IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE

CRIMINAL APPEAL No.284-I OF 2002

Wahid Iqbal son of Muhammad Iqbal-- Caste Jatt, resident of Al-Noor Colony, Rawalpindi.		Appellant
	Versus	
The State	--	Respondent
Counsel for the appellant	--	Mr.Muhammad Munir Peracha, Advocate
Counsel for the State	--	Mr.Muhammad Sharif Janjua, Advocate
No.date of FIR and Police station	--	No.416 dt: 24.12.1997 Airport, Rawalpindi.
Date of the order of Trial Court	--	20.11.2002
Date of institution	--	3.12.2002
Date of hearing	--	22.5.2003
Date of decision	--	22.5.2003

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JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 20.11.2002, passed by the learned Additional Sessions Judge, Rawalpindi whereby appellant Wahid Iqbal son of Muhammad Iqbal was convicted under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to ten years rigorous imprisonment alongwith a fine of Rs.5,000/- or in default thereof to further undergo two months' simple imprisonment. Benefit of section 382-B Cr.P.C. was, however, extended to the appellant.

2. Facts of the case, in brief, as gathered from the record, are that on 24.12.1997 complaint Exh.PA, was lodged by one Tahir Mahmood with SHO police station Airport, Rawalpindi, wherein, it was alleged that her daughter namely, Mst.Shamila Tahir, aged about 13 years, student of sixth class of Government High School, Dhoke Gangal, Rawalpindi had on 23.12.1997 gone to her school. She, as per routine, was bound to return by 1.00 p.m. However, since she did not return at

the scheduled time, therefore, the complainant went in search of her and in the way came across PWs Raja Altaf and Zafar Iqbal, residents of Dhoke Gangal, who told him i.e. the complainant that they had, at about 10.00 a.m. seen Mst.Shamila going alongwith Khalid accused in a private taxi. It was alleged by the complainant that since his daughter was abducted by Khalid accused, who was on visiting terms with the complainant, therefore, his guilt may be brought home by initiating proceedings. The case was accordingly registered and the alleged abductee was recovered on 2.1.1998. Her statement under section 164 Cr.P.C. too, was recorded on 5.1.1998 wherein, she also implicated the present appellant. He, therefore, was arrested and on completion of investigation was challaned to the Court for trial. Since whereabouts of Muhammad Khalid accused were not traceable, therefore, he was declared as proclaimed offender.

3. Charge under sections 11 and 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was framed to which the appellant pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the appellant produced seven witnesses, in all. P.W.1 Tahir Mahmood is the complainant. He, at the trial, reiterated the version contained in the FIR. P.W.2 Raja Altaf Hussain had allegedly on the day of occurrence, seen the abductee going in a taxi in the company of the appellant and Khalid accused. P.W.3 Mst.Shamila Tahir is the abductee. She while corroborating the statement of the complainant deposed that she had friendship with one Rabia. The present appellant used to attend telephone on her behalf. Her said friend had also introduced her to one Zahida who happened to be sister of the appellant. On the day of occurrence while she was on her way to her school, a taxi stopped near her wherein both the accused persons i.e. the appellant and absconding accused Khalid were sitting. There were armed with pistols. After taking her on gun point, they dragged her into the taxi. A blanket was put on her and she was threatened not to raise alarm or else would be killed. In the way, however, the present appellant alighted from the taxi and she was

carried, by the absconding accused, to a house. Subsequently, she was taken to some other place. A Nikahkhawan was also brought through one Khalil and her signatures were forcibly obtained on nikahnama. Later on, she was taken to Rawalpindi by accused Khalid. When they reached at Moti Mahal, they were intercepted by a police party, whereupon Khalid accused fled. She was taken into custody by the police and was got medically examined. P.W.4 Mst.Razia Bibi, Lady Constable had taken the abductee for medical examination. P.W.5 Maqbool Ahmad, Magistrate had on 5.1.1998, recorded statement of the abductee under section 164 Cr.P.C. He produced the same in Court as Exh.PC. P.W.6 Muhammad Asghar, ASI is the Investigating Officer of the case. P.W.7 Lady Doctor Tallat Mehmood, S.M.O. had on 3.1.1998, medically examined the abductee. She produced the MLR as Exh.PD. In her opinion, the girl was not subjected to sexual intercourse.

5. On the conclusion of the prosecution evidence the appellant was examined under section 342 Cr.P.C. In his above statement the appellant denied the charge and pleaded innocence. He, however, did

not opt to appear as his own witness in terms of section 340(2) Cr.P.C. nor did he examine any witness in his defence.

6. After hearing arguments of the learned counsel for the parties the learned trial Court convicted the appellant and sentenced him to the punishments as mentioned in the opening para hereof.

7. I have heard Mr.Muhammad Munir Peracha, Advocate, learned counsel for the appellant, Mr.Muhammad Sharif Janjua, Advocate, learned counsel for the State and have also perused the entire record with their assistance, carefully.

8. It has been, inter-alia, contended by the learned counsel for the appellant that neither the appellant was nominated in the FIR nor was he, after arrest, put to identification test nor the crime weapon was recovered from his possession, therefore, the possibility that the appellant might have been implicated on the basis of suspicion, could not have been ruled out because, as per abductee, she had not earlier seen the appellant. He added that even otherwise, a minor role to the extent of aiding the principal offender was attributed to the appellant

and the abductee too, was not recovered from his possession, therefore, he could not have been convicted for the offence.

