

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.243 /L of 2005

Muhammad Yousaf son of Rajjab Ali, resident of Mauza Jamra, Police Station Noor Shah, District Sahiwal

	.....	Appellant
	Versus	
The State	.....	Respondent
Counsel for appellant	.....	Nemo
Counsel for the State	.....	Mr. Arif Karim Chaudhry Deputy Prosecutor General
F.I.R No. Date & Police Station	.....	257/2000, 03.05.2000 Noor Shah District Sahiwal
Date of Judgment of trial Court	.....	25.06.2005
Date of institution	19.07.2005
Last date of hearing	20.07.2009
Date of decision	20.07.2009

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JUDGMENT:

JUSTICE SYED AFZAL HAIDER, J:- This appeal is directed against the judgment dated 25.06.2005 delivered by learned Additional Sessions Judge, Sahiwal whereby appellant Muhammad Yousaf has been convicted and sentenced as follows:-

- i. Under Section 452 of the Pakistan Penal Code : Three years rigorous imprisonment with fine of Rs. 10,000/- or in default whereof to further undergo six months rigorous imprisonment.
- ii. Under Section 18 read with Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 : Five years rigorous imprisonment with fine of Rs.20,000/- or in default whereof to further undergo one year rigorous imprisonment.

Both the sentences were ordered to run concurrently with benefit of Section 382-B of the Code of Criminal Procedure.

2. Brief facts of the case as mentioned in the crime report dated 03.05.2000 are as under:

On 02.05.2000 Mst. Sallan Bibi complainant PW.2, aged 17 years alongwith her younger sister was present in her house while her father and brothers had gone to harvest the wheat crops. At about 4.00 p.m, Muhammad Yousaf accused armed with dagger entered the courtyard of her house after scaling over the northern wall. He put the dagger on her chest and threatened to kill her in case she

raised alarm. He grappled with her and fell her on the cot. He untied the string of her shalwar and started committing zina-bil-jabr with her. Her younger sister started weeping. The complainant also raised alarm, upon which her uncle Mehboob (PW not produced) and Manzoor Ahmad PW.3 and many other inhabitants of the village were attracted to the spot and saw the occurrence. On seeing them, the accused fled away leaving the complainant in naked condition. The father of complainant came to know of the incident in the evening when he returned home. The accused party sought pardon but the complainant did not agree.

3. The crime report was registered as FIR No.257/2000 on 03.05.2000. Investigation ensued as a consequence of registration of crime report Ex.PB/1. Investigation was undertaken by Muhammad Akram, Sub Inspector P.W.4. After investigation the local police submitted report under Section 173 of the Code of Criminal Procedure before the Court on 26.05.2000 directing the accused to face trial. The learned trial Court framed charge against the accused persons on 01.03.2001 under Section 452 of the Pakistan Penal Code and under Section 18 read with Section 10(3) of the Offence of Zina (Enforcement

of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

4. The prosecution in order to prove its case produced four witnesses at the trial. The gist of evidence of the witnesses for the prosecution is as follows:

- (i) PW.1 Muhammad Yousaf Constable had deposed about the recovery of dagger P-1 from accused which was taken into possession through recovery memo Ex.PA. The PW and Riasat had signed the recovery memo.
- (ii) Mst. Sallan Bibi complainant appeared as PW.2 and endorsed the contents of her crime report Ex.PB.
- (iii) PW.3 Manzoor Ahmad Shah supported the version of the complainant.
- (iv) PW.4 Muhammad Akram S.I. had investigated the case. He recorded the statement Ex.PB of the complainant and sent the same to the police station for registration of formal FIR. He inspected the place of occurrence, prepared rough site plan Ex.PC and recorded the statements of the PWs. After

cancellation of bail application, he arrested the accused on 19.05.2000 and recovered dagger Ex.P1 on 24.05.2000 which was taken into possession through recovery memo Ex.PA. He recorded the statements of Riasat Ali and Muhammad Yousaf Constables who signed the recovery memo. He prepared the site plan of the place of recovery Ex.PA/1.

