IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.28 /L of 2008

Sohail Afzal son of Muhammad Afzal r/o Gumrali Khurd, Tehsil & District Gujrat

..... Appellant

Versus

The State

..... Respondent

Counsel for appellant	.....	Nemo Advocate
Counsel for the State	.....	Mr. Arif Karim Chaudhry Deputy Prosecutor General
F.I.R No. Date & Police Station	.....	694, 05.12.2005 Kunjah District Gujrat
Date of Judgment of trial Court	.....	10.03.2008
Date of institution	.....	07.05.2008
Last date of hearing	.....	20.07.2009
Date of decision	.....	20.07.2009

(0)

JUDGMENT

SYED AFZAL HAIDER, Judge.- Sohail Afzal appellant has filed this appeal against judgment dated 10.03.2008 delivered by learned Additional Sessions Judge, Gujrat whereby he has been convicted under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to ten years rigorous imprisonment with a fine of Rs.10,000/- and in default whereof to further undergo two months simple imprisonment. Benefit of section 382-B of the Code of Criminal Procedure has also been extended to the appellant.

2. Brief facts of the case are that one Munawar Hussain lodged a crime report with Police Station Kunjah that on 0512.2005 his niece Mst. Saima Rani had come to attend the chehlum ceremony of his father. After the khatam he went to the house of his brother for settlement of accounts leaving his niece, his wife Mst.Farzana Kausar and mother Mst. Rasoolan Bibi in the house. At about 11/12.00 mid night Sohail Afzal and Saqib Waseem armed with fire arms reportedly entered into his house after scaling over the wall and took Mst. Saima Rani forcibly with them

with the help of Atif and Zaufiqar who were present outside the house in the street. Complainant's wife Mst. Farzana Kausar informed him about the incident who alongwith Qamar Abbas and Ghulam Sarwar and other people started searching Mst. Saima and the accused. During search they reached near Saim Pully Shah Jehanian where they saw Saqib Waseem, Sohail Afzal, Muhammad Atif and Zulfiqar riding on motorcycles carrying Mst. Saima Rani with them. At the sight of complainant party the accused left Saima Rani and made good their escape. The complainant further alleged that her niece had been abducted on the instigation of Mst. Shahida Parveen wife of Afzal who had been demanding the hand of Mst. Saima Rani for her son Sohail Afzal accused which proposal was refused by the parents of Mst. Saima Rani.

3. Crime report was registered on 05.12.2005 as F.I.R. No. 694/2005 Ex.PA/1 with Police Station Kunjah District Gujrat by Mujahid Hussain, Sub Inspector P.W.10, on the application Ex.PA of the complainant. The investigation of the case was entrusted to Muhammad Ashraf, Sub Inspector. P.W.6. He reached the place of occurrence, prepared rough site plan, recorded statement of abductee under section

161 of the Code of Criminal Procedure who was produced before the Illaqa Magistrate on 06.12.2005 for recording her statement under section 164 of the Code of Criminal Procedure which statement was not recorded. The investigation was taken up by Arif Hussain Shah, Inspector P.W.8 on 18.12.2005 on the transfer of Muhammad Ashraf, Sub Inspector. Accused was arrested on 09.01.2006. As the Inspector had been transferred, accused was handed over to Moharrar. The case was further investigated by Muhammad Ashraf, Sub Inspector P.W.7. On 13.01.2006 he formally arrested the accused as he was already in police custody. The Investigating Officer interrogated and found him guilty during investigation. On 30.01.2006 the I.O. obtained warrants of arrest of the other accused Saqib Waseem, Atif, Zulfiqar and Mst. Shahida who became absconders and could not be arrested despite his best efforts. On his transfer on 08.02.2006 the case file was handed over to Ahmad Nawaz Moharrar. The I.O. was again posted at Police Station Kunjah on 28.06.2006 and second time the investigation was entrusted to him. On the same day accused Saqib Waseem and Zulfiqar appeared before him after obtaining pre-arrest bail. The investigation of the case was again

conducted by Muhammad Ashraf, Sub Inspector P.W.6. After completion of necessary investigation report under section 173 of the Code of Criminal Procedure was submitted in the court requiring the accused to face trial.

