

**IN THE FEDERAL SHARIAT COURT**  
( Appellate Jurisdiction )

**PRESENT:**

**MR. JUSTICE SYED AFZAL HAIDER**

**CRIMINAL APPEAL NO.249/L OF 2004**

Hussain Bakhsh alias Bilal son of Umar Hayat,  
Caste Goarcha, Resident of Kumhari Khoo,  
Tehsil & District Bhakkar.

---Appellant

Versus

The State

--- Respondent

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Counsel for the appellant	---	Syed Ahmed Saeed Karmani & Syed Fida Abbas, Advocates
Counsel for the State	---	Ch. Muhammad Ishaque D.P.G.
FIR No., date & Police Station	---	212/02 dated 28.12.2002 City Bhakkar
Date of Judgment of Trial Court	---	22.07.2004
Date of Institution	---	07.08.2004
Date of Hearing	---	13.12.2010
Date of Decision	---	13.12.2010

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**JUDGMENT:**

**Justice Syed Afzal Haider, Judge:** Appellant Hussain

Bakhsh alias Bilal through Criminal Appeal No.249/L/2004 has challenged the judgment dated 22.07.2004 delivered by the learned Additional Sessions Judge-II, Bhakkar whereby he was convicted under section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to five years rigorous imprisonment with five stripes and fine of Rs.5,000/- or in default whereof to further undergo three months imprisonment. The benefit of section 382-B of the Code of Criminal Procedure was extended to the appellant. The remaining five accused namely Umar Hayat, Abdul Hameed, Ahmad Nawaz alias Amndi, Mst. Maqsoodan and Muhammad Ashraf were acquitted by the trial court. It may be pointed out here that Mst. Zubaida Parveen PW.5, the complainant, had filed Criminal Revision No.104/L/2004 for enhancement of sentence awarded to

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the appellant which was dismissed on 15.09.2009 for lack of prosecution.

2. The prosecution case in brief is that complainant Mst. Zubaida Parveen PW.5 laid oral information which recorded by Muhammad Iqbal Khan Sub Inspector as Ex.PB on 28.12.2002 wherein it was stated that during the night between 3/4.11.2002 at 8.30 p.m. she went out of her house to collect the solid waste from animal when Mst. Maqsoodan accused enticed her and took her to her house where she was served with a glass of milk whereafter she felt giddy. Maqsoodan Bibi accused kept her in her house for two nights. On the third night at about 10.00 p.m. Ahmad Nawaz accused came there on a rickshaw. He alongwith his co-accused namely Umar Hayat and Muhammad Ashraf took her in a rickshaw to Bus Stand Bhakkar, from where she was taken to Lahore by Umar Hayat accused who kept her in the house of Hamid accused where Hamid and Bilal accused were already present. They kept her

B.I.

there for ten days. Bilal accused allegedly committed zina-bil-jabr with her twice. The accused also got her photographs there.

Bilal accused then took her to Chak No.50 where she was kept a day and in the evening Bilal and Ahmad Nawaz accused took her to the house of Maqsoodan Bibi and on the way Bilal accused committed zina-bil-jabr with her in the sand dunes.

Elahi Bakhsh, Aurangzeb and Rahim Bakhsh took her from there to the house of her parents on 15<sup>th</sup> November, 2002.

3. Muhammad Iqbal Khan Sub Inspector Police, PW.7, recorded the crime information in the form of a complaint Ex.PB which was later on registered as case FIR No.212/02 Ex.PB/1 at Police Station City Bhakkar on 28.12.2002 under sections 11 & 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

4. Police investigation ensued as a consequence of registration of crime report. Muhammad Iqbal Khan, Sub

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Inspector PW.7 undertook the investigation. After drafting the complaint Ex.PB, he got Mst. Zubaida Bibi medically examined, prepared injury statement, recorded statements of witnesses namely Ghulam Jaffar, Bano Mai and Elahi Bakhsh under section 161 of the Code of Criminal Procedure and prepared site plan Ex.PD. He then arrested accused Umar Hayat and Abdul Hameed on 29.12.2002, took into possession medico legal report and two sealed parcel on 30.12.2002 which were produced before him by foot constable Mst. Shahana Kausar PW.2 whose statement was also recorded. Thereafter the accused persons were sent to judicial lock up on 01.01.2003. He made efforts for arrest of remaining accused but could not trace them. He submitted incomplete report against Umar Hayat and Abdul Hameed on 07.01.2003. On 19.12.2003 he produced record before the court of learned Additional Sessions Judge where bail application of Maqsoodan Bibi and Muhammad Ashraf was withdrawn and bail application to the extent of

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Ahmad Nawaz and Bilal was dismissed. Consequently he arrested them on 19.12.2003 and sent accused Ahmad Nawaz and Bilal to judicial lock up. The Station House Officer then submitted a report under section 173 of the Code of Criminal Procedure in the Court on 20.02.2003 requiring the accused to face trial.

