed have not been truthfully brought out. Even the defence version cannot be accepted as a gospel of truth. In this situation,when both the parties do not take the Court into confidence by disclosing the whole truth,the Court has to sift the grain from the chaff in order to reach the truth in the light of particular facts of the case. The maxim falsus in uno falsus in omnibus is not applicable for discarding the evidence of the witnesses as a whole and hence so much of the evidence which is credible can be accepted. Reference may be made to the cases of Syed Ali Bepari versus Nibaran-Mollah and others (PLD 1962 SC 502),Shahid Raza and another Versus The State (1992 SCMR 1647) and Irshad Ahmad and others Versus The State and others (PLD 1996 SC-138) wherein earlier judgments were also noticed."

The contention,therefore, has no force.

14. As regards the charge of abduction it may be pointed out here that the prosecution in order to prove the charge has examined P.W.4 Mst.Attia Khaliq and P.W.6 Muhammad-

Iqbal. The learned trial Judge has disbelieved the statement of Mst.Attia Khaliq qua her abduction in view of inter alia, the following improvements/improbabilities:-

a) In her statement at the trial,she has stated that the appellant, in order to abduct her, had placed pistol on her temple whereas, it was not found so recorded in her statements under sections 161 and 164 Cr.P.C.

b) Since,as per record, complainant's house was situated in a thickly populated area,therefore, abduction by force, was not believable.

c) That as per the abductee, she was shifted from Bakra Mandi to Rawal Dam Islamabad and therefrom to Peshawar,but strangely,during the entire journey she kept quiet and made no attempt to rescue herself from the clutches of the appellant. Her behaviour thus was not inconsonance with the ordinary course of nature.

15. Though in coming to the conclusion that it was not a case of abduction but was of elopement, the learned trial Court has not discussed the statement of P.W.4 Muhammad-Iqbal qua the allegation of abduction yet, it may be pointed out here that his statement too, appears to be shaky, rather doubtful. Admittedly Muhammad Iqbal is a near relative of Mst.Attia Khaliq. According to him,mother of Mst.Attia Khaliq is his paternal aunt. He claimed to have seen both, the appellant as well as Mst.Attia Khaliq on 13.4.1991 at about 8.30/9.00 P.M while they were going in the taxi. He has deposed that on seeing Mst.Attia Khaliq

in the company of the appellant he straightaway went to the house of complainant and informed him regarding the factum of his seeing both the abductee and the appellant in the taxi, whereupon, according to the witness, complainant went inside his house and on return told the witness that "since his wife had gone outside therefore, on her return he would tell something". However, when confronted with Ex.DA, i.e his statement recorded under section 161 Cr.P.C, the above fact was not found mentioned therein which indicates that P.W.4 has considerably improved his statement at the trial and if the improved portion of his statement is taken out of consideration then his claim towards seeing Mst.Attia-Khaliq with the appellant in a taxi, also becomes doubtful. After all he, being a close relative and cousin of the abductee in all circumstances was bound to immediately inform the complainant. Another fact which renders his statement as vague is that as per complainant while leaving for Taravih prayer, he had left both Mst.Attia Khaliq and his wife in his house whereas, on return he found that Mst.Attia Khaliq was missing, however, his wife was present in the house. He apparently contradicts the statement of Muhammad Iqbal. Thus the statement of P.W.4 too, was of no help to the prosecution so far as the offence of abduction is concerned. In the circumstances in my view,

appellant was rightly acquitted of the charge of abduction.

16. As regards the charge of zina under section 10(3) of the Ordinance against the appellant it may be pointed out here that though the appellant at the very outset had denied the charge and pleaded not guilty yet,at the trial has not denied the factum of taking Mst.Attia Khaliq with him nor he has denied the commission of sexual intercourse. On the contrary, his plea was that since Mst.Attia Khaliq had accompanied him with her free will and consent in order to contact marriage and had entered into the wedlock,therefore, he i.e the appellant was jusitified not only to take her away but to commit sexual intercourse with her, as well. By raising the plea of valid marriage, in his defence, the appellant has himself minimised the scope of controversy to the single issue "as to whether the plea of nikah was true or false". A perual of the statement of Mst.Attia-Khaliq shows that she at the trial had not only denied the factum of her nikah with the appellant but had pleaded unequivocally that her signatures on the so-called nikahnama i.e Ex.DC were obtained forcibly through coercion and duress. Record reveals that the appellant while making statement under section 342 Cr.P.C had pleaded that

Mst.Attia Khaliq being sui juris had entered into a valid nikah with him at Peshawar and the nikah was duly entered into solemnized and got registered. Record further reveals that despite categorical denial by Mst.Attia Khaliq regarding execution of nikahnama i.e Ex.DC as well as her signatures thereon at the places DC/1 and DC/2, appellant has failed to substantiate that the nikah-nama was not a forged document, it was executed in presence of the witnesses and was also got registered in accordance with law. Though learned counsel for the appellant has attempted to argue that since the Registrar and witnesses of nikah all were made accused in the case, therefore, the plea of valid marriage could not have been substantiated. Yet, there appears to be no force in the contention, for the simple reason, that being accused even, they could have easily appeared as their own witnesses and deposed to the above facts in order to substantiate the plea .

