

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 34/L OF 2002

Akhtar Abbas son of Allah Bakhsh,
r/o Mauza Hala, Tehsil Kot Addu,
District Muzaffargarh.

.... Appellant

Versus

The State Respondent

Counsel for appellant ... Mehr Sardar Ahmed Abid,
Advocate

Counsel for complainant ... Qari Abdul Kareem Shahab,
Advocate

Counsel for the State Ms. Rukhsana Malik,
Additional Advocate General

FIR No. Date & 165/2000, 14.05.2000
Police Station Kot Adu, District Muzaffargarh

Date of judgment of 22.01.2002
trial court

Dates of Institution 09.02.2002

Date of hearing 20.02.2009

Date of decision 27.02.2009

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JUDGMENT

SYED AFZAL HAIDER, Judge.- This Appeal has been filed by Akhtar Abbas through which he has challenged the judgment dated 22.01.2002 delivered by learned District & Sessions Judge (Juvenile Court) Muzaffargarh whereby he has been convicted under section 377 of Pakistan Penal Code and sentenced to three years rigorous imprisonment and to pay a fine of Rs.15,000/- and in default whereof to further suffer three months simple imprisonment. Benefit of section 382-B of the Code of Criminal Procedure was also granted to the appellant.

2. Brief facts of the case are that on 09.05.2000 at about 4.00.p.m. Muhammad Sajjad aged about 08 years went to the house of his father's sister (phoophi) near Government Primary School Chah Mochaniwala. Shahid Iqbal (the acquitted accused) and Akhtar Abbas, who were already there, took Muhammad Sajjad in a room of the school deceitfully and both of them committed sodomy with the victim. Muhammad Sajjad raised hue and cry which attracted Muhammad Aslam and Muhammad Sharif (given up P.W) who saw the incident from the window. On seeing the PWs the

accused made good their escape through the windows. The accused party being related to the complainant made efforts to seek pardon but the complainant did not agree. On the basis of this incident FIR. No.165 dated 14.05.2000 was registered on the basis of a written Murasla of Muhammad Arif A.S.I PW8 at Police Station Kot Addu District Muzaffargarh which Murasla was recorded on the oral statement of PW1 complainant.

3. The case was investigated by Muhammad Arif, ASI, P.W.8. He visited the place of occurrence, prepared site plan Ex.PD, recorded statements of witnesses under section 161 of the Code of Criminal Procedure, arrested both the accused and got them medically examined. According to his investigation Shahid Iqbal (acquitted accused) was innocent. Report under section 173 of the Code of Criminal Procedure was submitted to court by the SHO on 26.08.2000 requiring both the accused to face trial.

4. The trial court on receipt of the report framed charge against both the accused under section 12 of Offence of Zina (Enforcement of

Hudood) Ordinance, 1979 and under section 377 of the Pakistan Penal Code on 22.06.2001. The accused did not plead guilty and claimed trial.

5. At the trial the prosecution in order to prove its case produced 10 witnesses. P.W.1 complainant Lal Muhammad alias Laloo repeated the version recorded in the FIR. He is not an eye witness of the occurrence. Muhammad Sajjad victim appeared as P.W.2 and narrated the incident. P.W.3 Muhammad Aslam is an eye witness of the occurrence. He deposed that he saw Shahid Iqbal, through the window the acquitted accused, committing sodomy with the victim and further that both the accused made good their escape through the window. Ghulam Rasool Head Constable No.369 appeared as P.W.4 and stated that on receipt of complaint Ex.PA he registered formally FIR Ex.PA/1 on 14.05.2000 and on the same day he also received one parcel of sealed bottle and one sealed envelope from Muhammad Arif ASI for safe custody in the malkhana which was handed over to Sarfraz Ahmed Constable No.801 on 18.05.2000 for transmission to the Chemical Examiner. He also received from Muhammad Arif, ASI shalwar Ex.P1 of the victim on 20.05.2000 as case property. Muhammad

Sarfraz constable No.801 appeared as P.W.5 and deposed that he, on 18.05.2000, received one sealed parcel and one sealed envelope from PW.4 Ghulam Rasool for onward transmission to the Office of the Chemical Examiner which was delivered intact on the same day. He is also marginal witness of recovery memo Ex.PB through which shalwar of the victim was taken into possession by the Investigating Officer. Dr. Muhammad Shafique Khan appeared as PW.6 and deposed about the medical examination of victim Muhammad Sajjad. He issued MLC of the victim and stated that he handed over on 10.05.2000 one sealed envelope and one sealed bottle containing swabs to Talib Hussain, Constable No.965/C. P.W.7 Muhammad Akhtar ASI is stated to have arrested the accused on 24.08.2000 when bail application of both the accused was rejected. P.W.8 Muhammad Arif, ASI investigated the case. Detail of his investigation has already been mentioned above. Dr. Munir Aftab, Medical Officer, Civil Hospital, Kot Addu appeared as P.W.9 to depose that he medically examined both accused Shahid Iqbal and Akhtar Abbas and found both of them fit to perform sexual intercourse though the former "could not ejaculate on prostatic message."