9. Mr.Muhammad Sharif Janjua, Advocate, learned counsel for the State having been questioned as to why? the appellant, if was not previously known to the abductee or any of the witnesses was put to identification test after arrest, candidly conceded and submitted that though in the circumstances of the case, it was essential yet, the omission was not fatal because the abductee had at the trial identified the appellant to be the culprit. He has, however, confirmed that neither the crime weapon nor the abductee were recovered from the possession of the appellant.

10. I have given my anxious consideration to the respective contentions of the learned counsel for the parties. Admittedly, in the FIR name of the appellant does not find place. It is the prosecution case that prior to lodging of the FIR the complainant had met P.W.2 Raja Altaf Hussain and the other witnesses who had allegedly informed him that they had seen Mst.Shamila going in a private taxi alongwith the

accused persons. However, omission to name the appellant in the FIR suggests that either the present appellant was not involved in the crime or was not present in the taxi otherwise he would have been straightaway nominated. The omission, therefore, casts serious doubt on the veracity of the statements of the PWs. Further, it is an admitted fact that the appellant was not previously known to the abductee nor had she seen him before the occurrence. The abductee, in the course of her statement, has confirmed that appellant had never came across her nor had she seen his photograph. The appellant was also not known to the complainant or to P.W.2. Since the P.W.2 as well as the abductee had only fleeting glimpses of the appellant, therefore, in the circumstances, non holding of the identification test parade, in my view, was fatal towards the prosecution case. It may be mentioned here though, legally, statement made in Court by a witness is the substantive evidence within the purview of Article 2 (c) of The Qanun-e-Shahadat Order, 1984, and the identification made by a witness at the parade is only corroboratory in nature yet, where the accused was not previously

known to the witness and he i.e. the witness had only a fleeting glimpse of the accused, holding of the test identification parade becomes essential and vital because normally it is seen that statements of witnesses are recorded in Courts much after the occurrence and therefore, the possibility that a witness might not have mistakenly nominated or pointed out some body cannot be ruled out. The evidence of identification of an accused person at the trial for the first time, therefore, is considered by the Courts, to be inherently of a very weak character and it has been time and again pointed out that prosecution in order to carry conviction must establish that the accused was correctly and properly identified by the witness at the time of occurrence and the goal cannot be achieved unless evidence furnished by the prosecution at the trial is capable to provide answers to certain questions e.g. as to how long did the witnesses have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused

etc. and needful cannot be done unless the suspect is put to identification test at the first opportunity because human beings have their own limitations and memory fade by the lapse of time. In the case of Danial Boyd (Muslim name Saifullah) and another (1992 SCMR 196) it was held by the Hon'ble Supreme Court of Pakistan that when accused was charged in F.I.R. and in statements under section 161, Cr.P.C. by the description of their statures, their identification in a formal parade was a "must". Further, in the case of State through Advocate General Sindh v. Farman Hussain and others, reported as PLD 1985 SC 1 it was laid down that in a criminal case if a witness gets momentary glimpse of an accused and claims that he would be able to identify him then after his arrest identification test becomes very essential which is to be conducted strictly according to the guidelines and legal requirements enunciated by law. It would be pertinent to mention here that identification parade is not only, the preferred and approved method of identification of suspects by Courts but is also requirement of the Police Rules as well. Rule 26.32 of the Police Rule,

1934 is explicit in this regard. Under sub-rule(1) thereof it has been provided that the rules shall be strictly observed in confronting arrested suspects with such witnesses, who claim to be able to identify them and under rule 1 (c) it has been made obligatory for the police officers to arrange for identification test of the suspects soon after their arrest. Sub-rule (2) provides that though, it is not the duty of the officer conducting them or of the independent witnesses to record statements or cross-examine either suspects or identifying witnesses yet, they should be requested to question the latter as to the circumstances in which they saw the suspect whom they claim to identify.

11. Since in the instant case the appellant was not previously known to the PWs nor had they seen him prior to the incident, therefore, in the absence of the identification test parade or any other incriminating piece of evidence, to my mind, it was highly unsafe to record conviction against the appellant on the basis of the solitary statement of the abductee with whom too, he had allegedly remained for a while, in the condition that she herself was covered with a blanket. Another fact

which cannot be lost sight of is that though as per abductee the appellant was accompanying the absconding accused while she was carried in the taxi yet, he had alighted therefrom in the way. No overt act in addition to the above, has been attributed to him, therefore, in the absence of corroboration from any material source i.e. recovery of crime weapon or the vehicle or the abductee the appellant could not have been convicted for the offence.

12. Since the prosecution has utterly failed to make out its case against the present appellant beyond any shadow of doubt, therefore, the appeal is allowed and appellant Wahid Iqabl son of Muhammad Iqbal is acquitted of the charge. He shall be released forthwith if not required in any other case.

These are the reasons for my short order of the even date.

(Ch. Ejaz Yousaf)
Chief Justice

FIT FOR REPORTING.

Chief Justice

Islamabad,dated the
22nd May, 2003
ABDUL RAHMAN