It is well settled that when no prima facie case is made out then it would be open to an accused person to rely on the presumption of innocence or on the discrepancies, deficiencies and infirmities of the prosecution evidence but once prima facie a case is made out and presumption of innocence is crowd out than the force of suspicous circumstance is intensified whenever, the accused attempts

no explanation of facts which he may reasonably be presumed to be able and interested to explain..

In the above context it may also be pointed out here that it is duty of the accused to place before the trial court the true facts of the case if he considers that the version of the occurrence as given by the prosecution witnesses is incorrect. In the above view I am fortified by the following reported judgments:-

1. Hari Narayan Chandra and others Vs.Emperor, AIR 1928-Cal-27,
2. Leda Bhaget Vs.Emperor, 1931-Patna-384,
3. Ghanshyam Singh and other Vs.Emperor, AIR 1928-Patna-100.
4. The Public Prosecutor Vs.Budipiti-Devasikamani, 106 Ind.Cases-559,
5. Ashraf Ali Vs.Emperor, 43-Ind.Cases-241 and
6. Muhammad Nabi Khan and another Vs.Emperor AIR 1934-Oudh-251.

In the circumstances the omission made by the appellant was fatal,because by raising a special plea in defence onus was shifted upon the accused to substantiate the same. In the circumstances, in my view, it was obligatory for the appellant to prove the factum of nikah.

17. It has been further time and again laid down by the Superior Courts that if special plea is raised by an

accused in his defence then it becomes his duty to establish the same by producing evidence. In this view I am fortified by the judgments delivered in the cases of Hukam Zad Vs.The State 1996 P.Cr.L.J (SC) 1548 and Kotan Khan Vs.The State, 1992 MLD 1944. It would be pertinent to mention here that though it has been categorically pleaded by the appellant that since Mst.Atia Khaliq was not ready to return to her parent's house and having been forced to return, became hostile towards the appellant and deposed falsely against him, yet, unresonance of the defence plea can be ascertained from the very fact that a single suggestion was not put to Mst.Attia Khaliq in this regard.

18. As regards the second limb of argument in the contention that solitary statement of the victim was not sufficient to base conviction thereon. It may be pointed out here that it is not the number of witnesses but quality and credibility of the evidence which is to be considered. In cases of Zina, there are generally hardly any witnesses other than the victim herself, as it is very rare that such offence takes place in view of others or at public place. That is why, the Superior Courts in this country have attached great sanctity to the statement of the victim and it has been repeatedly laid down that

sole testimony of the victim would be sufficient to base conviction thereon if it inspires confidence.

It would also be not out of place to mention here that Mst.Attia Khaliq the victim in the instant case has not only fully supported the prosecution case as regards the commission of zina-bil-jabr by the appellant but has deposed at the trial, in a straightforward manner that time and again she was subjected to zina-bil-jabr by the present appellant and that neither her nikah was performed with the appellant nor she had signed the nikah nama Ex.DC nor had she thumb marked the same. Her statement is fully corroborated by the report of P.W.5 lady Dr.Salma Akram, who at the trial has deposed that Mst.Attia was subjected to sexual intercourse and her vagina admitted two fingures with difficulty. Chemical Examiner's report to the effect that swabs were stained with semen renders further corroboration to the statement of the prosecutrix. The fact cannot be lost sight of that at the trial Mst.Attia was subjected to lengthy cross-examination but nothing favourable to the defence or damaging to the prosecution was elicited from her. Further neither any enmity has been alleged against her nor it has been pleaded that she had any motive to falsely implciate the accused, therefore,

her statement qua the commission of zina in my view, was rightly believed by the trial court. The contention as such as no force.

19. As regards the quantum of sentence, it may be pointed out here that though Mr.Munir Ahmad Piracha,Advocate, learned counsel for the complainant in Cr.A.No.182/I of 1998 has vehemently contended that the sentence recorded by the trial court against the appellant under section 10(3) of the Ordinance being inadequate be enhanced yet, I feel that since the appellant has undergone the rigours of a protracted trial, which relates back to the incident occurred in April,1991, therefore, the sentence of imprisonment of five years R.I inflicted on the appellant by the learned court below, in the circumstances of the case,is appropriate and ends of justice would be met with if it is maintained.

The upshot of the above discussion is that in my view prosecution has succeeded in bringing home guilt of the appellant so for as the charge under section 10(3) of the Ordinance is concerned, and the considerations which weighed with the learned Additional Sessions Judge Rawalpindi fully conforms to the requirements of law and do not call for

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any interference by this Court. Resultantly both the appeals i.e Cr.A.No.174/I of 1998 and Cr.A.No.182/I of 1998 are hereby dismissed.

Fit for reporting.

[redacted]
JUDGE

(CH.EJAZ YOUSAF)
JUDGE

Announced on 31.1.2000
at Islamabad.
M.Akram/