Lastly Muhammad Abid Ali, Secretary Union Council Manhan appeared as P.W.10. He produced birth register regarding the age of Shahid Iqbal accused, wherein his date of birth was not mentioned.

6. The learned trial court after close of the prosecution evidence examined both the accused under section 342 of the Code of Criminal Procedure. Both of them pleaded innocence. Accused Shahid produced a medical certificate wherein he took up the plea of alibi stating that he was admitted in hospital on the day of occurrence. Akhtar Abbas accused, aged about 12 years, during his statement without oath submitted: "I am innocent and may be acquitted. At the time of occurrence, I was sexually unfit and was not present at the time of occurrence." This statement was made on 19.11.2001 i.e. one and a half year after the alleged incident when he was about 10 ½ years old. He did not avail the opportunity of appearing as a witness under section 340(2) of the Code of Criminal Procedure. The learned trial court after close of the prosecution evidence found the minor accused Shahid Iqbal innocent and acquitted him but convicted the present

appellant under section 377 of the Pakistan Penal Code. Hence the present appeal against conviction.

7. I have heard the learned counsel for the appellant as well as the complainant and the learned Additional Prosecutor General. I have also perused the record and read the impugned judgment and the evidence recorded in this case with the assistance of learned counsel for the parties. 10. :-.

8. Learned counsel for the appellant stated that the element of unexplained delay and absence of evidence of sodomy against the appellant makes the prosecution story doubtful.

9. Learned counsel for the complainant however stated that the evidence of complainant, who had heard the story from the victim, as well as the deposition of the eye witness coupled with the evidence of the victim, duly corroborated by the report of the Chemical Examiner, go a long way to establish the case of the prosecution. He relied upon the following authorities in support of his contentions.

- a. Azhar Iqbal etc. versus The State 1997-SD 536
- b. Muhammad Ashraf versus The State 1998-SD 117

- c. Saleem Khan & another versus The State PLJ-2001 FSC 46
- d. Ansar Ali and another versus The State 2007 PCr.LJ 56
- e. Asghar Ali alias Asghari versus The State 2005 PCr.LJ 97.

10. Learned counsel for the State supported the judgment and also urged that the medical evidence as well as the report of the Chemical Examiner supports the case of prosecution.

11. I have considered the arguments of the parties and also gone through the judgments cited by learned counsel for the appellant. My observations are as follows:-

- i. The victim as well as the accused are minors and the learned trial court held the trial as a Juvenile Court.
- ii. In the case of Azhar Iqbal it was held that delay in lodging FIR in sodomy cases is "natural result of the socio-ethnic situations coupled with painful mental condition of the victim and his close relatives". The learned Single Judge in this case had accepted the positive report of the Chemical Examiner even though the anal swabs were taken 4 ½ days after the occurrence. In the case of Muhammad Ashraf another learned Single Judge of the Federal Shariat Court held that "on account of petty enmities some person would not subject his honour and honour of his family by fabricating a false case of sodomy". In

the case of Saleem Khan a Division Bench of this Court found that "sole testimony of victim which inspires confidence would be sufficient to base conviction of accused". In the case of Ansar Ali a learned Single Judge of this Court found that the efforts of compromise fade into insignificance once an FIR had been registered by complainant in respect of an offence. In the case of Asghar Ali alias Ashgari a Division Bench of this Court observed that it was not the number of witnesses but the quality and credibility of evidence which has to be considered. It was further observed that "though at times, keeping in view the principle of safe administration of justice the statement of a solitary witness is not considered enough to base conviction thereon, yet, generally where, a witness is found completely independent and wholly reliable his testimony ipso facto is believed and corroboration thereof is sought for a matter of prudence only".