5. The learned trial court framed charges against the accused on 29.04.2003 under sections 11 & 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The accused did not plead guilty and claimed trial.

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6. The prosecution produced seven witnesses to prove its case. The gist of deposition of prosecution witnesses is as follows:-

- (i) PW.1 Lady Doctor Falak Riffat had medically examined Mst. Zubaida Parveen complainant. She observed as under:-

“On P/V examination.

Hymen was torn, tears were old vagina admitted one little finger. Two vaginal swabs taken, one internal and one external and sent to the Chemical Examiner for detection of semen and blood. Both swabs were blood stained due to menstruation. Two sealed envelope, and one copy of M.L.C. was handed over to the Lady Constable.

OPINION.

She was not virgin. I kept my opinion reserved till the receipt of report of Chemical Examiner which has been received, which is Ex.PA, while my examination report is Ex.PA/1.

FINAL RESULT.

The Chemical Examiner report Ex.PA, I gave my final result according to the Chemical Examiner report, external swabs were not stained with semen, while the internal vaginal swabs were found stained with semen and blood. Therefore, my opinion about the rape is positive. My final report is Ex.PK/2, the report Ex.PA/1 and Ex.PA/2 are in my hand and bears my signature.”

- (ii) PW.2 Mst. Shahana Kausar, Lady Constable stated that she had got Mst. Zubaida Parveen medically

examined and thereafter the Lady Doctor gave her two sealed envelopes and a carbon copy of M.L.R. which she delivered to Muhammad Iqbal, Sub Inspector who took the same into possession and prepared recovery memo which was signed by her.

(iii) PW.3 Riaz Hussain Constable had delivered two sealed envelopes in the office of Chemical Examiner, Rawalpindi on 02.01.2003 which were handed over to him by the Moharrir on 01.01.2003.

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(iv) PW.4 Saif Ullah Head Constable had recorded formal FIR Ex.PB/1 on receipt of written complaint Ex.PB. He received two sealed parcels from the Investigating Officer on 30.12.2002 which he kept in Mal Khana. On 01.01.2003 he delivered the said parcels to Riaz Constable for onward transmission to the office of the Chemical Examiner, Lahore.



(v) Mst. Zubaida Parveen complainant appeared as PW.5 and endorsed the contents of her complaint Ex.PB.

(vi) Mst. Bano Bibi, step-mother of Mst. Zubaida Parveen complainant, appeared as PW.6 and stated that “on 03.11.2002 at about 8.30 p.m. Mst. Zubaida went out to collect dung and did not return back. Afterwards we came to know that Mst. Maqsoodan Bibi who used to visit our house had taken Mst. Zubaida to her house and thereafter she was taken to Lahore, to the house of Hameed and Bilal and was kept there for 10 days, and thereafter she was returned to us by Aurangzeb, Elahi Bakhsh and Rahim Bakhsh. After return Mst. Zubaida Parveen told me all the facts. We tried to get registered the case but the police did not listen to us afterwards at the direction of S.P. our case was registered.”

(vii) PW.7 Muhammad Iqbal Khan Sub Inspector had undertaken the investigation. The details of his

investigation have already been mentioned in paragraph 4 of this judgment.

7. The prosecution closed its case on 29.05.2004.

Thereafter the learned trial Court recorded statements of accused under section 342 of the Code of Criminal Procedure on 12.06.2004. The accused denied the allegations leveled against them. All the accused gave the same reply to the pertinent question "Why this case against you and why the prosecution witnesses deposed against you?" as under:-

"The P.Witnesses are closely related to each other, who are inimical towards us. No independent P.W. supported the version of the complainant. Actually Mst. Zubaida Parveen was living with her step mother whose behaviour was cruel to her and Mst. Zubaida Parveen used to run away from the house of her step mother and she was also mentally upset. Due to suspicion Ghulam Jaffar filed different applications against us and when Mst. Zubaida was recovered from

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her real mother from Chak No.47/TDA by Ghulam Jaffar she was forced to give statement against us as Ghulam Jaffar wanted to extort money from us.”

8. Learned trial Court after completing the codal formalities of the trial returned a verdict of guilt against the appellant who was convicted and sentenced as mentioned in the opening paragraph of this judgment. Five accused were however acquitted by the learned trial Court for reason that the case against them was not free from reasonable doubt.

9. I have gone through the file. Evidence of witnesses of prosecution and statements of accused have been perused. Relevant portions of the impugned judgment have been scanned.