4. The learned trial court framed charge against all the accused under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial. Saqib Wasim, Atif and Zulfiqar were declared proclaimed offenders by police. Sohail Afzal and his mother Mst. Shahida Parveen had appeared in the court.

5. The prosecution in order to prove its case produced 10 witnesses at the trial. The gist of deposition of the witnesses is as under:-

i. Munawar Hussain, complainant appeared as P.W.1 and endorsed the contents of his crime report.

ii. Mst. Saima Rani, victim as P.W.2 corroborated the statement made by her maternal uncle Munawar Hussain, complainant regarding her abduction by the accused.

iii. Mst. Farzana Kausar wife of Munawar Hussain, complainant P.W.1 also corroborated the statement made by her husband and Mst. Saima Rani victim.

iv. Ghulam Ambia Sub Inspector appeared as P.W.4 and deposed that on 13.04.2006 he obtained proclamations under section 87 of the Code of Criminal Procedure against accused Saqib Waseem, Zulfiqar, Atif and Mst. Shahida and handed over the same to Mazhar Ali constable for execution.

v. Mst. Sughra Bibi mother of Mst. Saima Rani appeared as P.W.5 and deposed that she was informed about the abduction of victim on telephone and also stated that the mother of accused had demanded the hand of Mst. Saima Rani for her son, the accused which request was refused.

vi. Muhammad Ashraf, Sub Inspector and Arif Hussain Shah, Inspector appeared as P.Ws.6 and 8 and gave details of investigation done by them from time to time. The same has already been mentioned in an earlier paragraph of this Judgment.

vii. Mazhar Hussain, constable appeared at the trial as P.W.9 and stated that on 30.01.2006 Muhammad Ashraf, Sub Inspector handed over to him non bailable warrants of arrest of accused Saqib, Zulfiqar, Atif P.Os and Mst. Shahida but he could not execute the warrants of arrest. He further stated that on 13.04.2006 the proclamations under section 87 of the Cr.P.C. were entrusted and he affixed one copy at the outer door of the house of accused.

viii. Mujahid Hussain, Sub Inspector appeared at the trial as P.W.10 and stated that on receipt of application Ex.PA from

the complainant he drafted formal F.I.R. Ex.PA/1 without addition or omissions.

6. After close of the prosecution evidence the learned trial court recorded statement of accused under section 342 of the Code of Criminal Procedure. Sohail Afzal accused in answer to question, "Why this case against you and why the P.Ws deposed against you?, stated as follows:-

"I am innocent. As a matter of fact Mst. Saima Rani was involved in lose affairs with me for a few years. On the eventful night Mst.Saima Rani alleged abductee came to my house of her own with her free will. My mother Shahida bibi is also arrayed as an accused in this case for the charge of abetment who in fact return Saima Rani back to her house. But the complainant party started her search throughout the village and in this way disappearance of Saima Rani becake talk of the town. The complainant party got registered this false case against me and rest of my family was also falsely involved in this case in order to save themselves from shame. Saima Rani alleged abductee is not minor and now she is married at village Golikee. Police turned down my plea of innocence as a result of arranged affairs with the complainant party. Mother of Mst. Saima Rani had been borrowing money from me at different occasions with the promise to arrange marriage with Saima Rani. When my mother came to know about this matter she reprimanded me and complainant party and refused to take the hand of Saima Rani for me. This refusal was also insulting for

complainant party also, so due to this ill-will and grouse I alongwith my family was roped in this case. During the course of investigation nothing was recovered from me. P.Ws are interested, related and inimical towards me, so they deposed against me".

7. The learned trial court at the end of the proceedings found no evidence of abduction against Mst. Shahida Parveen and consequently she was acquitted. The case of absconding accused, Saqib Waseem, Atif and Zulfiqar was kept pending as they could not be arrested. Accused Sohail Afzal was convicted and sentenced as noted in the opening paragraph of this Judgment. While awarding a sentence of 10 years rigorous imprisonment with a fine of Rs.10,000/- or two months simple imprisonment in case of non payment of fine, the learned trial court observed that the accused was a young man and first offender and might "mend his ways in future if lesser punishment is awarded to him". However the sentence of 10 years under the given circumstances of the case cannot be described as lesser sentence; but awarding of sentence is pure discretion of the Court.