5. The prosecution closed its case on 26.01.2005. Thereafter statement of accused was recorded on 10.06.2005 under Section 342 of the Code of Criminal Procedure. The accused denied the allegations levelled against him and stated in his defence as under:

“I am innocent. No such like occurrence had happened. The PWs on account of bickering in the brathri and deposed falsely against me. In fact prior to the present occurrence about one month earlier I spotted Mst. Sallan Bibi PW.1 and Manzoor Ahmad Shah making love juxtures and thereafter embracing each other at about Maghrab Wela time and the rumor spread in the village due to which Mst. Sallan, her father and Manzoor Shah flow to rage against me apprehending that the said rumor was spread by me and thereafter Mst. Sallan was married with PW Manzoor

Ahmad Shah and Manzoor Ahmad Shah otherwise had also a grudge because my parents had also asked for the hand of Mst. Sallan for myself but on seeing her in company of Manzoor Ahmad Shah prior to her marriage and engagement, I decline to marry with her due to which after marriage Mst. Sallan and Manzoor Shah in order to do away with their bad reputation got registered present case against me falsely. In fact no such like occurrence had happened nor I ever ought to do so. It is for the same reason that none of the neighbourers who would have been natural PWs in such eventuality had supported the prosecution version. The PWs are related and I have been victimized as also being from the opposite group of Khaggas.”

6. The learned trial court in the end, in paragraph 21 of the impugned judgment found:-

“The upshot of the above discussion is that it is established beyond any shadow of doubt that accused Muhammad Yousaf son of Rajab Ali while armed with dagger after tress-passing in the house of victim Mst. Sallan Bibi tried to commit zina-bil-jabar with her and the charge against him is, therefore, proved. Hence Muhammad Yousaf is convicted u/s 452 Pakistan Penal Code and sentenced to THREE YEARS R.I. and fine of

Rs.10,000/- in default of payment of which he is to further undergo R.I. for SIX MONTHS. The convict Muhammad Yousaf is also convicted u/s 18 read with section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to FIVE YEARS R.I. and a fine of Rs. 20,000/- in default of payment of which he shall further undergo R.I. for ONE YEAR.”

7. I have gone through the file. The evidence of the witnesses for prosecution and statement of the accused under Section 342 of the Code of Criminal Procedure have been perused. The relevant portions of the judgment have also been scanned.

8. Learned counsel for the accused had raised the following points for consideration of learned trial court:-

- i. that there was an element of unexplained delay of more than 24 hours in informing the police;
- ii. victim's statement was not supported by independent witnesses;
- iii. no neighbour from immediate vicinity came at the spot at the time of occurrence nor was any neighbour cited as witness;

- iv. the alleged eye witness belongs to another locality and is interested because he was a contender to win over Mst. Sallan Bibi for marriage;
 - v. the younger sister, reportedly present at the place of occurrence, was not produced. This aspect is covered by the mischief of Article 129(g) of Qanoon-e-Shahadat, 1984; and
 - vi. The absence of medical examination shows that no such incident took place as no marks of violence on the body of the victim were proved by prosecution.
9. The points that found favour with the learned trial court in convicting the accused are detailed below:-
- i. that there is no legal bar in accepting the evidence of witnesses closely related to the victim;
 - ii. that the evidence as regards the attempt to commit Zina was not shattered in cross-examination;
 - iii. that some shortcomings in the statement of complainant cannot be given importance particularly when a period of 4/5 years had passed when statement was recorded at the trial;
 - iv. the statement of victim was corroborated by a person who became her husband after the occurrence;

- v. that the victim had stated that the accused threw her on the cot and removed her shalwar and after making her naked was attempting to commit Zina with her;
 - vi. that the statement of victim is confidence inspiring and is corroborated by statement of P.W.3 Manzoor Ahmad Shah;
 - vii. the recovery of dagger P1 on the pointation of accused lends sufficient corroboration to the prosecution version. Absence of private witnesses, as required under section 103 of the Code of Criminal Procedure, does not affect recoveries on the pointation of accused. Reference 1994 SCMR 614; and
 - viii. The learned trial court in para 19 of the impugned judgment has made a sweeping statement that no woman can think of levelling false accusation of an attempt to commit Zina because her own honour is at stake.
10. I agree with the observation of learned trial court that the statement of a witness cannot be discarded on the sole ground of relationship with the victim. Every deposition must be assessed on its own merits subject of course to the facts and surrounding circumstances of that particular case. No facts of two cases are alike. Principles regulating appreciation of evidence in criminal cases are available for guidance of judicial tribunals.