- iii. There is no cavil with the propositions laid down in the above mentioned authorities but the courts certainly become cautious when the element of unexplained delay creeps in the prosecution case. The prompt reporting of a crime eliminates consultation and deliberation factor on the part of the prosecution to a large extent though a crime report lodged expeditiously cannot ipso facto guarantee correctness of the facts narrated therein. Speedy reporting alone cannot become the sole basis of conviction. Delay however "puts the court on notice to

make close scrutiny of the evidence" as held by the Apex Court in the case of Muhammad Mushtaq PLJ 2001 Cr.C.459.

- iv. In this case the incident is alleged to have taken place on 09.05.2000 at 4.00.p.m. whereas the victim was medically examined by P.W.6 Dr. Muhammad Shafique Khan on 10.05.2000. The victim had been taken to the hospital by Talib Hussain Constable 965/C. Though there were no marks of violence on the person of the victim yet abrasions, contusions, were present at both interior knee and posterior surface and elbow and at neck region also. After the medical examination the MLC along with one sealed envelope and one sealed bottle containing swabs was given to Talib Hussain. The police however did not register the case because the complainant did not want to proceed against the culprits. An affidavit was also sworn by the complainant on 11.05.2000 which is placed on the record as Ex.DA in which he stated that he had forgiven the accused and expressed the desire that the police should drop the case. However on 14.05.2000 FIR 165/2000 was registered at police station Kot Addu District Muzaffargarh at 2.30.p.m. on the basis of an oral statement made by the complainant before Muhammad Arif, ASI who was on patrol duty at northern level crossing. The said Muhammad Arif ASI, P.W.8 sent that murasala to the police station and P.W.4 formally registered the crime report on the same date i.e. 14.05.2000.

- v. The investigating officer P.W.8 Muhammad Arif, ASI in his examination-in-chief stated as follows:-

“On 14.5.2000 I was posted as ASI at P.S. Kot Adu. Complainant Lal alias Laloo came to me on 10.5.2000. He produced an application before me. I also got examined victim Muhammad Sajjad from T.H.Q. Hospital, Kot Adu. On the same day Lal Muhammad complainant stated that I have compromised and I do not want to proceed against the accused. On 11.5.2000 he produced affidavit Ex.DA to the effect that do not want to proceed against the accused. On 14.05.2000 on the narration of Lal Muhammad I recorded complaint Ex.PA without any addition or omission on my part.”

- vi. Apart from the statement of the victim Muhammad Sajjad the evidence of Muhammad Aslam P.W.3, who is supposed to have seen the offence of sodomy being committed upon Muhammad Sajjad, is on record. Muhammad Aslam, the eye witness, states as follows:-

“Sharif PW also came at that time. We both proceeded towards the school. The windows of the room were open and we saw *through the windows that Shahid Iqbal accused was committing sodomy with Muhammad Sajjad. Akhtar Abbas accused had kept his hand on the mouth of Muhammad Sajjad. On seeing us both the accused went out through the windows*”. (Emphasis added)

- vii. The only role attributed to the present appellant is that he “had kept his hand on the mouth of Muhammad Sajjad.” The offence

of sodomy is not attributed to the present appellant by the sole eye witness.

- viii. P.W. Muhammad Sharif, the independent eye witness, was given up and was not produced by the prosecution.
- ix. On the same set of evidence the present appellant was convicted but Shahid Iqbal, the only accused seen by the solitary eye witness Muhammad Aslam as committing sodomy with Muhammad Sajjid, was acquitted and the complainant did not challenge his acquittal before us.
- x. P.W.3 Muhammad Aslam categorically stated that he saw the sodomy incident through the window: "Shahid Iqbal was committing sodomy with Sajjad". It clearly indicates that this P.W. does not implicate the appellant for the offence of sodomy.
- xi. The record shows that the MLC 103-S/2000 as well as the sealed envelope and sealed parcel was received by Talib Hussain constable No.965C from the Doctor PW6 on 10.05.2000. Not only has the prosecution not produced Talib Hussain but the Investigating Officer PW.8 admitted in his cross-examination to the following effect:-

"I cannot tell on which date parcels were handed over to me and I also cannot tell on which date parcels were handed over to the constable for onward transmission in

the office of the Chemical Examiner because both the dates have not been mentioned in my case diary."

In view of this missing link the report of the Chemical Examiner dated 24.05.2000 Ex.PC/1 loses significance as the record of swabs/sealed parcel and envelope is not available in police record. The reason is obvious. The swabs were obtained on 10.05.2000 but after the medical examination the complainant refused to proceed with the case and no FIR was registered with the result that the packet was probably destroyed as not being property of any registered crime report.