10. Learned Counsel for the appellant has raised the following points for consideration:-

- (i) that there was delay of eight days in reporting the incident to the police;

- (ii) That Ghulam Jaffar moved few applications one after the other before different police officers between November and December, 2002 in which the number of accused varied from five to six;
- (iii) that the lady doctor in this case opined that the hymen would rupture if penetration is done by finger or pencil or some hard substance;
- (iv) that the positive report of the Chemical Examiner is not reliable because the swabs were sent late; and lastly
- (v) that the appellant has served 18 months sentence;

11. The learned D.P.G. on the other hand stated as follows:-

- (i) that the complainant PW.5 has not only endorsed the crime report but she has, in her statement at the trial, fully implicated the accused in her allegations of abduction and rape;
- (ii) that the medical opinion also supports the oral testimony of the complainant;
- (iii) that the report of the Chemical Examiner lends further support to the allegation of rape;
- (iv) that Muhammad Iqbal Khan Sub Inspector PW.7 has investigated the case and he is of the firm view that

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Mst. Zubaida Parveen was abducted and subjected to rape by the appellant;

(v) that PWs: 5, 6 and 7 were subjected to lengthy cross-examination but the witnesses could not be shattered in so far as the allegation of abduction and rape was concerned. On the contrary the replies to the question put in the cross-examination strengthened the case of the prosecution;

(vi) that the appellant in his statement recorded under section 342 of the Code of Criminal Procedure had taken up the plea that that complainant was not a normal person and that he was falsely implicated in this case. The learned D.P.G. asserted that the defence has neither proved that the complainant was mentally disturbed nor that there was any ill will on the part of complainant to falsely implicate the appellant; and lastly

(vii) it is urged that the prosecution has proved its case beyond any shadow of doubt;

12. My observations after considering all the facts and circumstances of the case are as follows:-

(i) The element of delay was duly explained by the complainant in her statement at the trial when she stated that she had narrated entire incident to her step-mother and father who made contact with the police on number

of times but the police did not register the case whereafter she moved application to the learned Sessions Judge who directed S.P. Bhakkar to register the case against the accused.

(ii) As regards the different applications moved by Ghulam Jaffar it is worthy of mention that Ghulam Jaffar, the father of victim did not opt to appear in this case though he was alleged author of a few applications moved before different authorities wherein the incident was related against two set of accused. In his absence the accused could not confront any other witness about moving more than one application regarding the same incident.

(iii) There is no cavil with the proposition that if the penetration takes place in the vagina by finger or a pencil or some other hard substance the hymen would most likely get ruptured. In this case the stained swabs were also soiled with blood as is clear from the report of the Chemical Examiner Ex.PA.

(iv) What is more important in this case is that even according to the version of the complainant herself she was not recovered from the appellant. She however stated that she was brought to the house of her father by Aurangzeb, Elahi Bakhsh and Rahim Bakhsh on 15.11.2002 but none of them appeared at the trial to

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corroborate her version. However after her alleged restoration her medical examination took place on 28.12.2002. It is not possible for semen to be retained in the vagina for one month and 13 days. According to the report of the Chemical Examiner the swabs were additionally soiled with blood. At the time of medical examination of the victim she was in menstrual period. This means that the contaminated swabs are relatable to 28.12.2002 and not to any date prior to 15.11.2002. This fact alone casts serious doubt on the entire prosecution evidence.


13. In view of serious doubt arising in this case, it is not advisable to accept the solitary and uncorroborated statement of Mst. Zubaida Parveen. On the same set of evidence five co-accused were acquitted. The story of abduction is also not free from doubt. In the absence of proof of abduction and rape the claim of the prosecution to maintain conviction cannot be sustained. In order to bring home the guilt to accused the prosecution is under an obligation to prove the ingredients of the offence with which the accused is charged. The charges in

this case were framed by learned trial Court against the accused under sections 10(3) and 11 of Ordinance VII of 1979. It was also asserted that the accused took photographs of Mst. Zubaida Parveen. However no photograph was recovered from the appellant. There was no resistance offered by the alleged victim at any public place either in Bhakkar, Chak No.50 or the busy streets of Lahore. She reportedly boarded buses as well. The appellant was however not convicted for abduction. Charge of rape was also not proved. The conviction is indicative of consensual relationship but Mst. Zubaida Parveen was not summoned to face trial. Such an omission amounts to discrimination.

14. Under the circumstances it would not be safe to maintain conviction and sentence recorded against the appellant by learned trial Court. Consequently the impugned judgment dated 22.07.2004 delivered by the Additional Sessions Judge-II,




Bhakkar in Hudood Case No.5 of 2003 is set aside and the appeal is accepted. Appellant Hussain Bakhsh alias Bilal is present on bail. He is free to move about and his surety is discharged from the burden of bail bond.

  
Justice Syed Afzal Haider

Dated Lahore the  
13<sup>th</sup> December, 2010  
Imran/\*

*Fit for reporting.*

  
Justice Syed Afzal Haider