11. It is however not possible to endorse the view expressed by learned trial court that a woman would not falsely allege an attempt for Zina against an accused person because her honour is at stake. Instead of quoting instances from history or even folk culture, it would suffice to refer to Ayaat 24-35 Sura Yousaf of the Holy Quran wherein the story of the consort of the Egyptian Pontifer is narrated. She had attempted to seduce Syedna Yousaf A.S. In this process the shirt of the latter was torn. This story is a reminder that evil, *within a male or a female*, if activated can lead to transgression. In this story, the wife of a dignitary has been made a symbol of mortal weakness. It is therefore not safe to agree with William Shakespeare when he advises woman folk in a Sonnet not to sigh over male frailty:

Sigh no more ladies, sigh no more
 Men were deceivers ever
 One foot in Sea and one on Shore
 To one thing constant never
 Then sigh not so
 But let them go
 And be you blithe and bonny
 Converting all your sounds of woe
 Into Hey nonny nonny.

Sing no more ditties, sing no more
 Of dumps so dull and heavy;
 The fraud of men was ever so,
 Since summer first was leavy.
 Then sigh not so,
 But let them go,

And be you blithe and bonny,
Converting all your sounds of woe
Into Hey nonny, nonny

12. The time of occurrence in this case is 4.00.p.m. The place of occurrence is a house in the main bazaar of the locality. The site plan Ex.PC shows residence of three different persons on three sides of the house where the offence was committed while on the western side is the main bazaar. The main entry of the house is also towards the street. The site plan shows point No.2, boundary wall on the north, from where the accused sought ingress in the house after scaling over the wall and this is also the point from where he is reported to have escaped on the arrival of witnesses. The two witnesses are shown present on the western side of the compound of the house at the time of occurrence but *there is no explanation as to how both of them entered the house when its door was not opened by any inmate.* The other question that raises doubt is the height of the wall which the accused allegedly scaled while entering and also while effecting his escape. The investigating officer, P.W.4 was conveniently not sure whether the four walls of the house, where

occurrence took place, were 8/9 feet high or more. Walls higher than normal man's height are not easy to scale. This aspect is as confounding as the unexplained presence of chance witnesses within the four walls without the main door of the house being open.

13. The other point that needs clarification is that no one from the neighbourhood responded to the call of the victim either at the time of occurrence or thereafter at the investigation or trial stage but two persons namely Mahboob Shah and Manzoor Ahmad find mention as witnesses in the belated crime report and both of them are not the residents of that area and out of these two only Manzoor Ahmad, appeared as P.W.3 but Mahboob Shah, the real uncle of the victim, given up as unnecessary by D.D.A. on 23.09.2003. This Manzoor Ahmad, married the victim, after he had been cited as a witness. He was interested in marrying the victim as admitted by the victim. He is therefore not only a *wajtakkar* witness but was deeply interested in courting the young Sallan Bibi. In this view of the matter the evidence of P.W.3 Manzoor Ahmad has to be weighed carefully. Except his

statement there is no independent corroboration of the statement of Mst.

Sallan Bibi P.W.2.

14. The evidence of Mst. Sallan Bibi, the solitary witness of the offence of attempt to commit rape, has therefore to be weighed for the purpose of maintaining conviction of accused. According to her deposition her younger sister was present in the house at the time of incident but she did not appear during investigation or trial to support the story of the victim. The victim nowhere stated that the accused had also removed his shalwar, trouser or chaddar at the time he was attempting Zina with her though she has alleged removal of her shalwar in particular. Even P.W.3, Manzoor Ahmad, the husband and first cousin of Mst. Sallan Bibi categorically stated that the victim was without shalwar at the time of the alleged occurrence but no such thing is attributed to the accused. How can then an attempt to commit Zina be made when the accused is not at all alleged to have removed his own shalwar. P.W.3 does not mention the presence of any brother or sister of the victim at the place of occurrence.