- xii. The site plan Ex.PD produced by the prosecution shows two rooms of the school in which point No.1 is the room where the occurrence is alleged to have taken place. It is stated by the Investigating Officer, who prepared this site plan on 14.05.2000, that this is a katcha room which is without doors and windows. This site plan was never challenged by the prosecution. This site plan was prepared by Muhammad Arif, ASI who visited the place of occurrence and recorded the statements of witnesses as well. In response to questions pertaining to the site plan, the Investigating Officer PW.8 replied as under:

“It is correct that in site plan Ex.PD at point No.1, I had mentioned that the school was of a Katcha room having no window and door. Volunteered that space for entrance was present. I had not shown the point from which PWs saw the occurrence. I had not also mentioned the place where the PWs were standing. I also had not mentioned the direction of running of the accused. The floor of the school room was Katcha but hard. The court yard of the school was also Katcha. There were no foot prints in the court yard of the school and in the room as I have visited the place of occurrence after 5 days of the occurrence.”

This aspect of the case certainly casts doubt on the prosecution story.

- xiii. The solitary statement of the victim PW.2 could have become basis of conviction provided there was corroboration oral or medical. The testimony of Muhammad Aslam, the alleged eye-witness PW.3, does not implicate the appellant with the charge of sodomy and now we are left only the medical evidence. The Doctor PW.9, testing the accused for sexual potency found both fit for sexual penetration but from among both the minor accused he found the present appellant “had attained erection and ejaculation at the time of examination by me on prostatic message”. The anal swabs obtained by the doctor was given to Talib Hussain constable No.965/c in the form of “one sealed parcel and one sealed bottle containing swabs.” But neither the number of swabs was mentioned by the doctor nor was the said

Talib Hussain produced by the prosecution. Without his evidence the positive report of the Chemical Examiner is of no value as the initial chain is missing. In this view of the matter the corroboration by way of Ex.PC/1, the report of the Chemical Examiner, is conspicuously missing in this case which is fatal for the prosecution. The lends support to the statement of the appellant wherein he states that at the time of incident he was not sexually potent.

12. In view of the facts and circumstances of this case it is not safe to support the verdict of guilt recorded by the learned trial court because the very conduct of the complainant from the time he received information of the commission of offence on 09.05.2000 till 14.05.2000 is not consistent. He gets the child medically examined but asks the police not to proceed with the case and then signs an affidavit by virtue of which he forgives both the accused and then on 14th he takes a U turn and makes an oral statement for registration of the case. On the same set of evidence Shahid Iqbal accused was acquitted but Akhtar Abbas was convicted even though P.W.3, the solitary eye witness, did not charge the present appellant with sodomy and the other eye witness was not produced by the prosecution. The site plan produced by the prosecution makes the story all the more doubtful because

there is neither any window from which the solitary eye witness allegedly saw the occurrence nor the place from where the witnesses saw the occurrence. Conceding for the sake of argument that there was a window through which P.W.3 and Muhammad Sharif P.W. both adults, saw the occurrence, it is not understandable that both the accused slipped out of the same window where these grown up witnesses were standing but they never captured the fleeing children. The report of the Chemical Examiner does not connect the appellant as Talib Hussain constable has not been produced.

13. I am also fully conscious of the fact that conviction can be recorded on the sole testimony but it is also a principle of criminal jurisprudence that in the interest of safe administration of justice corroboration should not only be sought but the testimony of the only witness should also be considered carefully. I am also not unmindful of the fact that the present incident is attributed to school urchins of a village. Of course the delay in itself is not fatal but the conduct of the complainant has also to be kept in view while considering the effect of a delayed crime report. The Law Latin Lexicon records an old legal maxim:-

“Nobiliiores et benigniores praesumptiones in dubiis sunt praeferendae:” Maxim means “In cases of doubt, the more generous and more benign presumptions are to be preferred.”

14. In this view of the matter the present appellant has earned benefit of reasonable doubt. Consequently the impugned judgment dated 22.01.2002 delivered by learned District and Sessions Judge (Juvenile Court) Muzaffargarh in Hudood Case No.117-2 of 2001, Hudood Trial No.15 of 2001 whereby the appellant was convicted under section 377 PPC and sentenced for three years rigorous imprisonment with fine of Rs.15000/- or in default to undergo a further term of three months S.I. is hereby set aside. The appellant is on bail. He is free to move about. His sureties are hereby discharged from the liability of their bonds and the obligation of producing him in the court.

Syaidan

JUSTICE SYED AFZAL HAIDER

Announced in Open Court
on 27.02.2009 at Islamabad
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Syaidan

Fit for reporting