8. I have gone through the file. The prosecution evidence as well as the statement of accused has been perused. Relevant portions of

the impugned judgment have been scanned. The reasons that prevailed upon the learned trial court in returning the verdict of guilt may be summarized as follows:-

i. The suggestions put to the prosecution witnesses show that on the eventful night Saima Rani was not in her house and she was in the house of the accused;

ii. That Mst. Shahida Parveen, mother of the accused extended threats that Saima Rani would be abducted;

iii. That the accused was found guilty by the investigating Officer during investigation of the case;

iv. That Saima Rani was "recovered from the accused when complainant alongwith his companions was searching her".

v. It is not possible for a female to go to the house of her paramour all alone at midnight when the house of the latter is at some distance from her own house; and

vi. The admitted fact is that appellant loved her and he abducted her to compel her to marry him.

9. Having considered the evidence on record in the light of what the learned trial court has observed, I am not inclined to maintain conviction and sentence awarded to the accused for the following reasons:-

i. There was no need for the learned trial court to pose a question as to where Mst. Saima Rani was on the fateful night because the accused in a detailed reply to question No.6 had very frankly admitted his previous relationship with the alleged victim who visited his house on the fateful night. The mother of accused "returned Saima Rani back to her house. But the complainant party started her search throughout the village and in this way disappearance of Saima Rani had become the talk of the town" The accused had taken up this plea before the police and had cross-examined the abductee on this point as well as other parts of his defence. This suggestion was also put to P.W.3 Mst. Farzana *who in fact stated that police reached the place of occurrence after half an hour of the incident.* The same suggestion was repeated to P.W.1 Munawar Hussain the complainant. This plea was also raised at the time of arguments. It means that at all the three stages the plea of the accused was onsistant.

ii. The uncle of the abductee feigned ignorance that the name of accused was entered in the Register of the Madrasa as a person entitled to see her whenever he wanted;

iii. The victim conceded that during entire process of her abduction she neither raised hue or cry nor offered any resistance. She did not receive even a bruise on her body. No Nikah papers were ready nor was she asked to sign blank papers on a nikah form;

iv. No crime empties, pistol or even the motorcycle, the crime vehicle was recovered by the police from the accused;

v. The real brother of the abductee and Ghulam Sarwar, witnesses nominated in the F.I.R, were not produced;

vi. It is not in evidence that the abductee was recovered from the accused. The allegation is that all the accused left the abductee on seeing the witnesses. The witnesses were unarmed and on foot but the accused, armed with pistol, riding a motorcycle did not proceed further but left her in the midst is not understandable;

vii. The evidence of complainant does not inspire confidence because a) he had not reason to be away from his house at night time; b) the explanation that he had gone to the house of his brother, in the same village, to settle the account cannot be accepted; c) he claimed there was chehlum ceremony of his father in the house but he did not know the date of death of his father though he remembers the date of his appearance of his niece.

10. It is also not possible to agree with the observations made in this age of woman empowerment) recorded in the impugned judgment that a young girl would not leave her house all

alone at midnight and proceed to the house of her paramour particularly when it is at some distance. Instances of this nature were recorded even in those days when the woman did not enjoy socio political freedoms. It is better to avoid making sweeping statements because life is an exciting business. It becomes all the more exciting when passions are injected in its intricate existence.

11. There is no lawyer appearing on behalf of the appellant. Muhammad Ramzan, who claims himself as clerk of Ch.Muhammad Hussain Maken, Advocate states that the learned counsel for the appellant is out of country. He says that notice for today reached them but he had not made any alternate arrangement. Learned Deputy Prosecutor General however supports the conviction and sentence. Learned Deputy Prosecutor General has further stated that the occurrence is admitted by the accused, therefore, the offence stands proved.

12. In view of what has been stated above it is not advisable to maintain conviction and sentence of appellant recorded by learned trial court. The defence of the accused is not

unconvincing. Resultantly judgment dated 10.03.2008 passed in Hudood Case No. 04 of 2006 is hereby set aside. The appellant shall be released forthwith unless required in any other case.

Sd/- Afzal Haider

JUSTICE SYED AFZAL HAIDER

Lahore the 20th July, 2009.

UMAR DRAZ/

Fit for Reporting

Sd/- Afzal Haider

JUSTICE SYED AFZAL HIDER