Muhammad Akram Sub Inspector P.W.4, stated that none of the neighbours appeared before him during the investigation. He conceded that he did not associate anybody from the neighbourhood to verify the correctness or otherwise of the alleged crime. The witness also conceded that investigation was not open. The witness also admitted that the place from the dagger P1 was recovered on the pointation of the accused did not belong to him. The dagger was of a common pattern.

16. However the fact remains that P.W. Mst. Sallan has levelled allegation against accused. The explanation of the accused, as detailed above, is that he was also interested in marrying her till such time that he saw P.W. Manzoor Ahmad and Mst. Sallan kissing each other. This news spread in the village and the accused was suspected as the person behind this scandal which had become the talk of the town. This explanation may or may not be true but in order to convict a person of any offence the prosecution must prove that the ingredients of the offence with which the accused has been charged are proved beyond reasonable doubt. The accused has been convicted a) under section 452 of the Pakistan Penal Code for house trespass after making preparation

to cause hurt etc. and b) under section 18 read with section 10(3) of Ordinance VII of 1979 i.e. for attempting to commit the offence of Zina.

Since the latter offence took place in the house of victim so we will have to see whether house trespass has been established. It is essential because offence of attempted Zina was committed within the four walls of the house after successful trespass and presence of accused at the spot.

17. While assessing the prosecution evidence in preceding paragraphs one finds that not only the ingress into but also the egress of the accused from the house is questionable as well as the presence of witnesses in the compound of a house, when there is no evidence that the main door of the house was opened for the witnesses, has not at all been satisfactorily explained. The prosecution was under an obligation to prove the possibility of the story. It just cannot be left to judicial imagination. The function of the Court is not to fill the lacunae of the prosecution tale. The basic duty of the Court is to assess the evidence available on record in the light of the facts and circumstances of the case. The absence of witnesses from the neighbourhood, particularly at about 4.00.p.m. in the month of May, when not only people remain

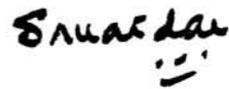
under their roofs to avoid the effect of scorching solar heat, but according to prosecution story the hue and cry raised by victim and her sister had attracted two wajtakkar witnesses from the bazaar, reduces the entire episode into a fiction more suitable for crime Digests. The height of the wall is another hurdle in believing that the accused committed house trespass. The non appearance of the brother and sister of the victim or even the uncle of victim, who was cited as an eye witness in the F.I.R, to corroborate the story of prosecution supports my belief that the appellant has earned benefit of reasonable doubt.

18. The appellant was on bail. He is not present today.

According to the report of Muhammad Hussain, Sub Inspector Police Station Noor Shah, written on back of the notice sent to him, the appellant is confined in Central Jail, Sahiwal in another Case F.I.R. No. 93/2008 under section 302 of Pakistan Penal Code. This explains the reason why the present appeal is not being pursued. His counsel is also not present but I would not keep this case pending because the F.I.R in this case was registered in the year 2000 and the judgment of the learned trial court was announced on 25.06.2005. Had I

come to the conclusion that it was a case for conviction I would not had decided the matter in the absence of the appellant or his counsel but since it is not possible for me to maintain the conviction, this case is being decided in the absence of the appellant as well as his learned counsel. The incident complained of is almost nine years old. Further adjournment would not served any purpose.

19. In view of what has been stated above, I am not inclined to maintain the convictions and sentences recorded by learned trial court vide the impugned judgment dated 25.06.2005 delivered in Hudood Case No. 09/ASJ of 2000 and Hudood Trial No. 06/ASJ of 2001. Resultantly Criminal Appeal No. 243/L of 2005 moved by the appellant is accepted. Appellant is on bail. His sureties are discharged to the extent of this case.



JUSTICE SYED AFZAL HAIDER

Lahore the 20th July, 2009
UMAR DRAZ/

Fit For Reporting



JUSTICE SYED AFZAL HAIDER